
Jason Mazzone

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol39/iss1/1

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
TOWARDS A SOCIAL CAPITAL THEORY OF LAW: LESSONS FROM COLLABORATIVE REPRODUCTION

Jason Mazzone*

I. INTRODUCTION

Visiting the United States in the 1830s, Alexis de Tocqueville observed that the success of American democracy was largely explained by the prevalence of civic associations that linked citizens together.¹ In small-scale associations, de Tocqueville argued, citizens learn to participate meaningfully in democratic processes, thereby avoiding concentration of power in a central government.² Furthermore, involvement in voluntary associations greatly enhances the quality of community life by tempering individualism and facilitating cooperation for collective benefit.³ No government, in de Tocqueville's view, could achieve the same goals as citizens acting together in a vibrant civic sphere.⁴ "If the inhabitants of democratic countries," he concluded, "did not learn . . . some habits of acting together in the affairs of daily life, civilization itself would be in peril . . . . [K]nowledge of how to combine is the mother of all other forms of knowledge; on its pro-


2. Id. at 189-95.
3. Id. at 513-17.
4. Id. at 515.
gress depends that of all others."  

Contemporary social scientists have marshaled empirical evidence in support of this basic idea, demonstrating that strong social ties among individuals are critical for the well-being of communities. The success of schools, the pace of economic development, the effectiveness of local government and even the physical and mental health of citizens, as well as the prevalence of negative social phenomena such as crime, poverty, unemployment and drug use, are all influenced by the quality of social connections.

In a variety of ways, law regulates social relationships. Marriage, contracts, torts, duties, agency, adoption and commercial partnerships are all areas in which law governs relationships between and among individuals. While law regulates social ties, does it also strengthen them in ways that produce collective benefits? This article introduces a new method to evaluate and orient legal regulation. It proposes that since social connections are so important for healthy communities, law's effectiveness should be measured by its success at preserving and promoting social ties.

To demonstrate this method of legal analysis, this article considers law's success in its regulation of one particular area of modern life—the family. It proposes that effective legal regulation of family is regulation that protects and promotes social ties for collective benefits. This article thus evaluates law's treatment of the family and asks whether and how law might better serve our common interests, in its definitions and regulations of family relationships, by adhering to a framework that emphasizes the importance of social ties. This article focuses on collaborative reproduction, which is defined as arrangements in which someone other than one's partner provides gametes or gestation necessary for repro-

5. Id. at 514-17.
7. See id.
8. By collective benefits I mean simply benefits to the community at large as distinguished from benefits to individuals or small groups of people. (Similarly, by collective interests I mean the interests of the general community.) Crime control, for example, benefits everybody (even if some benefit from it more than others).
9. See infra Part II.
Examples of collaborative reproduction include sperm, egg or embryo donation and surrogate motherhood. By focusing on a narrow and relatively new realm in which the law regulates and determines family relationships, this article establishes a basis for broader thinking.

Collaborative reproduction has an important advantage over other areas in family law for explaining the theory of this article. While in other areas of family law, such as divorce, custody and adoption, there is a broadly understood (if disputed) idea of traditional family norms, collaborative reproduction makes uncertain the very application of these norms. Collaborative reproduction moves from an ideal of a married man and woman giving birth to and raising their genetic child to an elaborate, often commercial, arrangement in which as many as five adults could claim, based on different connections, to be a child’s parent. In collaborative reproduction the way to define family relationships is suddenly open to debate. Collaborative reproduction means, for example, that a woman can give birth to a child who shares none of her genes. But then who—the provider of the egg or the woman who gestates and gives birth—is the child’s mother? Collaborative reproduction allows a lesbian couple to obtain sperm from an anonymous male and raise a child together. Does their child have a father, and if so, what rights does he have? Collaborative reproduction also means that couples can hire surrogates to do the work of pregnancy. If the agreement turns sour, should the surrogate be allowed to keep the baby intended for somebody else? Because these questions have no obvious answers, collaborative reproduction frees us from many preconceptions about family life and allows us to think more prospectively and imaginatively about how law’s regulation of the family can serve our common interests.

Therefore, collaborative reproduction is a useful area to focus upon when considering law’s regulation of family because, by its very nature, it unhitches us from the numbing

---

11. See id.
12. See John L. Hill, What Does it Mean to be a “Parent”? The Claims of Biology as the Basis for Parental Rights, 66 N.Y.U. L. Rev. 353, 355 (1991) (“These include a sperm donor, an egg donor, a surrogate or gestational host, and two non-biologically related individuals who intend to raise the child.”).
comfort of tradition and so forces us to think constructively and creatively about how law is to benefit collective life. The detailed discussion of collaborative reproduction in this article should not, however, be mistaken for a discussion that is primarily about collaborative reproduction. The purpose is not merely to propose appropriate legal regulation of various methods of collaborative reproduction. The goal remains much broader—one of understanding how effectively law meets our common needs in its regulation of the family in a variety of contexts. Collaborative reproduction is only a tool to help us think clearly about legal regulation of the family to promote those common needs.\(^{13}\)

Part II provides a framework through which the starting point of this article is conceptualized and reinforced: social connections serve our collective interests and should be promoted. That framework is one of social capital.\(^{14}\) This article uses social capital simply as a means to express the importance of social ties, that is, as a means to articulate the goal that law should pursue. Therefore, the discussion does not dwell on theories of social capital, much less seek to contribute to an understanding of how social connections translate into collective goods. Rather, because the importance of generating social capital is the premise of the analysis, the discussion is limited to an introduction of the term as it has already been elucidated by social scientists, and a brief consideration of the specific type of social capital that is most relevant to this article.

Part III considers three models for legal regulation of family relationships in collaborative reproduction.\(^{15}\) Each model is evaluated on the basis of its success at promoting the social connections that benefit collective life. The first model is one of shared parenting, in which law recognizes all

---

13. Therefore, this article takes no position on the desirability of permitting or banning various types of collaborative reproduction.

14. For the classical treatment of the term see JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 300-21 (1990).

15. The selection of models reflects the range of proposals that have been made by legal commentators for determining parenthood and family ties in collaborative reproduction. No model, however, exactly replicates any particular proposal in the academic literature. Rather, the models typify recurring ideas and thus can be seen as "ideal types" of regulation. See 1 MAX WEBER, ECONOMY AND SOCIETY 19-22 (Gunther Roth & Claus Wittich eds., Ephraim Fischoff et. al. trans., 1978) (1947).
of the individuals involved in collaborative reproduction as having a familial relationship with the child produced. The second model is one of biological ties, in which law bases its recognition of family relationships and its assignment of parental rights on biological connections. The third model is one of contract and intent, in which law simply adopts the expressed choices of participants involved in collaborative reproduction to determine the resulting familial relationships and parental rights.

This article asserts that none of these models of legal regulation succeed in protecting and promoting social relationships for collective benefit. In other words, each model proves unsuitable for generating social capital. However, the analysis and rejection of these models yields three principles necessary for law to build strong social ties in its regulation of family relationships. We find that social capital that strengthens communities is built where law promotes (1) a variety of family ties that are (2) voluntarily entered by individuals, and where (3) law regulates the content or terms of family relationships once they are created.

Finally, Part IV uses these three principles from collaborative reproduction for a general analysis of legal regulation of the family. The principles provide a way to evaluate law's treatment of familial relationships in various contexts. To demonstrate the value of these principles, they are applied to several illustrative examples of legal regulation of the family, and in each case they suggest how law might be redirected to better serve our common interests.

II. SOCIAL CAPITAL

A. Social Capital Generally

Researchers who have demonstrated the importance of social connections to healthy communities have developed the concept of social capital as a way to discuss and explain their findings. Coleman provides a functional definition of social capital:

Social capital is defined by its function. It is not a single entity, but a variety of different entities having two characteristics in common: They all consist of some aspect of a social structure, and they facilitate certain actions of individuals who are within the structure. Like other
tal is beyond the scope of this article, but the basic concept may be understood by analogy to other forms of capital. Whereas physical capital (e.g., tools) and human capital (e.g., education) increase individual productivity, social capital refers to features of social organization, such as networks, norms and social trust that facilitate coordination and cooperation for mutual benefit. Social capital may exist in a number of forms. Participating in a PTA creates social capital, as does attending a town meeting, sharing gardening tools, helping a child with homework, singing in a choir or having coffee with a friend. In each case, the resulting networks and norms build trust and allow for future cooperation among participants. Social capital provides a resource, which individuals might use to pursue their own goals. But more importantly, social capital produces positive externalities for communities as a whole, such as less crime, better schools, economic growth and healthy citizens. Political scientist, Robert Putnam, has argued at length that the quality of public life largely depends on the stock of social capital in a community.

forms of capital, social capital is productive, making possible the achievement of certain ends that would not be attainable in its absence. Unlike other forms of capital, social capital inheres in the structure of relations between persons and among persons. It is lodged neither in individuals nor in physical implements of production.

COLEMAN, supra note 14, at 302.

17. See Putnam, supra note 6, at 20.

18. Social capital is a resource in the same way a tool (physical capital) or a law degree (human capital) are resources. Social networks help individuals do things. Finding a job, for example, is greatly facilitated by knowing others who can relay opportunities or provide recommendations. Or, to take another example, painting a house is easier if friends come over to help.

19. See Putnam, supra note 6, at 18-20.

20. Id. at 18-21. Putnam's own focus has been the role of social capital in the success of local political and economic institutions. Based on findings from a twenty-year study of sub-national governments in different regions of Italy, ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993), Putnam reports that norms and networks of civic engagement powerfully affect the performance of representative government: "Voter turnout, newspaper readership, membership in choral societies and in football clubs—these were the hallmarks of a successful region." Putnam, supra note 6, at 19-20. Putnam has demonstrated that the level of social capital in the United States has been declining over the past few decades as people have disengaged from various civic organizations and activities. Id. at 21-29; Robert D. Putnam, Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America, The 1995 Ithiel de Sola Pool Lecture, Address before the American Political Science Association 3-5 (Sept. 1995) [hereinafter Putnam, Tuning In, Tuning Out]. This decline, Putnam suggests, has serious consequences for the
way that social connections translate into collective benefits is instructive:

For a variety of reasons, life is easier in a community blessed with a substantial stock of social capital. In the first place, networks of civic engagement foster sturdy norms of generalized reciprocity and encourage the emergence of social trust. Such networks facilitate coordination and communication, amplify reputations, and thus allow dilemmas of collective action to be resolved. When economic and political negotiation is embedded in dense networks of social interaction, incentives for opportunism are reduced. At the same time, networks of civic engagement embody past success at collaboration, which can serve as a cultural template for future collaboration. Finally, dense networks of interaction probably broaden the participants' sense of self, developing the "I" into the "we," or... enhancing the participants' "taste" for collective benefits.\(^2\)

The core message of social capital theory thus may be stated in the following way: networks of social relationships serve the collective good.

**B. Family Social Capital**

Social capital in the family exists in the relations between children, parents and other members of the family unit.\(^2\)\(^2\) The amount of social capital present in families can vary widely. Families with strong ties that extend to grandparents, aunts and uncles are rich in social capital.\(^2\)\(^3\) Individuals living alone with just occasional contact with distant relatives enjoy only low levels of family social capital.\(^2\)\(^4\) While divorce reduces social capital,\(^2\)\(^5\) families small in size, such as one adult and a child, may embody high social capital if the members have a close relationship, spend large amounts of time with each other and frequently engage in shared activi-
ties. Family social capital creates two types of benefits: (1) benefits to individuals and (2) collective benefits to the community as a whole.

1. Individual Benefits

Family social capital can greatly benefit individual family members. High levels of social capital in families correlate with fewer behavioral problems among children, higher educational achievement, lower drop-out rates and greater chances for children’s long-term success. In sum, because of the important role that social capital plays in child development and socialization,

human capital can be irrelevant to outcomes for children . . . if parents are not an important part of their children’s lives or if their human capital is employed exclusively at work or elsewhere outside the home . . . . That is, if the human capital possessed by parents is not complemented by the social capital embodied in family relations, the human capital of the parents becomes irrelevant to the

26. See id. at 385.
28. See Coleman, supra note 22, at 385 (reporting on social capital exemplified by Asian immigrant parents purchasing a second copy of school textbooks for the mother to study in order to more effectively help her child do well in school).
29. See id. at 380 (reporting that even when human capital and financial capital within a family are great, dropout rates of children from families with lower social capital—single-parent households, parents who have both worked before the child was in school, and families in which children report little communication with their parents on personal matters—are higher than are drop-out rates for children without these deficiencies).
30. See, e.g., Gay C. Kitson & Leslie A. Morgan, The Multiple Consequences of Divorce: A Decade Review, 52 J. MARRIAGE & FAM. 913 (1990) (reporting that children of divorce are less likely to obtain the level of education they would have obtained had their parents remained married); Sara McLanahan & Karen Booth, Mother-Only Families: Problems, Prospects, and Politics, 51 J. MARRIAGE & FAM. 557, 558 (1989) (reporting that children from mother-only families obtain fewer years of education, are more likely to drop out of high school, and are more likely to have lower income and themselves live in poverty as adults than children from dual-parent families).
child's educational growth.31

For adults too, family social capital can have important returns. Long-term family relationships often provide a solid source of emotional and practical support.32 Empirical studies have shown that support from family members is of a special quality, rarely matched by support from even close friends.33 A decade of research on marriage and health demonstrates that social capital embodied in family relationships also has significant implications for the health and psychological well-being of individual family members. "Marriage is associated with physical health, psychological well-being and low mortality. Compared to people who are divorced, separated, single or widowed, the married have better overall well-being. This overall positive effect is strong and consistent."34 Being married is associated with less anxiety, lower mortality, less heart disease, fewer strokes, fewer accidents, better resistance to cancer, less depression, a healthier diet, fewer fights, less drinking and a lower chance of suicide.35 Simply living with another person does not capture these benefits, being married is what matters.36 Nor are these effects just a result of the greater economic security and increased support that come from marriage: marriage provides a different kind of social support, one that is unavailable in other contexts.37 Simply stated, individuals who can draw on

31. Coleman, supra note 22, at 384 (emphasis added).

32. Family members can lend money, provide advice, baby-sit on short notice, share job leads, cushion the effects of tragedy, invest in a business, clean house, and arrange weddings. Families often represent an unusually deep network of trust that allows even distant relatives to coordinate in the pursuit of goals. Family social capital may be generated just by virtue of there being a family in place—a collection of people related by birth or marriage—without the same need for long-term exchanges and trust-building that social capital in groups of strangers may require. Individuals may also be able to tap family social capital even when they themselves have been untrustworthy in the past: violations of social codes by family members may be more easily forgotten or forgiven.

33. See Michael Walker et al., Statistical Models for Social Support Networks, in ADVANCES IN SOCIAL NETWORK ANALYSIS (Stanley Wasserman & Joseph Galaskiewicz eds., 1994) (reporting that parent-child ties are so broadly supportive that even weaker, but still active parent-child ties are able to provide almost as much support as intimate friendship ties).


35. See id. at 1061-62.

36. See id. at 1062.

37. See id. at 1065. See also Choi K. Wann et al., The Relationship Between
family social capital are healthier, happier and have more reliable sources of practical and emotional support.

2. Collective Benefits

Besides its importance to individuals, family social capital also benefits the community as a whole. Because of these considerable social benefits, promoting family social capital is a goal that law should pursue. There are at least four reasons family social capital matters for the well-being of communities.

First, family social capital has implications for levels of other forms of social capital. Accounting for education, age, race and other factors, single people, i.e. those who are divorced, separated or never married, are significantly less civically engaged than are married people. Trust is a useful indicator of the level of social capital, and single people are less trusting. Furthermore, single-parenthood also disrupts social capital. As a result of marital disruption, single-mother families have higher rates of residential mobility and, therefore, less contact with neighbors than do families headed by married couples. Finally, there is also evidence that mother-only families are less likely to be found in neighborhoods that provide strong social support and guard

---

Social Support and Life Satisfaction as a Function of Family Structure, 58 J. MARRIAGE & FAM. 502 (1996) (reporting that social support from a spouse is the primary correlate of life satisfaction for married adults and that, at least for married women, emotional support from family members is more critical for life satisfaction than support from others such as friends).

38. The importance of social capital for individuals is of course not isolated from its importance to the community: where low social capital means behavioral problems among children, reduced educational opportunities and success, increased poverty, and unhealthy citizens, there is a substantial cost that we collectively bear.

39. Indeed, it seems clear that no other institution is capable of generating the same social capital benefits. See Coleman, supra note 22, at 398 ("The withering away of the family as the principal agent for the socialization of children is not paralleled by the growth of another institution with the incentive to make investments that aid the growth and development of children."); David Popenoe, American Family Decline: 1960-1990, 55 J. MARRIAGE & FAM. 527, 539 (1993) ("There is strong reason to believe . . . that the family is by far the best institution to carry out [the functions of child-rearing and providing affection and companionship] . . . and that insofar as these functions are shifted to other institutions, they will not be carried out as well.").

40. See Putnam, Tuning In, Tuning Out, supra note 20, at 12.

41. See id.

42. See McLanahan & Booth, supra note 30, at 561.
Second, the level of family social capital may influence the effectiveness of other forms of social capital. If parent-child relationships embody little social capital, then even high levels of parent-parent interaction at a community level may be undermined and their potential social capital benefits diminished. Low-levels of family social capital, for instance, may mean that social norms that control crime do not permeate down through the family to the level of the child. Alternatively, families with an absent parent may be disconnected from social networks that transmit information about employment opportunities. In each case, the usual benefits of high social capital at the community level are not realized.

Third, social capital that is generated in the family can be used by others outside the family to achieve their own goals. That is, family social capital produces positive externalities. For example, stronger parent-child relationships may result in schools being provided with extra tuition and, therefore, reduce the workload of teachers. Or, my friend can enlist the help of my sister even if the two are strangers. Family social capital thus affects not just the goals of those located within the family but of others who draw on family networks for their own benefit.

Fourth, the level of family social capital today has an impact on family social capital tomorrow, because low-levels of family social capital seem to be inherited. Children from mother-only families are more likely to marry early, have children early and have children outside of marriage than are children from dual-parent homes. Children from mother-only families are also more likely to divorce, as are children who start out in dual-parent families but whose parents subsequently divorce. Children of divorce are also more cautious about marriage and less trusting of future spouses, and young women whose parents have divorced are less

43. See id. at 568.
44. See id. at 565.
45. See id.
46. See Kitson & Morgan, supra note 30, at 920.
48. See Kathryn M. Franklin et al., Long-Term Impact of Parental Divorce on Optimism and Trust: Changes in General Assumptions or Narrow Beliefs?, 59 J. PERSONALITY & SOC. PSYCHOL. 743 (1990).
3. Declining Family Social Capital

The need for law to protect and promote family social capital is more urgent today given the evidence that levels of family social capital have been declining. There has been a clear loosening of family ties in the past few decades. Indeed, people have been foregoing not just nuclear families but family relationships altogether. The sharp increase in divorce during the last four decades is well documented. Divorce is now so prevalent that the likelihood a marriage begun in 1990 will end in divorce or separation is estimated to be as high as 60%. Divorce is also much more acceptable: less than one-fifth of the population currently believe that parents should stay together for the sake of children.

Either because of divorce or their parents never marrying, most American children spend part of their childhood in a single-parent family. The chance that a child will live with a single parent at some point is 70% for white children


50. Of course, law is not the only remedy for decreased social capital. But, as the remainder of this article will show, because law has important effects on levels of social capital it can play a significant role in reform.

51. In considering changes in family ties over this period, it is important to recognize that some of these changes have been going on for much longer (divorce, for example, has been on the rise for more than one hundred years); at the same time, however, recent changes are remarkable because they represent a sharp acceleration in trends. See Popenoe, supra note 39, at 529-30.

52. See id. at 535-37.

53. There are various ways of measuring this change. In number of divorces per 1000 existing marriages, the rate increased from nine in 1960 to 21 in 1987. See id. at 531. The number of divorced people in the population quadrupled over the same period. See id. at 531-32. For white women, the likelihood that their marriage would end in divorce rose from 20% in 1960 to 45% by 1980. See id. In 1867, when divorce statistics were first recorded, the rate was 0.3 per 1,000 population; it has since risen by a factor of more than 17. See Paul C. Glick & Sung-Ling Lin, Recent Changes in Divorce and Remarriage, 48 J. MARRIAGE & FAM. 737, 738 (1986). The largest increase occurred between 1965 and 1981 when the rate reached a level of 5.3. See id. There was a gradual decline in divorce during the 1980s; in 1984 the rate was 4.9 per 1,000 population. See id.

54. See Popenoe, supra note 39, at 532.


born in 1980 (up from 19% for children born between 1950 and 1954). For African American children the chances are now 94% (up from 48%). In 1960, 88% of children lived with two parents; by 1989 the figure had dropped to 73%. Over the same period, the figure for children living with two natural parents, both married only once, dropped from 73% to 56%. The number of children currently living with a single parent has risen from 9% of all children in 1960 to 24% today. Almost half of children whose parents are married see their parents divorce by the time they reach age sixteen, and it often takes five years or more for their mothers to remarry. Almost half of all white children whose parents remarry see the second marriage end before they reach adulthood. Furthermore, African American women marry less often, experience more marital disruption, and remarry more slowly and less often than white women. In addition, we now have the highest recorded rate of out-of-wedlock births: a quarter of all children born, representing a massive increase from just 5% in 1960. Sixty-two percent of African American children are currently born outside marriage.

There has been a "widespread retreat from marriage." Young women today marry on average four years later than did their mothers. From 1960 to 1990 the proportion of women aged twenty to twenty-four who had never married increased from 28.4% to 62.8%; for women aged twenty-five to twenty-nine the change was from 10.5% to 31.1%. Women born in the late 1930s (reaching marriage age around 1960) had a 97% probability of getting married at some point; women born in 1983 face a likelihood of 90%. For college-

57. See Popenoe, supra note 39, at 531.
58. See id.
59. See id.
60. See id.
61. See id.
63. See id.
64. See id.
65. See id.
66. See Popenoe, supra note 39, at 532.
67. See id.
68. Id.
69. See id. See also Hamburg, supra note 55, at 4 (reporting that Americans today are more likely than ever before to postpone marriage).
70. See Popenoe, supra note 39, at 532.
71. See id. at 532-33.
educated women the figure is even lower (80%) and it is lower still for African American women (75%). \(^{72}\) Whereas marriage was once seen "as a social obligation—an institution designed mainly for economic security and procreation," surveys today indicate that "marriage is understood mainly as a path toward self-fulfillment." \(^{73}\)

Childbearing has declined as well and, as a result, "families" increasingly contain no children. The average American woman in the late 1950s had 3.7 children; by 1990 this had dropped to 1.9. \(^{74}\) Women increasingly postpone having children: it is estimated that 15-20% of young women today will never give birth. \(^{75}\) Parenthood has declined in status over the past few decades according to several measures. \(^{76}\) Moreover, children currently constitute the smallest proportion of the population ever. The figure dropped from one-third in 1960 to one-quarter in 1993. \(^{77}\) For the first time ever, the average couple now has more parents than it does children. \(^{78}\)

In light of these figures, it is sometimes argued that nuclear families have simply become obsolete, replaced by new voluntary social arrangements that perform the same functions. \(^{79}\) But this does not seem to be so. Rather, there has

---

72. See id. at 533.
73. Id.
74. See id. at 530.
75. See id.
76. The decline in the status of parenthood has been summarized in the following way:

Between 1957 and 1976, the percentage of adults who felt positive about parenthood—that is, who viewed parenthood as a role that could fulfill their major values—dropped from 58 to 44 . . . . And between 1970 and 1983, the percentage of women who gave the answer "being a mother, raising a family" to the question, "What do you think are the two or three most enjoyable things about being a woman today?" dropped from 53 to 26. These attitudinal changes are associated with a remarkable decrease in the stigma associated with childlessness. In less than 2 decades, from 1962 to 1980, the proportion of American mothers who stated that "all couples should have children" declined by nearly half, from 84% to 43%.

Popenoe, supra note 39, at 530 (citations omitted).
77. See id.
79. See, e.g., JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 7 (1996) ("No longer is there a single culturally dominant family pattern . . . . Instead, postindustrial conditions have compelled and encouraged us to craft a wide array of family arrange-
been a recent rise in the frequency of individuals living alone. Non-family households (defined as a household maintained by a person who lives alone or with others to whom he or she is unrelated) rose from 15% of all households in 1960 to 29% in 1990.\textsuperscript{80} 85% of these households consist of just one person.\textsuperscript{81} The proportion of all American adults who are currently unmarried climbed from 28% in 1974 to 48% in 1994.\textsuperscript{82} There are also six times as many couples cohabiting today as in 1960, and pre-marital cohabitation is associated with divorce.\textsuperscript{83} From 1960 to 1980, "[t]he proportion of adult lives spent as a spouse, a parent or a member of a conjugal family unit [dropped to] the lowest point in history,"\textsuperscript{84} and surveys show a growing acceptability of divorce, permanent singleness and childlessness.\textsuperscript{85}

Parents today also spend less time with their children. In 1985, 14% of pre-school children were cared for in an organized child care facility.\textsuperscript{86} The figure has now more than doubled.\textsuperscript{87} The proportion of working mothers using a child care facility as the primary form of care for children under age five rose from 13% in 1977 to 25% in 1985.\textsuperscript{88} By 1990, half of all children of working parents were either being cared for in a center or in another home.\textsuperscript{89} A majority of mothers of preschool children now work outside the home.\textsuperscript{90} Mothers today work almost as frequently as non-mothers.\textsuperscript{91} From 1960 to 1990 the proportion of married, working women with children under six years climbed from 19% to 59%.\textsuperscript{92} Moreover, 79% of the American population currently

\textsuperscript{80. See Popenoe, supra note 39, at 533. See also Putnam, Tuning In, Tuning Out, supra note 20, at 12 (reporting that the incidence of one-person households has more than doubled since 1950).}
\textsuperscript{81. See Popenoe, supra note 39, at 533. See also Putnam, Tuning In, Tuning Out, supra note 20, at 12 (reporting that the incidence of one-person households has more than doubled since 1950).}
\textsuperscript{82. See Putnam, Tuning In, Tuning Out, supra note 20, at 12.}
\textsuperscript{83. See Popenoe, supra note 39, at 534.}
\textsuperscript{84. Id.}
\textsuperscript{85. See id.}
\textsuperscript{86. See Hamburg, supra note 55, at 5.}
\textsuperscript{87. See id.}
\textsuperscript{88. See id.}
\textsuperscript{89. See id.}
\textsuperscript{90. See id. at 4.}
\textsuperscript{91. See Popenoe, supra note 39, at 531.}
\textsuperscript{92. See id.}
believes that two-paychecks are necessary to support a family.93 Parents today devote about 40% less time to direct child-rearing activities than did their own parents.94 Parents in 1965 spent about thirty-three hours a week in contact with their children; by the mid-1980s this figure had declined to just seventeen hours.95 As a result, a larger fraction of parenting time today is spent doing errands and chores.96 Grandparenting has also declined: only about 5% of all American children see a grandparent regularly,97 but there has been a 44% rise in the incidence of grandchildren living with grandparents since 1980.98 In short, today “children spend a huge chunk of time during their years of most rapid growth and development in out-of-home settings or looking after themselves . . . . Adolescents increasingly drift into a separate ‘teen culture’ that is often lacking in adult leadership, mentorship and support.”99

These changes over the past few decades represent a loss of family social capital because of decreases in the number of family ties and reduced interactions among family members.100 A result of this loss is that the social capital effects of legal regulation of the family are today more pronounced.101

93. See id.
95. See id.
96. See id.
98. See Margaret Platt Jendrek, Grandparents Who Parent Their Grandchildren: Effects on Lifestyle, 55 J. MARRIAGE & FAM. 609 (1993). An indication of the social capital effects of these arrangements is that grandparents taking care of their grandchildren disengage from various other activities and report diminished social networks. See id. at 614-19. See also ARTHUR KORNHABER, CONTEMPORARY GRANDPARENTING 130-31 (1996) (reporting that in 1970, 2.2 million children under the age of 18 lived in grandparent-headed households; by 1994 some estimates put the figure as high as seven million).
100. One response to the evidence of declining social capital has been that old institutions have simply been replaced by new ones, and, as such, social capital has not been lost but only changed form. I do not plan to discuss this point in any detail, except to note that even if other social ties (e.g., friendships) have indeed replaced family relationships, they do not seem to provide the same social capital benefits. See, e.g., Walker et al., supra note 33, at 55 (reporting that parent-child ties are so broadly supportive that even weaker, but still active parent-child ties are able to provide almost as much support as intimate friendship ties).
101. The effect is a function of scarcity. If the level of social capital is high,
As such, the need to orient law to serve our collective interests by building social capital in its regulation of family ties is now all the more urgent. As we move forward to examine law's effectiveness in its regulation of families, the basic consideration in this article can now be precisely stated: law acts in our common interests when it protects and promotes social capital.

III. PROMOTING SOCIAL CAPITAL THROUGH LEGAL REGULATION: LESSONS FROM COLLABORATIVE REPRODUCTION

A. Model of Shared Parenting

The central idea of shared parenting is that all of the adults who participate in collaborative reproduction play a parenting role in the child's life.\(^\text{102}\) According to this model, being part of a process that gives birth to a child is a unique experience that can serve as a basis for a sustained social connection. Therefore, law should recognize the importance of gamete donors and surrogates in collaborative reproduction, and encourage long-term social ties between them and the children they help produce. In the context of single-parent or divorced families, for example, gamete donors or surrogates might buffer the effects of absent parents, providing practical help as well as emotional support to a child. In more intact nuclear families, donors and surrogates could teach children important skills, offer new perspectives or provide care when parents must work. Put simply, at the heart of the model of shared parenting is a notion that the more adults performing parental functions the better.

We now turn to a more detailed discussion of this model so as to be able to evaluate it from a social capital perspective. We examine two specific proposals of the model. The first proposal is for openness in collaborative reproduction: acknowledgment of the use of reproductive collaborators and their identities. The second proposal is for law to recognize a parental or associational right between gamete donors or surrogates and the resulting child.\(^\text{103}\)

\(^{102}\) See supra note 15.

\(^{103}\) The first proposal is a precondition of the second: in order for law to
1. Openness

The shared parenting model's proposal for greater openness in collaborative reproduction has two components. The first is for an end to secrecy in order to promote openness about the fact that collaborative reproduction has been used. The second is for an end to anonymity in order to identify the parties involved.

i. Secrecy

Secrecy is common in collaborative reproduction, especially in the case of artificial insemination using sperm provided by a donor. Where a couple uses donor sperm, there is typically secrecy about the identity of the donor, secrecy from the couple's friends and relatives about the use of the donor and secrecy from the child about his or her origins. The secrecy of artificial insemination parallels the secrecy of adoption earlier this century.

104. See JUDITH N. LASKER & SUSAN BORG, IN SEARCH OF PARENTHOOD 43 (1987). In one study of 57 couples, 33 told nobody outside the medical profession of their use of artificial insemination by donor. R. SNOWDEN ET AL., ARTIFICIAL REPRODUCTION: A SOCIAL INVESTIGATION 94 (1983). Single women and lesbian couples are less secretive about the use of donor sperm and there is also some evidence that couples today increasingly favor record-keeping that would allow for future contact between their children and the donor. See Elizabeth L. Gibson, Artificial Insemination by Donor: Information, Communication and Regulation, 30 J. FAM. L. 1, 27-28 (1991-92). There has been greater openness in egg donation as well as more common use of eggs from friends or relatives. See Katheryn D. Katz, Ghost Mothers: Human Egg Donation and the Legacy of the Past, 57 ALB. L. REV. 733, 773 (1994).

105. See LASKER & BORG, supra note 104, at 43. Secrecy in collaborative reproduction is not practiced in every country. For example, certain European countries (notably Sweden, Germany, and Switzerland) prohibit anonymity in sperm donation; in Germany and Switzerland the right to know one's genetic origins is constitutionally protected. See Rainer Frank, Germany: Blood Versus 'Mere' Social Ties, 32 U. LOUISVILLE J. FAM. L. 335 (1993-94); Olivier Guillod, Switzerland: Everyone Has the Right to Know His or Her Origins!, 32 U. LOUISVILLE J. FAM. L. 465 (1993-94); Todd Krim, Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother, 5 ANNALS HEALTH L. 193 (1996).

106. During the first 200 years of adoption in the United States secrecy was unthinkable. See Katz, supra note 104, at 760-61. But by the second half of the twentieth century, with a rise in the proportion of children available for adoption who were born out of wedlock, and stigma associated with illegitimacy, secrecy became much more prevalent. See id. By the early 1950s, most states had mandated anonymity of birth parents in adoption and prohibited contact between birth parents and adoptive parents. See id. at 761. All legal ties be-
Secrecy in the use of donor sperm is undoubtedly linked to the medicalization of artificial insemination. In reality, insemination is a fairly simple procedure that can be performed at home with a syringe.\textsuperscript{107} Physician involvement facilitates secrecy, removing the need for the couple to find their own sperm donor. Further, there is evidence that secrecy is greatly preferred by the medical profession, which is often a source of sperm.\textsuperscript{108}

Secrecy in the use of donor sperm has been carried to great lengths. At the collection stage, "[l]eaving receptacles containing the semen on shelves, against doors and even behind geranium pots, to be picked up by the next person involved in the delivery system, is not unknown."\textsuperscript{109} At the insemination stage, some women have been inseminated with a mixture of semen from both the husband and the donor, while other couples have been advised to have intercourse on the day that insemination occurs, to allow some measure of doubt about actual fatherhood.\textsuperscript{110} At the time of birth, "[m]ost physicians and other staff members of AID [Artificial Insemination by Donor] programs strongly encourage their patients to keep AID a secret from everyone. They even suggest
not telling the obstetrician who delivers the baby, so that the husband's name will be put on the birth certificate without hesitation."\textsuperscript{111} Finally, secrecy may pervade a child's entire life: parents often worry for years that the child will grow up not to resemble the husband.\textsuperscript{112}

Secrecy in the use of donor sperm seems principally focused on protecting the husband from the embarrassment of infertility.\textsuperscript{113} As such, couples using donor sperm have been known to explain medical appointments to relatives and friends as efforts to treat the wife's fertility problem, with the implication that male infertility would be much more embarrassing.\textsuperscript{114} Because of the apparent stigma of male infertility,\textsuperscript{115} a couple's reliance on donor sperm can lead to marital difficulties as the husband feels jealous of the donor\textsuperscript{116} and outright denial that donor sperm was even used.\textsuperscript{117}

The model of shared parenting makes two arguments for increased disclosure in collaborative reproduction. First, secrecy surrounding collaborative reproduction impedes the formation of familial ties between reproductive collaborators and the resulting children. Where the occurrence of collaborative reproduction remains unacknowledged, law is unable to encourage participants to form social relationships with the children they help produce. As such, secrecy undermines the entire program of the model of shared parenting.\textsuperscript{118}

Second, secrecy may threaten relationships within the child's social family. Secrecy can lead to family tensions if the husband's embarrassment with his own infertility is unresolved and he comes to feel isolated from the family, or

\textsuperscript{111} LASKER & BORG, supra note 104, at 45.
\textsuperscript{112} See SNOWDEN ET AL., supra note 104, at 137.
\textsuperscript{113} See MICHAEL & HEATHER HUMPHREY, FAMILIES WITH A DIFFERENCE: VARIETIES OF SURROGATE PARENTHOOD 134-37 (1988); SNOWDEN ET AL., supra note 104, at 130.
\textsuperscript{114} See SNOWDEN ET AL., supra note 104, at 104-05.
\textsuperscript{115} Having biological children is still widely considered a condition of full adult male status. See id. at 128.
\textsuperscript{116} See Humphrey, supra note 113, at 134-37.
\textsuperscript{117} See id. at 136. See also SNOWDEN ET AL., supra note 104, at 149. This study concluded that "[t]o acknowledge . . . that the child was the genetic pro-
creation of another man was for most men a hurtful and traumatic experience. Some men found it so potentially hurtful that they evaded this acknowledgment by a defensive, psychological denial that the donor was in fact the genitor of the child." Id.
\textsuperscript{118} In this way, secrecy parallels anonymity, an issue which we take up next.
even to reject the child. \footnote{119}{See Gibson, supra note 104, at 11 (citing Clamar, Psychological Implications of Donor Insemination, 40 AM. J. OF PSYCHOANALYSIS 173 (1980); Gerstel, A Psychoanalytic View of Artificial Donor Insemination, 17 AM. J. OF PSYCHOTHERAPY 64 (1963); Berger et. al., Psychological Patterns in Donor Insemination Couples, 31 CAN. J. OF PSYCHIATRY 518, 519 (1986); Kraft et. al., The Psychological Dimensions of Infertility, 50 AM. J. OF ORTHOPSYCHIATRY 618, 622 (1980)). See also ANNETTE BARAN & REUBEN PANNOR, LETHAL SECRETS: THE SHOCKING CONSEQUENCES AND UNSOLVED PROBLEMS OF ARTIFICIAL INSEMINATION 51 (1989) (arguing that artificial insemination by donor results in the erosion of family relationships).} Furthermore, secrecy is psychologically taxing and often produces considerable stress. \footnote{120}{As the philosopher Sissela Bok writes:
Secrecy can harm those who make use of it in several ways. It can debilitate judgment, first of all, whenever it shuts out criticism and feedback, leading people to become mired down in stereotyped, unexamined, often erroneous beliefs and ways of thinking. Neither their perception of a problem nor their reasoning about it then receives the benefit of challenge and exposure. Scientists working under conditions of intense secrecy have testified to its stifling effect on their judgment and creativity. And those who have written about their undercover work as journalists, police agents, and spies, or about living incognito for political reasons, have described similar effects of prolonged concealment on their capacity to plan and to choose, at times on their sense of identity. Secrecy can affect character and moral choice in similar ways. It allows people to maintain façades that conceal traits such as callousness or vindictiveness—traits which can, in the absence of criticism or challenge from without, prove debilitating. And guilty or deeply embarrassing secrets can corrode from within before outsiders have a chance to respond or to be of help . . .
As secrecy debilitates character and judgment, it can also lower resistance to the irrational and pathological. SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 25 (1982).}

One commentator concludes that "the social and psychological problems created by keeping the secret from the child (and by implication, other members of the family) may be greater than those that result from telling the child." \footnote{121}{SNOWDEN & MITCHELL, supra note 109, at 69 (emphasis added).} Children who grow up in families where basic truths are kept hidden may come to sense that something is amiss and experience uncertainty. \footnote{122}{One study reports:
Communication is not only dependent on the spoken word; sometimes there exists an unspoken awareness that a particular topic should be avoided. Even young children can sense this without there ever being direct mention of it. This is particularly so in the family, which is an organization where each person has the opportunity to get to know the feelings and thoughts of other members who are regularly in close proximity . . . . There are two points here that are relevant to the AID} And relationships with other relatives
may be undermined if based on a lie.\textsuperscript{123}

Since it may be difficult to maintain the secret of collaborative reproduction, there exists a constant risk of an upsetting disclosure. Although couples may resolve not to tell their child about her origins, they nonetheless find it difficult not to tell anybody at all.\textsuperscript{124} As such, the child might discover the truth from somebody else and may assume that there is something wrong with being conceived by collaborative reproduction and, therefore, something wrong with him or her.\textsuperscript{125} Alternatively, the secret may be revealed as an act of hostility by one of the parents, for example, the mother wishing to hurt the husband, or the father disowning the child in a fit of anger.\textsuperscript{126} Or the truth may come out in other unfavorable circumstances, such as a divorce and custody...
battle.\textsuperscript{127}

In each of these ways, secrecy can undermine family relationships.\textsuperscript{128} There is also evidence that children may experience psychological difficulties when unaware of or cut off from their genetic origins; on this theory, secrecy could be a constant source of instability.\textsuperscript{129} In short, secrecy in collaborative reproduction undermines the familial ties that this model seeks to sustain—those between the reproductive collaborators, the social parents, and the child.

\textit{ii. Anonymity}

Just as collaborative reproduction is largely cloaked in secrecy, the majority of donors of sperm, eggs or embryos remain anonymous to the couples they help and to the children produced.\textsuperscript{130} Anonymity prevents participants in collaborative reproduction from forming a relationship with a child, because there can be no social tie where identity is unknown. The model of shared parenting, therefore, proposes that law discourage anonymity. It suggests that gamete donors should be able to discover the identity of the children they help produce and that children know their genetic parents. Similarly, surrogate mothers should know where the children they give birth to end up, and all children should know their gestational mothers.

The model suggests several ways for law to promote identification of participants in collaborative reproduction. First, health professionals who assist in collaborative repro-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{127} See id. at 160; Gibson, \textit{supra} note 104, at 11. The manner of disclosure can be critical for psychological well-being: evidence from the adoption context indicates that the way in which adopted children learn of their status is more important than when they find out. See HUMPHREY, \textit{supra} note 113, at 89.
\item \textsuperscript{128} In one study, all of the couples who had told family or friends found that it had been advantageous to do so; in almost every case the decision to use donor sperm was accepted without any reservation. SNOWDEN ET AL., \textit{supra} note 104, at 112.
\item \textsuperscript{129} See infra notes 192-201 and accompanying text. Knowledge of one's genetic history may also have medical benefits. See Gibson, \textit{supra} note 104, at 22-23. And some commentators suggest that secrecy risks future incest (although such a risk is surely small). See id. at 23-24.
\item \textsuperscript{130} See Lori B. Andrews & Lisa Douglass, \textit{Alternative Reproduction}, 65 S. CAL. L. REV. 623, 659 (1991). Robertson reports that anonymity has been the usual practice with sperm donation and may also inform egg and embryo donation, and even surrogacy, though often surrogates and egg donors meet the couples they help. ROBERTSON, \textit{supra} note 10, at 123. Further, family members may serve as surrogates or egg donors. See id.
\end{itemize}
\end{footnotesize}
duction could be required to keep records and provide identifying information to all of the parties involved. Alternatively, the identity of each party could be recorded on the child’s birth certificate, and a copy provided to each participant. Children born from collaborative reproduction could have a protected right of access to their own birth records, including the identity of collaborators. Or there could be a system of registration such that children and collaborators may all access identifying information from a central source.

Before leaving this proposal, we consider two sets of objections to ending anonymity and the model’s responses to them. First, gamete donors may object, concerned that if their identities are revealed they may at some future point be held financially responsible for the children they helped create. The model of shared parenting answers this concern by proposing statutes specifying the obligations of donors. A further concern on the collaborator side is that without anonymity sperm banks and other institutions would be unable to attract donors. The model’s response to this claim is that it seems unsupported by empirical evidence: many donors appear comfortable with having their identities revealed.

A second set of objections to ending anonymity comes from social parents. There is evidence that they also prefer that donors remain anonymous so as not to be able to later disrupt the family’s life (or perhaps try to take away the child). Indeed, some social parents even discourage children from contacting a genetic parent whose identity is known.

132. See Andrews & Douglass, supra note 130, at 660 n.182 (suggesting that the fear of liability is reduced in the thirty-one states that have adopted statutes providing that the husband of the sperm recipient is the legal father).
133. At the Sperm Bank of Northern California, for example, 75% of donors agreed to provide a name and address allowing future contact. Id. at 661. Other studies have demonstrated that donors have an interest in the results of their participation, if not in having their identities revealed. In one such study, 79% of donors desired to know the outcome of inseminations with their semen. (And secrecy was not especially important: a majority had already told others of their donation.) But only a minority wished to know anything about the child or the social parents, and most favored anonymity. Gibson, supra note 104, at 29 (citing Sauer et. al., Attitudinal Survey of Sperm Donors to an Artificial Insemination Clinic, 34 J. OF REPRODUCTIVE MED. 362, 363 (1989)).
134. See Andrews & Douglass, supra note 130, at 659.
The model considers this fear of disruption an exaggerated and insufficient reason to maintain anonymity. Because children are capable of maintaining social ties with multiple adults,\(^{135}\) strong relationships with others (even genetic others) need not dilute a child's bond with his or her social family.

Knowing the identity of a gamete donor or surrogate is unlikely by itself to represent a custody threat, since participants in collaborative reproduction rarely renege on deals and seek custody.\(^{136}\) Even surrogate mothers, who are arguably the most likely to pose a custody threat, usually do not regret having to turn over a baby to social parents.\(^{137}\) In addition, evidence from the surrogacy context suggests that the greater the openness and contact between the various participants in collaborative reproduction, the more smoothly the process actually proceeds. For example, in a study of forty-one surrogates, 22% of the women felt that giving up the baby was the most emotionally difficult aspect of the experience. But for 25% of the surrogates, the most difficult aspect was losing contact with the contracting parents.\(^{138}\) The same study found that 75% of the women considered the most rewarding part of their experience the "creation of a family, giving the gift of life, seeing the beautiful baby, or

135. This has been the experience with divorce and subsequent remarriage: The reality is that, in many potential stepparent adoption situations, the child has three or more parents. Often the child will form a strong bond with the spouse of the custodial parent without sacrificing the bond with the visiting non-custodial parent. In addition, the child may bond strongly to the spouse of the non-custodial parent, if visitation is frequent and extended, thus recognizing psychologically, if not legally, four persons serving in the role of parent. As is often the case, the law fails to reflect the reality of the way in which individuals relate to one another. James B. Boskey, The Swamps of Home: A Reconstruction of the Parent-Child Relationship, 26 U. TOL. L. REV. 805, 826 (1995).


137. See Andrews & Douglass, supra note 130, at 677-78.

138. See id. at 676-77 (citing Kathy Forest & David MacPhee, Surrogate Mothers' Grief Experiences and Social Support Networks 17 (1989) (unpublished manuscript, available at Department of Human Development and Family Studies, Colorado State University.).
Finally, the model of shared parenting suggests that anonymity has probably been preferred because the benefits of openness have not been experienced. Again, the evidence from surrogacy is instructive. In a study of eighty-nine surrogates and adoptive couples, all couples agreed that "knowing each other" benefited the children; in some cases the families grew close. Had surrogacy been anonymous from its outset (with centers established for women to secretly gestate and give birth and then anonymously ship children to paying parents) then perhaps the same reasons in support of anonymity in the donation of gametes would be expressed in support of anonymity of surrogacy. Conversely, if openness is broadened and contact with gamete donors does not prove to threaten custody or undermine the bonds between children and their social parents, then openness may well be viewed more positively. In short, the model argues that the current preference for anonymity reflects a lack of experience.

2. Parental or Associational Right

The second proposal under the model of shared parenting is for law to recognize a parental or associational right between gamete donors or gestational surrogates and the children they help produce. Such a right is intended to encourage the formation of a social relationship between reproductive collaborators and children. Although the mere formalization of a biological link may never be sufficient to ensure a successful social relationship, the model suggests that legal recognition of such a tie would make the development of social relationships more likely. The model has two

139. Id.
140. Id. at 678.
141. As will be seen, this model further suggests that the experience with open adoption indicates that the resistance to contact with donors of genetic material (or with surrogates) reflects an exaggerated fear. See infra notes 171-173 and accompanying text.
142. For many people there is a special significance to having biological offspring. This explains why infertility is often considered a shortcoming and why most parents take note of features of their children that resemble their own. The significance of biological ties also accounts for attitudes towards adoption. Although adoption can bring all of the joys of parenthood, it tends to be seen as a second choice to biological reproduction. Further, in adoption children’s attributes are often matched to those of adoptive parents, there is a preference
differential versions of the right that law should assign to reproductive collaborators. The first version involves a modest right of association. The second version provides for much more extensive parental rights.

i. Limited Associational Rights

In its more modest version, the model of shared parenting proposes that law recognize a right of association between reproductive collaborators and their resulting children. This may be considered a quasi-parental or a non-parental right, but in no case would it be akin to the rights of the social parents. Accordingly, the right would be one of contact or visitation. An associational right would not threaten the legal status of the social parents nor would it confer deep financial or other obligations on the donor or surrogate. It might provide merely for an annual visit with the child in the presence of the social parents for a fixed number of years, and then leave the parties free to continue or terminate contact as they prefer. Or the right could involve more regular visits with or without the social parents present. In either case, the right of association could be revocable should it turn out to be against the best interests of the child.

According to the model, a right of association represents a small but critical change in the relationships of collaborative reproduction. Left to their own devices, individuals involved in collaborative reproduction might be reluctant to initiate contact with each other but, once started, such contact could produce substantial benefits. Once in touch with the child the model suggests that donors or surrogates could become a reliable source of emotional and practical support for heterosexual couples (mirroring biological reproduction), and the fact of adoption itself may be concealed. See Andrews & Douglass, supra note 130, at 627-29. Some people, of course, want nothing to do with their genetic kin. And some adopted children may go through life without much of an urge to ever track down the source of their own genes. But for many people, genetic ties remain important, if only because our society places such an emphasis on them. See generally Dorothy E. Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209 (1995). As such, there is at least some reason to think that genetic ties may serve as the basis of a social link between donors of gametes or gestational surrogates and the children of collaborative reproduction.

143. These represent end points on a spectrum of possible formulations or versions of the right, rather than the only available choices. Law could quite easily combine elements of each version, or apply one version in some instances of collaborative reproduction and the other version in different instances.
similar to other family members. Therefore law should provide the parties with an initial push (or perhaps just an excuse for interaction) to encourage the formation of social relationships that might become significant over the long-term.

This associational right in collaborative reproduction mimics statutory rights of visitation and contact between children and third-parties in other contexts. In particular, all fifty states have statutes giving grandparents visitation rights. The nature of these grandparent rights varies among states. Some states simply allow for reasonable visitation with no prerequisites, while other states permit visitation only if there has been a death of a child's parent, a divorce between the parents or a step-parent adoption. Certain states extend visitation rights beyond the context of grandparents to stepparents, siblings and other relatives as well and even to non relatives who have an interest in the welfare of a child. This version of the model thus draws on the pre-existing associational rights of family members and other third parties and extends these rights to reproductive collaborators and the children they produce. Just as associational rights granted in these contexts preserve and build family ties, the model uses such rights to encourage familial relationships in collaborative reproduction while preserving the role of the social parents.

ii. Expansive Parental Rights

In its more expansive version, the model of shared parenting assigns to reproductive collaborators parental rights that co-exist with the rights of a child's social parents. Professor Kandel, a scholar of anthropology and law, makes the strongest case for this version of the model and so we rely on her presentation of the argument. Kandel's discussion fo-

---

145. See id. at 22-25.
146. See id.
1998] SOCIAL CAPITAL 29
cuses on assigning parental rights in the context of gesta-
tional surrogacy, but drawing on her work to exemplify the
proposal does not preclude recognizing such rights in other
contexts.149

Professor Kandel is motivated by a California court's as-
sertion that a child may have only one natural mother in ges-
tational surrogacy, the genetic mother.150 Kandel argues that
the court's reasoning reflects a myopic resistance to expand-
ing notions of motherhood—particularly to recognizing more
than one woman as a child's natural mother.151 In Kandel's
view, the claims of a genetic and of a gestational mother to be
a child's natural parent are equally compelling.152 "The ge-
netic parents' contribution of hereditary material," Kandel
argues, "determines most of the physical, mental, and tem-
peramental qualities which the child will possess at birth."153
In addition, in surrogacy "[t]he genetic mother suffers the
risky surgical removal of her eggs, often preceded by har-
rowing years of infertility treatments and clinicalized sexual
relations which have been carefully timed to coincide with

149. See also Boskey, supra note 135. Boskey argues that "law should be
prepared to recognize the existence of a parent-child relationship between any
number of adults and a child in appropriate circumstances." Id. at 809. He
suggests that parental rights—consisting of the right of possession, the right of
association, the right of supervision, and the right of acquisition—as well as pa-
rental duties—to provide, protect, and nurture—can be rebundled in various
ways in order to give multiple adults parental or quasi-parental status. Id. at
813-23. Boskey focuses on social connections as giving rise to parenthood; in
his view, then, merely being a sperm or egg donor would be insufficient to con-
fer parental status (even where multiple adults can share the re-bundled rights
and duties). Id. at 844. Boskey is undecided, however, about whether gesta-
tional surrogates should be recognized as parents because he is uncertain about
the "weight that one assigns to the physical nurturing of the child during preg-
nancy." Id. at 845. Still, Boskey's approach fits with this version of the model
because he does not see parenthood as entailing choices between one individual
and another (or between one couple and another) but rather as a matter of
weighing the claims of any number of individuals, all of whom could potentially
be recognized as parents. Id.

denied, 510 U.S. 874 (1993)).

151. Id. at 180-82. Kandel notes that even where definitions of motherhood
have been relaxed (such as in homosexual adoption), one woman is still recog-
nized as the natural mother, with maternal status extended by analogy to a
second woman performing parenting tasks. Id.

152. Id. at 187-88.

153. Id. at 188.
her ovulatory cycle." On the other hand the gestational mother, according to Kandel, is "elaborately linked through biochemical and hormonal interconnections" to the fetus. She provides nourishment and protects the fetus, which uses the mother's excretory and respiratory systems. In addition, the gestational mother faces all the health risks of pregnancy. Given that these claims to motherhood are both strong, Kandel suggests that rather than insist a child has only one natural mother, law should accept that "[d]ual motherhood is a fact of nature because it is made possible by technology."

Kandel draws on a large body of anthropological evidence to show that arrangements involving multiple parents benefit children as well as the communities in which such practices occur. Kandel describes a system of multiple care-taking among the Efe of Northeastern Zaire. There, nursing and child-care responsibilities are shared from the moment a child is born with successful results:

At three weeks, infants spend thirty-nine percent of their time in physical contact with people other than their mothers and at eighteen weeks, sixty percent of their time is spent with people other than their mothers. Researchers found that Efe infants were likely to be precocious in their social skills and predisposed to cooperation, mutual support, and gregariousness.

Kandel also describes child sharing in Oceania, among Native Americans, and in West Africa. She reports, for example, that in Oceanic societies "‘feeding children,' the practice of sharing and exchanging children among relatives and close friends, is pervasive." Kandel indicates that a "feeding child" in Oceania may have equal contact with two sets of family groups and be equally at home in each household. The "feeding parents" devise property to the child at

154. Id. (citations omitted).
155. Kandel, supra note 148, at 188 (citations omitted).
156. Id. (citations omitted).
157. Id. at 189 (citations omitted).
158. Id. at 193.
159. Id. at 195 (citing Edward Z. Tronick et al., Multiple Caretaking of Efe (Pygmy) Infants, 89 AM. ANTHROPOL. 96, 96-104 (1987)).
160. Id. at 204 (citations omitted).
161. Kandel, supra note 148, at 204 (citations omitted).
162. Id. (citations omitted).
the time of "adoption" and the child inherits from both biological and "feeding parents." Both sets of Oceanic parents provide for and discipline the child. Kandel reports that survey data from Oceania show that at any given time more than 25% of all children do not live in the home of their biological parents.

Kandel emphasizes the benefits of such arrangements for children: "[f]rom the perspective of all the children, the advantage of child sharing lies in having a broadened network of social support and an enlarged set of role models to aid in bridging the gap between the nuclear family and the larger society." She asserts that "children can flourish in contexts where social rearing is shared," and that children raised under co-parenting arrangements in West Africa are less aggressive, less anxious and more independent than those raised only by their birth parents. She notes that kibbutz children—also raised by multiple mothers—are emotionally healthy and possess strong interpersonal skills. Finally, Kandel reports that there are important benefits to communities in which shared-parenting occurs since such arrangements efficiently distribute children among members of a social group and link individuals into strong kinship networks that facilitate future cooperative action.

163. Id. (citations omitted).
164. Id. at 205 (citations omitted).
165. Id. at 204 (citations omitted).
166. Id. at 210 (citations omitted).
168. Id. at 210 (citations omitted).
169. Id. at 195 (citing MELFORD E. SPIRO, CHILDREN OF THE KIBBUTZ 196-209 (1958)).
170. Id. at 201 (citations omitted). Kandel suggests that shared-parenting "allocates rights and responsibilities for . . . children, in a way which is adaptive and functional for a particular society." Id. (citations omitted). She continues: "[t]he flexible nature of child exchange . . . makes it an effective means for reallocating people in response to need and compensating for the unequal statistical distribution of births . . . thus maintaining a total number of individuals and a sex ratio more suitable to familial and economic needs." Id. at 205 (citations omitted).
171. Kandel, supra note 148, at 206-08. Kandel emphasizes the social importance of child-sharing:

Oceanic child exchange operates in a context of kinship solidarity and support. Children are regarded as a resource to be shared among those who recognize one another as kin. It is a compliment to ask for a child and an insult to refuse to give one, especially to a childless relative. To refuse a request for a child is to deny the existence of a kin-
Kandel finds shared parenting in these other contexts an "inspiring model for gestational surrogacy families," and she is optimistic that child sharing may be imported to inform and reform American surrogacy practices. Kandel thus advocates that gestational surrogacy agreements be understood as setting forth the terms of custody allocation rather than designating parentage:

The gestational surrogacy contract should be interpreted as a contract which creates a kinship group consisting of a child and three parents, all of whom retain their co-equal parenting rights. Its purpose is to allocate custodial rights and responsibilities among the three parents of a common child. In essence, the gestational surrogacy agreement is very much like the custody and visitation agreements made between separated, divorced, and never married parents and should be governed by the same principles of law.

Kandel argues that in gestational surrogacy "the child's close and continuing contact with [all] parents should be encouraged," as is done in custody arrangements between divorced parents. She offers specific proposals for dividing parental rights and responsibilities among these three parent-ship bond with the person making the request. Furthermore, feeding a child creates a kinship bond which endures over generations. [F]riends who exchange children then become kin. Exchanging and sharing children is a transaction in co-parenting, a generalized and flexible contract pursuant to which people become and remain close kin.

Id. (citations omitted).

172. Id. at 211.

173. Kandel suggests that child-sharing is not entirely foreign to the United States. Id. She cites the contemporary prevalence of children with multiple sets of "parents" because their natural parents have divorced and remarried. She notes also that parenting functions are often performed by other relatives, friends, or neighbors in African-American communities. Id. And she points to instances of open adoption. Id. at 211-14. Kandel is especially enthusiastic about open adoption: "Continuing a relationship with her birth parents permits an adopted child to know that she is remembered and loved. Furthermore, a child of open adoption is better able to experience and assimilate the fullness of her identity." Kandel, supra note 148, at 199 (citing Annette Baran & Reuben Pannor, Perspectives on Open Adoption, in 3 THE FUTURE OF CHILDREN 119, 119-122 (1993); Kathleen Silber & Martinez Dorner, Children of Open Adoption 51, 68-70 (1989)). Kandel suggests that since open adoption shares many of the features of her proposal for child-sharing it provides evidence that child sharing in surrogacy can work successfully in the United States. Id. at 235.

174. Id. at 226.

175. Id. at 227.
ents. In her view, "the gestational surrogacy agreement should be premised upon two specific understandings. First, one mother is bearing the child so that the other mother, and the genetic father, can fulfill the social roles of parenthood. Second, the gestational mother will remain actively involved in the child's social rearing." Thus, Kandel argues that a child should presumptively reside with the genetic parents who should have the bulk of parenting time, daily child care, decision-making responsibilities and rewards of raising the child. But the gestational mother should also act as a "real life parent to her child" and have substantial parenting time as well. According to Kandel, "the gestational mother should nurse the baby and visit the genetic parents' home to feed, bathe and play with the child" from the point of birth. As the child grows older, he or she should visit with the gestational mother for longer periods. Kandel argues that the goal in this system of multiple parents should be for the child to spend one third of parenting time with the gestational mother, although a different arrangement could be negotiated among the parties. The gestational mother may also decide to terminate her parental rights after the birth of the child, but surrogacy contracts should not be enforceable as such. In addition, Kandel suggests that a surrogacy contract, understood as an agreement about custody, would be subject to modification if in the best interests of the child (a standard which does not itself compel a choice between two women as mothers).

Kandel proposes that the legal system should give genetic parents incentives to treat the gestational mother fairly: "the presumption that the genetic parents have a greater share of parenting time is premised upon their encouraging and supporting the active involvement of the gestational mother in the child’s social rearing, if she so desires." As such, if the genetic parents interfere with contact

176. Id. at 228.
177. Kandel, supra note 148, at 229.
178. Id.
179. Id. at 229-30.
180. Id.
181. Id. at 230-31.
182. Id. at 227.
184. Id. at 231-32.
between the gestational mother and the child, custody modifications could be sought. 185

3. Evaluation

The model of shared parenting represents law's clearest acknowledgment of its effects on family social capital. The model specifically seeks to generate and sustain new social relationships, a feature that distinguishes it from the other models we will consider. Rather than choose among participants in collaborative reproduction when determining parenthood, the model recognizes each of the adults involved and treats their presence as an opportunity to build new familial bonds. The model also aims to protect relationships within a child's social family by promoting greater openness. In short, the model represents an effort by law to generate social capital in building new social ties, as well as to protect social capital in existing family relationships.

Despite these efforts, the model of shared parenting fails to offer law a useful program by which to protect and promote social capital for collective benefit. The basic problem with this model is that it seeks to produce social capital through highly coercive means. That is, it builds social ties by forcing interactions among individuals who would otherwise not connect. 186 The model is not simply a program for thinking broadly about family relationships or for permitting and encouraging a myriad of familial connections. Rather, the model of shared parenting is one that requires social interactions. It does not merely recognize instances where shared parenting occurs voluntarily, but instead seeks to make shared parenting happen. The model aims, in other

185. Id.

186. It is important to make clear at the outset of this evaluation who is being coerced under the model of shared parenting. Coercion means not simply that children are forced to interact with reproductive collaborators (or that collaborators are forced to interact with children where the parental or associational right works that way as well). More significantly, the model coerces adult to adult relationships. Under this model, the child's social parents are forced to interact with the reproductive collaborator and to provide access to their child, when they would otherwise prefer not to do so. This is easily seen by comparing the model's scheme with that of marriage. Under the model, social parents are resistant to the involvement of the reproductive collaborator—whose relationship with the child occurs despite this resistance. In marriage, by contrast, the relationship of each parent with the child takes place with the consent and encouragement of the other parent. See infra note 192.
words, to reach parties who would not ordinarily engage in these types of familial relationships. Indeed, these parties—forced to interact—are the focus of the model’s social capital efforts. Under the model, law builds social capital not through the power of persuasion and encouragement, but through law’s outright coercion. Social capital is thus said to be built only because law alters the balance sheet by specifying that new social ties formally exist where none before were present.

Most seriously, the model of shared parenting subjects familial relationships to litigation and enforcement by courts. In order to generate new social capital, the model relies on tools that law has developed for dealing with relationships that have broken down and cannot proceed amicably without intervention and control: division of parenting, detailed specification of rights and responsibilities and recourse to judicial power to sanction violations or interferences. The model essentially turns the arrival of a newborn into a proceeding not unlike divorce and custody. The very concept of a parental or associational right, as proposed by the model, clearly reveals that the model’s focus is the development of social connections that would not occur voluntarily and that instead require law’s coercion.

It is this involvement of law (potential or actual) at the most specific level (particular families) using its most specific tools (assignment and enforcement of rights and responsibilities) to resolve disputes (anticipated or actual) that shows why the model of shared parenting does not help create, prospectively and generally, social capital. This model rests on the identification of particular individual parties and provides them with a specified set of legal claims that are enforceable by courts. Under the model of shared parenting, law is to build social capital by giving individuals rights they can enforce. Individuals, turned litigants, do law’s work.

Social capital is not built by coercion. The work that is done to create social capital under this model represents effort without achievement. The stock of social capital that shared parenting appears to create is illusory, vanishing at the slightest touch. Social ties that rely on enforceable rights

187. See supra notes 172-185 and accompanying text.
188. See supra Part III.A.2.
of access and association, and judicial sanctions for interference, are an especially weak form of connection. Indeed, one might say that they are not a form of connection at all, since granting rights of access represents a poor mechanism to generate ongoing bonds of trust and loyalty. Where interaction requires the exercise of an assigned right and occurs only as a response to the right's mandate, the interaction remains little more than a right exercised by one party and a mandate obeyed by the other. Indeed, we usually think of relationships that occur in spite of a set of rules and threats to be of a special, personal nature: lovers who marry against the wishes of their families, friendships that cross religious or ethnic borders, relationships that risk punishment because they defy taboos. But when interactions occur because individuals have no other choice, it is clear that the lack of choice is the reason they take place, not because there is anything special or significant about the relationship itself. The very presence of a rule requiring a social interaction is the signal that the tie itself is devoid of meaning. If the tie stood for anything more than what the rule assigns it, then the rule would not be necessary. Without the buttress of regulation and coercion, therefore, the social relationships created under this model collapse.

The spirit of shared parenting seems attractive if law is to build and sustain social capital for collective benefits. As Professor Kandel's anthropological evidence indicates, children can benefit from deep relationships with multiple adults, even multiple mothers. But where reaping these benefits requires formalism, litigation, judicial monitoring and enforcement and the tools of divorce, something has obviously been lost in the translation. Where law's role becomes to measure complaints, resolve disputes and order compliance, it is unlikely to generate social capital.

Social capital requires at least a minimal amount of choice. It requires that individuals connect because, at some level they want to, not because they fear punishment if they disobey. Choice is the prerequisite for social capital not simply because it is through choice that people form meaningful relationships, but because choice is the condition for law promoting social ties at all. Choice is the guarantee that social ties exist in fact, not merely in law. That is, choice makes sure that there is more to relationships than only
their legal recognition or designation. Choice serves as a check on law's temptation to call "social capital" what is only a legally-defined relationship and to be lazy in its work of building actual social ties. A requirement of choice makes law do more than just formalize relationships which are themselves meaningless. Choice, in essence, binds law's hands, preventing it from relying wholly on its most coercive tools in its task to build social capital precisely because those tools fail to produce social capital for collective benefits.

Professor Kandel's reliance on open adoption\textsuperscript{189} to gauge the success of her version of shared parenting is thus misplaced. Open adoption, if successful, involves ties that are voluntarily formed, quite the opposite of what the model of shared parenting proposes. Given that open adoption is rarely recognized, it does not generally create legally enforceable rights (such agreements are unenforceable in nearly every state).\textsuperscript{190} Indeed, the absence of legal recognition and enforcement makes it difficult to determine just how successful open adoption agreements even are. Social ties formed through open adoption exist because all of the parties agree, and continue to agree, that they should exist. This is quite different from the shared parenting model's reliance on enforcement of legally assigned rights.

A more relevant comparison for Kandel's version of the model would be divorce, with shared custody or assignment of visitation rights. There, the experience casts a darker shadow on the model's proposal. Such arrangements exist precisely because relationships have broken down, and formalization steps in to fill the gap left by the departure of mutual trust. Shared custody is hardly an ideal arrangement for a child,\textsuperscript{191} and it does not serve social capital well. Its

\textsuperscript{189} See supra note 171.

\textsuperscript{190} The exception is the state of Oregon in which written agreements giving birth parents (as well as grandparents and siblings) continued access to an adopted child are enforceable. OR. REV. STAT. § 109.305 (Supp. 1994).

\textsuperscript{191} But see Christy M. Buchanan, Eleanor E. Maccoby, & Sanford M. Dornbusch, Adolescents After Divorce 254 (1996) (reporting only minor effects of dual residence on adolescent adjustment following divorce); Charlene E. Depner, Revolution and Reassessment: Child Custody in Context, in Redefining Families: Implications for Children's Development 99, 105-09 (Adele Eskeles Gottfried & Allen W. Gottfried eds., 1994). Depner concludes that the literature on the effects of joint custody for children is uncertain. \textit{Id.} She reports that few studies have considered links between custody status and psychological well-being of children and that the studies that do exist do not
purpose is to harmonize interactions where disputes have occurred and future hostilities are likely. It is an attempt to salvage something from a relationship that has deteriorated, not a mechanism for creating new and healthy connections.

The more limited version of this model, recognizing only an associational right, does not resolve the difficulty. Although more modest in its scope, an enforceable right remains the mechanism for creating social connections in this version of the model as well. Law's role might be less intrusive, and less litigation might arise, but reduced coercion is a function of this version's more modest goals, not a sign that it successfully builds social capital.¹⁹²

find significant custody effects. Id. Further, fathers who have joint custody spend more time with their children and are more likely to pay child support. Id. Yet Depner notes that other studies have shown that children find it difficult to handle the logistics that joint custody requires and that they generally report satisfaction with shared-parenting only when their parents are not engaged in conflict. Id.

¹⁹² Two objections to my evaluation of the model of shared parenting are likely. The first objection is that the actual relationship that the model of shared parenting seeks to promote is the relationship between the reproductive collaborator(s) and the child that results. Those parties may not be resistant at all to such a relationship and indeed might come to enjoy it once started. As such, my characterization of law's efforts under this model as coercive does not apply to this particular relationship, but instead only characterizes the resistance of the child's social parents who do not wish a relationship between the collaborator(s) and the child to occur (and so deny access). In short, my criticism exaggerates the amount of coercion the model entails by failing to focus on the most relevant social tie.

I have two responses to this objection. The first is that although the specific association that law promotes under the model of shared parenting is the relationship between the reproductive collaborator and the child, it is not possible to separate a child from her social family for the purposes of building social capital. Exercise of a right of access to a child requires the cooperation of the social parents (and presumably it is their interference with the right that would be actionable). The social parents can also make a considerable difference—without even going as far as to violate the right of access held by a third party and incur sanctions—to the success with which third party rights are exercised, and thus the social capital benefits that result. Social families can choose to provide greater access than that is required—or choose to satisfy only the bare minimum. They can disrupt the exercise of a right of association up to the point at which courts will step in. And they can have significant influence over a child—either directly (telling the child to misbehave, to remain silent, or to try to escape when in the presence of the third party) or indirectly (by their own hostility towards the third party). Thus although in theory the relationship at issue is that between the collaborator and the child, in practice—when it comes down to actually going to see the child—the social parents are also very much involved. Open adoption is premised, after all, on cooperation between adults, not simply between the child and an additional set of parents.

My second response is an elaboration of the first. Because of the neces-
So far we have seen that the model of shared parenting, in advocating parental or associational rights, fails to protect and promote social capital because the model depends on coerced relationships. Coercion is why the other proposal of this model, to end secrecy and anonymity in collaborative reproduction, also undermines the goal of promoting social capital. The proposal for greater openness ignores the benefits to social capital that may inhere in public ambiguity about reproduction. For although secrecy might create tensions among family members, announcing and recording the necessary involvement of the social family in the child’s life, building social capital may actually require the cooperation of the social family. Certainly, rights of association may be enforced against hostile social parents but it is not clear that social capital will be built under such circumstances. Social families can, to a large degree, define the relationship between a child and a third-party. Social families can encourage the relationship to proceed in a healthy and vibrant manner in a way that will help the formation of long-lasting ties that have social capital benefits. Or social families can turn the exercise of associational rights into occasions for resistance and moments of suspicion. Social families, in short, can make the difference between trust and distrust, between connection and mere association. As such, the objection to my evaluation of the model overstates the independence of children from their social families, ignoring the difficulty of drawing a clear line that marks the boundary between where the family ends and the child begins. The objection thus fails to recognize the role that families themselves play in the creation of social capital formed through ties that technically link only their children to third parties.

The second objection to my evaluation of the model is that family relationships in general are coercive. People are, after all, born into particular families without choice and when family relationships break down individuals often resort to law in order to maintain ties. Thus, this second objection suggests, if social capital may be built in families that involve these “coerced” relationships, why may it not also be built through other ties coerced by law? My response to this objection is consistent with my answers to the first. The suggestion that shared parenting is only as coercive as other family relationships focuses narrowly on the relationship between a child and the reproductive collaborator. Certainly, that relationship on its own is similar to the relationship between a child and her social parents: ending up in a relationship because one is born to social parents is not really less coercive than ending up in a relationship because law requires it. But there is a critical difference in collaborative reproduction, seen if we broaden our sights to consider the context in which the relationship with the child must occur. Coercion in the case of collaborative reproduction means, in my mind, coercion of adults; coercion of the social parents who cannot (as my response to the first objection indicates) be ignored. They are the ones made to allow other parties to visit with their child. This is quite different from regular family arrangements where the adults are not forced to interact in ways they would rather not. That is, where a married couple has a child, each parent’s relationship with the child proceeds with the blessing of the other parent. Assessing coercion, then, requires not just focusing on the adult-child relationship but on the adult-adult relationships that are implicated as well. For this reason, it is not the case that the model of shared parenting involves no more coercion than that already within regular families.
facts of a child's origins in the way the model proposes underlines the importance of choices over disclosure of family bonds. Secrets are, after all, both a threat to intimate relationships and a condition for intimacy. Secrets mark a boundary between the public and the private, giving private life much of its meaning and allowing strong family ties to develop.\textsuperscript{193} The proposal for greater openness makes that boundary much less certain, by coerced exposure of the origins of a child. To put things more simply, the model fails to see the extent that ambiguity is a prerequisite of family freedom.\textsuperscript{194}

Of course, there is a conceptual difference between secrets that a family keeps to itself and secrets that individual family members keep from each other. But in practice the

\textsuperscript{193} As the philosopher Sissela Bok writes:

Control over secrecy provides a safety valve for individuals in the midst of communal life—some influence over transactions between the world of personal experience and the world shared with others. With no control over such exchanges, human beings would be unable to exercise choice about their lives . . . . If experience in the shared world becomes too overwhelming, the sense of identity suffers . . . . Control over secrecy and openness is needed in order to protect identity: the sense of what we identify ourselves as, through and with. Such control may be needed to guard solitude, privacy, intimacy, and friendship. It protects vulnerable beliefs or feelings, inwardness, and the sense of being set apart: of having or belonging to regions not fully penetrable to scrutiny, including those of memory and dream; of being someone who is more, has become more, has more possibilities for the future than can ever meet the eyes of observers.

\textit{Bok, supra} note 120, at 20-21. \textit{See also} James L. Nelson, \textit{Genetic Narratives: Biology, Stories, and the Definition of Family}, 2 Health Matrix 71, 77 (1992) ("Families are significant contexts in which we enjoy intimate relationships, places in which we can express parts of ourselves which we elsewhere suppress, places where we can know and be known with a sort of particularity that doesn't often occur elsewhere.").

\textsuperscript{194} Consider two examples. First, encountering a parent whose child is of a different race often gives people pause—leading them to wonder where the child "came from" in a manner they would not wonder were the parent and child of the same race. Second, there is a similar sense of puzzlement when coming across a same-sex couple that suddenly has a child (e.g., seeing a picture in a newspaper of two men and a baby where all the text says is something like "John and Paul are happy to announce the safe arrival of their daughter Jennifer, who weighed . . . ."). One can be fully in favor of interracial adoption and gay parenting and yet still wonder about the "origins" of these children: ambiguities are hard to live with. But the parents' refusal in each case to publicly advertise where these children "came from" is quite empowering. It shuts off private conduct from public prying. And it makes unconventional choices about reproduction as worthy of privacy and respect (and not in need of explanation) as reproduction by heterosexual intercourse.
two are not easily separated. Freedom of families to choose secrecy from the public must also entail the freedom of individual family members to choose how to arrange truths among themselves. The model's proposal that a child's genetic origins be reported and accessible makes this clear: revelation to individual family members requires public record-keeping, whether or not any particular member of the public will necessarily have access to such records. Secrecy in collaborative reproduction, then, is a precondition for intimate family ties and the social capital that those relationships represent, even though secrecy can also expose relationships to stress. Just as coerced relationships fail to produce social capital, coerced exposure of family truths undermines it.

B. Model of Biological Ties

A second model law that may be used to determine family relationships and parenthood in collaborative reproduction is the model of biological ties. This model proposes that law preserve and strengthen social relationships between individuals who share a biological connection, though what exactly constitutes a biological connection may vary. Under this model law might consider only the genetic connections that exist in collaborative reproduction. As such, law would preserve and strengthen relationships between providers of gametes and the resulting children. Alternatively, law might focus primarily on gestational connections, thus strengthening the relationship between a mother and the child she carries and gives birth to, even if (as in gestational surrogacy) there is no genetic link. Two versions of this model, representing each of these possibilities, will therefore be discussed.

1. Genetic Ties

In the first version, the model law focuses on genetic ties. People have a compelling urge to know their genetic roots and to be with others who share their roots. Individuals who are cut off from these roots, the theory goes, never quite recover. As such the genetic version of the model proposes that law should give priority to genetic-based relationships.

195. See supra note 15.
Natural parents are, therefore, preferable to adoptive parents, and genetic mothers trump gestational mothers.

This version of the model draws on evidence from the adoption context about the dire consequences of separating children from their genetic roots. Adopted children have been said to grieve at the loss of the birth-mother, fear future abandonment, feel guilt because of divided loyalty between their birth parents and adoptive parents and experience an intense longing for their biological parents. The concept of "genealogical bewilderment" describes the identity confusion that results from not knowing or having contact with one's genetic family. This is said to inhibit healthy development and undermine the formation of close ties with adoptive parents and with others in adult life. In recent years, these alleged emotional stresses related to adoption and separation from genetic parents have resulted in calls for greater disclosure to adopted children and, in some quarters, for open adoptions.
Because genetic ties are so fundamentally important, this version of the model asserts, law should act to preserve and promote genetic-based relationships. As such, law’s assignment of parenthood is simple: the parents of a child are the genetic parents, regardless of the involvement of anybody else in the reproductive process. There are of course well-known instances of law doing exactly that. In Anna J. v. Mark C., for example, the California Court of Appeals focused on genetic ties to reject a gestational surrogate’s claim to motherhood. The court decided to resolve the surrogate’s claim just as it would “resolve the question of a man’s claim to paternity... when blood tests positively exclude him as a candidate.” Since there was no genetic link between the surrogate and the child, the court held she was not the natural mother.

In another case, the Tennessee Supreme Court found that an interest in avoiding genetic parenthood is as significant as the parental interest in child-rearing.

2. Gestational Ties

In the second version of the biological model, law focuses on relationships that are gestationally linked. As such, law should preserve and strengthen the relationship between a mother who bears a child and the child produced in collaborative reproduction, even if the two lack a genetic connection. What counts in determining family ties are pregnancy and birth.

This version of the model points to evidence that the experience of carrying and bearing a child establishes an unusually strong bond between the gestational mother and the

---

artificial insemination or egg donation.

Id. For an overview of the findings of researchers that adoption creates psychological difficulties for adoptees, see D.K. Deutsch et al., Overrepresentation of Adoptees in Children with the Attention Deficit Disorder, 12 BEHAV. GENETIC 231, 231-38 (1982).


204. 286 Cal. Rptr. at 376.

205. Further, applying Michael H. v. Gerald D., 491 U.S. 110 (1989), the court held that the gestational surrogate had no constitutionally protected liberty interest in her relationship with the child she gave birth to because such a right has not traditionally been protected and would interfere with the rights of the genetic parents. Id. at 379-80.

Research suggests an important prenatal bond between a gestational mother and the child she carries. Studies indicate that women often experience loyalty toward the fetus early in pregnancy, and that quickening is an especially important point for the development of feelings of attachment. While both biological parents may interact with the fetus, pregnant mothers seem to have a stronger sense of the fetus as a separate individual. And women often mourn the loss of even a nonviable fetus. There is also evidence of postnatal bonding, especially during the critical period following birth when the mother and child experience strong feelings of attachment for each other. Different studies illustrate the importance of early and secure emotional ties between children and their parents to child-development.

207. Professor Rothman adds an additional twist to this version of the model. BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD (1989). Rothman suggests that parenthood derives from intimate social relationships but she recharacterizes the biological connection between a gestational mother and the child as a specifically social link, thus warranting her recognition as the legal parent. Id. at 37-39. Rothman writes: "The mother, as a social being is responding socially to the experience of carrying her baby." Id. at 97. In Rothman's view, a gestational surrogate should always be free to change her mind about relinquishing the child she carries because she is the one with the strongest social relationship with the newborn. Id. at 239. Rothman compares this relationship with that between the contracting parents in surrogacy and the child. Prior to a child's birth, Rothman argues, a genetic father may at most only begin to establish a social relationship with the child through his relationship with the gestational mother. Id. at 104-05. And he can only develop a truly nurturing relationship after birth. Id. at 214-23. In surrogacy, Rothman claims, the genetic father has an especially limited relationship with the child—dependent wholly on the surrogate's cooperation—and the same is true of the genetic (non-gestational) mother. BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD 98 (1989).

208. See Hill, supra note 12, at 397.

209. See id. (citing Fletcher & Evans, Maternal Bonding in Early Fetal Ultrasound Examinations, 308 NEW ENG. J. MED. 392 (1983); Leifer, Psychological Changes Accompanying Pregnancy and Motherhood, 95 GENETIC PSYCHOL. MONOGRAPHS 55 (1977)).


211. See id. (citing Kennell, Slayter & Klaus, The Mourning Response of Parents to the Death of a Newborn Baby, 283 NEW ENG. J. MED. 344 (1970)).

212. See id. at 394-400 (citing numerous studies).

213. See Hill, supra note 12, at 402. Hill notes that it is well established that infants failing to form a bond with any adult are likely to lack the ability to form deep and enduring relationships later in life. Id. (citing FRUIBERG, EARLY CHILDHOOD BIRTHRIGHT: IN DEFENSE OF MOTHERING 51-62 (1977); Singer, Brodzinsky & Ramsay, Mother-Infant Attachment in Adoptive Families, 56 CHILD DEV. 1543 (1985)). Hill cites one study that found a high correlation be-
nally, there is evidence that women who surrender children shortly after birth suffer severe psychological distress. A mother will often feel separation anxiety when apart from her child even for a short period.\textsuperscript{214} Moreover, writings in the adoption context suggest that permanent separation may lead to a deep sense of loss, long-lasting depression, recurring dreams about loss and reunion, a greater level of protective-ness towards remaining children, long-term conflicts and interpersonal difficulties, marital discord and even reduced fertility.\textsuperscript{216} These separation effects are thought to be especially strong for mothers who are compelled to relinquish a child.\textsuperscript{216}

Citing this evidence of bonding, the gestational ties version of the biological model argues that law should protect the relationship between gestational mothers and the children they carry. In the surrogacy context, then, law should recognize the birth-mother as the legal mother of a child, even where she lacks a genetic link to the child or previously agreed to turn over the child to a contracting couple.\textsuperscript{217} Notions of motherhood, in this version of the biological model, depend on having been pregnant with and giving birth to a child because of the important relationship that results.

\begin{itemize}
\item \textsuperscript{214} See id. at 405 (citing Hock, McBride & Gnezda, \textit{Maternal Separation Anxiety: Mother-Infant Separation from the Maternal Perspective}, 60 CHILD DEV. 793 (1989)).
\item \textsuperscript{216} See id. at 406 (citing Deykin, Campbell & Patti, \textit{The Post-Adoption Experience of Surrendering Parents}, 54 AM. J. ORTHOPSYCHIATRY 271 (1984)).
\item \textsuperscript{217} See FIELD, supra note 136, at 151 (arguing that a surrogate mother should have the right to renounce the contract up until the time she turns over the child to the contracting couple); ROTHMAN, supra note 207, at 239.
\end{itemize}
3. Evaluation

Neither version of the biological model offers law a way to promote social capital. First, the premise of the model is highly questionable. Biology, it turns out, may not matter to the extent the model asserts. The evidence that genetic ties count in the way the first version of the model claims that they do—that contact with genetic roots is critical for identity and stability—is widely disputed. The experience with adoption is telling: adopted children, by and large, are as well adjusted as children who remain with their genetic parents. At the very least, it is clear that for many people, such as fathers who abandon their children, parents who beat their kids, relatives who do not speak to each other and even anonymous sperm donors, genetic ties do not matter much at all.

The evidence of a special bond, both prenatal and postnatal, between a gestational mother and a child, underlying the second version of the model, is also much debated. It is not clear whether mother-infant bonding represents a biological link or response, or whether it results from social factors that motivate a woman to behave in a certain way towards her baby. Some studies, in this regard, show that bonding is not universal among women and that it is influenced by socioeconomic factors. Recent research also undermines the notion of postnatal bonding, or of a critical period in which the mother is likely to develop strong feelings of attach-

218. See, e.g., ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 173-81 (1993) (discussing weaknesses of literature on the importance of genetic ties); HUMPHREY, supra note 113, at 66-67 (concluding from a review of the literature on genealogical bewilderment that it "should be accorded no more than a modest influence").
219. See LASKER & BORG, supra note 104, at 163.
220. See supra note 133 and accompanying text.
221. See HUMPHREY, supra note 113, at 73-74 (reporting that adoptees with a compulsion to search tend to have personality problems and disturbed family relationships, and noting that in Britain when birth records were opened in 1975 only a very small minority (perhaps 2%) of adoptees ever sought access to them).
222. See generally Hill, supra note 12, at 394 n.219 (providing citations to studies expressing a range of viewpoints on this subject).
223. See id. at 398.
224. See id. (citing Kennell & Klaus, Mother-Infant Bonding: Weighing the Evidence, 4 DEV. REV. 275 (1984); Egeland & Farber, Infant-Mother Attachment: Factors Related to its Development and Changes Over Time, 55 CHILD DEV. 753 (1984)).
As one commentator concludes, "it remains to be proven that the bonding process is qualitatively distinct from feelings of attachment for the child developed by others in the procreative process."

Even if postnatal bonding does occur, at most it matters only if breaking or precluding the bond *ab initio* will result in psychological harm to the mother since all parents can come to develop strong ties with their children whether or not they are biologically linked. Further, although many studies indicate the importance for child-development of early and secure emotional ties between children and their parents, "[t]here is absolutely no evidence . . . that the child must form this relationship with a biological parent." Indeed, very young children can quickly form bonds with any adult. Moreover, as to claims of the psychological harm caused by relinquishment of a child, drawn largely from the adoption context, it certainly seems plausible that:

surrendering mothers in the adoption situation are more susceptible to the trauma of relinquishment than gestational hosts in the collaborative-reproductive arrangement precisely because the adoptive mother is under no legal compulsion to surrender a child even where she informally has agreed to do so before birth. Indeed, it is likely that many surrendering mothers vacillate as to their decision for some time up to, and in some cases even after, the birth of the child. This wavering may aggravate feelings of loss once the decision is made to surrender the child. In short, expectations may influence feelings. If the post-relinquishment experience of birth mothers is not at all related to their previous feelings regarding the child, then it is possible that women who do not expect to raise the

---


226. *Id.*

227. See *id.* at 400.

228. See Hill, *supra* note 12, at 402. It is well-established that infants failing to form a bond with any adult are likely to lack the ability to form deep and enduring relationships later in life. See *id.* at 402 (citing Fruiberg, *EARLY CHILDHOOD BIRTHRIGHT: IN DEFENSE OF MOTHERING* 51-62 (1977); Singer et. al., *Mother-Infant Attachment in Adoptive Families*, 56 CHILD DEV. 1543 (1985)).

229. *Id.* at 403.

child may be relatively less affected by the relinquishment. 231

Finally, when considering the harm caused by relinquishment, one should take into account the harm to those whose expectations of receiving a child, through a surrogacy or other agreement, are thwarted. 232

Because this evidence for the natural significance of biological (both genetic and gestational) connections is so problematic, the biological model for determining familial relationships rests on a weak foundation. As such, the model offers an uncertain mechanism by which law can generate social capital and its associated benefits. In this model, social capital outcomes hinge on a single fact: the significance of biological ties. If the biological tie turns out to be unimportant in the way the model imagines, then it leaves law with nothing with which to create social capital. Put differently, all that distinguishes the biological model from a proposal that law randomly match individuals is the importance of the biological fact. Should that fact be less critical than the model presumes, then law’s efforts to build social capital will be wasted.

In addition to the problematic premise of the model, there is another reason it fails to promote social capital. Even assuming that (a) biological ties are important, (b) people “feel” more connected to others biologically related to them than they do to biological strangers and (c) biological ties can lead to social connections, why should biology be law’s mechanism for building social capital at all? Even agreeing, in other words, that law can build social capital by focusing on biological links, why should this be the method that law chooses?

A focus on biology would straight-jacket law from the start. 233 Because one can easily imagine a variety of social

231. Id. at 406 (citations omitted).
232. See Hill, supra note 12, at 407. Hill suggests that only women who have previously had children should be permitted to be surrogates since they are more capable of predicting the feelings experienced during pregnancy. Id. at 416 n.314. He also advocates greater psychological screening of prospective surrogates to weed out those more likely to face relinquishment difficulties. Id.
233. Kathleen Nolan, What to Do About Parenting, 14 J. HEALTH POL., POL’Y & L. 827, 831 (1989) reminds us also that reproductive technologies to produce genetically linked offspring may impoverish the meaning of generativity "if we allow genetic procreation to become too precious, too central to our self-worth,
connections, some of which have a biological basis and some of which do not, shifting law's focus to ties that are biologically based seems unwise. It would restrict both the amount of social capital that law may create—by turning law's attention away from social capital that could be formed in the absence of a biological connection—and the sites where law could act to build social capital. The biological model narrowly reduces the range of social relations that law promotes, relations that might have significant social capital benefits. Indeed, in some instances the biological model will destroy social capital by shifting law away from protecting and promoting social ties that lack a biological basis.

Building social capital for collective benefits may require experimentation, innovation and multiple approaches of design. Such experimentation can lead law to mechanisms for creating social capital that are highly effective, perhaps more effective than a focus on biological connections. But the biological model forecloses that possibility by mandating, once and for all, the specific program that law is to follow.

The biological model asserts that this restriction is justified because in fact biological ties are more easily and more naturally formed. The model thus claims to offer law a shortcut, to ease law's burden, by prescribing its course of direction in creating social capital. But even if evidence of the importance of biological connections is accepted, this very prescription limits social capital. The decision of what types of social ties are to be law's focus as it protects and promotes social capital should not be made in advance. The biological model, after all, does not claim that biological ties are always easily formed, or that they are always more important than other types of ties, or that they can always be the basis for sustained social relationships. All that the model suggests (and all that its evidence, in its best light, supports) is that in general, or in many cases, biological ties are significant. In any given instance, the model recognizes, biological ties may or may not matter and so may or may not be a suitable basis for the creation of social connections. Precisely because all that the model claims is what is true in many cases (yet not invariably), a decision in advance to focus on biological ties and not other ties represents a poor choice for law's program

too vital to our sense of family."

234. See supra Part III.B.2.
to create social capital. For it means that law will have to ignore situations where it can create social capital, because of the absence of a biological tie. Therefore, because of the restraint the biological model imposes, law will fail to promote social capital where it otherwise would be able to do so.

The seriousness of the restriction that this model imposes is most evident where biological ties compete directly for law's protection with other social connections. Take, for example, the case of two women who jointly raise a child, both acting as mothers. After some period, the biological mother terminates the arrangement and leaves. Law's focus on biological ties to define familial relationships and its rejection of the long-term social connection between the child and the other mother works directly to diminish social capital. Consider another example, the case of a genetic parent who abandons a child but then shows up after ten years seeking legal recognition. The biological model suggests that law should value the biological parent's claim and prefer it over that of another adult without a genetic link, who has nonetheless developed a deep relationship with the child and served as a parent. Social capital does not benefit by such choices, mandated by the biological model.\footnote{See generally Joseph Goldstein et al., Beyond the Best Interests of the Child 80 (Burnett Books 1979) (1973). Goldstein argues that law should emphasize psychological parenting: [T]he status of parent... requires a continuing interaction between adult and child to survive. It can be broken by the adult parent by "chance," by the establishment of a new adult-child relationship, which we call common-law adoption, or by "choice" through a more formal legal process we have come to call adoption. It is the real tie—the reality of an ongoing relationship—that is crucial... and that demands the protection of the state through law. Id.}

The suggestion that law will succeed on average, or in most instances, in creating social capital if it focuses on biological links does not resolve this difficulty. Why, after all, should law follow a model that leads to success only on average, or even in most cases, when more is attainable? Why, when law can protect and promote social capital in the absence of a biological link should it fail to do so? When a relationship falls outside law's scope only because it lacks a biological connection, then law's neglecting to protect and promote the social capital the relationship represents is a
clear failure. For where the only difference is the missing biological connection, the model’s justification for not protecting the social capital inherent in the relationship must be the importance of the biological link itself. But the biological connection is the method this model offers law, not the goal; law’s goal must remain to create social capital for collective benefits. Even accepting the model’s claims about the significance of biological connections, this advance restriction on the types of relationships that law may preserve will inevitably overlook some social ties that nonetheless have social capital benefits.

Finally, we are unable to salvage the biological model by treating it as offering only a general rule of preferring biological ties, which law may ignore in particular instances to promote social capital. For if the model only aims to direct law towards biological relations presumptively, but not conclusively, it would be like having no model at all. If law is to generally prefer biological relations, but remains free to ignore them in favor of other ties more suited to building social capital in particular instances, then the same outcomes would be achieved if law were simply to select the ties that maximize social capital in the first place. Whether law initially looks to biological ties, or whether it first looks to other forms of ties, if the criteria for their evaluation (social capital benefits) remain the same, so will the result; order does not matter. Thus, recasting the biological model as one offering not a mandate but a general rule means the model provides no strategy at all for law to protect and promote social capital.

C. Model of Contract and Intent

1. Overview of the Model

A third and final model by which law might determine family relationships and parenthood in collaborative reproduction is the model of contract and intent.236 Under this model law preserves and respects the relationships that people themselves bargain for. Rather than concern itself with the importance or irrelevance of any particular basis (such as a biological link) for relationships, law should permit people

236. See supra note 15.
to freely make their own arrangements by consent and contract. Furthermore, law should settle relationship disputes just as it settles other contract disputes. In determining who is the parent of a child produced by collaborative reproduction, law should ask who the participating parties intended to be a parent, and look to a signed agreement or some other evidence of the parties' intent.

Professor Hill is a strong proponent of the model of contract and intent and his argument is exemplary. Professor Hill argues that in collaborative reproduction courts should simply look to what the collaborating parties intended—specifically whom the intended parents were—in order to determine parental rights. Original intent trumps subsequent claims in Hill's method. He proposes that there be a requirement of express designation of the intended parents in any contract for collaborative reproduction, as well as judicial review of the contract to force all the parties to announce their intentions before reproduction proceeds.

Hill offers three justifications for recognizing the intended parents in collaborative reproduction as the "procreators," and thus the legal parents of a child. The first is a "but for" argument of causation: treat the intended parents as the legal parents because "while all of the players in the procreative arrangement are necessary in bringing a child into the world, the child would not have been born but

237. Numerous other commentators also argue that law should focus on contracts in collaborative reproduction. See, e.g., POSNER, supra note 136, at 420-29; ROBERTSON, supra note 10, at 131. See also John E. Durkin, Reproductive Technology and the New Family: Recognizing the Other Mother, 10 J. CONTEMP. HEALTH L. & POLY 327 (1993) (arguing that enforceable contracts between lesbians be used to protect parental rights of the non-biological mother). But see FIELD, supra note 136, at 151-52. Field has doubts that surrogacy contracts should be permitted at all but argues that if such contracts are allowed the gestational mother should have the right to renounce the contract up until the time she turns over the child to the contracting couple. Once the child moves into the couple's home, however, the rights of the gestational mother should be terminated. Field asserts that if the biological mother renounces the contract then the genetic father should not be able to prevail in a custody dispute unless the mother is shown to be unfit. But, Field suggests, the father should still be able to develop a relationship with the child that would be legally protected (and he would, in such instances, be liable for the child's support). Id.


239. Id.

240. Id. at 355.
for the efforts of the intended parents.\footnote{241} According to Hill, "the intended parents are the first cause, or the prime movers, of the procreative relationship" while "the others are participants only after the intention and action of the intended parents to have a child."\footnote{242} In addition, because no particular biological participants are necessary, no one but the intended parents are in the unique relationship with the child of being the "but for" cause of the child's existence.\footnote{243}

The second argument Hill makes in favor of the model of contract and intent is that law should hold gestational hosts and donors of gametes to their original agreement not to seek parental rights.\footnote{244} Hill argues for enforcement of this agreement because it is the basis for the involvement of collaborators in the procreative relationship\footnote{245} and because the intended parents rely, financially and emotionally, on the agreement being met.\footnote{246}

Finally, Hill's third reason for intentional parenting is to avoid uncertainty. Permitting a gestational host or genetic collaborator to claim parenthood encourages lengthy litigation over parentage that can harm the parties involved.\footnote{247} Such litigation and disputes subject children to uncertain (and later changes in) custody or visitation arrangements.\footnote{248}

The model of contract and intent, in short, requires parties to choose in advance the rules that law is to follow; law's task in determining family relationships is simply to implement those choices.\footnote{249} Some courts have adopted this model to determine parenthood in collaborative reproduction and notions of intent also lurk in some state statutes governing

\begin{itemize}
\item \footnote{241} Id. at 415.
\item \footnote{242} Id.
\item \footnote{243} Id.
\item \footnote{244} Hill, supra note 12, at 415.
\item \footnote{245} Id. at 415-16.
\item \footnote{246} Id. at 416.
\item \footnote{247} Id. at 417.
\item \footnote{248} Id.
\item \footnote{249} See Marjorie M. Schultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, Wis. L. Rev. 297, 324-25 (1990). Schultz agrees with Hill that contractual intent should trump other claims for parental rights, and argues that courts can easily determine the intent of parties in collaborative reproduction. Id. Further, Schultz suggests that law should respect intent because it means treating individuals with dignity: failing to enforce surrogacy arrangements reinforces the notion that women are unable to rationally enter into contracts (e.g., because of hormonal changes during pregnancy that affect decision-making). Id. at 384.
\end{itemize}
surrogacy arrangements. In Johnson v. Calvert, the California Supreme Court ultimately focused on contractual intent (not genetic ties) to determine parentage in a gestational surrogacy arrangement, thus denying the surrogate any role in the life of the child. "She who intended to bring about the birth of a child that she intended to raise as her own," the court concluded, "is the natural mother." An earlier court went so far in its focus on intent to suggest that a child conceived through artificial insemination does not even have a natural father, reasoning that "[t]he anonymous donor of the sperm cannot be considered the 'natural father' as he is no more responsible for the use made of his sperm than is the donor of blood or a kidney.

2. Evaluation

The model of contract and intent avoids the flaws of the other two models we have considered. It does not restrict law in the manner of the model of biological ties; as such, it allows for greater innovation and imagination in law's pursuit of social capital. Further, unlike the model of shared par-

250. A Virginia statute distinguishes between gestational surrogacy and instances where the surrogate is also the genetic mother. The statute designates the intended parents the legal parents if the surrogacy contract has court approval. But the statute's definition of intended parents does not extend beyond married couples. If the surrogacy contract has not been approved by a court, then the statute designates the intended mother the legal mother only if she donated the genetic material. If the intended mother did not provide genetic material, then the surrogate may refuse to give up the baby and is recognized (along with her husband if he too was a party to the agreement) as the legal parent. VA. CODE ANN. §§ 20-156-162 (Supp. 1991). An Arkansas statute also presumes the intended mother to be the legal mother in surrogacy so long as she is married to the biological father or the parties used sperm provided by an anonymous donor. ARK. CODE ANN. § 9-10-201 (Supp. 1991). Finally, under Option A of the Uniform Status of Children of Assisted Contraception Act, surrogacy contracts are enforceable (and the intended parents are deemed the legal parents) unless either party breaks the agreement before conception or the surrogate changes her mind within 180 days of the last insemination. See FIELD, supra note 136, at 156-58.


252. Id. at 784 (emphasis added).


254. Other commentators reject a reliance on intent in surrogacy because they see it as biased against women. See, e.g., Anne Goodwin, Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements, 26 FAM. L.Q. 275, 287 (1993) (arguing that intent-based parentage "reflects a bias against the pregnant woman because, unlike the genetic/intended parents, the gestational carrier's physical and social rela-
enting, the model of contract and intent focuses specifically on voluntary ties, protecting connections that are freely chosen rather than forcing those that would not otherwise occur.

However, the model of contract and intent fails to promote social capital. From a social capital perspective the difficulty with this model lies precisely in its assignment of a limited role to law. It envisages law as an enforcer of the facts and terms of relationships to which individuals, at some prior point in time, agreed. Yet law, if it is to promote social capital, has a greater stake in those relationships than the model acknowledges. By curtailing this larger interest, the model fails to build social capital for two related reasons.

First, the focus under this model is the prior intentions of the parties. As with the biological model, law is to look through a predetermined lens. Although perhaps less restrictive than the biological model—in that a variety of ties could be created in advance by the parties to a contract—this model nonetheless removes from law's focus some relationships that would have social capital benefits. The difficulty is that many types of social ties are strong sites of social capital but lack the requisite moment of intent and contract. Relationships, after all, often occur without anybody ever intending them to do so. Yet their value as generators of social capital is not diminished because intent was never specified, or a contract was never signed. Take the example of a sperm donor, tracked down by his teenage daughter after the death of her mother. The two develop a strong bond. The donor may have never intended a relationship with his daughter, but the relationship does not become less significant for lack of intent. And critically, it is a relationship that law should promote in its efforts to build social capital. The model of contract and intent would shift law's focus away from relationships of this kind, and in the same way that the model of biology turns law away from non-biological ties, it prevents useful experimentation in creating social capital.

Relationships may also occur despite the intentions of the parties involved. The model of contract and intent would di-

*relationship with the potential child dramatically changes as her pregnancy progresses and when she experiences childbirth*); Kandel, *supra* note 148, at 193 (arguing that the "variability of maternal emotion, especially in the hormonally charged states of pregnancy and childbirth [makes it] . . . inhumane to rely upon contractual commitment to determine natural motherhood").
rect law away from these types of relationships as well, even though they may have substantial social capital benefits. A man who declares he wants nothing to do with his wife's illegitimate child, for example, may nonetheless find himself providing care and support. His announcements—perhaps duly recorded and signed—might be quite contrary to his actual behavior. Indeed, loudly disowning the child might even facilitate this man assuming a parental role (say, because it saves his pride, or meets the expectations of his own parents or friends). Alternatively, a surrogate may intend at the outset to have no relationship with the child she carries but then find herself developing a deep bond.

The model of contract and intent also takes for granted that intent precedes a relationship. But intent may only occur during the course of a relationship or may only be evident or supplied in retrospect. A foster parent, for example, may say she will not adopt a child, but then go ahead and adopt anyway. After the adoption takes place, this parent might say she always planned to adopt. It is not that she is lying, and she might not even have changed her mind: the way we view past behavior and feelings may depend, in part, on current circumstances.

Moreover, intent may not result in any sort of relationship at all. A man may intend to be the father of a child, for example, but then run off before the child is born. A second man may be reluctant to be that child's father but eventually become quite attached. Law would not promote social capital if it recognized the relationship of the first man to the child, where intent was clearly declared, but denied that of the second, where intent is much less apparent.

Because the model of contract and intent directs law to the intentions of parties as the basis for measuring relationships and weighing competing claims, it denies law's interest in a variety of other social ties where intent is missing, or less clear, or where it seems irrelevant. From a social capital perspective, the model thus restricts law by obscuring its interest in social ties conducive to social capital but lacking evidence of intent. In short, the model removes from law's focus promotion and protection—social ties that nonetheless serve social capital goals.

The second way the model of contract and intent curtails law's larger interest in social relationships is by removing
choices as to the content or terms of relationships from law and leaving those choices to individuals.\textsuperscript{255} The model draws no distinctions among the types of contracts and the varieties of intent that may exist. It only requires that each result from an informed choice. But some such choices are likely to be more effective at generating social capital than others. Over time, some might work to diminish social capital. If law is to build social capital, it cannot be neutral regarding the content or terms of relationships in the way the model of contract and intent makes it. As such, the model provides a highly restricted role for law and, therefore, undermines the program of protecting and promoting ties that generate social capital.

It is important to be clear what is meant by this criticism. The argument is not that law's interest lies in monitoring who forms social ties. Rather, the suggestion here is that quite apart from which particular individuals enter social relationships, law has an interest in the content of those relationships. Different relationships, irrespective of which individuals are involved, may have very different social capital implications.

Take, for example, the case of a divorced woman with four children who remarries. The couple signs a contract specifying that the new husband does not intend to be the father of the children and intends to assume no parental responsibilities. This new union promotes social capital and, therefore, will be encouraged by law. But the content of the arrangement is quite different. The specification that the husband will assume no parental responsibilities is troubling from a social capital perspective, because it represents a very limited commitment by the husband to his new wife's children, a diluted social relationship. The husband has used the

\textsuperscript{255} See, e.g., Durkin, supra note 237, at 344-45. Durkin writes:

When the... partners determine that they want to raise a child together they must determine the rights and obligations of each co-parent and put this into a written contract.... In the contract, the parties may wish to establish financial obligations to... partially or fully support the child. The parties could agree upon custody and visitation rights should the couple separate in the future. The contract could include numerous other provisions, such as a stipulation of the child's surname, the faith under which the child would be raised, or any other parental right or duty that the parties wish to stipulate.

\textit{Id.}
mechanism of intent to define his relationship with the children in such a way as to incur minimal obligation. His intent undermines social capital because it produces instability, as the husband is free to leave the arrangement without penalty. Although the decision to enter this social arrangement thus benefits social capital, the terms of it do not. Alternatively, the content of an arrangement that promotes long-term commitment, reliability and stability better serves social capital.

From a social capital perspective, law strongly encourages the formation of new social ties, such as among the individuals of the preceding example. But law's interest in the content that those ties take, quite independent of who forms them, is substantial. Another example is that of adoption. From a social capital perspective, law should encourage the formation of family units through adoption. At the same time, law should specify the rights and responsibilities associated with adopting a child in order to ensure strong ties. The model of contract and intent removes from law influence over the terms of a relationship, allowing individual participants to work out and agree to them on their own. 256 The

256. Commentators frequently confuse the distinction between the freedom to enter relationships and the freedom to determine what relationships are to mean. One commentator, for example, suggests that "by freeing families from biology and allowing families to be formed in the marketplace, assisted reproductive technologies move us closer towards a world of private ordering, where not only the form but also the content and the extent of family obligations may become the product of individual choice." Radhika Rao, Assisted Reproductive Technology and the Threat to the Traditional Family, 47 HASTINGS L.J. 951 (1996). But this concern assumes that the content of family relationships formed through non-collaborative reproduction is always subject to regulation whereas the content of familial relationships formed through collaborative reproduction is never subject to regulation. Whether or not law regulates a certain type of relationship is a question wholly apart from the way that relationship arises. This commentator takes for granted that collaborative reproduction necessarily requires the application of the model of contract and intent—and that in rejecting such a model there is no alternative, and so there can be no collaborative reproduction. Rao, as such, writes:

biological bonds, because reflexive and irrevocable, may prove more reliable than voluntarily assumed contractual commitments. When family members come together as a matter of choice, on the other hand, their commitment to each other may accordingly become both contingent and revocable . . . . [P]arenthood by consent may encourage the attitude that family relationships can be freely entered and exited, accepted or rejected.

Id. at 965. But if law can regulate the content of biological relationships, then it can also regulate the content of family ties formed through collaborative re-
production. Discarding the model of contract and intent, in short, does not also require discarding collaborative reproduction. BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE 129-81 (1997) also confuses the choice to enter relationships with the choice to define what relationships will mean in her claim that expanded definitions of family produce weaker family ties. Carl E. Schneider, Bioethics and the Family, 1992 UTAH L. REV. 819 makes a similar error in his criticism of courts that extend marital protections (and obligations) to couples that, although not actually married, function like other married couples. Schneider writes:

Marriage represents a specially serious and binding commitment two people make to each other. The commitment forms the basis for treating spouses in special ways. Of course, people don't have to marry in order to make such commitments, and some unmarried couples may be as solidly bound as any husband and wife. But unless people go through the public affirmation of the commitment that marriage constitutes, the law cannot know that they have made it .... In addition, there is a slippery-slope problem .... Marriage provides ... a bright-line rule .... [O]nce a court starts asking whether a non-marital relationship is the functional equivalent of marriage, it starts a process in which it compares the case at hand with the weakest case in which a couple has been found to have achieved the functional equivalent of marriage. That case then becomes a precedent, and the process begins again .... At the end of the day lies the risk that extending the regime of functional equivalents will tend to assimilate relatively transient and shallow relationships to marriage ... [and so] erode the special qualities of marriage and reduce marriage to just one more "life style choice."

Id. at 833-34. But the meaning that relationships will have is not independent of law. Extending the definition of marriage or family to cover a larger number of social ties does not mean that the definition becomes meaningless, because law can continue to regulate the content such relationships take. Marriage is not special because it is a special word; it is special because of the particular rights and obligations it entails. It does not follow that in expanding the notion of who is to be covered by those rights and obligations that they disappear or become subject to individual modification. Indeed, when courts expand such rights and obligations to cover social relationships that do not formally meet the definition of marriage or family, it is individual choice as to content of relationships that is likely to be upset, rather than the definition of marriage or family itself. As such, Schneider gets things exactly backwards. Law's interest in the meaning of social relationships is not served by being stingy about who may enter them; it is served by tightening the meaning itself. (Schneider would thus do better to criticize not deep relationships that look like marriage but marriages that do not look like deep relationships: for example, marriages for immigration purposes, marriages that happen or end quickly (and lead to more marriage) and marriages in which spouses are abusive). Finally, one of the cases that Schneider cites as exemplifying courts wrongly expanding on the definition of family involved a homosexual couple (and parental protection). Id. at 833 (citing Braschi v. Stahl Assocs., 543 N.E.2d 49 (N.Y. 1989)). Schneider must, then, fail to see the irony of his thesis. The couple in that case could not get married, although all the evidence suggests they certainly would have. Extending marital rights and obligations to that couple would be highly consistent with promoting marriage as entailing a special obligation. Schneider, in confusing choice of terms with choice of relationship, thus undermines his own purpose to protect marriage and family.
model, in minimizing law's ability to specify or regulate content, thus largely disarms law in its quest to promote social capital. Law may encourage a variety of social connections because of the social capital benefits that result. But once social ties are entered, law has an interest in defining the terms to ensure that the social capital benefits are not stripped away by the terms of social connections.

D. Principles of Social Capital

Taken together, the three models for determining familial ties and parenthood in collaborative reproduction provide three principles by which law can protect and promote social capital as it regulates the family. First, the analysis of the model of shared parenting indicated that social capital depends on relationships that are free from coercion. Second, the analysis of the model of biological ties showed that law should not be restricted to promoting only certain types of social relationships if it is to generate social capital. Finally, the evaluation of the model of contract and intent revealed that law should not be denied its interest in the terms or content of social relationships, because of the social capital implications.

These principles from collaborative reproduction can thus be summarized in the following way. Law creates social capital by promoting and protecting (a) a variety of family ties that are (b) voluntarily entered by individuals, and where (c) law regulates the content or terms of those relationships once they are formed. Conversely, law fails to generate social capital for collective benefits if it recognizes family ties among only some individuals but not others, where it coerces people to enter or not to enter family relationships or where it leaves the terms of those relationships entirely to individual choice. Against these three principles, law's success in promoting social capital through its regulation of family relationships may be measured.

IV. LEGAL REGULATION OF THE FAMILY: THE SOCIAL CAPITAL APPROACH

With these three principles we are now able to evaluate more closely law's regulation of family life and to begin to redirect law to serve our common interests. Having focused narrowly on legal regulation of family relationships in the
specific context of collaborative reproduction, we may now think more broadly. The final part of this article applies the lessons of collaborative reproduction to law's regulation of family in general. The three principles generated from collaborative reproduction provide a way to evaluate law's regulation of family in a variety of contexts. In order to illustrate this possibility, we consider several instances of legal regulation of family relationships: (A) presumptions of legitimacy, (B) the constitutional rights of unwed fathers and (C) an assignment of parenthood in artificial insemination. In each case, the purpose will be to apply the principles from collaborative reproduction in order to evaluate law's effectiveness at promoting social capital and to suggest how to make law more responsive to our shared interests.257

A. Presumptions of Legitimacy

In regulating relationships between married couples and their children, law has long treated children conceived during marriage as children of the marriage. At common law, this "presumption of legitimacy," known as Lord Mansfield's Rule,258 meant that any child born to a married woman was considered the child of her husband as well. This was so even if the father was absent at the time of conception. As one court put it, "[i]f a husband, not physically incapable, was within the four seas of England during the period of gestation, the court would not listen to evidence casting doubt on his paternity."259 This presumption of legitimacy prevented third parties from bringing actions to establish fatherhood.260 Legitimacy is still largely presumed under statutory law today, and in many states the presumption is irrebuttable.261

257. There is no particular logic to the choice of instances of legal regulation considered here. The purpose of this article has always been large: to understand how law, in its regulation of all areas of family life, might be brought closer to meeting our collective needs. As such, the examples considered in this section are only several among many to which the principles from collaborative reproduction might be usefully applied.

258. See Hill, supra note 12, at 373.


260. See Hill, supra note 12, at 373.

261. See, e.g., Petitioner F. v. Respondent R., 430 A.2d 1075 (Del. 1981) (rejecting a natural father's petition to establish parental rights to a child conceived while the mother of the child was married to another man). The Delaware court stated that allowing the natural father standing to establish paternity would "open the door to the invasion of continuing family stability by any
In other states, a challenge may generally only be brought by the mother of the child or her husband. 262

Historically, this presumption of legitimacy undoubtedly reflected the stigma associated with sex outside marriage. But it also served practical ends, for until very recently it was difficult to prove fatherhood scientifically. 263 In addition, the presumption reduced the likelihood that children would be abandoned, as it was probably designed to prevent a man from denying that his wife's children were his own, rather than to preclude others from asserting paternity. 264 The presumption of legitimacy has held strong even where it has led to odd results, such as the birth of a mixed-race child to a white couple, 265 or a child born where the husband has had a vasectomy and his wife has been having extramarital sex. 266

In order to evaluate the effectiveness of the presumption of legitimacy from a social capital perspective, we apply the three principles from collaborative reproduction. Thus the relevant questions are: whether the presumption protects and promotes a variety of social ties, whether the ties it protects are voluntarily chosen and whether it is a regulation of the terms of the relationships once entered.

Starting with the second principle, it is clear that the presumption of legitimacy regulates relationships voluntarily entered—marriages that are freely chosen. It does not represent a coercive effort by law to force individuals into associations that they would not otherwise choose. Under the pre-
sumption of legitimacy, the husband's connection to his child is established through his voluntary relationship with the child's mother.267

Turning to the third principle, the presumption of legitimacy also regulates the terms of relationships that individuals enter. The presumption means that if a couple decides to marry, then one result is that law will consider them both parents of any children born. Law designates parenthood and its responsibilities, rather than leaving it to the choice of the couple. Law thus protects its interest in the content of the marital relationship in a way that promotes social capital by making both parents responsible for the support of any children born during the marriage.

Lastly, we consider whether the presumption of legitimacy promotes a variety of social ties. Here, the answer is less obvious. The presumption does not require an actual biological (genetic) link to recognize a father-child relationship. Thus it does not limit parenthood to relationships with one's proven offspring. As such, the presumption of legitimacy respects two different types of family ties, those with a genetic basis and those without. Yet the social capital benefits of the presumption are nonetheless limited because it is only made in a specific category of cases: where a child is born to a married couple. This restriction means that law fails to promote relationships in other circumstances that warrant a similar presumption of parenthood because of the social capital benefits. Two unmarried adults, for example, who live together for twenty years and raise three children are equally suitable candidates for designating parenthood as are adults who actually marry in advance. Law's failure to apply a presumption in the absence of marriage thus represents a loss of social capital. Consider two other examples. In the absence of a presumption of his parenthood, an unmarried social father may feel free to walk out on his children. Alternatively, a third party might, years after the birth

267. Of course, designation of parenthood might seem coercive where it is not wanted (such as because a child is not actually one's genetic offspring). But, as the analysis of the model of shared parenting made clear, the critical relationship for deciding coercion is that between adults, not relationships between an adult and a child. In that sense, then, there is no coercion because the marriage is voluntarily entered—and may be ended at any point. See supra note 192.
of a child, raise a claim of fatherhood that disrupts a functioning social family. These are both instances of law failing to protect and promote family social capital by focusing on a narrow class of relationships rather than looking to the social capital benefits of a variety of ties.

In short, the three principles suggest that the presumption of legitimacy serves social capital by promoting family ties that are voluntarily entered and by protecting law's interest in the content of marital relationships. On the other hand, the presumption of legitimacy is unwisely restricted to children born to married couples. Law would more effectively promote social capital if it were to extend its presumption of fatherhood to other instances beyond the context of marriage.

B. Constitutional Rights of Unwed Fathers

We next consider an issue related to the presumption of legitimacy: law's treatment under the United States Constitution of the relationship of an unwed father to his natural child.\textsuperscript{268} Again, the principles from collaborative reproduction will be applied to consider how effectively law serves our collective interests in this area of regulation.

As one commentator notes, two critical rules emerge from the Supreme Court's consideration of the parental rights of unmarried men.\textsuperscript{269} First, where the mother of a child is not herself married, a man's biological connection to the child gives him an opportunity to establish a relationship with the child and some procedural safeguards for that relationship.\textsuperscript{270} However, if the unwed father fails to form a social relationship with the child, he eventually loses all rights.\textsuperscript{271} The second rule (consistent with the presumption of legitimacy) is that a genetic father has no constitutional right to establish paternity or to seek any recognition of a relationship with the child (even where he has tried to establish such a relationship) if the mother of the child is married to an-

\begin{footnotes}
\footnote{268}{These cases invoke the Due Process and Equal Protection clauses of the Fourteenth Amendment. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 121-132 (1989); Stanley v. Illinois, 405 U.S. 645, 657-58 (1972).}
\footnote{269}{Hill, supra note 12, at 375-76.}
\footnote{271}{Id. at 376 (citing Lehr v. Robertson, 463 U.S. 248, Quilloin v. Walcott, 434 U.S. 246).}
\end{footnotes}
In order to assess law's treatment of unwed fathers from a social capital perspective, it is helpful to apply the three principles we have developed to the specific cases in which these unwed father rules have emerged. The first of these cases, Stanley v. Illinois, concerned a father who had lived with his children and their unwed mother intermittently for eighteen years. The father, Stanley, challenged a state statute that conclusively presumed every unwed father was unfit to care for his children. Upon the mother's death, application of the statute made Stanley's children wards of the state without a hearing to establish his unfitness to parent. The Supreme Court struck down the statute as a violation of procedural due process and equal protection. Justice White for the Court wrote:

[The interest of a parent in the companionship, care, custody, and management of his or her children “come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.”

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed “essential . . . .”

Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony.

The Court's ruling that the state could not presumptively deprive Stanley of his parental relationship with his children clearly promoted social capital as measured by our three principles. First, the decision represented law promoting a

---

272. Id. (citing Michael H. v. Gerald D., 491 U.S. 110 (1989)). Hill concludes that “fatherhood is a function of the confluence of three factors: the man's biological relationship with the child, his legal or social relationship with the child's mother, and the extent of his social and psychological commitment to the child.” Id. at 381. Hill further suggests that with respect to the second factor, “while marriage traditionally has been the most important type of relationship, ascription of paternal rights also may depend upon the type of nonmarital relationship.” Id. at 381 n.154 (citations omitted).


274. Id. at 646.

275. Id.

276. Id.

277. Id. at 658.

278. Id. at 651 (citations omitted).

variety of social ties. Marriage was not a necessary condition for law to recognize and protect familial relationships. *Stanley* thus avoids the main shortcoming of the presumption of legitimacy: its restriction to marital relationships. Indeed, the *Stanley* court specifically noted that significant family ties can exist in the absence of marriage, and that law should protect such relationships.\(^{280}\) Secondly, the *Stanley* decision represented law's protection of ties voluntarily entered. Stanley's relationship with the children's mother was clearly of this nature.\(^{281}\) Third, *Stanley* protects law's interest in regulating the content or terms of relationships. The Court determined that rights and responsibilities flowed from the existence of the relationship itself, not from any agreement made between Stanley and the children's mother. Significantly, the absence of marriage did not remove the father from law's focus in this regard. *Stanley* thus satisfies all three principles for promoting social capital.

Two other cases involving unwed fathers are usefully considered together. In the first, *Quilloin v. Walcott*,\(^{282}\) the Supreme Court upheld a state statute that permitted the adoption of an illegitimate child over the objection of the genetic father if the father had not taken steps to legitimize the child.\(^{283}\) The Court found no constitutional difficulty with allowing a mother's husband (with whom her child had lived for most of his life) to adopt the child as his own, despite a challenge by the genetic father.\(^{284}\) The Court distinguished *Stanley* by using a best-interest standard, under which adoption made sense because it gave legal recognition to an established family.\(^{285}\) But the Court noted:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the chil-

---

280. *Id.* at 651.

281. See generally GOLDSTEIN ET AL., *supra* note 235, at 78 (arguing that because the psychological relationship between a child and an adult should be central to determining parental status, the fact that a third party prevented the formation of a relationship should make no difference).


283. *Id.* at 256.

284. *Id.* at 254-55.

285. *Id.* at 255.
dren's best interest."

Quilloin is, of course, the application of the presumption of legitimacy from the point of view of the genetic father, and so may be evaluated for its social capital benefits in the same way that we assessed the marital presumption. Quilloin becomes more significant, though, from a social capital perspective when we consider it in conjunction with a second case, Lehr v. Robertson.

In Lehr, the Supreme Court rejected a claim that an unwed father had an absolute right to notice and a hearing before his child could be adopted by the mother's subsequent husband. The Court focused specifically on the father's relationship with his child, noting that he had never supported and had hardly seen the child during the two years between the child's birth and the adoption petition. The Court wrote:

[T]he existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating ... the rights of the parent ... Because appellant, like the father in Quilloin, has never established a substantial relationship with his daughter ... the ... [state statute] ... did not operate to deny ... [him] equal protection.

In Lehr, the Court made clear that a biological relationship with a child gives the father only an opportunity to be considered a parent:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's develop-

286. Id. (citations omitted). But see Hill, supra note 12, at 377 (suggesting that because the best-interests test cannot be the basis for terminating parental rights without a showing of parental unfitness, Quilloin only makes sense as a statement that for constitutional purposes the genetic father was not a "parent" of the child because "[b]y failing to assume any significant responsibility in the eleven years since the child's birth, the petitioner had lost, or had never fully actualized, his status as the parent.").
288. Id. at 250.
289. Id. at 250-52.
290. Id. at 266-67.
ment. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interests lie.\textsuperscript{281}

The Court stressed, however, that the development of a relationship \textit{can} give rise to constitutional protection:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by “com[ing] forward to participate in the rearing of his child,” his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he “act[s] as a father toward his children.”\textsuperscript{292}

\textit{Quilloin} and \textit{Lehr} thus stand for the proposition that a mere genetic tie does not give an unwed father a constitutionally-protected parental relationship with his natural child. Only when the father develops a social relationship with the child does parental status arise, which the Constitution protects.

This \textit{Lehr} doctrine may be evaluated for its social capital benefits using the three principles that were developed above. First, \textit{Lehr} promotes a variety of social relationships by refusing to give preferential treatment to genetic ties. In fact, it permits adoption over the objection of an unwed father whose sole claim is biologically-based. Second, \textit{Lehr} protects and promotes relationships that people voluntarily enter. It prevents interference by a father, on the basis of his genetic claim alone, in the familial arrangements of the child, the child’s mother and her husband who has taken on the parenting role. An unwed genetic father only establishes his relationship with his child through a voluntary arrangement with the child’s mother: it is the mother who allows or denies him contact with the natural child. As such, \textit{Lehr} both protects ties that are voluntarily entered and does not coerce new relationships that would not otherwise exist. Third, \textit{Lehr} protects law’s interest in the content of relationships that people enter. In permitting the adoption of the child by the new husband, law firmly assigns him the responsibilities that come with fatherhood despite the existence of an absent genetic father. \textit{Lehr} thus satisfies all three social capital principles.

\footnotesize{\textsuperscript{291} Id. at 262 (footnote omitted). \textsuperscript{292} Id. at 261 (citations omitted).}
Social capital also benefits where Lehr protects the genetic father's parental status, for example, where he has developed a relationship with the child. In these circumstances, Lehr does not permit extinguishing some social relationships in order that others may be created, but instead protects a variety of social ties, including those between an unwed father and his genetic child. Lehr satisfies the other two social capital principles in these instances as well. It protects voluntary connections rather than coercing the formation of new ones, since a father who has developed a relationship with his genetic child has likely had the cooperation of the child's mother. Lehr also preserves law's interest in the terms of relationships. Under Lehr, law determines what an established relationship between a genetic father and his child will mean: "the rights of the parents are a counterpart of the responsibilities they have assumed." 293

A fourth case involving unwed fathers is Michael H. v. Gerald D. 294 There, the Supreme Court upheld a state statute conclusively presuming a child born to a married woman living with her husband to be her husband's child, thus preventing a third party from establishing his paternity. 295 Blood tests showed that the plaintiff was almost certainly the biological father, 296 and he was strongly committed to the child who, along with her mother, had in fact lived with him at various times. 297 Yet the Court refused to allow a paternity claim, citing the common law tradition of protecting relationships that develop within the family. 298

Justice Scalia, for a four-judge plurality, wrote that for the plaintiff's relationship with the child to create a liberty interest it must be one that society has traditionally protected. 299 Scalia stated that this requires looking to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." 300 As such, Scalia asserted, the issue was whether there is a tradition of protecting the "rights of an adulterous natural fa-

295. Id. at 129-30.
296. Id. at 114.
297. Id. at 124-25.
298. Id. at 122-23.
299. Id. at 122.
Scalia concluded that although the Constitution may protect the opportunity for natural fathers to develop a relationship with their children, there is no right to rebut a presumption that the child is the daughter of her mother's husband.  

Again the three principles are used to assess the Court's decision for its social capital implications. At first blush, its consistency with the presumption of legitimacy in the marital context suggests that *Michael H.* results in the same social capital benefits. That is, *Michael H.* protects family ties apart from those that are genetic. It protects the voluntary relationships of the mother, her husband and the child. Finally, it preserves law's interest in the content of familial relationships by recognizing the social father as the parent. But the particular facts of *Michael H.* make inappropriate the decision's comparison to the marital presumption of legitimacy. For *Michael H.* did not involve a genetic father appearing out of nowhere to disrupt the familial ties of a couple and their child. Rather, in *Michael H.* the genetic father had already developed a strong relationship with his daughter (including living with her and her mother).  

With this distinction in mind, it becomes clear that *Michael H.* in fact fails to promote social capital, according to the three principles. First, the decision does not protect a variety of social ties. It favors ties in the context of marriage over other relationships even where, as in that case, ties outside the marital context are clearly significant. Scalia's focus on the "rights of an adulterous natural father" is thus an advance restriction that undermines social capital. In other words, the focus on marriage as a decisive element of paternity means that law fails to protect social capital even where there is a relationship outside the marital context that is nonetheless significant.  

Second, the decision does not protect relationships that are voluntarily entered. In *Michael H.*, the father established his relationship with the child with the approval of her mother. The Court, by denying his parental claim, short-
circuited this voluntary connection.

Finally, the decision does not protect law's interest in the terms of relationships. The Court refused to consider the genetic father's prolonged connection to his child in this particular case an adequate basis for the assignment of rights and responsibilities in the absence of marriage. The decision of the mother and the genetic father not to marry thus became determinative, removing the terms of their relationship, and that of the father and his daughter, from law's regulation. In short, by denying a parental claim even where there was a substantial social relationship between a genetic father and his daughter (and her mother), the *Michael H.* Court failed to promote social capital by dismissing the value of ties that occur outside the marital context. 305

The opinions of three other justices in *Michael H.* indicate how to redirect law to better promote social capital for collective benefits. Each opinion recognizes that law should not be restricted to protecting only certain types of social ties. Justice Stevens, rejecting the plurality's conclusion that a natural father could never have a liberty interest in establishing a relationship with his genetic children if conceived while the mother was married to another man, wrote that "enduring 'family' relationships may develop in unconventional settings." 6

Justice Brennan suggested that because there was a tradition of protecting the relationship of a parent to a child, the Court would do better, instead of focusing exclusively on marriage, to ask "whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected to be deemed an aspect of 'liberty' as well." 307 As such, Brennan found that the genetic father and his child had a "substantial" parent-child relationship that the Constitution should protect, 308 and that marriage

---

305. For this reason, the decision suffers from the same shortcoming as the failure to extend a presumption of fatherhood beyond the marital context. See *supra* Part IV.A.

306. *Michael H. v. Gerald D.*, 491 U.S. 110, 133 (1989) (Stevens, J., concurring). Justice Stevens, however, considered the plaintiff's rights protected by his ability to petition for visitation rights under state law (although such a petition had been denied). *Id.* at 136 (Stevens, J., concurring).

307. *Id.* at 142 (Brennan, J., dissenting).

308. *Id.* at 142-45 (Brennan, J., dissenting).
Justice White argued that because the genetic father had played an active parental role in the life of his child, there should be a protected liberty interest in this relationship. Each of these three opinions in *Michael H.* expand law's focus beyond a particular type of relationship, decided in advance. By directing law to consider the nature of the social tie that exists, rather than whether it fits a predetermined category, these opinions offer an approach to the regulation of family relationships that more successfully promotes social capital.

C. Artificial Insemination by Donor

The final instance of legal regulation of family relationships that we assess comes, coincidentally, from collaborative reproduction. Here, we apply the three principles for promoting social capital to evaluate an assignment of parenthood in artificial insemination using donor sperm.

*Jhordan C. v. Mary K.* involved a suit brought by a sperm donor to establish his paternity over a child conceived by artificial insemination. The donor had provided semen to a woman who planned to raise the child with her female partner. The donor maintained contact with the couple during pregnancy and then visited the child on five occasions. The court in *Jhordan C.* considered the paternity claim by applying a state statute that provided that so long as there is physician-involvement in the insemination procedure, a sperm donor is not the legal father. Since no physician had been involved in this instance, the court proceeded to recognize the sperm donor as the child's father and awarded him visitation rights.

In rejecting the claim by the mother and her partner, that granting visitation to the donor infringed on the autonomy of their family, the court emphasized the donor's rela-

---

309. *Id.* at 144 (Brennan, J., dissenting).
310. *Id.* at 159-60 (White, J., dissenting). Justice White specifically concluded that protecting the child from the stigma of illegitimacy and preserving the marital unit were insufficient state interests to deny the plaintiff the opportunity to establish his paternity. *Id.* at 161-62 (White, J., dissenting).
311. 224 Cal. Rptr. 530 (Ct. App. 1986).
312. *Id.* at 533.
313. *Id.* at 534-35.
tionship with the child:

The semen donor here was permitted to develop a social relationship with [the mother] and [the child] as the child's father. During [the mother's] pregnancy [the donor] maintained contact with her. They visited each other several times, and [the mother] did not object to [the donor's] collection of baby equipment or the creation of a trust fund for the child. [The mother] permitted [the donor] to visit [the child] on the day after the child's birth and allowed monthly visits thereafter.314

Applying our three principles, the court's reasoning initially appears to promote social capital. The Jhordan C. court seems to encourage a variety of social ties: there is no requirement of a marital relationship to sustain the connection between the donor and the child. These ties, as the court indicated, are also ties that were voluntarily entered: the donor developed a social relationship with the child with the consent of the mother(s). And the decision protects law's interest in the content of relationships: the donor, by virtue of the social relationship, is recognized as the father and assigned parental rights and responsibilities.315

Yet on closer inspection the Jhordan C. court's overall approach is inconsistent with our three principles. It is only because of the circumstances of this particular case that the court gives a surface impression of protecting and promoting social capital for collective benefits. The court's broader program does not encourage a variety of social ties at all. Instead, the court allowed the sperm donor to seek paternity rights in this instance only because the mother of the child was unmarried. The court made clear that were the mother married to another man it would deny the donor's claim: "In the case of the married woman her husband is the presumed father . . . and any outsider—including a semen donor, regardless of physician involvement—is precluded from maintaining a paternity action . . . "n316 The court found no difficulty with this distinction: "In the case of a married woman, the marital relationship invokes a long-recognized social policy of preserving the integrity of marriage."317 As such, the

314. Id. at 536.
315. Id. at 536-38.
316. Id. at 536.
Jhordan C. court, rather than encouraging a variety of social ties, in fact focuses on whether or not connections are grounded in marriage. The court's recognition of a relationship between the sperm donor and the child turned on its denial that the child's mother had a relationship with any other parental figure. Her partner, although closely involved in raising the child, was invisible to the eyes of this court: "Mary and Victoria contend that they and [the child] compose a family unit and that the [donor's claim would] constitute an infringement upon a right they have to family autonomy .... But this argument begs the question of which persons comprise the family in this case ...."

It is hard to imagine this court suggesting that a married couple also "begs the question of which persons comprise the family." As such, the Jhordan C. court's overall scheme is to deny recognition of a sperm donor's rights, even when based on a social relationship with the child, if there is a married couple involved. This case, however, involving a lesbian couple, fell outside the scope of the court's overall plan, and so it recognized paternity. Thus, it is mere accident that the court's decision suggests an approach that preserves social ties to promote social capital.

The Jhordan C. court would better serve our collective interests by recognizing and protecting, in all contexts, social relationships that are strong and meaningful. Where a significant social relationship has in fact developed between a sperm donor and a child—as the court claimed in this case—then that relationship deserves protection, regardless of the marital status of the social parents. And where there is only a biological connection between a sperm donor and the child, and no social tie, law should prevent the donor from interfering with the child's familial relationships with the social parents, again without regard to their marital status."

318. Id. at 536.

319. The court's insistence that "this case is not intended to express any judicial preference toward traditional notions of family structure," id. at 537, is surely disingenuous. See also Patricia J. Falk, The Gap between Psychosocial Assumptions and Empirical Research in Lesbian-Mother Child Custody Cases, in REDEFINING FAMILIES: IMPLICATIONS FOR CHILDREN'S DEVELOPMENT 131, 151 (Adele E. Gottfried & Allen W. Gottfried eds., 1994) (noting that "a rapidly growing and highly consistent body of empirical work has failed to identify significant differences between lesbian mothers and their heterosexual counterparts or the children raised by these groups. Researchers have been unable to
The failure of the *Jhordan C.* court is not unusual. Other courts, when determining the rights of lesbian couples who split up after having jointly raised a child produced with donor sperm, have refused to recognize as the child’s parent the mother who lacks a biological connection, and so have denied her continued access. Such decisions are clearly contrary to the social capital goal as measured by our three principles, for they fail to protect a significant parent-child relationship—one originally encouraged by the biological mother—simply because of the particular individuals involved. In such circumstances, law fails to promote social capital by recognizing certain types of social ties and ignoring others. Fortunately, some courts have begun to redirect law in this area to better serve our collective interests by protecting parent-child ties even if they lack a biological or marital basis. Barriers, nonetheless, persist.

320. *See, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991). The case involved a lesbian couple who had used artificial insemination to produce a child. The sperm was supplied by the brother of the non-biological mother—who inseminated her partner, gave the child her last name, raised the child, and provided financial support to the child and her partner for several years. When the couple split up, the court refused to grant the non-biological mother visitation rights because, it found, she was not the child’s parent.

321. *See In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis.), cert. denied, 116 S. Ct. 475 (1996). In that case the Wisconsin Supreme Court affirmed a lower court’s dismissal of a custody claim by a non-biological lesbian mother but held that the mother (as a “non-parent”) would have standing to bring a suit for visitation if she could show that she had developed a parent-like relationship with the child which had been threatened by a “significant triggering event,” so as to justify state intervention. To establish the parent-like relationship, the petitioner needed to show:

- the biological or adoptive parent consented to, and fostered, the petitioner’s relationship with the child; . . . the petitioner and the child lived together in the same household; . . . the petitioner assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation; and . . . the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.

*Id.* at 435-36. Establishing a “significant triggering event” required showing that the legally recognized parent had interfered substantially with the non-parent’s relationship with the child. *Id.* at 436.

322. Although the Wisconsin court, *id.*, protects and promotes social capital by recognizing a variety of ties that are voluntarily entered, and preserving law’s interest in the content of social arrangements, its test remains a sizable barrier to recognition of the non-biological mother’s relationship with the child.
V. Conclusion

This article has introduced a method of legal analysis that emphasizes the importance of social connections for healthy communities. Under this approach, law succeeds where it protects and promotes social capital for collective benefit. In order to demonstrate the social capital approach to law, we have considered the example of legal regulation of the family. It is no small irony that during the course of contemporary debates over the family and family values, family ties have continued to decline. That is, the intense interest in families and their significance has not led to a revival of family relationships that benefit our societies.

The risk, it seems, in thinking about regulating the family, is failing to see just how families matter. But by focusing on the importance of social capital, we have seen how law can enhance the quality of our communities as it regulates family relationships. The social capital approach teaches that law is more likely to benefit collective life where it protects a variety of family ties, where it promotes ties that are voluntarily entered, and where it regulates the terms of family relationships.

If it is to benefit collective life, law needs to be freed from the influences of superstition, romanticism and false authority. Understanding the importance of social connections is

Focusing on the actual relationship in that case suggests that, from a social capital perspective, it deserved law's protection. The non-biological mother attended childbirth classes with her partner, named the child with her, provided the main source of financial support for four years, lived with them both, and spent time with the child as any parent would. The child considered the non-biological mother his parent, expressed a desire to maintain a relationship with her, and considered her own parents to be his grandparents. Id. at 421-22. Cf. In re Jacob, 660 N.E.2d 397 (N.Y. 1995) (recognizing adoption by lesbian partner). See generally John A. Robertson, Assisted Reproductive Technology and the Family, 47 HASTINGS L. J. 911, 932-33 (1996). Robertson argues forcefully that reproductive technologies should remind us of the value of family relationships, without regard to the particular individuals involved:

[Assisted Reproductive Technologies] remind us of the importance to individuals and couples of having a sphere of intimacy and privacy . . . .

If the principle of autonomy that underlies the use of ARTs is applied to other situations of associational intimacy, the rights of gays and lesbians to marry and to have and rear children should also be recognized. Both involve individual choices about fundamental human relations that define and give meaning to life . . . . ARTs . . . remind us of how important family is to human flourishing, and hence the need for tolerance of different ways of forming or defining families.

Id.
critical to a society concerned with the well-being of its members and with the vitality of its neighborhoods. Legal analysis from a social capital perspective offers a way to direct law, in its regulations of modern life, towards those common interests.