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# A Diversity Approach to Parenthood in Family Life and Family Law

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What is parenthood? How should we frame the competing models? Red versus blue (by analogy to red and blue states)?[1] "Traditional" versus "nontraditional"? Conservative versus liberal? Religious versus secular? Rural versus urban? Natural versus socially constructed? Simple answers are elusive. Indeed, "The definition of parentage—and with it the determination of which adults receive legal recognition in children's lives—has become the most contentious issue in family law."[2]

The most visible "family values" issues continue to be abortion and same-sex marriage. However, the definition and future of parenthood are important subtexts of those debates. Opposition to legal abortion often rests on a view that a fetus is a child and a pregnant woman is a mother who should accept the responsibilities of parenthood, or give someone else a chance to parent the child. Proponents of legal abortion counter that a pregnant woman should not be compelled to nurture a fetus and become a mother and that women have the constitutional right to decide whether to do so. Opponents of opening civil marriage to same-sex couples argue that supporting responsible procreation and child rearing is marriage's primary purpose and same-sex households are not optimal for children. Supporters of same-sex marriage challenge this primary purpose and counter that gay men and lesbians are capable parents and children in their households fare just as well as children reared by heterosexual parents.

This book proposes two models of parenthood—an *integrative model* and a *diversity model*—as an organizing device to make sense of complicated puzzles about family life and family law and to promote a constructive conversation about parenthood. In chapter 1, Daniel Cere suggests that recent developments in the natural and social sciences resonate with an integrative model and considers what implications kinship study has for the rights of parents and children.[3] In this chapter, I articulate a diversity model, situating it in social practice and family law. By social practice, I refer both to contemporary patterns of family life and to understandings

of parenthood. I illustrate ways in which family law supports a diversity approach to defining legal parentage. This approach recognizes and supports pathways to parenthood in addition to heterosexual procreation within marriage and does not restrict parental rights and responsibilities to biological parents. In both social practice and law, there is considerable support for a diversity model. However, we also see the continuing hold of an integrative model and a mixture of public acceptance of *and* ambivalence about family diversity.



Ambivalence and acceptance seem equally apt in considering how family law grapples with defining parenthood and assigning parental rights and responsibilities as patterns of family life change and developments in technology make new methods of childbearing possible. Family law scholars speak of traditional legal definitions of parenthood as being "in a time of transition" and "uncertainty."[4] Due to "recent revolutions in family law," June Carbone explains, parental obligation to children may exist "independent" of marriage, raising the question of how best to secure adult responsibility for children.[5] David Meyer observes that, by contrast to an earlier model, in which "parenthood was understood to be largely a natural relation founded upon biological reproduction, and legal status as a parent followed easily from recognition of that natural fact," contemporary family law wrestles with "tensions between legal, biological, and social conceptions of parenthood."[6] He concludes that "there is no going back" from changing patterns of family life, yet there is no consensus about how to reconcile them with respect for traditional family ideals. Meyer predicts: "Until society itself comes to a clearer resolution of its own ambivalence about the respective roles of biology, care giving, contract, and tradition in defining parenthood, family law is unlikely to do much better."[7]

The mixture of integrative and diversity models in social practice and law suggests the image of a continuum, which may help to identify points of convergence in contemporary debates. Rather than poles, suggesting values polarization, a continuum suggests pulls toward different ideas along a spectrum. The integrative and diversity models harbor emphases, variations, or configurations. Working with a continuum may further this book's project of tackling the hard questions about what is best for adults, children, and society.

I illustrate how the integrative model features in debates over whether to extend civil marriage to same-sex couples and whether, when individual states *do* allow such marriages, the federal government should recognize them for purposes of federal marriage benefits and obligations, or

refuse to do so (as the Defense of Marriage Act [DOMA] requires).[8] This model is congruent with some traditional concerns of family law but at variance with certain features of contemporary family law. I then elaborate the diversity model, beginning with social practice. I discuss demographic studies on the changing place of marriage, the rise of alternative family forms, and public attitudes about such developments. Turning to family law, I sketch the evolution toward a diversity model of parenthood, drawing on judicial opinions, state laws, and, again, the debate over DOMA. I identify diversity within the diversity model with respect to whether to link the parent-child bond to adult-adult intimate bonds and whether to expand marriage or disestablish it. I explore possible points of convergence by integrative and diversity proponents on troubling trends of family and marital inequality. I conclude by suggesting the value of envisioning a continuum of approaches to parenthood.



## An Overview of the Two Paradigms

### *The Integrative Model*

One answer to the question, Who is a parent?, emphasizes parenthood as an incident of marital procreation. Some argue that this has been, historically, the core normative understanding of parenthood. In contemporary debates over redefining marriage, appeals to traditional understandings stress the link between marriage and parenthood and the importance of the "channelling function" of family law: historically, family law supported the *social institutions* of marriage and parenthood and steered men and women to participate in them.[9] Under this view, the social institution of marriage combines, in one package, heterosexual sex between one man and one woman, reproduction resulting from such sex, and parenthood. Thus, Cere, in a report for the Council on Family Law, describes this as a "conjugal model" of marriage, stressing that what makes marriage "unique" is "the attempt to bridge sex difference and the struggle with the generative power of opposite-sex unions"—namely, that "heterosexual sex acts can and often do produce children." He contrasts an alternative model of marriage as a "close relationship," under which "marriage and children are not really connected" and marriage is not uniquely tied to the "sexual ecology" of human life.[10]

If there is a "pure" form of this conjugal model, perhaps it is certain orthodox religious views of the goods and purposes of marriage. According to the "Manhattan Declaration" (signed by more than a hundred "Orthodox, Catholic, and evangelical Christian leaders"), the "one-flesh union" of

one man and one woman as husband and wife is "the crowning achievement of God's creation," and marriage is "the first institution of human society." The declaration affirms marriage's procreative purpose and its "sexual complementarity": marriage's "objective reality" is a "covenantal union," which is "sealed, completed, and actualized by loving sexual intercourse in which the spouses become one flesh . . . by fulfilling together the behavioral conditions of procreation."[11] Thus, demands by same-sex couples for marriage as a matter of "equality of civil rights" are mistaken: homosexual relationships cannot be marriages because they are not one-flesh unions fulfilling these conditions. This implicates parenthood: "rearing of children" who are the "fruit" of their parents' union is one of the "profound reasons" for marriage.[12]



Proponents of the integrative model sometimes appeal to the *congruence* of a conjugal view of marriage, the purposes of family law, and the role of religious institutions in reinforcing civil marriage.[13] This is one reason they oppose same-sex marriage. However, there is a notable lack of congruence between some forms of the integrative model and contemporary constitutional and family law. After all, *Griswold v. Connecticut*, which spoke loftily of marriage as a "noble" association, "intimate to the degree of being sacred," upheld the right of a married couple to *use* contraception.[14] In addition, the legal right to abortion allows women (married or unmarried) to terminate their pregnancies. State high courts that have accepted constitutional challenges by same-sex couples to civil marriage laws have rejected the argument that procreation is the primary purpose of marriage. Moreover, they have concluded that allowing same-sex couples to marry furthers the state's interest in providing an optimal setting for child rearing.[15] Similar conclusions about child well-being—and the salutary role of marriage in promoting family stability—feature in legislative arguments as states like New York pass laws allowing same-sex marriage.[16]

To be sure, the large majority of states have defense of marriage acts that define marriage as the union of one man and one woman—a definition congruent with the integrative model. Some state DOMAs declare a "compelling" state interest to "nurture and promote" traditional marriage for its "unique contribution to the rearing of healthy children."[17] Indeed, when Congress enacted the federal DOMA, it embraced the integrative model's articulation of the unique, "conjugal" role of marriage in managing heterosexual procreation: "Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in

a committed relationship."[18] However, a significant minority of states (including some with DOMAs)—invoking a governmental interest in family stability—allow same-sex partners to enter into an alternative legal status (civil union or domestic partnership), entitling them to all the parental rights and responsibilities linked to marital status.

These developments suggest a significant tension in a growing minority of states between the integrative model and the law of parenthood. This tension is evident in the views of some prominent proponents of the integrative model: for example, David Blankenhorn, president of the Institute for American Values, initially proposed civil unions for same-sex couples as a principled compromise to the marriage controversy—extending to same-sex partners whatever parental rights and responsibilities spouses enjoy due to marital status.[19] Three years later, in June 2012, in the face of a clear "emerging consensus" in America in favor of same-sex marriage, Blankenhorn had come to find that compromise unworkable and announced: "the time has come for me to accept gay marriage and emphasize the good that it can do." Although he stated that he still firmly embraced the integrative model's view that marriage is a unique institution "whose core purpose is to unite the biological, social and legal components of parenthood into one lasting bond," he identified a number of goods at stake in legally recognizing gay and lesbian couples and their children, including dignity, equal citizenship, "basic fairness," and comity.[20] Proponents of the integrative model, he concluded, had not persuaded the public of their view about marriage's relationship to parenthood, nor did he find any signs that fighting gay marriage was helping to bring about a "positive recommitment to marriage as an institution." Instead, he found it "profoundly disturbing" that "much of the opposition to gay marriage seems to stem, at least in part, from an underlying anti-gay animus." Thus, Blankenhorn's new position might be seen as a willingness to bring same-sex couples who support marriage within an integrative big tent: he seeks common ground between straight people and gay men and lesbians on strengthening marriage as an institution, shoring up as "vital" a cultural norm of "marrying before having children," and reflecting on whether children born through the use of ART have certain rights to know their biological parents.[21] By contrast, Maggie Gallagher, a prominent ally of Blankenhorn's in the marriage and integrative parenthood movements, swiftly countered that giving up "the truth" about the good of marriage (that is, its unique integrative role in uniting one male and one female) is "too high a price to pay" for comity and living with each other.[22]

Even in some states that do not afford same-sex partners a formal legal status for their adult-adult relationship, adoption laws allow them to establish formal legal relationships with a child (whether the biological child of one partner or a nonbiological child adopted by both).

Adoption would seem to challenge the integrative model, since it departs from the unity of biological and social parenthood. However, proponents of the model answer that adoption is simply a humane and necessary way to establish a parental relationship when biological parents cannot or will not care for children. In this volume, Elizabeth Marquardt calls adoption "an inspiration" and evidence that "biology is not everything" when it comes to fostering child well-being.[23] By contrast, the integrative model's proponents find troubling the use of assisted reproductive technology (ART) to produce children. Catholic teaching objects that ART commodifies the human person by implying a "right" to have a child and separates the unitive and procreative aspects of "the conjugal act."[24] Other critics object that creating a child by using donated egg or sperm deliberately severs biological from social parenthood. For example, the Commission on Parenthood's Future, in a report published by the Institute for American Values, insists that every child has a moral right to his or her two biological parents, and (echoing a recent French parliamentary report) that adults do not have a right "to" a child, if that means that they produce that child in a way that deviates from a marital/procreative model.[25]

Recognizing adoption as a pathway to parenthood raises the question, Who should be permitted to adopt? For the integrative model, the ideal adoptive family is a married, heterosexual couple, replicating the dyad found in a biological mother-father home. Nonetheless, in opposing the creation of parenthood rights by courts through doctrines of "functional" or "psychological" parenthood, some proponents support formal adoption (through second-parent adoption) for gay and lesbian couples as "preferable for children" to after-the-fact judicial bestowal of such status.[26] However, this support seems in tension with the integrative model's opposition to same-sex marriage.

Some proponents of the integrative model argue that it is better for society because it channels sexuality and procreation into marriage, helping men become responsible, productive members of society and securing for mothers the paternal investment needed to help children and families thrive.[27] Marriage rectifies a natural asymmetry between the sexes in

parental investment. A vivid example of this argument appears in Justice Cordy's dissent in *Goodridge v. Department of Public Health*:

> Whereas the relationship between the mother and child is demonstrably and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. . . . The institution of marriage fills this void by formally binding the husband-father to his wife and child, imposing on him the responsibilities of fatherhood.



An alternative society, without the institution of marriage, "in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic."[28] New York's highest court, in *Hernandez v. Robles*, drew on Cordy's dissent in concluding that the legislature had a rational basis for limiting marriage to opposite-sex couples. Emphasizing that heterosexual sexual relationships can lead to accidental pregnancy, while homosexual ones cannot, it contends that marriage provides an "inducement" to opposite-sex couples, whose sexual relationships resulting in children are "all too often casual or temporary," to "make a solemn, long-term commitment to each other."[29] Notably, Congress's defense of DOMA against constitutional challenge invokes *Hernandez*'s rationale.[30]

Proponents of the integrative model also stress that it takes seriously sex difference and gender complementarity.[31] Biological difference provides a child with two differently sexed parents who provide models for being male and female and who parent in different ways. (*Hernandez* stated: "Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what a man and woman are like.")[32] Thus, proponents are concerned with families headed by a single parent and by gay or lesbian parents. To the extent family law permits and facilitates these forms of parenthood and does not consider gender differences salient for assigning parental rights and responsibilities (as Susan Frelich Appleton elaborates),[33] it is in tension with the integrative model.

### *The Diversity Model*

A diversity approach to parenthood begins with recognition of the *fact* of diversity in patterns of family life in contemporary society.[34] There are

diverse pathways to becoming a parent and diverse family forms in which people parent. As one survey concludes, "The portrait of the American family circa 2010 starts where it always has—with mom, pop and the kids," but "the family album now includes other ensembles." Thus, along with the nuclear family—the marital, two biological parent family, but also a marital family with adopted children—are families formed by a single parent (whether due to divorce or the absence of marriage), families formed by two unmarried biological parents, by lesbian and gay parents, and by foster parents, blended families formed when divorced parents remarry or cohabit with new partners, and extended families (where a grandparent or other relative serves as caretaker, with or without the biological parents present in the household). A growing family form is the transnational family, with caretaking arrangements that, "while still kin-based, complicate the paradigm of mother/father/children integrative family life."[35]



Some diverse family forms are relatively new, such as a same-sex couple and their children living openly as a family. Others have historical antecedents: the extended family, the family formed by common-law marriage, and the single-parent family. The point is that majorities of Americans include, in their definition of "family," family forms that clearly do not fit the integrative model, although they have varying assessments of whether this diversity is good, is bad, or makes no difference.[36] In addition, while the integrative model views marriage's unique (indeed, universal) role as ensuring two biological parents for children, significantly fewer people view "having children" as a "very important reason to get married" compared with "love," "making a lifelong commitment," and "companionship."[37] Public opinion seems to hew less closely to the integrative view than to the *Goodridge* court's conclusion that "exclusive and permanent commitment," not procreation, is the most important element of marriage.[38]

The diversity model entails a belief about the *value* of diversity. Generally, its proponents regard some degree of diversity in family forms and parenthood not as evidence of deviance or decline but as the inevitable by-product of persons exercising their greater freedom to live out their vision of a good life, facilitated by changes in constitutional, criminal, and family law, and in women's economic status in society.[39] Elsewhere, I have drawn upon the political liberalism of John Rawls to develop a liberal feminist account of the family.[40] Translating liberal toleration to the realm of family law, the basic idea is that, given the fact of reasonable pluralism, achieving uniformity of family form could be done only with a degree of coercion that is unacceptable in a modern constitutional democracy.

Instead, as people exercise their moral capacity to decide the best way to live, they will adopt different family forms.

Political liberalism does not dictate that the family must take a particular *form* (e.g., the marital, heterosexual family), so long as the family can carry out its *functions* (e.g., the task of social reproduction) in a manner consonant with relevant public values.[41] A commitment to family diversity emphasizing function over form and the important personal and public goods furthered by families is consonant with feminist and liberal principles. From this commitment comes a conviction that government should recognize and support different forms of family.



To be sure, recognition of the *fact* of greater family diversity does not translate into accepting or *valuing* all such diversity. One way to interpret the evidently greater acceptance of gay and lesbian couples than single mothers is that the public is more accepting of diverse family forms that include *two* parents, even if not married or not opposite-sex, than of single-parent families. What are the concerns about single mothers? That (1) a child needs both a mother and a father; (2) a child needs two parents (such that two moms would not be as worrisome); or (3) a single mother is likely to be poor and to require public assistance? If single motherhood signifies poverty, would public opinion be more favorable toward "single mothers by choice" who are well educated, are financially self-supporting, and often form communities of support with other single mothers?[42] Or, instead, might some view "*all* practices of single motherhood" as "deviant" (to borrow Martha Albertson Fineman's term)[43] simply because of their singleness?

Could the integrative model's emphasis on gender complementarity in parenting explain public opinion? The Pew survey does not inquire as to ideal styles of parenting but does indicate growing acceptance of "the dual income/shared homemaker model" as the better template for marriage.[44] Moreover, far from supporting gender complementarity, responses to the question, What makes a good partner? "are . . . notable for how closely the public's evaluations of the two gender roles [husband and wife] are aligned."[45] If we can extrapolate from attitudes about partners to attitudes about parents, this suggests considerable support for what Appleton describes as family law's "equality project," that is, the move away from fixed gender roles to gender neutrality with respect to spousal and parental roles.[46]

We can glean from the Pew survey both recognition of family diversity and mixed views on how to evaluate it. A finer-grained analysis suggests

an American public "sharply divided in its judgments" about changes in the structure of the American family: "About a third generally accepts the changes; a third is tolerant but skeptical; and a third considers them bad for society."[47]

**Family Law's Evolving Embrace of the Diversity Model**

Family law embraces a diversity model when it recognizes and supports diverse family forms. In 2000, the U.S. Supreme Court observed, in *Troxel v. Granville*, a case strongly affirming parental rights: "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household."[48] (Notably, the mother whose rights the Court protected was trying to stabilize her children's place in a complex, blended family.)[49] The Court spoke, decades earlier, of the "venerable" roots of the tradition of the multigenerational family—"of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children"—and opined: "Decisions concerning child rearing, which [earlier precedents] have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of children."[50]

The fact that marriage is not the exclusive source of parental rights and responsibilities provides one indication that contemporary family law embodies a diversity approach. For example, paternity laws support society's interest in ensuring sources of financial support for children, and most states are strict in holding persons responsible for the reproductive consequences of sex.[51] Thus, the integrative model stresses *marriage* as the social institution that deals with problems of accidental or unintended pregnancy, but it is not the only mechanism family law uses to compel financial responsibility for children.

Family law's recognition of parental rights and responsibilities outside of marriage also reflects the influence of federal constitutional guarantees of equal protection for nonmarital children, on the rationale that they should not be punished for the "irresponsible sexual liaisons" of their parents.[52] Additionally, the Supreme Court's "unwed father jurisprudence" accords biological fathers who show the requisite degree of responsibility a say in their children's lives.[53] These examples illustrate that contemporary family law finds ways to impose parental responsibilities and recognize rights apart from marriage. Integrationists might counter that the law's

approach to the practical problems posed by nonmarital childbirth does not necessarily indicate a departure from a normative preference for formalizing parental status through marriage. However, there are also ways in which family law affirmatively supports parental status apart from marriage.

Adoption provides an example. If family law supported only an integrative model, it would confine adoption to married, heterosexual couples. However, this is not what most states do, and even "outlier" states have moved toward a diversity model. For example, a gay man (who had been an exemplary foster parent) recently challenged in court Florida's adoption law, which expressly prohibited homosexual persons from adopting a child.[54] To the state's argument that the ban had a rational basis because it furthered Florida's goal of providing children with "better role models" in "non-homosexual households, preferably with a husband and wife as parents," the state court countered that more than a third of Florida's adoptions are by single parents. Florida itself, in other words, supported a diversity of family forms. Moreover, the Department of Children and Families agreed that "gay people and homosexuals make equally good parents," and the appellate court reiterated the lower court's findings that the social science evidence was "robust" on the point that "there are no differences in the parenting of homosexuals or the adjustment of their children."[55]

A diversity approach is also evident in the evolution of a functional—rather than formal—approach to defining family and parenthood. Some state courts and legislatures employ such notions as functional parent, de facto parent, and psychological parent to assign parental rights and responsibilities to a person who is otherwise a "legal stranger" to a child (as Appleton and David Meyer elaborate).[56] Furthering the best interests of the child is a primary reason for doing so.

Family law's deviation from the integrative model is evident in use of notions of "intentional parenthood" in resolving disputes arising from use of ART, as well as in conferring rights and obligations on persons with no biological connection to a child. For example, the California Supreme Court interpreted its child support statutes to apply to a woman who agreed to the conception of her lesbian partner's children, lived with them, supported them, and held out to the world that they were her children. Family law's protective function explains this ruling: the children get the support of two parents, thus reducing the state's public welfare burden.[57]

Admittedly, courts sometimes stress that they are responding to—rather than valuing—diversity in family life. Sometimes, they invite

legislatures to make laws indicating how to manage this diversity and sort out legal parenthood.[58] However, courts sometimes acknowledge the value of diversity: they articulate a belief that supporting diverse family forms is consistent with family values.[59]

A strong indication that contemporary family law in a significant minority of states embraces not only the fact but also the value of diversity is the emphasis on "fairness to families" and on the state's interest in supporting *all* families in the new generation of laws allowing same-sex couples access to civil marriage (Massachusetts, Connecticut, New Hampshire, Iowa, Vermont, the District of Columbia, and New York), civil unions (New Jersey, Illinois, Hawaii, Maryland, and Delaware), or expansive domestic partnership laws (as in California, Oregon, Washington, and Nevada).[60] The spur to such change in some states was a successful constitutional challenge by same-sex couples to state marriage laws.[61] However, a number of legislatures have acted without the spur of such a judicial ruling, including, most recently, New York (several years after an unsuccessful constitutional challenge). In 2012, both Maryland and Washington enacted marriage equality laws, which, however, will only take effect if they survive a voter referendum. When the respective state governors signed these laws, they stressed the positive benefits to children of gay and lesbian parents from the message sent that their families are worthy of dignity and equal protection, rather than being "separate but equal."[62]



Some states have acted even in the face of a state DOMA. Consider Oregon, whose Family Fairness Act accords same-sex domestic partners the same benefits, obligations, and protections as spouses and married parents.[63] The act declares: "This state has a strong interest in promoting stable and lasting families, including the families of same-sex couples and their children. All Oregon families should be provided with the opportunity to obtain necessary legal protections and status and the ability to achieve their fullest potential."[64]

The move by some legislatures, such as in Oregon, to give as much legal protection as possible under the existing state constitutional regime to families that do not fit an integrative model suggests not only the recognition of the fact of family diversity but also the appreciation of its value. These examples suggest the coexistence of the integrative and diversity models, with tenacious support for preserving "traditional" marriage side by side with a strong impulse to protect and be fair to all families. Some courts, notably California's and Connecticut's high courts, have resolved this evident tension by ruling that domestic partnerships or civil unions

(respectively) did not afford same-sex couples the "equal dignity and respect" for their family life to which they are entitled under the state's constitution.[65] Further, some legislatures that chose civil unions as a compromise to preserve traditional understandings of marriage while protecting families formed by gay men and lesbians (e.g., Vermont and New Hampshire) have recognized that "separate is not equal" and opened civil marriage to same-sex couples to promote family stability and fairness.[66]

The ongoing debate over the provision of the federal DOMA that defines marriage, for purposes of federal law, as the union of one man and one woman affords another example of tension between the two models and movement toward the diversity model. The Obama administration announced it would no longer defend DOMA in certain constitutional challenges brought by same-sex couples married under state law. It observed that the legislative record of DOMA was filled with expressions of "moral disapproval of gays and lesbians and their intimate and family relationships" and reflected "precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against."[67] Expressly rejecting an integrative argument (offered in the congressional report) that DOMA, by limiting marriage to opposite-sex couples, "serves a governmental interest in 'responsible procreation and child-rearing,' the attorney general stated: "Since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents."[68] As Congress considers bills to repeal DOMA and to support federal recognition of valid state marriages, lawmakers and witnesses stress the capability of same-sex parents as well as marriage's role in fostering family stability.[69]

When legislatures pass laws facilitating diverse pathways to parenthood, such laws arguably reflect a judgment that these new models are in children's best interests and are consistent with family law's protective functions. Some of these developments seem to fall along a continuum rather than fitting pure integrative or diversity models. For example, civil union laws might be consistent with an integrative model in reserving marriage for opposite-sex couples. Yet, civil unions afford to same-sex partners *all* the spousal benefits and obligations and parental rights and responsibilities that flow from marriage. In this sense, they *integrate* the intimate bond between adults with the parent-child bond for families that differ from the "conjugal" family.

Family law in the United States is not uniform. Among the states are salient differences, sometimes along the lines of red versus blue states, with red states more closely embracing integrative parenthood and rejecting forms of family diversity.[70] Nonetheless, one could reasonably conclude that much of contemporary family law more closely fits the diversity than the integrative model to the extent it allows the separation of legal parenthood from marriage, facilitates pathways to parenthood apart from biological procreation, recognizes parental rights and responsibilities for persons without a biological connection to a child, and, in a significant minority of states, allows same-sex partners access to institutions (whether civil marriage, civil union, or domestic partnership) affording them formal legal status as adult partners and parents.



**Diversity within the Diversity Model**

There are variations within each model. Proponents of a diversity approach differ about the implications of family diversity for law. Some (including me) believe that family law should continue to recognize and support the institution of marriage but in ways consistent with sex equality and opened up to include same-sex couples.[71] Such a model supports exploring whether a new civil registration scheme could foster stability in other households with children (such as cohabiting couples). Cynthia Grant Bowman points to the popularity of such a system, in other countries, among opposite-sex cohabitants, some of whom may seek to avoid the historical or religious symbolism of marriage.[72] Along these lines, a few U.S. states allow opposite-sex couples access to civil unions and expansive domestic partnerships.[73] A registration scheme, Judith Stacey proposes, might also help meet the needs of the more complex families formed by some lesbian and gay parents, when more than two persons have parental roles.[74] I have argued that a civil registration system could help to recognize and support other forms of committed adult relationships, such as adult siblings forming a household or friends aging with friends.[75]

By contrast, some proponents of a diversity model argue for dethroning marriage. An argument for "uncoupling marriage and parenting," advanced by Stacey, is that "our needs for both eros and domesticity are often at odds," so that tying parenting so tightly to marriage makes child well-being too vulnerable to "Cupid's antics."[76] Martha Albertson Fineman proposes to reorient family law around the caretaker-dependent relationship and attach the subsidies now linked to marital status to that dyad,

shifting marriage to the realm of private contract.[77] Many scholars embrace this basic proposal.[78]

But some scholars who share Fineman's view about ending state support for marriage resist her call to eliminate the state's role in regulating adult-adult relationships. Tamara Metz argues for disestablishing marriage and creating—and regulating—an "intimate caregiving union status," including "parents and children (biological and de facto); husband and wife; long-term cohabiting hetero- and homosexual lovers and partners; 'lesbigay' units; nonsexually intimate adult units or groups; adult siblings; adult children; and aging parents."[79] This model supports diverse forms of parenthood, while situating the caregiving of parents in the broader context of caregiving relationships. Such broader support for "intimate care in all its guises," Metz contends, is more just and more consistent with liberal commitments to liberty, equality, and stability.[80] This approach differs both from diversity approaches that would shift the focus to intergenerational caretaking relationships and from integrative approaches that contend that society's interest in encouraging committed adult relationships is confined to procreative unions.[81] Thus, Maxine Eichner argues that state support is warranted because such adult relationships further "a broad range of important goods."[82]

Another area of disagreement concerns the number of legally recognized parents. Multiple parenthood departs from the integrative model that, for each child, there should be one legally recognized father and one mother. How does the diversity model address the question whether children "can or should have more than two parents"?[83] As Nancy Dowd observes, some children already have more than two adults assuming parenting roles in their lives, due to patterns of marriage, divorce, cohabitation, and remarriage, as well as to open adoption and foster care. But, should more than two adults have legally recognized rights and responsibilities with respect to a particular child? In certain circumstances, family law has recognized three legal parents (e.g., a biological mother, her same-sex partner, and the sperm donor, or genetic father).[84] Some scholars view the recognition of multiple parenthood as consistent with family law's recognition of parental status due to social parenthood, apart from biology.[85] Dowd argues that recognizing multiple fatherhood would be consistent with the actual experience of many fathers and further the channelling function of family law.[86] Laura Kessler proposes that lifting the "numerosity requirement" with respect to parenthood would address situations in

which children have "significant family ties" to "*more than two adults* concurrently."[87] Proponents of a diversity model differ on these issues.[88]

**Diversity or "Diverging Destinies"?**

I turn now to trends toward inequality in family life and suggest possible common ground between the integrative and diversity models. My concern here is with what sociologist Sara McLanahan refers to as children's "diverging destinies" based on parental resources,[89] and what the Pew report describes as "a new 'marriage gap' in the United States . . . increasingly aligned with a growing income gap."[90] McLanahan warned of these "diverging destinies" nearly a decade ago. Commentators continue to identify the problem of "two classes, divided by 'I do'" as a troubling form of inequality between families—and the children within them.[91]



McLanahan argues that, while one trajectory for women, "associated with delays in childbearing and increases in maternal employment," results in "gains in resources" for children, the other, "associated with divorce and non-marital childbearing," "reflects losses" in resources for them.[92] She argues that society should care about "growing disparities in children's resources."[93]

Another inequality concern is a "class-based decline in marriage," with a dramatically larger gap in 2008 than in 1960 between marriage rates of college graduates (64 percent) and those with a high school diploma or less (48 percent).[94] Better-educated and economically successful people marry at higher rates (generally, to other well-educated and successful people), but lower down the economic spectrum, marriage rates are lower, nonmarital parenthood is more common, and divorce rates (often after early marriages) are higher.[95] The gap is not due simply to class-based views on the value of marriage. Rather, "Those with less income and education are opting out of marriage not because they don't value the institution or aspire to its benefits, but because they may doubt that they (or potential spouses) can meet the standards they impose on marriage."[96] Some men and women report that they are delaying getting married until they have the economic preconditions for a successful marriage.[97] Although low-income women value becoming a mother and say they value the institution of marriage, they may not view their male partner as a suitable marriage partner. They also believe they are capable of being a good parent without marriage.[98]

Wherever one falls on the continuum between integrative and diversity models, inequality in access to marriage, family life, and the successful

transition to adulthood and the resulting forms of inequality for children are serious concerns. So, too, are the continuing high rates of teen pregnancy and early parenthood in the United States.

The problems of marriage inequality, unequal resources among children, and teen pregnancy and early parenthood suggest that not every current pattern of family life is one that proponents of a diversity model would celebrate. With proponents of an integrative model, they would find some of these trends and forms of inequality troubling. Although there would likely be differences concerning the best solutions, common ground is worth pursuing.



**Conclusion: A Continuum Approach to Mapping Parenthood**

I have suggested that the diversity model includes recognition of the fact of family diversity and appreciation of its value. It entails that diverse family forms should be supported by family law. I have illustrated that proponents differ on such matters as the continuing place of marriage and whether to link the adult-adult intimate relationship to the parent-child relationship. The diversity model captures the diverse pathways to parenthood in social practice. It also fits changes in family law giving legal protection to these pathways.

A premise of this volume is that using the integrative and diversity models is a fruitful way to wrestle with significant questions about parenthood. I have suggested that, given the differences within each model, it is helpful to locate positions about parenthood as points on a continuum rather than as a dichotomy. To give a few examples: people may accept the notion of family law's channelling function but draw different conclusions about what type of relationships the law should support and promote. Thus, people may share a belief in the importance of integrating adult-adult intimate and parent-child bonds but differ on whether parents must be opposite-sex or may also be same-sex. They may share a preference for establishing formal legal ties between parent and child but differ on what to do in concrete situations in which persons without formal legal ties are functioning as parents to children. They may harbor an intuition that family law's primary concern should be intergenerational relationships, of which the parent-child is the most fundamental, or they may envision the parent-child relationship as one in a family of relationships that the law should encourage and support. These are but a few of the matters we could productively map along a continuum of approaches to parenthood.

## Notes

1. See Naomi R. Cahn and June Carbone, *Red Families v. Blue Families: Legal Polarization and the Creation of Culture* (New York: Oxford University Press, 2010).

2. June Carbone, "The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity," *Louisiana Law Review* 65 (2005): 1295.

3. Daniel Cere, "Toward an Integrative Account of Parenthood" (this volume).

4. David D. Meyer, "Parenthood in a Time of Transition: Tensions between Legal, Biological, and Social Conceptions of Parenthood," *American Journal of Comparative Law* 54 (2006): 125; Carbone, "Legal Definition of Parenthood," 1295.



5. Carbone, "Legal Definition of Parenthood," 1297.

6. Meyer, "Parenthood in a Time of Transition," 125.

7. Ibid., 144.

8. Pub. L. No. 104–199, 1 U.S.C. sec. 7 (1996).

9. See Carl E. Schneider, "The Channelling Function in Family Law," *Hofstra Law Review* 20 (1992): 495; Linda C. McClain, "Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law," *Cardozo Law Review* 28 (2007): 2133.

10. Council on Family Law, *The Future of Family Law: Law and the Marriage Crisis in North America* (New York: Institute for American Values, 2005), 12–13, 14–15 (naming Daniel Cere as principal investigator).

11. Robert George, Timothy George, and Chuck Colson, "The Manhattan Declaration: A Call of Christian Conscience," Nov. 20, 2009, http://www.manhattan declaration.org (accessed Nov. 21, 2009).

12. Ibid., 5.

13. See, e.g., Brief Amici Curiae of the Church of Jesus Christ of Latter-Day Saints, California Catholic Conference, National Association of Evangelicals, and Union of Orthodox Jewish Congregations of America in Support of Respondent State of California in In re Marriage Cases, 183 P.3d 384 (Cal. 2008).

14. Griswold v. Connecticut, 381 U.S. 479 (1965).

15. Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003); In re Marriage Cases, 183 P.3d 384 (Cal. 2008). In response to the California Supreme Court's ruling that not allowing same-sex couples to marry (even though they could enter domestic partnerships) violated California's constitution, California voters, in November 2008, approved Proposition 8, amending the state's constitution to define marriage as between one man and one woman. Same-sex couples have prevailed in a federal constitutional challenge to Proposition 8 in federal district and appellate court, although the case may reach the U.S. Supreme Court. Perry v. Schwarzenegger, 704 F. Supp. 921 (N.D. Cal. 2010), *affirmed sub nom.* Perry v. Brown, 671 F. 3d 1052 (9th Cir. 2012).

16. See New York Marriage Equality Act, ch. 95 (2011).

17. Me. Rev. Stat. tit. 19–A, sec. 650 (1998 and Supp. 2011) (Maine's DOMA).

18. Committee on the Judiciary, Defense of Marriage Act, H.R. Rep. 104–664 (1996), 14 (also citing testimony by the Council on Families in America).

19. David Blankenhorn and Jonathan Rauch, "A Reconciliation on Gay Marriage," *New York Times*, Feb. 22, 2009, WK11.

20. See David Blankenhorn, "How My View on Gay Marriage Changed," *New York Times*, http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?_r=2&hp&pagewanted=print (accessed June 23, 2012).

21. Ibid.; see also Mark Oppenheimer, "David Blankenhorn and the Battle Over Same-Sex Marriage," http://www.yourpublicmedia.org/content/wnpr/david-blankenhorn-and-battle-over-same-sex-marriage (accessed June 25, 2012).

22. Maggie Gallagher, "Bigotry, David Blankenhorn, and the Future of Marriage," http://www.thepublicdiscourse.com/2012/06/5759 (accessed June 25, 2012).

23. Elizabeth Marquardt, "Of Human Bonding: Integrating the Needs and Desires of Women, Men, and the Children Their Unions Produce," 325 (this volume).

24. Russell E. Smith, "*In Vitro* Fertilization—Fact Pattern, Roman Catholic Response," part IV.A of "Symposium: Roman Catholic, Islamic, and Jewish Treatment of Familial Issues, Including Education, Abortion, in Vitro Fertilization, Prenuptial Agreements, and Marital Fraud," *Loyola Los Angeles International and Comparative Law Review* 16 (1993): 9, 47–53.

25. Institute for American Values and Commission on Parenthood's Future, *The Revolution in Parenthood: The Emerging Global Clash between Adult Rights and Children's Needs* (New York: Institute for American Values, 2006). Elizabeth Marquardt is the principal investigator on this report.

26. Ibid., 24.

27. Council on Family Law, *The Future of Family Law*; *Marriage and the Public Good: Ten Principles* (Princeton, NJ: Witherspoon Institute, 2008).

28. *Goodridge*, 996.

29. Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

30. See Memorandum of Law of Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives in Support of Its Motion to Dismiss, Pedersen v. Office of Personnel Management, Case No. 3:10–cv.01750 (VLB), 49, http://www.glad.org/doma/documents (accessed Jan. 26, 2012).

31. Cere, "Epilogue" (this volume); Daniel Cere, "The Conjugal Tradition in Post Modernity: The Closure of Public Discourse?" (unpublished manuscript, 2003).

32. *Hernandez*, 7.

33. Susan Frelich Appleton, "Gender and Parentage: Family Law's Equality Project in Our Empirical Age" (this volume).

34. Judith Stacey, "Toward Equal Regard for Marriages and Other Imperfect Intimate Affiliations," *Hofstra Law Review* 32 (2003): 331.

35. Carola Suárez-Orozco and Marcelo M. Suárez-Orozco, "Transnationalism of the Heart: Familyhood across Borders," 280 (this volume); see also Rhacel Salazar Parreñas, "Transnational Mothering and Models of Parenthood: Ideological and Intergenerational Challenges in Filipina Migrant Families" (this volume).

36. Pew Research Center, *The Decline of Marriage and Rise of New Families*, Nov. 18, 2010, http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/6/ (accessed May 1, 2011).

37. Ibid., 22 ("having children" is a "very important reason to get married": 59 percent of married persons, 44 percent of unmarried; "love" [married, 93 percent; unmar-

ried, 84 percent]; "making a lifelong commitment" [married, 87 percent; unmarried, 74 percent]; and "companionship" [married, 81 percent; unmarried, 63 percent]).

38. *Goodridge*, 961–962.

39. Here, I analogize to Rawls's idea of the "fact of reasonable pluralism" and the "fact of oppression." John Rawls, *Political Liberalism* (1993; repr., New York: Columbia University Press, 1996), 36–37.

40. Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge: Harvard University Press, 2006).

41. Ibid.

42. See, e.g., Emily Bazelon, "2 Kids + 0 Husband = Family," *New York Times Magazine*, Feb. 1, 2009, 30L; Rosanna Hertz, *Single by Chance, Mothers by Choice: How Women Are Choosing Parenthood without Marriage and Creating the New American Family* (New York: Oxford University Press, 2006).

43. Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995), 101–104.

44. Hertz, *Single by Chance*, 26.

45. Ibid., 30.

46. Appleton, "Gender and Parentage," 238–240.

47. Pew Research Center, *The Public Renders a Split Verdict on Changes in Family Structure*, Feb. 16, 2011, http://www.pewsocialtrends.org/2011/02/16/the-public-renders-a-split-verdict-on-changes-in-family-structure/ (accessed May 5, 2011).

48. Troxel v. Granville, 530 U.S. 57 (2000).

49. Ariela R. Dubler, "Constructing the Modern American Family: The Stories of *Troxel v. Granville*," in *Family Law Stories*, ed. Carol Sanger (New York: Foundation Press, 2008), 95–111.

50. Moore v. City of East Cleveland, 431 U.S. 494, 504, 505 (1977).

51. See Wallis v. Smith, 22 P.3d 682 (N.M. Ct. App. 2001).

52. Weber v. Aetna Casualty and Surety Company, 406 U.S. 164 (1972).

53. Lehr v. Robertson, 463 U.S. 248 (1983).

54. In re Adoption of X.X.G. and N.R.G., 45 So. 3d 79, 87 (Fla. Dist. Ct. App. 2010).

55. Ibid.

56. See, e.g., In re Parentage of L.B., 122 P.3d 161 (Wash. 2005) (en banc). See also Appleton, "Gender and Parentage"; David D. Meyer, "Family Diversity and the Rights of Parenthood" (this volume).

57. Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

58. In re C.K.G., 173 S.W.3d 714 (Tenn. 2005) (defining motherhood in a surrogacy case, but concluding: "Given the far-reaching, profoundly complex, and competing public policy considerations . . . crafting a general rule to adjudicate all controversies [involving ART] is more appropriately accomplished by the Tennessee General Assembly"); K.M. v. E.G., 117 P.3d 673 (Cal. 2005) (Werdegar, J., dissenting) (urging that "only legislation defining parentage in the context of assisted reproduction is likely to restore predictability and prevent further lapses into the disorder of ad hoc adjudication").

59. V.C. v. M.J.B., 163 N.J. 200, 232 (N.J. 2000) (Long, J., concurring).

60. For an up-to-date overview, see "States," www.freedomtomarry.org/states (accessed Feb. 2, 2012).

61. *Goodridge*; Kerrigan v. Commissioner of Public Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W. 2d 862 (Iowa 2009).

62. See Governor Chris Gregoire, "Marriage Equality Bill Signing," Feb. 13, 2012, http://governor.wa.gov/speeches/speech-view.asp?SpeechSeq=223 (accessed June 14, 2012); Office of Governor Martin O'Malley, "Marriage Equality Bill Signing," Mar. 1, 2012, http://www.governor.maryland.gov/blog/?p=4551 (accessed June 14, 2012).

63. Or. Rev. Stat. 106.990(2) (2003 and Supp. 2011).

64. Ibid.

65. *Marriage Cases*; see also *Kerrigan*, 418. Proposition 8 nullified the California Supreme Court's ruling that same-sex couples must be accorded access to civil marriage, not simply domestic partnerships, through amending the state constitution by ballot initiative. A federal district court ruled that Proposition 8 violates the federal constitution and was affirmed on appeal by the Ninth Circuit. Perry v. Schwarzenegger, 704 F. Supp.2d 921 (N.D. Cal. 2010), *affirmed sub nom* Perry v. Brown, 671 F. 3d 1052 (9th Cir. 2012). The Ninth Circuit indicated that it was deciding the case as narrowly as possible—based on the unique circumstances of California's law—and not ruling on the broader question of whether same-sex couples have a federal constitutional right to marry.

66. Vt. Stat. Ann. tit. 15, sec. 8 (2007 and Supp. 2011); N.H. Rev. Stat. Ann. sec. 457:1–a (Supp. 2011).

67. Eric Holder, Attorney General to Hon. John A. Boehner, Feb. 23, 2011, 4.

68. Ibid.

69. *The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing on S. 598 before the S. Comm. on the Judiciary*, 112th Cong. (2011).

70. See Cahn and Carbone, *Red Families v. Blue Families*, 117–138.

71. McClain, *Place of Families*, 155–190.

72. See, e.g., Cynthia Grant Bowman, *Unmarried Couples, Law, and Public Policy* (New York: Oxford University Press, 2010), 221–230 (proposing registered partnerships).

73. For example, civil unions in Hawaii and Illinois and domestic partnerships in Nevada.

74. Stacey, "Toward Equal Regard," 346–348.

75. McClain, *Place of Families*, 191–209.

76. Judith Stacey, "Uncoupling Marriage and Parenting," 79 (this volume).

77. Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2004).

78. See, e.g., Nancy D. Polikoff, "Ending Marriage as We Know It," *Hofstra Law Review* 32 (2003): 201.

79. Tamara Metz, *Untying the Knot: Marriage, the State, and the Case for Their Divorce* (Princeton: Princeton University Press, 2010), 120.

80. Ibid.

81. See H.R. Rep. 104–664, 14.

82. Maxine Eichner, *The Supportive State: Families, Government, and America's Political Ideals* (New York: Oxford University Press, 2010), 101.

83. Susan Frelich Appleton, "Parents by the Numbers," *Hofstra Law Review* 37 (2008): 11.

84. Ibid., 12–13 (citing cases from Ontario and Pennsylvania).

85. Katherine K. Baker, "Bionormativity and the Construction of Parenthood," *Georgia Law Review* 42 (2008): 649.

86. Nancy E. Dowd, "Multiple Parents/Multiple Fathers," *Journal of Law and Family Studies* 9 (2007): 231; Melanie B. Jacobs, "My Two Dads: Disaggregating Biological and Social Paternity," *Arizona State Law Journal* 38 (2006): 809.

87. Laura T. Kessler, "Community Parenting," *Washington University Journal of Law and Policy* 24 (2007): 47, 50.

88. For concerns about legal attempts to protect "nontraditional caregiving relationships," see Emily Buss, "'Parental' Rights," *Virginia Law Review* 88 (2002): 635.

89. Sara McLanahan, "Diverging Destinies: How Children Are Faring under the Second Demographic Transition," *Demography* 41 (Nov. 2004): 607.

90. Pew Research Center, *Decline of Marriage*, i.

91. Jason DeParle, "Two Classes, Divided by 'I Do,'" *New York Times,* July 15, 2012, § 1:1. I cite this news article as a powerful example of such contemporary commentary, not to embrace entirely its analysis of the problem.

92. McLanahan, "Diverging Destinies," 608.

93. Ibid., 619.

94. Pew Research Center, *Decline of Marriage*, i.

95. McLanahan, "Diverging Destinies."

96. Pew Research Center, *Decline of Marriage*, 23.

97. McClain, *Place of Families*, 138–144; McClain, "Love, Marriage, and the Baby Carriage."

98. Kathryn Edin and Maria Kefalas, *Promises I Can Keep: Why Poor Women Put Motherhood before Marriage* (Berkeley: University of California Press, 2005).