WHO IS ENTITLED TO PARENTAL RESPONSIBILITY? BIOLOGY, CAREGIVING, INTENTION AND THE FAMILY LAW ACT 1975 (CTH): A JURISPRUDENTIAL FEMINIST ANALYSIS

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After explaining why considerations about parental entitlements must be factored into any legal regime purporting to allocate parental responsibility, the paper examines three possible grounds for the allocation of parental responsibility: biological connection between an adult and a child, relationship of caregiving between an adult and a child, and an adult's intention to parent a particular child. The article argues that while biology is a morally irrelevant ground for distributing parental responsibility, caregiving and intentionality are not, and that they usefully inform us on the circumstances under which certain adults are morally entitled to parental responsibility over particular children. The article then goes on to evaluate whether or not the Family Law Act 1975 *(Cth) sets up a morally defensible regime of parental responsibility allocation. It does so by assessing the extent to which the Act supports biology, caregiving and intentionality as grounds for identifying who has parental responsibility over children. It concludes that the Act falls well short of implementing a morally sound parental responsibility regime. The analysis is jurisprudential in nature and largely informed by feminist literature.*

I INTRODUCTION

An important, and generally applauded, conceptual shift in Australian family law was effected by the *Family Law Reform Act 1995* (Cth) ('*1995 Act*'), which replaced the concept of parental rights with that of 'parental responsibility'. The shift underscored that parenting is a matter of responsibility rather than entitlements, and that children's welfare and rights should be the controlling factor in deciding how to allocate parental authority. Importantly, in the *1995 Act* the focus on parental responsibility went hand in hand with the notion that mothers and fathers share responsibility for their children.[1] That notion animated also the more recent *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) ('*2006 Act*').

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1 Eva Ryrstedt, 'Joint Decision – A Prerequisite or a Drawback in Joint Parental Responsibility?' (2003) 17 *Australian Journal of Family Law* 155, 157–9, 165; Helen Rhoades, 'Yearning for Law: Fathers' Groups and Family Law Reform in Australia' in Richard Collier and Sally Sheldon (eds), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (2006) 125, 130.

Internationally, feminist reflection has been a contributor[2] to the school of thought advocating a conceptual shift away from parental rights[3] – a position that sits well with feminist critiques of rights discourse[4] and feminist valuation of modes of moral reasoning alternative to the ethics of justice and its emphasis on rights.[5] Somewhat ironically, when the law effected that shift, the result was to strengthen the claims of fathers with respect to their children after separation or divorce.[6] This result is cause for concern, even if feminists have long advocated greater male involvement in childrearing. As Carol Smart observes:

> it is not intrinsically a problem for feminist analyses … that fathers wish to become more involved with their children, rather it is that they are agitating [and that the law now grants them greater opportunities] to do so primarily after they have separated from their partners rather than during the course of their relationship. ... This means that the shape of fathers' demands in the early 21st century is not about reconfiguring parenthood as a whole in order that both parents can share the responsibilities and disadvantages – as well as benefits; rather it is a campaign against mothers and a reassertion of paternal privilege which can be exercised at will.[7]

One might be tempted to argue that the father-empowering effects of the reforms were due to the reform Acts' failure to genuinely de-centre parental rights despite proclaiming a shift towards the concept of parental responsibility. Indeed, that despite the rhetoric of parental responsibility both the *1995 Act* and the *2006 Act* have been no less about parental entitlements than about children's rights has not escaped commentators.[8]

But blaming the lingering spectre of parental rights for the father-empowering effects of the reforms would obscure one crucial point: if the law has remained implicitly focused on parental rights, despite the stated intentions of the *1995 Act*, it is because the displacement of parental rights was conceptually confusing and normatively undesirable in the first place. Thus, if the *1995 Act* and *2006 Act* fail to appropriately allocate parental powers and authority, as I think they do, it is not because they have *unduly* given effect to implicit considerations related to parental rights. Rather, it is because the theory of parental entitlements underlying the *Acts* is flawed. The rhetoric of 'parental responsibility' has disabled many of us from appreciating this point. Furthermore, it has absolved the drafters of the

2 Other important discourses which had a hand in popularising the rhetoric of parental responsibility have been in Neoliberalism: see Susan Boyd, '"Robbed of Their Families"? Fathers' Rights Discourses in Canadian Parenting Law Reform Processes' in Richard Collier and Sally Sheldon (eds), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (2006) 27, 50 as well as the children's rights movement and communitarianism: see Aleardo Zanghellini, 'Is There Such a Thing as a Right to Be a Parent?' (2008) 33 *Australian Journal of Legal Philosophy* 26, 43–51.

3 See, eg, Katharine Bartlett, 'Re-Expressing Parenthood' (1988) 98 *Yale Law Journal* 293.

4 Carol Smart, *Feminism and the Power of Law* (1989).

5 See, eg, Cheshire Calhoun, 'Justice, Care, Gender Bias' (1988) 85 *Journal of Philosophy* 451.

6 Helen Rhoades, 'The Rise and Rise of Shared Parenting Laws: A Critical Reflection' (2002) 19 *Canadian Journal of Family Law* 75, 97.

7 Carol Smart, 'Preface' in Richard Collier and Sally Sheldon (eds), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (2006) vii, ix.

8 Rhoades, 'The Rise and Rise of Shared Parenting Laws: A Critical Reflection', above n 6.

reform *Acts* from the responsibility to articulate their own theory or assumptions about parental rights, and discouraged commentators from developing a morally defensible alternative theory.

In this article I attempt to lay the groundwork for developing such a theory by focusing on the circumstances under which a person can be regarded as *morally entitled* to parental responsibility. To this end, in Part II I shall critically evaluate three criteria on which scholars have tended to rely when tackling, in different contexts, the issue of how the law should allocate parental responsibility. These criteria are biology, caregiving and intentionality. I will then use the conclusions reached in Part II to evaluate the defensibility of the current legal regime on the allocation of parental responsibility (Part III) and to outline a normatively desirable alternative (Part IV).

Why do I claim that refocusing the law away from parental rights was conceptually confusing and normatively undesirable? It was conceptually confusing because it wrongly implied that the twin ideas of parental responsibility and children's interests/rights had a comprehensively prescriptive content, dictating certain outcomes with respect to the question of how to allocate parental authority. Of course, when a court is considering who should be entrusted with the care of a child and decisional authority with respect to him or her (for instance in a divorce case), that particular child's best interests may, in the concrete circumstances of the case, dictate a specific outcome. But before that question may become relevant in court proceedings relating to a particular child (where a concrete answer needs to be provided to it), the law needs to settle it in the abstract, for all the children that are brought into this world. And the fact is neither the idea of parental responsibility nor that of children's rights provides reasonably univocal or sufficiently comprehensive answers to that question. In particular, despite conservative rhetoric to the contrary, children's interests are in principle compatible not just with one, but with a variety of family structures or childrearing arrangements: for example, children in lesbian or gay families fare as well as children from heterosexual families[9] and father absence is not per se a reliable predictor of diminished children's welfare.[10]

Since children's interests do not prescribe particular parental configurations such as the heterosexual nuclear family, in designing a system on the allocation of parental responsibility we need to reach beyond children's interests and the twin notion of parental responsibility. This is not the same as saying that children's

9 See, eg, Carlos Ball, 'Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference' (2003) 31 *Capital University Law Review* 691, 695–7 summarising the overview provided by the American Academy of Pediatrics' Committee on Psychosocial Aspects of Child and Family Health, *Helping Children and Families Deal with Divorce and Separation*, Clinical Report (2002) 110 *Pediatrics* 1019; Jenni Millbank, 'From Here to Maternity: A Review of the Research on Lesbian and Gay Families' (2003) 38 *Australian Journal of Social Issues* 541; Clare Murray, 'Same-Sex Families: Outcomes for Children and Parents' (2004) 34 *Family Law* 136.

10 See, eg, Louise Silverstein and Carl Auerbach, 'Deconstructing the Essential Father' (1999) 54 *American Psychologist* 397; Susan Golombok, Fiona Tasker and Clare Murray, 'Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers' (1997) 38 *Journal of Child Psychology and Psychiatry and Allied Disciplines* 783.

interests are irrelevant to answering the question of who should have parental responsibility.[11] What it does mean is that children's interests, even if we accord them primacy, do not tell us *enough*.

Appealing to the idea of parental rights allows us not only to provide answers where a reference to children's interests alone would provide none or too many, but also to design a system of parental responsibility which is normatively attractive. This is because, as I have argued elsewhere,[12] the concept of parental rights brings to the fore the important fact that, under certain circumstances, we are *morally required* to pay a certain level of respect to people's interest in parenting (for example by granting them the *right* to care for their children or to have their children residing at their home).

The case of the stolen generations illustrates why it is normatively undesirable to do away with the concept of parental rights. Our outrage at the practice stems not only from the knowledge that removing the children harmed them and devastated Aboriginal societies, but also from our feeling that it harmed (that is it violated cognisable and fundamental interests of) the parents of the children.[13] The moral intuition underlying this feeling is that the interest in parenting, although not of absolute importance, is important enough to ground parental rights: that is, it is important enough to hold others under certain duties to respect the relationship between children and the interest-holders[14] (that is, parents, in the sense of adults who inhabit certain positions with respect to certain children).

In sum, parental responsibility and children's interests, as conceptual categories, are not sufficiently specific in recommending how to allocate parental authority. Furthermore, it would be all but barbarous to discount parental interests when reaching decisions about such allocations. Thus, intuitions about parental rights have inevitably structured the choices that legislators have made when reforming Part VII ('Children') of the *Family Law Act 1975* (Cth) ('*Family Law Act*') in 1995, and when they did so again through the *2006 Act*.

Unfortunately, the specific assumptions about parental entitlements that have surreptitiously informed these reforms largely reflect an idealisation of the nuclear family – a heteronormative model essentially based on biology.[15] Under the *Family*

11 As we will see, they do have something important to contribute, such as the insight that children develop particular bonds with their caregivers which should not be disturbed without a good reason.

12 Zanghellini, above n 2, 42–58.

13 Here, of course, the word 'parents' may have a much broader meaning than we are accustomed to ascribing it when we think of the nuclear family.

14 This follows from the definition of right: a right exists when there is an individual interest of sufficient importance to ground duties in others: see Joseph Raz, *The Morality of Freedom* (1986) 166. Obviously, the importance of the interest in parenting is a ground for duties to protect the interest-holder's relationship with a certain child under some circumstances but not under others. In other words, the interest in parenting is important enough to ground parental rights under some circumstances but not under others. If my interest in parenting is to ground parental rights in me with respect to a specific child, there must not be counter-considerations outweighing the importance of my interest in parenting. These counter-considerations may be related to the child's interests, or to the interests of third parties, including the interest in parenting the same child held by some other person who is differently circumstanced from me.

15 But accommodations are made for adopted children: *Family Law Act 1975* (Cth) ss 4, 60F.

Law Act, as amended, children are thought of as having two parents (implicitly of different sexes),[16] ordinarily biologically related to them or presumed to be so related,[17] and entitled to share equally in parental authority,[18] now, normally, even when a parenting order has been sought.[19] These assumptions, to the extent that they are largely based on a biological model, are not only morally flawed, but they result in a regime of parental responsibility allocation that fails to do justice to the diversity of Australian family forms.

Currently, it is lesbian and gay families that have captured public attention in terms of the variety of childrearing arrangements they have introduced alongside more familiar models (heterosexual couples and single parents). Lesbian and gay families with children include same-sex couples raising children; lesbian and gay co-parenting projects in which generally a lesbian woman or couple raises a child with the involvement of a non-resident gay (sometimes straight) man (whether as a kindly uncle or a full parent); and poly-parenting (that is, co-parenting by more than two people, such as jointly by a gay couple and a lesbian couple).[20]

By remaining attached to biological models of parenting, I will argue, Australian law fails to protect adult-child relationships in circumstances in which the interest of the adult in parenting, given the position she or he inhabits with respect to the child, morally calls for respect of those relationships. Conversely, parental authority is bestowed upon adults who do not necessarily have a sound moral claim to it. This is true of the law's treatment both of 'traditional' family forms and of such 'new' family forms as those ushered in by lesbians and gay men.

Openly interrogating the circumstances under which a person is *morally entitled* to parental responsibility (that is, under which they can claim *parental rights*) is more likely to result in a system of parental authority-allocation that approximates feminist ideals. Defusing the politically charged question of parental entitlements by appealing to ideas such as parental responsibility and children's interests ultimately does not serve that end as well because it stands in the way of intellectual clarity. And it is precisely by engendering intellectual confusion that the fathers' rights movement has promoted its agenda, for example by conflating children's interests with fathers' interests.[21]

Some feminist theorising has been wary of the language of rights on the ground that it can be so easily co-opted by conservative forces;[22] those of us who have

16 *Family Law Act 1975* (Cth) ss 60B(1)(a), (2)(a), 60CC(2)(a).

17 *Family Law Act 1975* (Cth) ss 69P–T, 69W in conjunction with *Family Law Regulations 1984* (Cth) r 21C.

18 *Family Law Act 1975* (Cth) s 61C.

19 *Family Law Act 1975* (Cth) s 61DA.

20 On the variety of family forms created by lesbians and gay men in Australia, see Gay and Lesbian Rights Lobby of New South Wales, *And Then … The Brides Changed Nappies: Lesbian Mothers, Gay Fathers and the Legal Recognition of Our Relationships with the Children We Raise*, A Community Law Reform Project: Final Report (2003).

21 Richard Collier and Sally Sheldon, 'Fathers' Rights, Fatherhood and Law Reform – International Perspectives' in Richard Collier and Sally Sheldon (eds), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (2006) 1, 16.

22 Smart, *Feminism and the Power of Law*, above n 4, 153–9.

been partly influenced by that intellectual tradition might look with suspicion upon the project of re-centring the discourse of parental rights. But surely if we have learnt anything from the reforms of Part VII of the *Family Law Act* it is that there is no such thing as a non-cooptable conceptual category. Indeed, 'parental responsibility' has proved remarkably well suited to serving non-feminist agendas[23] (despite the fact that, admittedly, fathers' rights groups have occasionally shown a preference for reverting to the discourse of parental rights).[24]

The assumption informing the following analysis will be that, other things being equal, both 'traditional' and newer family forms deserve legal recognition through the protection of parent-child relationship occurring within them. As we will see, research has repeatedly demonstrated that family structure is not important to children's well being. Therefore, participants in the different parenting arrangements described above cannot have their moral claim to recognition of their interest in parenting disqualified merely by virtue of their choice to create an unconventional family structure.

II CRITERIA FOR THE ALLOCATION OF PARENTAL RESPONSIBILITY

A Biology

1 *The Role of Biology in Determining the Allocation of Parental Responsibility*

Even if parental roles can be successfully taken up regardless of a biological relationship with the child,[25] Western law has traditionally assumed that biological connection should be relevant to determining who is entitled to parental responsibility. Thus, legally a woman tends to be recognised as a child's mother, and hence to have parental rights over that child, merely by virtue of giving birth to it. On the other hand, a man's spousal relationship with the child's biological mother has traditionally carried with it legal parental rights over the child on the assumption that such a relationship was evidence of a biological connection between the child and the man. As Susan Boyd and Katherine Arnup put it, '[b]iological relations have played an ambiguous and sometimes mythical role in defining paternity … often *regardless* of an actual biological paternal connection'.[26]

23 The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) introducing into the *Family Law Act 1975* (Cth) a rebuttable presumption of shared parental responsibility as being in the child's best interests, as well as considerations of equal time, has confirmed the suitability of the rhetoric of parental responsibility to promoting in practice both the traditional nuclear family and parental interests (specifically, those of fathers), quite possibly at the expense of those of children: Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Impact of the* Family Law Amendment (Shared Parental Responsibility) Act 2006 *(Cth)* (2006) 29–32.

24 Rhoades, 'Yearning for Law: Fathers' Groups and Family Law Reform in Australia', above n 1, 140.

25 Joseph Goldstein, Anna Freud and Albert Solnit, *Beyond the Best Interests of the Child* (1979) 17–19.

26 Katherine Arnup and Susan Boyd, 'Familial Disputes? Sperm Donors, Lesbian Mothers, and Legal Parenthood' in Didi Herman and Carl Stychin (eds), *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (1995) 77, 88.

Genetic testing can now be used to establish whether or not a man has biologically fathered a child. While this development has the potential for reinforcing the role of biology in regulating parent-child relationships, others may have the opposite effect. Thus, the use of reproductive technologies has involved a challenge not only to traditional biology-based understandings of the family, but also to the concept of biological relationship itself. To give a classic example, is gestational but non-genetic motherhood, or genetic but non-gestational motherhood, biological?

These developments complicate the proposition that the allocation of parental responsibility should be based on biological criteria, but it is still possible for supporters of the biological model of parenthood to argue that these criteria, *appropriately redefined and clarified*, should determine who holds parental rights. If, however, biological criteria are to guide us in deciding how to allocate parental responsibility, we need to defend them on something more than the law's traditional attachment to them.

2 *Biological Connection as Intrinsically Valuable*

There are two main versions of the argument that parental responsibility should be allocated on a basis that acknowledges the primacy of biological ties. The first conceives of biological connection as intrinsically valuable and can be explained by quoting anthropologist Marilyn Strathern:

> The connections as Euro-Americans imagine them go two ways. On the one hand, kin relations are regarded as ultimately founded on procreation and biological necessity. On the other hand, the social arrangements that provide the living, daily context for the procreation of children are given justification by reference to the natural facts. Their distinctive nature is represented in terms of universal and inevitable biological processes. The biological facts of life thus serve to ground particular values associated with kinship.[27]

In other words, one reason why some believe that it is 'only natural' that parental rights should vest in biological parents is the objective status that biological ties supposedly have. Consider, for example, the following statement:

> The biological links in a family create powerful bonds because they are particular, specific, unique, and most important, irreversible connections. While one can divorce a spouse, the genetic tie between parent and child or between siblings can never be undone.
>
> Moreover, genetic ties can be extended over time and space; they exist despite physical distance or the absence of daily encounters.[28]

This passage claims some sort of pre- and trans-discursive significance for genetic ties. The implication is that there would be something badly wrong with a society's

27 Marilyn Strathern, 'Introduction: A Question of Context' in Jeanette Edwards et al (eds), *Technologies of Procreation: Kinship in the Age of Assisted Conception* (1999) 9, 23–4.

28 Sydney Callahan, 'Gays, Lesbians and the Use of Alternate Reproductive Technologies' in Hilde Nelson (ed), *Feminism and Families* (1997) 188, 191.

practices – including laws on parental responsibility – which failed to take that significance into account. But clearly the particularity, specificity, uniqueness and irreversibility of genetic links that the passage mentions is specific to the discourse of biology – just as, to take on the example provided in the quote, the dissolubility of the spousal bond is specific to the discourse of law.[29] And just as the spousal bond is indissoluble within, say, the discourse of Roman Catholicism, genetic ties, considered outside biological discourse, lack the incontrovertible significance they have within it.

It follows that in discussing how parental responsibility should be allocated, the existence of the biological category of 'genetic tie' has, in and of itself, no objective moral significance.[30] Or, to put it in Dorothy Roberts's words, 'the genetic tie's [social] meaning is not biologically preordained'.[31]

Leading ethicist Margaret Somerville has developed her own formulation of the argument about the intrinsic value of biological parenting. In synthesis, Somerville's argument, as she outlines it in her recent book *The Ethical Imagination: Journeys of the Human Spirit*,[32] states that a presumption in favour of respecting 'the Natural' is an essential moral principle that should guide our policy choices.[33] Keeping marriage heterosexual and providing that children be raised by heterosexual (married) couples, who, wherever possible, have a biological connection with the child, shows due respect for the Natural. This is because marriage is the formalisation of an inherently (biologically) procreative relationship.[34]

In critiquing, above, the argument about the intrinsic value of biological connection, I presented this argument as the notion that the objective significance of genetic ties within the discourse of biology carries over into other discourses, such as moral discourse. Somerville's argument is slightly different. She does not think of biology as a discursive realm about a certain 'reality', but rather as that reality itself; in other words she assumes that biological discourse offers a transparent reflection of that reality. Also, her focus is less on the 'reality' of biological links between children and parents as on the (related) biological reality of procreative sex.

Restated from Somerville's perspective, then, the 'intrinsically valuable' version of the argument from biology proceeds through the following stages:

- One: it is an incontrovertible biological fact that heterosexual relationships are 'inherently procreative'.

29 And only in those jurisdictions where the law makes provisions for divorce.

30 Cf Kenneth Alpern, 'Genetic Puzzles and Stork Stories: On the Meaning and Significance of Having Children' in Kenneth Alpern (ed), *The Ethics of Reproductive Technology* (1992) 147, 160–4; John Hill, 'What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (1991) 66 *New York University Law Review* 353, 389–91.

31 Dorothy Roberts, 'The Genetic Tie' (1995) 62 *University of Chicago Law Review* 209, 272.

32 Margaret Somerville, *The Ethical Imagination: Journeys of the Human Spirit* (2007).

33 Ibid 107.

34 Ibid 102–3, 148–9.

- Two: this incontrovertibility carries over, so to speak, into the realm of culture to establish a (moral) norm whereby marriage should be heterosexual and children reared by their biological parents (or, where that is not possible, at least by a heterosexual couple).
- Three: the carryover effect – and this is Somerville's original contribution to the argument from biology – is mediated and enabled through the concept of the Natural.
- Four: this concept can do the job precisely because the Natural is partly a matter of biological fact and partly a matter of cultural construct grounded in, or building on, biological realities.[35]

There are, however, at least three problems with this argument. First, the concept of the Natural remains far too nebulous. Somerville is aware of this difficulty, particularly where she argues that it may be difficult to distinguish between the cultural aspects of the Natural and the rest of culture (not grounded in the Natural), but she offers very little to dispel or reduce the confusion.[36]

Second, Somerville's justification for settling on a presumption in favour of the Natural is not only purely consequentialist[37] but also tautological. Rejecting the concept of the Natural, she claims, prevents us from distinguishing acceptable from unacceptable (unnatural) technological interventions/cultural forms,[38] but no explanation is offered as to *why* the Natural is the appropriate watershed.

Third, the insufficiency of the concept of the Natural in enabling the carryover effect from biological facts (the procreativity of heterosexual intercourse) to specific cultural forms (heterosexual marriage, biological parenting) is confirmed by a sleight of hand in Somerville's argument. When Somerville is still at the stage of identifying the biological fact in which the naturalness (goodness) of marriage/biological parenting is supposedly grounded, she speaks of it in terms of 'inherently procreative relationship between a man and a woman'.[39] But surely if there is anything 'inherently procreative' between a man and a woman it is merely their sexual act, not the relationship as a whole. Somerville's rhetorical device invests marriage/biological parenting with an aura of (biological) naturalness at the very outset, in the context of an argument ostensibly directed to showing the (cultural) naturalness of these social forms!

3 Biological Connection as Instrumentally Valuable: Biological Connection and Children's Interests

The second version of the argument that parental responsibility should vest in a child's biological parents (which often accompanies the first version of that

35 Ibid 96 and onwards.

36 Ibid 104–5.

37 Yet Somerville claims that the presumption can be useful in principle-based ethics: ibid 107.

38 Ibid 97.

39 Ibid 149.

argument, highlighting its philosophical insufficiency) claims that there exists some important connection between biological ties and children's interests.[40]

A particular formulation of this argument is that there is a connection between biological ties and nurturance. Sometimes this point seems to be merely assumed,[41] at other times it is explicitly articulated.[42] In either case, the implication is that it is in a child's natural and best interest to know and be cared for by its biological parents.[43]

The classical exposition of the argument connecting biological parenthood and nurturance is Aristotle's idea that children belong to their parents as a product belongs to its producer, and people naturally care for and love what is theirs.[44] Although this argument may resonate with popular wisdom even in this day and age, it is unconvincing.[45] Anthropological literature, for example, shows that among peoples who do not have a concept of biological fatherhood (in the sense that they do not connect heterosexual intercourse with begetting) men are as nurturing towards the children born to their wives (who may not be biologically theirs) as elsewhere.[46] This indicates that the relationship of adult-child belonging which, on the Aristotelian view, grounds the adult's special love for the child need not be based on the adult's biologically producing the child. So long as social practices (for example legal rules on parental responsibility) constitute the relationship as one of belonging, the adult's love and nurturance can be triggered regardless of biological bonds.[47]

Indeed, research on children raised by same-sex couples suggests that a non-biological parent's nurturance is not even necessarily connected to her or his

40 Ibid 102–3, 148–9.

41 William Wagner, *The Contractual Reallocation of Procreative Resources And Parental Rights: The Natural Endowment Critique* (1995) 140–2.

42 Callahan, above n 28, 196–7.

43 Ibid; Wagner, above n 41, 140–1, 153.

44 Jeffrey Blustein, *Parents and Children* (1982) 37, 42.

45 More recent expositions of the argument that biological bonds and nurturance go hand in hand sometimes appeal to evidence provided by evolutionary psychology and sociobiology: see, eg Callahan, above n 28, 197, without hinting at the dubious epistemological standing of these disciplines: see, eg, Lynne Segal, 'New Battlegrounds: Genetic Maps and Sexual Politics' in Belinda Brooks-Gordon et al (eds), *Sexuality Repositioned: Diversity and the Law* (2004) 65, 72–3.

46 Bertrand Russell, *Marriage and Morals* (1958) 20–1. On the problem of the extent to which Trobrianders actually ignored the role played by males in reproduction, see Peter Loizos and Patrick Heady, 'Introduction' in Peter Loizos and Patrick Heady (eds), *Conceiving Persons: Ethnographies of Procreation, Fertility and Growth* (1999) 1, 4, 13–14. Anthropology also shows that ignoring the biological aspects of reproduction is not a prerequisite for the successful institution of parent-child relationships between children and non-biological parents: Nicole Sault, 'Many Mothers, Many Fathers: The Meaning of Parenting around the World' (1996) 36 *Santa Clara Law Review* 395.

47 Research on the likelihood of child abuse in different familial environments (married biological parents, unmarried biological parents, biological mother and stepfather etc), assuming it is reliable, is consistent with the ideas that there is no simple relationship between nurturance and biology, and that social and legal practices constituting adult-child relationships as ones of belonging play a far more crucial role in triggering nurturing behaviour. Ironically, right-wing commentators and think-tanks use (and indeed undertake) this sort of research to support regressive policies promoting the traditional nuclear family. See, eg, Bettina Arndt, 'Double or Nothing', *Sydney Morning Herald* (Sydney), 2 December 1999; Institute for the Study of Civil Society, *Does Marriage Matter?* <http://www.civitas.org.uk/pdf/cs31.pdf> at 24 April 2009.

relationship with the child being *socially* or *legally* constituted as one of belonging: society's failure to adequately recognise her or his parental role poses a challenge,[48] but does not impact on the adult's love and nurturance.[49]

Unfortunately, the notion that non-biological parenting is inherently lacking has been perpetuated by many studies on parenting, such as ones on adoption, where researchers have largely devoted their attention to the study of negative, rather than positive, outcomes of non-biological parenting and failed to consider their social determinants.[50]

It is also worth underscoring the ethnocentric quality of extolling the virtues of biological parenting as inherently more nurturant. In this regard, Chodorow's observations remain as relevant today as when she made them almost three decades ago:

> There are whole cultures with extended households and various kinds of shared parenting, whole classes which have been reared by nurses. … [A]t this stage of our knowledge, it appears that something like *parental* involvement – ongoing commitment to a *particular* child – is essential. One becomes a person *in relation to* stable, caring others. But such commitment may be made by biological or nonbiological parents, members of an extended household or kin network, even, in some cases, nurses.[51]

Somerville, once again, has developed her own formulation of the argument that biological parenting is in the interest of children. According to her, children have a right to know and be raised by their biological father and mother (or, if that is not possible, at least a father and a mother). This right is established by the normative status of heterosexual marriage (in which two-parent, dual gender, and as a rule biological, parenting is the norm) which, as we have seen, is in turn based on the 'inherent procreativity' of heterosexual intercourse.[52]

Somerville's children's rights-based argument remains largely formalistic: rather than explaining which interests of children ground the right to a (biological) mother and father, it extrapolates those rights from the 'naturalness' of heterosexual intercourse. The implication is that biological parenting should be the norm because it is 'natural', but no reasons are offered as to *why* it is better for children's wellbeing.[53] To this extent the argument is an extension of Somerville's

48 That these challenges may conceivably affect the quality of the non-biological relationship with the child is of course not a reason to rule out non-biological parenting but rather to change society's (including the law's) failure to adequately recognise the role of non-biological parents.

49 See generally Gillian Dunne, 'Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship' (2000) 14 *Gender and Society* 11.

50 Katarina Wegar, 'Adoption, Family Ideology, and Social Stigma: Bias in Community Attitudes, Adoption Research, and Practice' (2000) 49 *Family Relations* 363.

51 Judith Lorber et al, 'On "The Reproduction of Mothering": A Methodological Debate' (1981) 6 *Signs* 482, 513.

52 Somerville, above n 32, 102–3, 148–9.

53 This formalistic defence of a child's right to biological parenting allows Somerville to avoid claiming that biological parenting is inherently more nurturing, or that its dual-gender quality allows for better psychological development, than child-rearing arrangements involving non-biological parents – arguments, as we have seen, belied by reputable research.

own formulation of the argument from the intrinsic value of biological parenting examined above (and hence stands or falls with it).

Somerville's children's rights argument becomes genuinely a version of the argument about the instrumental value of biological connection to children's wellbeing only where she argues that:

> knowing who our close biological relatives are and relating to them is central to how we form our human identity, relate to others and the world, and find meaning in life. Children … who don't know their genetic origins cannot sense themselves as embedded in a web of people.[54]

This argument, even if it were correct, proves too little: it may be a justification for the right to know one's genetic origins, but is insufficient to justify the right to biological parenting (and perhaps Somerville offers it largely in support of the former rather than the latter right). Even leaving this aside, the argument is based merely on anecdotal evidence;[55] it obscures how, regardless of biological connection, children's identities are negotiated and solidified through meaningful interpersonal relationships in many adoptive, same-sex and non-white families;[56] and it fails to interrogate the social and cultural practices responsible for mythologising biological connection, and of which the difficulties experienced by people who perceive a loss of genetic identity are probably an artefact.

In conclusion, neither version of the argument form biology, in any of their different formulations, including Somerville's, manages to establish that biology is a morally relevant criterion for the attribution of parental responsibility.

B *Caregiving*

1 *The Primary Caregiver Doctrine in the Context of Divorce*

It is unsurprising that the classic formulation of the second version of the argument from biology attempts to redeem that argument by establishing a connection between biology and nurturance/caregiving. Nurturance and caregiving are intuitively appealing criteria for the distribution of parental rights because they appear child-centred. Historically, considerations of nurturance/caregiving have indeed been used to justify disparate approaches to the allocation of parental responsibility, particularly in the context of divorce.[57]

54 Somerville, above, n 32, 154.

55 Ibid 148.

56 For example, genetic parenthood is de-emphasised in African American communities: see Roberts, above n 31, 269–72.

57 For example, in the United States an appeal to nurture has been used to rationalise the general preference for maternal custody (both physical and legal): Marygold Melli, 'Towards a Restructuring of Custody Decision-Making at Divorce: An Alternative Approach to the Best Interests of the Child' in John Eekelaar and Petar Sarčević (eds), *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century* (1993) 325, 327. The same appeal to nurture was also used to rationalise the historical antecedent of maternal preference (the tender years doctrine), as well as the earlier judicial preference for paternal custody: see Debra Friedman, *Towards a Structure of Indifference: The Social Origins of Maternal Custody* (1995) 28, 43.

The doctrine of the so-called 'primary caregiver' affirms the principle that physical custody and parental authority should vest, in principle, in the parent who has primarily cared for the child before divorce – in most cases the child's mother. Understanding the doctrine's advantages may help us determine the extent to which comparable ones may be involved in adopting caregiving principles in contexts different from divorce-related custody disputes.

The reason why a primary caregiver preference is said to benefit children of divorcing parents is that it 'provide[s] a means for quick resolution of the dispute',[58] thus avoiding the detrimental effects of prolonged custody litigation. Of course other solutions could achieve the same result, but the primary caregiver preference has the advantage of being 'grounded in respected child development theory'[59] according to which 'the ties that develop between a young child and its primary caretaker … are … essential to the healthy emotional development of the child'.[60] These considerations, coupled with the argument that the potential for parental conflict involved in court or law-imposed shared parental responsibility arrangements in post-divorce families poses risks to children's well being,[61] have been used to justify the recommendation that physical custody and decisional authority be vested in a primary caregiver after divorce.

Practical considerations may strengthen the case for attributing parental responsibility (in the sense of decisional authority) to primary caregivers in post-divorce families. It has been persuasively argued that parenthood 'that does not encompass a fair share of [caregiving] tasks … has the consequence that the [person] does not know the child sufficiently well to be able sensibly to take decisions'[62] in the child's interest. This point, made in relation to unmarried absent fatherhood, is equally applicable to non-resident post-divorce parents who were not the child's primary caregivers during marriage.

The arguments used to support the doctrine of the primary caregiver, therefore, are essentially child-centred. Indeed, the doctrine tends to be proposed, whether implicitly or expressly, as the best interpretation of the standard of the best interest of the child[63] – the standard that courts around the world apply when deciding who should have 'custody' of the children of a marriage ending in divorce.

58 Melli, above n 57, 328.

59 Ibid 330.

60 Ibid.

61 Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: The First Three Years* (2000) 56, 60; Susan Boyd, *Child Custody, Law, and Women's Work* (2003) 196.

62 Ruth Deech, 'The Rights of Fathers: Social and Biological Concepts of Fatherhood' in John Eekelaar and Petar Sarčević (eds), *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century* (1993) 19, 30.

63 See Arnup and Boyd, above n 26, 93; Boyd, *Child Custody, Law, and Women's Work*, above n 61, 211. Rhoades suggests re-conceiving the doctrine of the primary caregiver as a 'status quo principle', whereby judges, absent evidence of harm, would privilege the maintenance of caring arrangements preceding divorce to promote children's well-being through stability and continuity in caregiving: see Susan Boyd, Helen Rhoades and Kate Burns, 'The Politics of the Primary Caregiver Presumption: A Conversation' (1999) 13 *Australian Journal of Family Law* 233, 250–1. Others have suggested that the primary caregiver doctrine should replace the best interest standard, but still mainly on the ground that this would promote children's interests: see for example Melli, above n 57, 328, 330–1. Carol Smart and Bren Neale have recently suggested that a 'principle of care' should inform decision in custody/contact disputes – a principle that incorporates, but is not limited to, the primary caregiver doctrine: Carol Smart and Bren Neale, *Family Fragments?* (1999) 193–5.

Yet qualitative research suggests that children's experiences of post-divorce co-parenting (that is, parenting where mother and father share parenting equally, this being the main logical alternative to sole custody vested in the primary caregiver) vary widely. Smart et al state that: '[W]hile co-parenting [is] a source of security and emotional warmth for some children, especially younger ones, it could equally be a source of unhappiness and a prolonging of internecine misery for others'.[64] This makes the children-based defence of the primary caregiver doctrine less than unassailable – even if we reject, as we should, fathers' rights groups' simplistic and self-serving claims that research shows a clear link between fathers' involvement in parenting after separation or divorce and children's well-being.[65]

Although the primary caregiver doctrine may not be entirely watertight, I would argue that it is as plausible an interpretation of the best interests standard as any in the abstract, all other things being equal. As such, the doctrine could well be appropriately used as a presumption or starting point in divorce (or analogous) custody cases – with the proviso that the child's best interests, in the particular circumstances of concrete cases, may warrant a court's providing for a different allocation of parental responsibility than the doctrine would recommend.

But why bother with a 'starting point' or a presumption at all, when courts could just decide each case on its own merits – as they ostensibly did in Australia until the 2006 changes – so as to give concrete content to the child's best interests standard? Even in jurisdictions where guidance is given to courts applying the best interests standard (for example, through a list of factors courts need to take into account), the concept of 'best interests' remains too labile, the reality too complex, and the future too unpredictable to allow the standard to provide reasonably univocal answers in many cases. In some cases it may be reasonably clear that a particular parent's having or retaining parental responsibility for a child would be harmful for the child. But in many others, no matter how conscientiously the court has done its job, the situation is simply too over-determined to allow us to say with sufficient confidence that a child's interests are served by allocating parental responsibility in a particular way, and that they would be harmed if the decision were different. Having some sort of presumption or starting point, then, becomes crucial both in practical terms – to guide decision makers – and in terms of equity – to ensure transparency in outcomes.

Settling on the primary caregiver preference as the starting point of choice is not so much justified by the fact that it is the only plausible interpretation of the child's best interests standard in the abstract (though it is more plausible than many others). Rather, a primary caregiver preference will in most cases be compatible with our best guesses of what the interests of particular children require and ensure a fair consideration of the interest in parenting of the divorcing or divorced parents.

64 Carol Smart, Bren Neale and Amanda Wale, *The Changing Experience of Childhood: Families and Divorce* (2001) 140.

65 Rhoades, 'Yearning for Law: Fathers' Groups and Family Law Reform in Australia', above n 1, 135.

The literature tends to make this point about parental interests merely obliquely[66] – partly, no doubt, for fear of a backlash if anyone dare say that anything other than children's interests should be contemplated when decisions affecting children's lives are considered. This problem is particularly acute in a climate where feminist opposition to shared parental responsibility after divorce is represented and perceived as selfish, largely, no doubt, because of the rhetoric of the fathers' rights movement.

But the very success with which this movement has mobilised the discourse of the child's welfare[67] to promote its own agenda suggests that foregoing intellectual honesty and clarity is not necessarily conducive to a just outcome. The point that the primary caregiver principle should be supported because it treats fairly the interests of divorcing parents, then, needs to be made more openly and unapologetically. The principle is morally defensible because the parent who showed greater commitment to the child by forgoing or compromising the prospect of a rewarding career in the marketplace has a significantly more powerful moral claim than the other parent to have her or his interest in continuing to parent that child protected.[68] This proposition becomes even clearer if one keeps in mind that primary caregivers tend to be women, and that gender operates at a number of levels to make access to the labour market inequitable for women. As Smart notes, a woman's 'stake in the public sphere was lost at the point that she left the labour market to become a mother. It is not something that can simply be regained at the point when marriage fails'.[69]

66 See, eg, Carol Smart, 'Power and the Politics of Custody' in Carol Smart and Selma Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (1989) 1, 24–5. But see Boyd, *Child Custody, Law, and Women's Work*, above n 61, 162.

67 Boyd, *Child Custody, Law, and Women's Work*, above n 61, 201.

68 On the inequitable distribution of unpaid (including caregiving) work as between men and women within households, see Human Rights and Equal Opportunities Commission, *Striking the Balance: Women, Men, Work and Family – Discussion Paper* (2005) 25–38. Even in situations in which a woman (but it could be a man) *chooses* to perform all or most of childcare tasks, and her partner's adoption of an exclusive or predominantly breadwinning role does not spring from lack of real commitment to the child, the primary caregiver preference can be understood as benefiting the child, in the sense clarified in the text. Additionally it can be said to treat fairly the interests of the parents inasmuch as they have made different personal investment in the domestic and market spheres: see Kirsten Sandberg, 'Best Interests and Justice' in Carol Smart and Selma Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (1989) 100, 122–3; Susan Boyd, 'From Gender Specificity to Gender Neutrality? Ideologies in Canadian Child Custody Law' in Carol Smart and Selma Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (1989) 126, 152. Compare also Shoshana Gillers, 'A Labor Theory of Legal Parenthood' (2001) 110 *Yale Law Journal* 691, 717–20. Boyd, while supporting the primary caregiver presumption, has pointed out its limitations by summarising a number of feminist concerns: Boyd, Rhoades and Burns, above n 63, 239–43. The questions Boyd raises include: Would judges interpret caregiving appropriately when faced with examples of non-white or non-heterosexual or non-able-bodied or non-full-time homemaking caregiving? Might the primary caregiver presumption entrench the idea that childrearing is the primary responsibility of women and slow down the development of more equitable child-rearing arrangements? I do not address these concerns because they tend not to be directly relevant to my goal in discussing the primary caregiver principle, which is to throw light on the circumstances under which one can be deemed morally entitled to parental rights. However, note that according to Sack it should be possible to refine the primary caregiver presumption so as to address feminist concerns such as those just mentioned: Laura Sack, 'Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Custody Cases' (1992) 4 *Yale Journal of Law and Feminism* 291, 327.

69 Carol Smart, 'The "New" Parenthood: Fathers and Mothers after Divorce' in Elizabeth Silva and Carol Smart (eds), *The New Family?* (1999) 100, 112.

In those cases in which the child's best interests clearly suggest that leaving her or him under the parental authority of the primary caregiver would be more harmful than an alternative allocation of parental responsibility, I would not hesitate to argue that children's interests should prevail. But, as I argued, in many cases we will simply be unable to confidently reach the conclusion that giving effect to the primary caregiver doctrine will harm children's best interests.

2 The Doctrine of the Primary Caregiver outside the Context of Divorce

Caregiving is increasingly looked at as an organising principle to determine in whom parental responsibility should vest also outside the context of divorce. For instance, Martha Fineman argues that the law should generally protect the relationship between children and their mothers, but only selectively protect that between children and their fathers. The law would protect the latter relationship only if the father has effectively and significantly been involved in caregiving.[70] The privileging of the mother-child dyad is itself explained in terms of caregiving: it is mothers who in real life tend to do all or almost all of the nurturing work.[71]

Part of the reason why Fineman privileges the category of motherhood rather than that of caregiving is her scepticism about the usefulness of de-gendered legal categories. However, I would suggest that another reason is that Fineman intends her proposal to apply not only to cases of divorce (or other cases of custody disputes), but also to identify who should hold parental rights over newly-born children. Fineman's proposal, in replacing the primary caregiver doctrine with maternal preference, provides a rule which makes sense in light of caregiving principles, in that it attributes parental rights to the parent who is disproportionately likely to take up caregiving responsibilities in the child's life.[72] The preference can also be read as rewarding the undertaking of pre-existing caregiving burdens, those carried out during gestation.[73] Thus, Fineman's proposal of maternal preference is meant to apply to all heterosexual relationships in which children are born, be they marital or not, whether or not they end up in divorce, and from the moment of the child's birth.

Fineman's model, however, is not without problems. Although it may be appealing in terms of feminist politics,[74] it does not necessarily achieve an optimal or fair allocation of parental responsibility in all families. Imagine a cohabiting heterosexual couple to whom a child is born, and who decide to adopt a male

70 Martha Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (1995) 234–5.

71 See, eg, Eichler Margrit, *Family Shifts: Families, Policies and Gender Equality* (1997) 75.

72 'Fathers are highly involved in the care of their children in only 5 to 10 per cent of Australian families, and share the physical care of their children in only 1 to 2 per cent of families': Adele Horin, 'Fathers Are Still Not Sharing the Role, Says Study', *Sydney Morning Herald* (Sydney), 1 December 2003, 3.

73 Cf Martha Field, 'Surrogate Motherhood' in John Eekelaar and Petar Sarčević (eds), *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century* (1993) 223, 231.

74 Arnup and Boyd, above n 26, 94. But even this is contested, for example on the ground that its privileging of biological motherhood is predicated on the assumption that biological mothers are always good: ibid.

breadwinner/female caregiver family arrangement. According to Fineman's model, the father would presumably not acquire parental responsibility while being a breadwinner. However, it is unclear that this would be a desirable solution during cohabitation. Cohabitation may be taken to suggest that the family is reasonably well functioning. In such circumstances, unlike in the case of divorced or separated parents, it can be speculated that parents will tend to find an agreement on the issue of what is good for the child. So long as the breadwinner has the benefit of the caregiver's presence and advice, the former may also be reasonably presumed to be competent to make decisions for the child. Indeed, presumptively denying him parental responsibility may be likely to engender the sort of tensions which would be unlikely to be conducive to a happy family environment. Hence, Fineman's model would seem a less plausible interpretation of the child's best interest standard in the case of cohabiting heterosexual parents than the primary caregiver preference appears to be in the context of divorce.

Crucially for the purposes of my argument, Fineman's model in this case also fails to treat fairly the man's interest in parenting: after all, providing economically for the family is a form of commitment to the child.[75] In the context of divorce (and generally when a relationship breaks up) it may be necessary to make the stronger moral claim to parental rights (that of the primary caregiver) prevail over the other unless the parents are happy to share parental responsibility (partly to prevent the very real risk of the non-resident parent's intrusion in the other parent's life). But in a functioning heterosexual cohabiting relationship surely one can afford settling on an allocation of parental responsibility that tries to support the interests in parenting of both parents, particularly in a context where:

> [t]he findings of therapeutic, psychological and sociological research suggest a qualitative shift in men's physical and emotional relationships to children and childcare, as well as in men's own self-identification around ideas of commitment to 'family life'.[76]

Ruth Deech's proposal addresses the problem presented by Fineman's model. Deech's proposal is also centred on caregiving. She suggests that only committed fathers should share parental prerogatives with mothers, and she would take the existence of a marriage or cohabitation to be the watershed indicating whether or not the father is committed.[77] Her argument is that absent fatherhood making claims to parental responsibility 'is an empty egotistical concept'[78] (that is, it does not fairly treat the interest of mothers and fathers). She also points out, as already noted, that absent fatherhood renders the father unfit to make decisions for the child (that is, it is prejudicial to children's interests).[79]

This model is in some respects an improvement on Fineman's, but it could do with improvements of its own. For example, it uncritically assumes that married status is synonymous with paternal commitment to the child. But what about

75 Cf Drucilla Cornell, *At the Heart of Freedom: Feminism, Sex and Equality* (1998) 116.

76 Collier and Sheldon, above n 21, 11.

77 Deech, above n 62, 30–1.

78 Ibid 30.

79 Ibid.

absent married fathers? Why bother with marriage at all? Would cohabitation (regardless of marriage) not be a more reliable indicator of fatherly commitment?[80] Additionally, gendered as it is, the model in its current form does not cater for the possible existence of male primary caregivers.

Nor are either Fineman's or Deech's proposals easily applied in the context of devising general rules on the allocation of parental rights over children newly born to non-heterosexual families. To begin with, the models outlined above say nothing about the position of same-sex non-biological co-parents.[81] The assumptions of Fineman's explicitly gendered model, for example, cannot be transferred to same-sex parenting. Thus, non biological co-mothers seem to be much more likely to take up the role of primary caregivers than biological fathers in heterosexual families.[82]

Deech's model centred on cohabitation between the parents as a mark of the father's commitment is also devised with the heterosexual nuclear family in mind. It would prove inadequate even if applied to what is, in form, the closest lesbian-gay equivalent of a heterosexual nuclear family – namely, a two-parent dual-gender lesbian-gay co-parenting project. This is because lesbians and gay men who wish to co-parent a child do not necessarily (or even ordinarily) cohabit.

The case of lesbian/gay families shows that caregiving-based models of parental authority allocation have often failed to be sufficiently sensitive to the issue of family diversity. Nonetheless, the ideas underlying these models (as distinct from the specific models themselves) may well play a role – along with other principles – in a system of rules governing the allocation of parental rights. Let me articulate more clearly some of these ideas:

- primary caregivers are likely to know better the child and her or his needs;
- important emotional bonds tend to develop between children and their primary caregivers;
- rewarding primary caregiving with the attribution of parental responsibility tends to be fair to the interests of the adults parenting a child;
- a gestational mother's reproductive labour can be understood as primary caregiving;
- policies rewarding caregiving with the attribution of parental responsibility may encourage some adults to take a more active interest in, and make a greater effort to meet, the child's needs;
- absent parents are unlikely to know the child and her or his needs;

80 Even cohabitation is not altogether reliable as an indicator, but it may be taken to strike a reasonable balance between the need to have a workable and clear rule and the need for the law to reflect as accurately as possible the needs and interests of the family members.

81 Cf Susan Boyd, 'Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility' (2007) 25 *Windsor Yearbook of Access to Justice* 63, 92.

82 Susan Golombok, 'Lesbian Mother Families' in Andrew Bainham, Shelley Sclater and Martin Richards (eds), *What Is A Parent? A Socio-Legal Analysis* (1999) 161, 174.

- rewarding absent parenthood with the attribution of parental responsibility does not treat fairly the interest in parenting of the caregiver(s) vis-à-vis that of the absent parent;
- cohabiting adults in a relationship with the child's primary caregiver(s), even if they are not themselves primary caregivers, may be assumed to be competent to make decisions for the child;
- if the same adults cease to cohabit with the child's primary caregiver(s) their position becomes more similar to that of absent parents in terms of their ability to make decisions for the child;
- there is a potential for conflict (prejudicial to the child) between formerly cohabiting parents who are made to continue to share parental responsibility after cohabitation ceases, particularly if their respective knowledge of the child differs in degree;
- shared parental responsibility after cohabitation ceases may be used by the non-resident parent as means to intrude in the resident parent's life.

These propositions can assist us in thinking about how to allocate parental responsibility by clarifying some of the circumstances under which the interest in parenting tends to morally entitle one to parental responsibility.[83] In particular, they clarify how being in particular circumstances (for example, being an absent parent, or a formerly cohabiting parent who was not a primary caregiver during cohabitation, or somebody other than the birth mother of a newly born child) may count as a counter-consideration outweighing the importance of one's interest in parenting as a ground for parental rights.

C *Intention*

Drucilla Cornell, among others, has suggested that it should be possible for two or more people to agree to assume parental responsibility with respect to a certain child, regardless of their sex or biological relationship with the child. If, later in the child's life, others wished to take on parental responsibility for her or him, they could do so by agreement with the pre-existing parents.[84]

Proposals that intention be counted in its own right (that is, apart from biological connection) as a basis for attributing parental authority have not developed in a vacuum. Rather, they are the natural extension of intentional parenthood as a practice of non-traditional families. The expression 'intentional parenthood' in this context captures a set of kinship-building practices deliberately engaged in

83 As my remarks in the text make clear, I disagree with the view according to which rights discourse belongs to an ethic of justice diametrically opposed to an ethic of care: see Smart and Neale, above n 63, 170–1.

84 Cornell, above n 75, 125–6. Cornell suggests that each person acquiring parental responsibility through agreement could not subsequently renounce it, in order to protect children's need for stability: ibid 126. However, as I pointed out above, others suggest, and I would agree, that children risk being destabilised precisely when their parents' shared legal responsibility for them remains unaffected by divorce or other important changes in residence or caregiving patterns.

by a purely 'intentional' (ie non-biological) parent and, generally, other adults whose parental status is less socially problematic (eg a biological parent) so as to construct and solidify the parental status of the 'intentional parent'. For example, lesbian families have been known:

> for carefully '[tying] in' the non-biological mother, using various mechanisms, which might include inseminating at home, using the non-biological mother's surname for the child, sharing tasks of infant care and feeding to the extent possible [etc].[85]

Proposing that intention be made to legally count as a ground for attributing parental responsibility stems from an awareness, and needs to be placed in the context, of the reality of such kinship-building practices. In this sense, understanding these proposals as advocating that there should be perfect freedom to contractually allocate and reallocate parental responsibility at whim distorts their spirit,[86] as well as obscures the fact that the proposals envision such parental agreements as grounded in practices of kinship.

These points are entirely missed by conservative critiques of parenting by intention. They are also missed, more generally, by family values discourse idealising the heterosexual nuclear family as foundational to civil society on account of the beneficial functions which it is said to be exclusively capable of, or particularly effective in, performing.[87] According to this discourse, the intentional ordering of family relationships is an evil because, in questioning or undermining the currency or stability of the heterosexual nuclear family, it fosters the disintegration of the whole social body.

As Smart puts it, this stance:

> reflects current concerns over individual choice… [From this perspective] people are allowed too easily to make the wrong choices when it comes to family life, child care, marriage and reproduction, and what is needed is a reinforced legal structure to ensure that they are more likely to

85 Boyd, 'Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility', above n 81, 89.

86 For William Wagner, the acceptability of intention as a basis for the allocation of parental rights tends to decrease the further removed the allocation it recommends appears to be from the standard allocation based on the nuclear family model: Wagner, above n 41, 32–4, 141–2. One of Wagner's claims is that intentionally allocating parental rights treats children as things: ibid 149, 162. But this view holds only if we implausibly assume that parenting by intention is justified by and expresses the principle that adults are morally entitled to arrange and rearrange their family configurations for whatever reasons without having regard to children's interests. Wagner also suggests that 'a parent cannot contract away his or her rights without undermining the currency and meanings of relationships based on lineage within society generally': ibid 150. But in his argument I find no persuasive explanation as to why such meanings are particularly valuable. Wagner objects to parenting by intention on other grounds too, which seem to apply exclusively to the form of parenting by intention that he specifically targets (but which it is not the purposes of the present discussion to defend), namely, the allocation of parental rights in commercial contexts governed by contractual principles.

87 See Lynn Wardle, 'The Bonds of Matrimony and the Bonds of Constitutional Democracy' (2003) 32 *Hofstra Law Review* 349, 372; Eric Andersen, 'Children, Parents and Non-Parents: Protected Interests and Legal Standards' [1998] *Brigham Young University Law Review* 935, 947–8; Ronald Fletcher, *The Shaking of the Foundations: Family and Society* (1988) 24–34.

> make the right choices.[88]… [T]he overwhelming assumption is that the choices that people make are undermining families and that this constitutes a social problem.[89]

However, this family values rhetoric opposing the intentional ordering of family relationships should be rejected as unreasonable. On the one hand, it ignores the integrative functions of intentional parenting and misunderstands it by failing to see that it is embedded in practices of kinship. On the other hand, this discourse is based on a premise – that heterosexual nuclear families perform beneficial functions which cannot be provided equally well or better under different social arrangements – that is plainly naïve. This is illustrated, for example, by the confidence with which conservative authors holding this view assert – oblivious of feminist literature indicting marriage as the primary agent of gender inequality – that the functions that are optimally promoted by heterosexual nuclear families include fostering good relations between the sexes.[90]

The fact that family values rhetoric fails to make a convincing case against parenting by intention has important implications. The interest in parenting is valuable because of the value of a life with children, which is connoted by the special interpersonal bonds that are created as a result of undertaking and meeting commitments to a child. The law has traditionally supported the desire to satisfy the interest in parenting only to the extent that such a desire originated from people choosing to create heterosexual nuclear families. But the moral importance of the interest in parenting suggests that, in the absence of counter-considerations, the option of partaking in a life with children should be secured regardless of whether one happens to find the heterosexual nuclear family one's preferred or a feasible way of doing so. And this is precisely what intentionality – as a basis for the allocation of parental responsibility – does: it avoids restricting the option of entering a valuable form of life only to those who intend to create a heterosexual nuclear family. Indeed, the voluntary assumption and allocation of parental rights maximises people's opportunities to partake in a life with children. Given that no simple causal relationships can be established between family structure and children's wellbeing[91] and that other conceivable counter-considerations (such as the 'family values' based disintegration argument) appear devoid of merit, allocating parental responsibility through agreements appears to be a defensible moral entitlement.

That entitlement may be of particular value to non-traditional families, such as lesbian and gay families. The element of choice in lesbian and gay families is often emphasised. Lesbian and gay families have been dubbed 'families we choose' or

88 Carol Smart, 'Towards an Understanding of Family Change: Gender Conflict and Children's Citizenship' (2003) 17 *Australian Journal of Family Law* 20, 21. Smart points out that the structuralist tradition in sociological thought has been central in theorising the family as one of a set of interrelated societal institutions which, if affected by change, will destabilise the whole social body. Her argument is to the effect that conservative rhetoric on family values has appropriated this sociological discourse.

89 Ibid 22.

90 Wardle, above n 87, 373–5.

91 See, eg, Victorian Law Reform Commission, *Outcomes of Children Born of ART in a Diverse Range of Families*, Occasional Paper (2004) 17–18.

'families of choice', whether or not they include children.[92] On the one hand, lesbians and gay men are often outsiders to the family as this institution has been traditionally understood, both because they may be rejected by their families of origin,[93] and because they do not associate in a sexually intimate relationship with an adult of different sex to create a nuclear family. On the other hand, lesbians and gay men have appropriated the term 'family' to describe the intimate interpersonal bonds they form,[94] even if these bonds are not necessarily read as 'families' by society at large. It is this playing outside the rules of normative kinship (but, relevantly, and like other non-traditional families, not outside the 'moral realm of care and caregiving')[95] which invests lesbian and gay families with their quality of families of choice.

Lesbian and gay families involving children are viewed as families of choice inasmuch as they 'choose' parenting configurations which do not reflect the heterosexual nuclear family. Since the possible parenting configurations in lesbian and gay families constitute not just one, but a number of creative alternatives to the heterosexual nuclear family, it is no wonder that asking that these alternatives receive recognition tends to become – to a greater or lesser extent – a request for the law's recognition of intentional parenting.[96]

III DOES THE *FAMILY LAW ACT* MEASURE UP?

A *Premise*

Whereas the case for considering biology an acceptable criterion to allocate parental responsibility is yet to be made, both parenting intention and caregiving principles should play some role in constructing a morally defensible system of rules on the allocation of parental responsibility. This general point, even without further elaboration, may be used to evaluate the extent to which the *Family Law Act* has implemented a defensible system of rules on the allocation of parental responsibility. What weight, if any, does the *Act*, as amended in 1995 and 2006,

92 See, eg, Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (1991); Jeffrey Weeks, Brian Heaphy and Catherine Donovan, *Same Sex Intimacies: Families of Choice and Other Life Experiments* (2001).

93 Carlos Ball, *The Morality of Gay Rights: An Exploration in Political Philosophy* (2003) 149.

94 A move which some criticise from within the lesbian and gay community: see Ruthann Robson, 'Mother: The Legal Domestication of Lesbian Existence' in Martha Fineman and Isabel Karpin (eds), *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (1995) 103.

95 Elizabeth Silva and Carol Smart (eds), *The New Family?* (1999) 12.

96 See, eg, Gay and Lesbian Rights Lobby of New South Wales, above n 20, 22–3; Deborah Dempsey, 'Donor, Father or Parent? Conceiving Paternity in the Australian Family Court' (2004) 18 *International Journal of Law Policy and the Family* 76; Audra Laabs, 'Lesbian ART' (2001) 19 *Law and Inequality Journal* 65, 98–9; Nancy Polikoff, 'The Deliberate Construction of Families without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?' (1996) 36 *Santa Clara University Law Review* 375. Attempts at grappling with the issue of recognition of lesbians and/or gay families involving children without resorting at all to the principle of parenting by intention strike me as unsuccessful: see, eg, Matcheld Vonk, 'Lesbian Co-Mothers and a Known Donor with "Family Life" under Dutch Law' (2004) 18 *International Journal of Law Policy and the Family* 103.

give to biology, caregiving and parenting intention in determining how to distribute parental responsibility?

It is in Part VII ('Children') of the *Family Law Act* that the rules determining who has parental responsibility (that is, essentially, decision-making authority with respect to a particular child) are to be found.[97] Some of these rules apply 'by default' at a child's birth and tie the enjoyment of parental responsibility to a person's status as 'parent'. Since the method of conception determines who is to count as parent of a child, these rules operate differently depending on whether the child is born following intercourse or the use of reproductive technology. There are also rules relating to court orders or other legally relevant events, such as agreements between parents, which may intervene to disturb the allocation of parental responsibility as established by the rules applying by default.

An analysis of relevant rules relating to the allocation of parental responsibility suggests that the *Family Law Act* has got its priorities all wrong. The *Act* is heavily biased towards biological or quasi-biological (in the sense of 'one mother, one father') parenting configurations. While some space is carved out for caregiving principles and/or parenting intention it is a very small space indeed.

B *The Objects of Part VII*

The first object of Part VII, as stated in the *Act* itself, is:

> to ensure that the best interests of children are met by … ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives[98] [in light of the principle that] children have the right to know and be cared for by both their parents, regardless of whether their parents are married … or have never lived together; and … a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents.[99]

These passages clearly contemplate that children have *two* parents. But a child can be easily conceived of as having two parents only within a paradigm that assumes that a high value should be placed on biology and the heterosexual nuclear family. According to alternative discourses and practices, such as those connected to the idea of lesbian or gay families of choice, or non-Western kinship systems, there is no reason why a child should have necessarily or even ordinarily two parents.

C *Parental Responsibility prior to Court Orders*

1 *Premise*

The assumption about the value of biology underlying the objects of Part VII sets the general tone of the *Act's* approach to the question of the distribution of

97 But note that the *Family Law Act* does not apply to ex-nuptial children in Western Australia.

98 *Family Law Act 1975* (Cth) s 60B(1)(a).

99 *Family Law Act 1975* (Cth) s 60B(2)(a)–(b).

parental responsibility. Section 61C addresses the question of who has parental responsibility for a child until a court order is granted to alter the situation. The section provides that 'each of the parents of a child … has parental responsibility'. The *Act* does not define 'parent' – other than by clarifying that adoptive parents are included – but from the expressions used in the statement of the objects of Part VII (as well as other references to 'both parents', for instance in s 60CC) it is clear that biological connection, actual or presumed, is the central identifying criterion. This is confirmed not only by the jurisprudence of the Family Court,[100] but by an examination of the provisions relating to presumptions of parentage and parenting testing procedures, as well as those identifying the parents of children born following fertilisation procedures.

2 *Parenting Testing Procedures*

The provision on parenting testing procedures enables a court to order such procedures to be carried out in order to obtain information useful to determining who a child's parent is when that question is relevant to proceedings under the *Act* (including proceedings relating to the allocation of parental responsibility).[101] The testing procedures, as identified in the regulations, are clearly directed to establishing biological connection,[102] confirming the value placed by the *Family Law Act* on biology when it comes to distributing parental responsibility.

3 *Parentage Presumptions*

The presumptions of parentage[103] can also be used to determine parenthood for the purpose of establishing whether parental responsibility vests in a particular person. Importantly, these presumptions are largely gender-specific, that is, they tend to relate to paternity – the more elusive half of the mother-father dyad, which clearly works within the *Act*'s scheme to define normative parenthood.[104] These provisions reflect family law's traditional preoccupation with biological connection, which goes so far as presuming a biological tie between a child and a man (who, as a result, becomes the child's 'parent') where none may exist.

100 *Tobin v Tobin* (1999) 24 Fam LR 635, 645 (Finn, Kay and Chisholm JJ) ('*Tobin*'): 'parent', for the purposes of the Act's Division regarding child maintenance, should assume its 'natural meaning' of biological mother or father; *Re Mark* (2003) 31 Fam LR 162, 166–72 (Brown J) ('*Re Mark*'): the ordinary and natural meaning of 'parent' should apply to the word as used in other parts of the Act too.

101 *Family Law Act 1975* (Cth) s 69W.

102 *Family Law Regulations 1984* (Cth) r 21C.

103 *Family Law Act 1975* (Cth) ss 69P–T.

104 One possible exception to this privileging of biological or quasi-biological models is the *Family Law Act 1975* (Cth) s 69R, which provides that a person whose name is registered in the birth register of a State or Territory is presumed to be a parent of the relevant child. Since in the self-governing Territories the consenting partner of a lesbian biological mother who has conceived a child following a fertilisation procedure can have her name entered in the birth register, she might qualify as parent for the purposes of the *Family Law Act 1975* (Cth) (unless s 60H is interpreted restrictively as containing the *only* criteria relevant to identifying the parents of children born through such procedures, in which case it would render s 69R inapplicable to such children).

The effect of the parentage presumption provisions and the parentage testing provisions, combined with the provision that makes parental status the ordinary determinant of parental responsibility (s 61C), is to attribute parental responsibility on the ground of (actual or fictitious) biological connection, without regard to parenting intention or caregiving principles.[105]

4 *Section 60H*

Section 60H contains provisions identifying the parents of children born following fertilisation procedures. Because, as we have seen, parental responsibility is tied to one's status as parent, s 60H is crucial for the purpose of determining who has parental responsibility for children conceived other than by heterosexual intercourse.

Different subsections of s 60H address themselves to different cases of 'artificial conception'. On the one hand there is sub-s (1), which is applicable to married or de facto heterosexual couples using fertilisation procedures (normally because they cannot conceive by intercourse). This provision essentially facilitates the acquisition of parental status (and hence parental responsibility) for the gestational mother's male partner; they closely reflect traditional parentage presumptions based on presumed biological connection (the effect of which is to reinforce the normative status of the biological father-mother-child unit).[106]

On the other hand, sub-ss (2) and (3) apply to children born to women who are neither married nor in heterosexual de facto relationships – that is, essentially, lesbian and single heterosexual mothers. Unfortunately, s 60h(2)–(3) does not actually contain a principled set of criteria identifying parents in these cases; indeed it is so complex and poorly drafted that there is no agreement about how it should be interpreted. I shall discuss it at length because it directly illustrates that the natural complement to the fixation on biological or quasi-biological models

105 Although vesting parental responsibility in a birth-mother is compatible with caregiving principles, s 61C's apparent deference to those principles is belied by its simultaneous automatic attribution of parental responsibility to fathers, which reveals an overriding preoccupation with biology.

106 *Family Law Act 1975* (Cth) s 60H:

(1) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to a man; and

(b) either of the following paragraphs apply:

(i) the procedure was carried out with their consent;

(ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the man;

then, whether or not the child is biologically a child of the woman and of the man, the child is their child for the purposes of this Act.

…

(4) If a person lives with another person as the husband or wife of the first-mentioned person on a genuine domestic basis although not legally married to that person, subsection (1) applies in relation to them as if:

(a) they were married to each other; and

(b) neither person were married to any other person.

(5) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

of parenthood and parental responsibility is a serious failure to accommodate the needs (and moral claims) of alternative families.

The provisions in s 60H read:

> (2) If:
>
> (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
>
> (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;
>
> then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.
>
> (3) If:
>
> (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
>
> (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;
>
> then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.[107]

The first problem relates to the fact that 'it is not clear [whether] … the provisions of section 60H enlarge, [or] rather … restrict, the categories of persons who are regarded as a child's parents'[108] for the purposes of the *Family Law Act*. In other words, two approaches can be taken to the interpretation of s 60H: one has a restrictive effect; the other has an enlarging one.

The 'restricting' interpretation is that the criteria for establishing parentage mentioned in s 60H are the only ones that can be used to determine who counts as the parent of a child born through 'artificial conception'.[109] The 'enlarging' interpretation is that, when a child is born through 'artificial conception', the criteria contained in s 60H should be taken into account *in addition* to other criteria.[110]

The practical effect of the restricting interpretation is that those who provide sperm in non-coital reproductive arrangements (regardless of their, or anybody else's, parenting intention) never qualify as 'parents'. This is because, according to the restricting interpretation, an 'artificial conception' child is a man's child for the purposes of the *Family Law Act* only if the child is his under a State law prescribed in the regulations; but no State laws are prescribed by the *Family Law*

107 *Family Law Act 1975* (Cth) s 60H(1)–(2).

108 *B v J* (1996) 21 Fam LR 186, 196 (Fogarty J).

109 Except that if a judicial decision existed identifying somebody as parent in these cases, the *Family Law Act* would conclusively presume them to be parents for its purposes: *Family Law Act 1975* (Cth) ss 69S, 69U. The restricting interpretation has apparently been adopted by Guest J in *Re Patrick* (2002) 28 Fam LR 579, 640–3 ('*Re Patrick*').

110 The enlarging interpretation has been endorsed in *obiter* by Fogarty J in *B v J* (1996) 21 Fam LR 186, 196–7 (a case preceding *Re Patrick*) and by Brown J in *Re Mark* (2003) 31 Fam LR 162, 166–72 (a case following *Re Patrick*), whose reasoning was followed by Federal Magistrate Walters in *Re J & M* (2004) 32 Fam LR 668, 670.

Regulations 1984 (Cth) for the purposes of s 60H(3).[111] Thus, according to the restricting interpretation, no man (including no sperm donor) qualifies as parent under s 60H(3).[112]

But the implications of the restricting interpretation are farther reaching. The interpretation leaves 'artificial conception' children born to mothers without consenting husbands or de facto male partners[113] without any legal parent at all in every State and Territory except South Australia and the Northern Territory (as well as Western Australia).[114]

This result is clearly absurd, but there is no escaping the logic of the restricting interpretation. According to the restricting interpretation, *only* people who qualify under s 60H are parents for the purposes of the *Family Law Act*. But we have just seen that no man qualifies under s 60H(3).[115] With regard to female parents, s 60H appears to contemplate nobody other than birth mothers (thus ignoring, for example, lesbian non-biological co-mothers); but even they, according to sub-s (2), must first be parents for the purposes of a prescribed State law in order for them to qualify as parents under the section. Unfortunately, the *Family Law Regulations* prescribe only certain statutory provisions of South Australia and the Northern Territory for the purposes of s 60H(2),[116] so that birth mothers of 'artificial conception' children in other States and Territories are technically not parents under the restricting interpretation.

The enlarging interpretation of s 60H may avoid this absurd result, but gives rise to much uncertainty. According to this interpretation, people (be they birth mothers, sperm donors etc) who do not qualify as parents under s 60H can still qualify as parents under some other criteria relevant to the *Act*. Much then depends on what judges take these other criteria to be.

Fogarty J in *B v J*[117] has implied in *obiter* that genetic connection is sufficient to make sperm donors automatically qualify as parents.[118] Brown J in *Re Mark*[119]

111 Nor is it clear that the Regulations *could* prescribe any State law dealing with the position of sperm donors, as s 60H(3) speaks of laws declaring that a child *is* the child of a man, while the relevant State laws are all to the effect that a man who is neither the husband nor the heterosexual *de facto* partner of the woman who inseminates with his sperm is *not* (or does not have the rights and responsibilities of) a father of the child for the purposes of the law of the State: *Parentage Act 2004* (ACT) s 11(5); *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 1979* (NT) s 5F; *Status of Children Act 1978* (Qld) s 18; *Family Relationships Act 1975* (SA) s 10E(2); *Status of Children Act 1974* (Tas) s 10C(2); *Status of Children Act 1974* (Vic) s 10F.

112 Guest J in *Re Patrick* indeed concluded that sperm donors are not parents under the *Family Law Act*, which accords with his restricting interpretation of s 60H(3).

113 As we have seen, children born to mothers who do have consenting husbands or de facto male partners are covered by s 60H(1) and hence do have parents. See *Family Law Act 1975* (Cth) s 60H.

114 As previously observed, the *Family Law Act* does not apply to Western Australia's ex-nuptial children.

115 However, the husband or de facto male partner of the birth mother is covered by *Family Law Act 1975* (Cth) s 60H(1).

116 *Family Law Regulations 1984* (Cth) sch 7, prescribing *Family Relationships Act 1975* (SA) s 10C and *Status of Children Act 1979* (NT) s 5C (as well as a law of the Australian Capital Territory, now repealed).

117 (1996) 21 Fam LR 186.

118 Ibid 196–7.

119 (2003) 31 Fam LR 162.

has regarded other criteria as relevant to identifying parenthood in cases of 'artificial conception'. Relying on a decision of the Full Court of the Family Court holding that 'parent', for the purposes of the *Act's* Division regarding child maintenance, should assume its 'natural meaning' of biological mother or father,[120] she has suggested:

> (a) That the ordinary and natural meaning of 'parent' should apply to the word as used in other parts of the Act too; and
>
> (b) That this meaning should be used as an additional criterion to identify who qualifies as parent in those cases covered by s 60H (cases, that is, of 'artificial conception').[121]

This approach would seem to cover a woman who gives birth following alternative insemination. And Brown J argued, in *obiter*, that it would cover a man who, like the applicant in *Re Mark*, 'provided his genetic material with the express intention of fathering (begetting) a child he would parent'[122] (the man had entered a surrogacy agreement, and the birth-mother had not changed her mind about relinquishing the baby).

Under this approach parenting intention seems to matter when it comes to identifying parents in cases of 'artificial conception', but it appears not to be sufficient without the 'corroboration' of biological connection. This has the effect of severely containing the potential of intentionality principles to expand the scope of 'parent' under the *Family Law Act*. For example, if biological connection is required for the ordinary natural meaning to apply, non-biological co-parents in same-sex families are left out of the picture.[123]

Justice Guest's decision in *Re Patrick*[124] may also be taken to have suggested some criteria that are possibly relevant, under the enlarging interpretation, to identifying parenthood in cases of 'artificial conception'.[125] *Re Patrick* involved, among other things, the question of whether a gay sperm donor was a parent under the *Family Law Act*. The Court concluded that the sperm donor was not the father of a child born to a lesbian couple.[126] One of the reasons for this conclusion was that 'in the absence of express provisions in federal law, the *Family Law Act* can and should be read in light of state and territory presumptions'[127] which disqualify sperm donors from the category of parents for the purposes of State

120 *Tobin* (1999) 24 Fam LR 635, 645 (Finn, Kay and Chisholm JJ).

121 *Re Mark* (2003) 31 Fam LR 162, 166–72.

122 Ibid 170.

123 Indeed, according to *Tobin*, 'parent', for the purposes of the division on maintenance orders in the *Family Law Act*, does not include non-biological parents standing *in loco parentis*: *Tobin* (1999) 24 Fam LR 635, 645.

124 (2002) 28 Fam LR 579.

125 Although Guest J's support for the restricting interpretation in *Re Patrick* appears to be ratio decidendi (see author's commentary, above n 109; above n 112), that support does not fit well with the other parts of his ratio decidendi. In fact, these other parts of *Re Patrick* implicitly endorse the enlarging interpretation of s 60H by introducing additional criteria on the basis of which to decide who counts or does not count as parent of 'artificial conception' children for the purposes of the *Family Law Act*.

126 *Re Patrick* (2002) 28 Fam LR 579, 646–7.

127 Ibid 645.

law (unless they are in a relationship with the women using their sperm).[128] Since this statement applies the principle of reading federal law in light of State and Territory laws even beyond the cases in which s 60H expressly tells us to do so (that is, when these laws are prescribed by the regulations), it articulates an additional criterion for identifying parents of 'artificial conception' children.[129]

The principle that the *Family Law Act* should be read in light of existing State and Territory law[130] avoids the restricting interpretation's absurd implication of leaving many children without legal parents. Because birth mothers tend to be recognised as parents for the purposes of State and Territory law, they would qualify as parents also under the *Family Law Act*.[131]

Guest J arguably suggested another criterion for identifying who is (or at least who is not) a parent of 'artificial conception' children (hence implicitly applying the enlarging interpretation of s 60H). He did so where he made the policy-based argument that regarding sperm donors as parents would

128 *Parentage Act 2004* (ACT) s 11(5); *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 1979* (NT) s 5F; *Status of Children Act 1978* (Qld) s 18; *Family Relationships Act 1975* (SA) s 10E(2); *Status of Children Act 1974* (Tas) s 10C(2); *Status of Children Act 1974* (Vic) s 10F.

129 This amounts to an endorsement of the enlarging interpretation by Guest J, even if other parts of the judgment's ratio, as noted above, appeared to support the restricting interpretation. This inconsistency may be a result of Guest J's appreciation that s 60H, restrictively interpreted, would be insufficiently protective of families such as those involved in *Re Patrick*; supporting the principle that the *Family Law Act 1975* (Cth) should be read in light of State presumptions would allow at least birth mothers to qualify as the child's parents beyond the cases in which they do by virtue of s 60H. Note that there was no logical inconsistency in the reasoning of the original author of the suggestion that parents, even in cases of 'artificial conception', should be those who qualify as parents in light of State or Territory law. He had made that suggestion in the context of an argument that started from the enlarging approach to s 60H: see Danny Sandor, 'Children Born from Sperm Donation: Financial Support and Other Responsibilities in the Context of Discrimination' (1997) 4 *Australian Journal of Human Rights* 175, 179. Against my contention that the arguments underpinning the decision in *Re Patrick* are contradictory, see James McConvill and Eithne Mills, '*Re Patrick* and the Rights and Responsibilities of Sperm Donor Fathers in Australian Family Law' (2003) 3 *Queensland University of Technology Law & Justice Journal* 298, 313 who argue relying on Guest J's reasoning that '[t]he relevant legislation in Australia (the *Family Law Act*, the *Child Support Assessment) Act 1989* (Cth) and the relevant infertility treatment and the status of children legislation of the States and Territories) make it abundantly clear that the provision of sperm and a resulting birth may make the donor a father but not a parent'.

130 Brown J, however, has questioned the legal validity of this principle: *Re Mark* (2003) 31 Fam LR 162, 172.

131 Four States and Territories have explicit presumptions that birth mothers in 'artificial conception' procedures are parents (but Tasmania's provision does not apply to single women): *Parentage Act 2004* (ACT) s 11(5); *Status of Children Act 1979* (NT) s 5C; *Family Relationships Act 1975* (SA) s 10C; *Status of Children Act 1974* (Tas) s 10C(3). As pointed out above, the *Family Law Regulations* explicitly prescribe two of these laws for the purposes of s 60H(2); it is therefore unclear whether the other two laws could be made relevant to the identification of parents under the *Family Law Act 1975* (Cth) without their being prescribed.

lead to the 'strange' result of burdening anonymous sperm donors with parental responsibility.[132]

In sum, it remains unclear whether in cases of 'artificial conception' s 60H should be understood as providing the only criteria relevant to identifying who qualifies as parent, and hence has parental responsibility (restricting interpretation), or rather as providing only some of the relevant criteria (enlarging interpretation). The restricting interpretation leads to the absurd result of leaving many children without legal parents in most States. The enlarging interpretation engenders uncertainty. On those occasions when the enlarging interpretation has been adopted, at least the following criteria have been used or proposed, in addition to those found in s 60H, in order to decide who counts as parent:

- genetic connection;
- biological relationship combined with parenting intention;
- reading federal law in light of State and Territory law;
- avoiding burdening with parental responsibility classes of people who believe themselves to be immune from it.

Applying each of these criteria to the same facts may result in conflicting conclusions about who has parental responsibility for children born following fertilisation procedures. Apart from this, it is clear that the first two criteria do not depart from the traditional deference to biological connection, while the other two do not supply a principled method for determining how to allocate parental responsibility.

D *Parental Responsibility as Affected by Parenting Plans*

The *Family Law Act* does provide that parental responsibility can be reallocated through parental agreements (so-called 'parenting plans').[133] These agreements can be changed by further mutual agreement, and they can be revoked.[134]

132 *Re Patrick* (2002) 28 Fam LR 579, 645. If the rationale for the decision is really this policy-based one, then it might apply also to sperm donors in in vitro fertilisation ('IVF') procedures, even if the State laws in light of which the *Family Law Act 1975* (Cth) should, according to the decision, be interpreted, apply only to sperm donors in alternative insemination, as distinct from IVF, arrangements. However, Brown J in *Re Mark* took issue with this rationale for deciding who does or does not count as a parent of 'artificial conception' children under the *Family Law Act 1975* (Cth). She argued in *Re Mark* (2003) 31 Fam LR 162, 173–4: 'the imposition of responsibilities or entitlements on a class or classes of people who previously considered themselves immune from such responsibilities or entitlements would not be a reason for a trial judge to come to an otherwise logical conclusion.' Guest J himself, in *Re Patrick*, somewhat undermined his own commitment to this policy-based rationale by pointing out that it was 'strange' not to recognise the sperm donor in this case as a parent for the purposes of the *Family Law Act 1975* (Cth) given his 'active involvement in [the child]'s conception and his ongoing efforts to build a relationship with his son': *Re Patrick* (2002) 28 Fam LR 579, 645. For a critical discussion of Guest J's point that it was unfair not to recognise the sperm donor as a father in *Re Patrick* see Fiona Kelly, 'Redefining Parenthood: Gay and Lesbian Families in the Family Court: The Case of *Re Patrick*' (2002) 16 *Australian Journal of Family Law* 204.

133 *Family Law Act 1975* (Cth) s 63C.

134 *Family Law Act 1975* (Cth) s 63D.

In theory, these agreements could enable people in non-traditional families to give legal significance to their family configuration and parenting intentions. For example, as a result of a parenting plan, a non-biological same-sex co-parent could be legally entitled to make decisions for the child and have full authority to act with respect to third parties such as educational institutions, hospitals, etc.

However, the *Family Law Act* stipulates that a parenting plan is 'made between a child's parents'.[135] This wording seems to require that there be at least two parents (meaning 'parents' for the purposes of the *Family Law Act*) in order for an agreement to come into existence in the first place.[136]

This means that parenting plans are likely not to be an option for a large cohort of the people to whom they would be of most value – people who are neither married nor in heterosexual de facto relationships and who procreate through fertilisation procedures. As explained above, when a birth mother is unmarried or not in a heterosexual de facto relationship, it is unclear whether anybody (or anybody other than herself in the Northern Territory and South Australia) qualifies, under sub-ss 60H(2)–(3), as the parent of a child conceived through fertilisation procedures. Therefore, it is also unclear that any valid parenting plan can come into existence in relation to such a child. Thus, although the *Family Law Act* pays some tribute to the principle of parenting intention, it fails to do so equitably by apparently empowering only biological, or quasi-biological, mother-father dyads (the only clear beneficiaries of the provisions).

E *Parental Responsibility after Parenting Orders*

As mentioned above, court orders (for which any person with an interest in the child's welfare can apply)[137] can alter the allocation of parental responsibility resulting from the rules that normally associate it with the status of being a parent. The main rule is that in making a court order reallocating parental responsibility a court will take the child's best interests as the paramount consideration.[138]

Until recently it had been a longstanding principle that, in applying the child's best interests standard, there was no presumption that a particular allocation of parental responsibility was in the child's best interest. Following the 2006 amendments to the *Family Law Act*, however, the court is now normally required to apply a presumption that equal shared parental responsibility is in the child's best interests.[139] The presumption can be rebutted by evidence to the contrary, but the primary matter the court is required to consider in determining what is in the child's best interest is 'the benefit to the child of having a meaningful relationship with both of the child's parents'.[140] Furthermore, s 65DAA expressly requires a

135 *Family Law Act 1975* (Cth) s 63C.

136 See *Re Patrick* (2002) 28 Fam LR 579, 648.

137 *Family Law Act 1975* (Cth) s 65C(c).

138 *Family Law Act 1975* (Cth) s 65AA.

139 *Family Law Act 1975* (Cth) s 61DA.

140 *Family Law Act 1975* (Cth) s 60CC.

court making an order of equal shared parental responsibility to consider making an order providing that the child spend 'equal time' or, failing the making of such an order, 'substantial and significant time' with each parent, if in the child's best interest.

In a social context where family diversity has been steadily increasing, the extent to which these new provisions defer to, and promote, biological models of parenthood (given the reference to 'both parents' and given how parents are identified under the *Act*) is staggering. In a move fully consistent with this emphasis on biological models, the *Act* as amended demotes caregiving related factors (nature of adult-child relationship, effects of the child's separation from the adults with whom she or he has been living, adult's capacity to care for the child) to the status of secondary considerations among the matters that the Court is required to take into account when determining the child's best interests.[141]

IV A TENTATIVE ALTERNATIVE

If, as I argued in Part II, a morally defensible system of parental rights requires attention to the principles of caregiving and parenting intention rather than biology, it is clear that the *Family Law Act* largely fails to reflect sound moral entitlements to parental responsibility. Recent amendments to the *Act* have made matters worse.

It is beyond the scope of this article to devise a detailed system on the allocation of parental responsibility informed by caregiving and parenting intention principles. Yet, lest it be said that it is all very well to criticise the current system by appealing to abstract principles without providing viable practical alternatives, I will briefly attempt to sketch out a more morally defensible solution to the question of how to allocate parental responsibility. The relevant question is: under what specific circumstances is the interest in parenting to be considered important enough to ground parental rights?

My interest in parenting cannot possibly give me an undifferentiated claim to parental responsibility over any child that has been or is being brought into this world, and whom I may intend to parent. Certain circumstances must combine with my interest in parenting in order for that interest to be deemed important enough to ground other people's (or the State's) duty to recognise my parental relationship with a child.

In Part II, I have argued that caregiving principles make birth mothers' claims to parental responsibility over the child they carry particularly powerful. Thus, I would argue that the interest in parenting of birth mothers is of sufficient importance to make them automatically acquire parental responsibility over their children from the moment they are born. (The position here stated differs from the current

141 *Family Law Act 1975* (Cth) s 60CC(3).

situation under the *Family Law Act* because it does not automatically attribute parental responsibility to fathers merely on the basis of biological connection.)

I have also argued that the interest in parenting requires in principle that respect be paid to the allocation of parental responsibility provided for in parental agreements, as this allows us to maximise people's opportunities to partake in a valuable form of life (a life with children).[142] Since I assume that it is of the essence of parental rights that their holders have control, within limits, over the kind of relationships other people may establish with their child, the right-holders would always be a party to a parental agreement that reallocates those rights. Thus, a birth mother, as somebody who is entitled to acquire parental responsibility on an independent basis at the moment of a child's birth, must be a party to a prenatal parental agreement. I would also suggest that her interest in parenting requires that she retain parental responsibility even if she contracts it away in a *prenatal* parental agreement. Her caregiving role during pregnancy makes her interest in parenting the baby important enough to entitle her to parental responsibility even if at some point before birth she expressed an intention to transfer it to (as distinct from sharing it with) somebody else. In a *post*natal parental agreement the mother could however validly transfer parental responsibility, in which case she would not have to be a party to any subsequent parental agreement. (The difference between the position as stated here and the current law is that, according to the latter, parenting plans can only be entered into where two parents – recognised as such under the *Family Law Act* – exist; and such parents need to be a party to any such plan, even one entered into after renouncing their own parental responsibility in a previous one.)

Caregiving principles also suggest that the interest in parenting of a person morally entitled to parental responsibility (as a birth mother or somebody to whom a parental agreement attributes parental responsibility) remains important enough to keep grounding parental rights in that person subject to either of two conditions. The first is that the person in question actually provide substantial caregiving[143] (whether or not she or he resides with the child). The second is that she or he cohabit with a person residing with the child who satisfies the first requirement.[144]

142 Recently, the Victorian Law Reform Commission stopped short of recommending the recognition, for the purposes of State law, of poly-parenting through intention-based mechanisms. However, it did so citing considerations which – at least if compared to the rights-based rationale militating for recognition – range, with respect, from the overly cautious (more parents means potentially more complex situations) through the trivial (difficulties involved in signing consent forms for passports) to the irrelevant (only a minority of families would require such recognition). To its credit, however, the Commission did acknowledge the limitations of its recommendation and implicitly hinted at the need to review the same issue in the near future: Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Final Report*, Report No 10 (2007) 137–9.

143 The concept of 'substantial caregiving' is not intended to catch the personnel of day care facilities or baby sitters providing their services for valuable consideration.

144 Recall that, while cohabitation lasts, there is a reasonable assumption that there is congruence between the primary caregiver's and her or his cohabitant's views on the decisions they believe to be in the child's interest. There is also a reasonable assumption that the primary caregiver wants her or his cohabitant to retain parental authority even if the latter acts as a breadwinner.

Conversely, volunteering substantial caregiving for a sufficiently prolonged period of time with the acquiescence of the person(s) entitled to parental responsibility should in itself be considered to endow the caregiver's interest in parenting with the importance required to ground parental rights (that is, to make her or him acquire parental responsibility, even in the absence of an express parental agreement to that effect).

In practical terms, this means, for example, that a person who provides substantial caregiving is morally entitled to parental responsibility even if she or he does not cohabit with the biological mother of the child. It also means that if a biological and a non-biological parent who were cohabiting later separate, the moral entitlement to parental responsibility of the parent who was the primary caregiver takes precedence over the claims of the other parent – even if the latter is the biological parent. On the other hand, where both parents were providing substantial caregiving during the relationship, at the moment of separation the importance of the interest in parenting of each is such as to allow both to retain a full moral entitlement to parental responsibility. But if one of the parents ceases to provide substantial caregiving after separation, her or his parental rights (that is, her or his moral entitlement to parental responsibility) will contract accordingly. (This model obviously differs significantly from the equal shared parental responsibility scheme of the *Family Law Act*.)

To summarise, at the moment of a child's birth, one's interest in parenting morally entitles one to parental responsibility under the following circumstances:

(a) being the child's birth mother;

(b) being attributed parental responsibility in a prenatal parental agreement.

After a child's birth these circumstances are:

(a) being a person who was morally entitled to parental responsibility at the child's birth and who has not renounced it since (for example, in a postnatal parental agreement), so long as that person either provides substantial caregiving or cohabits with a person entitled to parental responsibility, lives with the child and provides substantial caregiving;

(b) being attributed parental responsibility in a parental agreement so long as one either provides substantial caregiving or cohabits with a person entitled to parental responsibility, lives with the child and provides substantial caregiving;

(c) volunteering prolonged and substantial caregiving (with the acquiescence of those entitled to parental responsibility) so long as one keeps providing it.

The above propositions explain under what circumstances people have parental rights – that is a moral claim to parental responsibility. Some of these propositions (for example, (a) or (b)) could be translated directly into statutory law. Others may

not work so well as provisions of statutory law, but would be more relevant as guidelines in the context of judicial decision-making.

Take, for example, my argument that the interest in parenting of a person volunteering substantial caregiving for a prolonged period of time morally entitles her or him to parental responsibility (proposition (c)). If the people enjoying parental responsibility on the legal plane and a caregiver who does not are on good terms, the latter may be practically involved in decision-making for the child regardless of whether or not the law provides that she or he has acquired a legal right to do so. On the other hand, if frictions arise between the caregiver and the others, it is likely that the caregiver will seek parental responsibility through a court order as somebody interested in the child's welfare. Thus, proposition (c) may be less useful or practical as a provision of statutory law automatically reallocating parental responsibility, than as a guide to judicial decision-making when somebody seeks a court order. The same may be true of the point that one's claim to parental rights retains moral force only for so long as one provides substantial caregiving (the caregiving qualifiers to propositions (a) and (b)).

In light of what I argued above,[145] in many cases coming before the courts, the child's best interest can be plausibly understood to be compatible with an allocation of parental responsibility resulting from the propositions listed above. In these cases, the court should prefer such an allocation even if others might be as compatible with the child's welfare. Needless to say, when a conflict arises between the moral entitlements of parents and the child's best interests, the latter would prevail. As explained above, however, over-determination and complexity in social relationships means that we could be reasonably positive that such a conflict actually existed or would be likely to eventuate only in a minority of cases.

V CONCLUSION

Considerations about parental rights are as necessary to the construction of a legal scheme allocating parental authority as are considerations related to children's interest and parental responsibility. However, for the last 10 years or so family law rhetoric in Australia has been inclined to emphasise only the latter.

When considering the criteria on the basis of which parental responsibility should be allocated, the most likely candidates are biology, caregiving and parenting intention. Upon closer examination, only caregiving and intention, but not biology, should have a place in determining the allocation of parental responsibility. This is because the recommendations they make on how to allocate parental

145 See Rhoades, 'Yearning for Law: Fathers' Groups and Family Law Reform in Australia', above n 1, 135; Smart, 'Power and the Politics of Custody', above n 66 and accompanying text. But see Boyd, *Child Custody, Law, and Women's Work*, above n 61, 162.

responsibility accord with our moral intuitions about both the moral entitlements of parents and children's interests.

The parental responsibility scheme contained in the *Family Law Act* reveals that it places too little emphasis on caregiving and intention and too much on biological models of parenthood and parental responsibility. This is particularly true of the provision attributing parental responsibility to a child's 'parents', the new presumption of equal shared parental responsibility, and the provision relating to parenting plans, combined with the several provisions giving content to the undefined category of 'parent'. Since 1995, an ostensibly exclusive concern with children's interests and parental responsibility has allowed for the introduction and progressive refinement (culminating in the *2006 Act*) of a legal scheme that is in fact largely based on unarticulated assumptions about parental entitlements. The indefensible character of those biology-centric assumptions has resulted in a regime that is backward looking, morally indefensible, unsuitable to cater for family diversity and in need of reform.