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Recommended Citation

Courtney Cahill, *The Story of Parenthood*, 2018 *JOTWELL* 1 (2018),
Available at: <https://ir.law.fsu.edu/articles/517>

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The Story of Parenthood

Author : Courtney Cahill

Date : June 22, 2018

Douglas NeJaime, *The Nature of Parenthood*, 126 **Yale L.J.** 2260 (2017).

Professor [Douglas NeJaime](#)'s article, *The Nature of Parenthood*, unites concepts, ideas, bodies of law, and legal subjects that have largely been viewed in isolation—until now. The “first comprehensive account of contemporary regulation of parental recognition in the context of ART [alternative reproductive technologies],” (p. 2270) *The Nature of Parenthood* brings into focus the similarities, connections, and dynamic relationships between and among things that scholars often consider separately: ART law and the law of unwed fatherhood; non-biological mothers in opposite-sex relationships and non-biological fathers in same-sex relationships; intended genetic mothers and unwed biological fathers; family law and constitutional law; past and present. Equal parts legal history, doctrinal and constitutional analysis, and legal reform, *The Nature of Parenthood* is a beautifully executed and orchestrated work that above all else spins an absorbing narrative of parenthood in the United States—one that defies clear distinctions among beginning, middle, and end.

Professor NeJaime's principal objectives in *The Nature of Parenthood* are threefold: (1) to show that modern parentage law has “carri[ed] forward” (p. 2289) the past in ways that continue to exclude traditionally marginalized groups and to underappreciate parenthood's social dimension; (2) to argue that the “legacies of exclusion embedded” (p. 2268) in modern parentage law are in conflict with many of the norms that have emerged from recent constitutional law and family law jurisprudence; and (3) to suggest reforms to family law and constitutional law (relating mainly to parentage) that better align both bodies of law with the values that have materialized from each, in fits and starts, over the last fifty to sixty years.

The Nature of Parenthood accomplishes these objectives by providing an exhaustive and engrossing narrative of parentage law in the United States, beginning in Part I with the past, specifically, with the law's historic privileging of marital, biological, and gender-differentiated parenthood through mechanisms like the marital presumption and the constitutional jurisprudence of unwed fathers. Among his other observations in Part I, NeJaime here illuminates the law's use of biology at once to *liberalize* parenthood (from the constraints of marriage) and to *limit* parenthood (within the constraints of reproductive difference). In so doing, he nicely sets the stage for Part II, which provides an even more elaborate account of simultaneous progress and regress in parentage law.

Part II is in many ways the heart of NeJaime's article. In it, NeJaime moves from the past to the present as well as from a broad overview of legal history to a meticulous doctrinal and legal analysis of contemporary law. He takes a deep dive into modern American parentage regulation as it applies to many different kinds of families (single, marital, same-sex, opposite-sex) and to many different forms of ART (donor insemination, egg donation, gestational surrogacy), and emerges to tell a fascinating story about the law's continued privileging of the traditional family in its approach to non-traditional parenthood.

For instance, NeJaime shows that the law in many states continues to prioritize marital parenthood by rendering the legal status of sperm donors who donate to single women uncertain and by making marriage the exclusive path to legal parenthood for certain classes of parents, like non-biological mothers in same-sex relationships. More interestingly, he reveals that the law in *most* states continues to prioritize not just biology but *biological maternity specifically* over both biological paternity and non-biological maternity by only recognizing surrogacy agreements when the intended mothers—but not the intended fathers—of such agreements use their own gametes to create the child. (These are the many jurisdictions that require genetic maternity but not genetic paternity for surrogacy agreements to be valid, not the

few jurisdictions that require *both* intended parents to use their own gametes for surrogacy agreements to be valid. (See pp. 2376-81 (listing states with the latter requirement).) In so doing, NeJaime suggests, contemporary parentage law continues to view the family as an institution that springs from a woman rather than from a man, and from a woman who, unlike a man, must, and need only, have a biological connection of some kind to her children. Indeed, he shows that contemporary parentage law remains tethered to the traditional family and its defining features—even as that law has evolved to partially accommodate the non-traditional family and *even though that law offers the possibility of upending the same gender-differentiated, reproductive logic on which it rests*.

Parts III and IV of *The Nature of Parenthood* turn, respectively, to the material and dignitary harms that contemporary parentage law inflicts on non-traditional parents and to NeJaime's recommended reforms of state parentage law and federal constitutional law relating primarily to parentage. Here, NeJaime discusses the few cases that have applied parentage rules like marital presumption in gender neutral ways and argues that those cases hold the potential for displacing biological maternity as the exclusive generator of the legally-recognized family. He also gestures toward the future, envisioning what a state parentage regime more closely aligned with contemporary constitutional norms might look like and considering how constitutional understandings of sex and gender discrimination themselves might transform in response to states' recognition of non-traditional parenthood—much in the same way that the constitutional law on marriage transformed in response to states' recognition of same-sex marriage.

NeJaime's *The Nature of Parenthood* makes numerous contributions to legal history, family law, and constitutional law—far too numerous to summarize in this necessarily abridged forum. It showcases the gravitational pull of biological maternity even in an alternative reproductive era that permits non-biological mothers and same-sex male couples to have children. It prompts us to consider what the persistence of biological maternity might mean for the future, when science could permit two men to create a child with their own gametes manufactured through skin cells.¹ It envisions the possibility of a world where the family springs from paternity no less than from maternity and from multiple parents no less than from the paradigmatic two.

Most provocatively, though, *The Nature of Parenthood* offers a fascinating story of parenthood in the United States, one that illuminates the progressive potential of even regressive tendencies in the law—a potential that conventional progress and regress narratives tend to obscure. NeJaime does this when he reminds us that the marital presumption has *always* recognized the social dimensions of parenthood, even when it overtly underwrote the gender-differentiated family. He does this when he suggests that ART law's recognition and protection of genetic motherhood at once fetishizes biological maternity *and* renders unstable the logic of reproductive difference that has long shaped parentage law. And he does this when he concludes his article by suggesting that parentage regimes rooted in marriage and biology could ultimately *unsettle* the marital and biological logic on which those regimes rest. Just as he has with the trajectory of marriage recognition in the United States,² NeJaime shows us that the trajectory of parentage recognition in the United States is not a simple matter of progression or regression. Rather, like the article that bears that title, the nature of parenthood is Janus-faced, simultaneously looking back and gazing beyond.

1. See generally Henry Greely, *The End of Sex and the Future of Human Reproduction* (2016) (discussing this possibility). [?]
2. See Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 *Harv. L. Rev.* 1185 (2016); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 *Calif. L. Rev.* 87 (2014). [?]

Cite as: Courtney Cahill, *The Story of Parenthood*, JOTWELL (June 22, 2018) (reviewing Douglas NeJaime, *The Nature of Parenthood*, 126 *Yale L.J.* 2260 (2017)), <https://family.jotwell.com/the-story-of-parenthood/>.