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Jane the Virgin and Other Stories of Unintentional Parenthood

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JANE THE VIRGIN AND OTHER STORIES OF UNINTENTIONAL PARENTHOOD

*June Carbone** and *Naomi Cahn***

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Introduction

Using any form of assisted reproductive technology requires an intent to become a parent; outside of *Jane the Virgin* teledramas,¹ accidental pregnancies through ART are rare. Each form of ART requires some deliberation. Even the simplest form of ART, using donor sperm, which does not necessarily involve medical intervention, still requires finding someone to provide the sperm; more sophisticated forms of ART involve the services of a fertility clinic, a physician, a surrogacy agency, and an egg donor. At each stage, doctors, brokers, and prospective parents arrange for prospective parents to accept responsibility for the resulting child, for gamete donors to sever their parental connection to the child, and for gestational carriers to recognize the intended parents' parental claims ahead of their own. Prospective parents have the opportunity parties involved in unassisted responsibility do not necessarily enjoy: the ability to establish the parties' intent in writing, in accordance with the mutual agreement of all of the participants.

The early law of assisted reproduction sought to ratify the prospective parent's intent – at least within marriage. Thus, the initial sperm donor laws called for recognition of a husband's paternity of a child born to his wife, where he consented to his wife's insemination by a doctor with another man's sperm.² These laws

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¹ *Jane the Virgin* (2015-16), <http://www.cwtv.com/shows/jane-the-virgin/chapter-thirty-four/?play=c6e533f9-34f1-45aa-9a05-002d43d0b026>. Jane is accidentally inseminated at a routine gynecological examination, and, even though she has vowed to remain a virgin until she marries, she becomes pregnant as a virgin.

Of course, there *are* accidents and mix-ups in the ART world. See, e.g., Dov Fox, *Reproductive Negligence*, __ *Harv. L. Rev.* __ (2015).

² See, e.g., NAOMI CAHN, *TEST TUBE FAMILIES* (2009).

paralleled the operation of the marital presumption more generally; the law has long presumed that a child born to a married woman's was her husband's child.³ Artificial insemination by donor differed from those cases because of the existence of medical records documenting the husband's lack of a biological tie making it much harder for courts to simply look the other way.⁴ The husband's consent, as a practical matter, validated the continued role of marriage in establishing parenthood without the pretense of a biological relationship.⁵

With the extension of assisted reproduction outside of marriage, intent became that much more important.⁶ Same-sex couples who could not marry and single women who wished to terminate a donor's parental status claimed that parenthood should be determined in accordance with intent alone.⁷ They argued that where a woman used artificial insemination to produce a child, her partner should be recognized as a parent on the basis of the two parties' consent, without marriage, adoption or a biological tie between the second parent and the child.⁸ In addition, these parties also maintained that where a woman, married, single or cohabiting, used a donor, that donor's parental status should be severed by operation of law in accordance with the presumed intent of the donor and recipient. These views prevailed in many courts and state legislatures, and they helped to establish a form of private ordering that ratified the creation of families of choice without necessarily requiring official state sanction through marriage or adoption.⁹

³ See June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219 (2011).

⁴ Typically, marital presumption statutes have denied standing to the biological father to establish paternity, and precluded testimony about a wife's infidelity or sexual relations with a husband present in the household. See Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 573, 564 (2000). See also Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105 (2007) (noting the long standing precedents that precluded testimony about a wife's infidelity, which in the era before reliable paternity testing was often the only way to establish the husband's lack of a biological tie to a child). We use the term "artificial insemination" because that is the language in most cases.

⁵ And, in *Michael H.*, the Supreme Court upheld the continued constitutionality of a case that affirmed a husband's parent status where he and the mother reconciled and remained married after the wife's affair with another man.

⁶ For a discussion and critique of intent and intentional parenthood, see, e.g., Heather Kolinsky, *The Intended Parent: The Power and Problems Inherent in Designating and Determining Intent in the Context of Parental Rights*, 119 PENN ST. L. REV. 801, 804 (2015).

⁷ Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 602 (2002).

⁸ *Id.* See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, (4th Dist. 1998); *Elisa B. v. Superior Court*, 117 P.3d 660 (2005).

⁹ The states vary widely, however, with some legislatures states continuing to sever the parental status of a sperm donor only with donation to a married woman, , and considerable variation in the willingness to recognize an unmarried woman's partner as a parent of the partner's child. See Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child*:

At the same time, however, the courts also began to move away from intent toward greater emphasis on biology in non-ART cases, often undermining community norms and private ordering in the process. At one time, a man who wanted a relationship with his child had to marry the mother; if he did not, he often did not receive recognition as a father at all.¹⁰ Marriage, rather than the circumstances of conception, established two-parent families, and marriage was thought to link the spouses' intention to create a family together with legal parenthood. Today, however, two-thirds of the states permit a biological father to contest the marital presumption, whatever the intent of the parties at the time of conception or the parties' respective roles after the birth.¹¹ And, in all states, where a man and woman intend that a woman will be a single parent, the man cannot escape responsibility for support and the woman cannot escape his right to a relationship with the child if he chooses to pursue it.¹² Moreover, once two adults receive recognition as legal parents, they have equal rights and responsibilities with respect to the child. In many states, the law presumes that it is in the child's interests to have a continuing relationship with both parents, and courts often seek to maximize the time the child spends with each parent, whatever the relationship between the parents at the time of the child's birth.

These differences between intentional and imposed parenthood are not just differences between assisted and unassisted reproduction. Nor are the differences limited to distinctions between same-sex and different sex couples. Instead, the distinctions correspond more broadly to differences between "elite" and "non-elite" reproduction.¹³ Elite parents typically marry before they have children, with marriage establishing their commitment to shared parental rights or

Parentage Laws for Children of Lesbian Couples in the Twenty-First Century, 5 Stan. J. C.R. & C.L., 201, 247 (2009).

¹⁰ See *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

¹¹ For a married lesbian couple using a sperm donor, therefore, the sperm donor laws recognizing a husband who consents as a legal parent may offer protection even where the marital presumption does not. See *Wendy G-M v. Erin G-M*, 45 Misc. 3d 574 (N.Y. Sup. Ct. 2014); see also *Counihan v. Bishop*, 974 N.Y.S.2d 137, 139 (App. Div. 2013) (earlier case applying the marital presumption to a Connecticut marriage); See generally Alexandra Eisman, Note, *The Extension of the Presumption of Legitimacy to Same-Sex Couples in New York*, 19 CARD. J.L. & GENDER 579, 583 (2013) (discussing the need to apply the presumption to same-sex couples, notwithstanding the lack of legal clarity).

¹² For parents seeking public assistance, a condition for receipt is agreeing to cooperate in finding the other parent. See Stacy Brustin & Lisa Vollendorf Martin, *Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803, 810 (2015) (observing that in the majority of states, legally recognized parents have coextensive parental rights and responsibilities by operation of law, regardless of their marital status and how they choose to structure their households); Craigslist donor, <http://wavy.com/2015/09/02/sperm-donor-fights-back-after-state-forces-him-to-pay-child-support/>.

¹³ By "elite," we simply mean those in the top third financially of the United States economy or, alternatively, the roughly one-third of young adults who are college graduates. See JUNE CARBONE AND NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 5-6 (2014) (discussing how to characterize different groups in terms of marriage orientation and family planning).

responsibilities,¹⁴ or they secure the severance of a gamete donor's parental rights if they wish to be single parents.¹⁵ The law of assisted reproduction ratifies and incorporates elite approaches to reproduction, which involve planning and consent, and LGBT advocates incorporated these values into their fight for equal recognition of their families, often making the implicit values more visible in the process.¹⁶ The result aligns emerging mainstream norms with practices that allow for legal ratification of families of choice.

Non-elites, by contrast, are less likely to plan their pregnancies, less likely to marry, and less likely to memorialize their intentions about parental rights and responsibilities.¹⁷ Moreover, for non-elites, the law is more likely to be imposed than chosen as these couples are less likely to know what the law is, have the means to use it to advance their own purposes even if they do know, or to face judges who will understand and apply the norms of their communities.¹⁸ They achieve greater autonomy therefore in structuring relationship terms by evading the law, the courts, and often each other. Many women today create families on their own terms by choosing not to marry, staying away from any form of public welfare, and refusing to seek formal support orders against the fathers of their children.¹⁹ These families, while they often reflect community norms for the conduct of relationships, operate in the "shadows" of the law,²⁰ without legal ratification or support for the results.

In this article, we contrast the roles of intent versus biology in establishing legal parenthood, and we trace the role of marriage in mediating tensions between the two. This article accordingly interrogates the role of assisted reproduction in crystallizing differences between elite and non-elite reproduction. Central to those differences is the role of intent at the time of conception and birth of a child. As Doug NeJaime has persuasively argued, LGBT families have used the concept of intent, as it originated in ART cases, to argue for recognition of families of choice, without either biological ties or the formalities of marriage or adoption or biological ties.²¹ Their success in winning formal legal regulation culminated in the

¹⁴ See Carbone & Cahn, Nonmarriage (unpublished manuscript 2016)

¹⁵ As a practical matter, this means using a doctor to perform the insemination in some states or anonymous donors in other states.

¹⁶ See, e.g. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016).

¹⁷ Carbone & Cahn, *Nonmarriage*, *supra* note ___.

¹⁸ See generally Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pts. I-III), 16 STAN. L. REV. 257 (1964), 16 STAN. L. REV. 900 (1964), 17 STAN. L. REV. 614 (1965) [hereinafter tenBroek Parts I-III]; June Carbone and Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185.

¹⁹ Carbone and Cahn, *Tripe System*, *id.*

²⁰ See Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

²¹ See NeJaime, *Marriage Equality*, *supra* note ___. NeJaime considers intent and function together and contrasts them to biology and gender as a basis for assigning parental roles. *Id.* at 1247. This article, however, treats intent and function as separate concepts, with "intent" referring to a plan to assume parental responsibilities or consent to a partner's assumption of

Supreme Court's embrace of marriage equality in *Obergefell v. Hodges*,²² which is likely to once again increase the role of marriage in integrating individual intent with legal recognition of parentage for couples in intact unions.

At the same time, women have used the creation of families outside of marriage to create alternative families on the basis of a different type of private ordering. Nonelite couples are less likely to reach consistent understandings about their relationships before pregnancy, birth or the assumption of parental roles. Instead, community norms order these understandings. Such norms treat a decision not to marry as part of a system that gives mothers more say vis-a-vis fathers outside of marriage than within it. While it hard to describe these arrangements as "intent-based" in the context of relationships that often involve little formal planning, they are a form of private ordering in that they reflect choices made in accordance with community norms rather than the formal institutions or publicly imposed mandates. When such couples appear in court, however, courts tend to impose policies that are not necessarily consistent with the parties' own choices or community norms. These couples, who lack access to the family planning systems and lawyers who help inform elite practices, achieve their greatest autonomy in creating families of choice by staying out of court and often by staying away from each other.

Both of these systems are today under assault. The integration of marriage and elite planning is likely to weaken recognition of families on the basis of intent alone,²³ and reforms are underway to reimpose elite family norms on nonelite parents, undermining their ability to create family terms on their own. One important group may crystalize reactions to these developments: LGBT couples who reject marriage. They may illustrate why many couples view marital terms as inappropriate for their relationships, preferring for example something other than equally shared responsibilities for children.²⁴ LGBT couples, who rely overwhelming on ART for reproduction, may thus once again be important to

parental rights at the time of child's conception and birth, while function refers to the actual assumption of parental rights and responsibilities after birth. As discussed *infra* note 109 and accompanying text, the distinction can become important as it is with respect to stepparents who assume a functional parental role but do not acquire equal parental status unless all of those involved consent to and go through with an adoption. In these circumstances, a custodial parent may well consent to the new partners' assumption of parental functions, without necessarily consenting to equal parental status, and the law that addresses stepparent status has historically recognized the distinction.

²² *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

²³ Indeed, it arguable that to the extent LGBT and other couples using ART have received recognition as parents on the basis of intent, it has been intent coupled with a marriage-like relationship rather than intent alone. See *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (acknowledging parenthood of a woman who contributed an egg to her lesbian partner despite trial court findings that the women intended the birth mother to be the sole legal parent where the women planned to raise the child together and in fact did so); Nejaime, *Marriage Equality*, *supra* note ____.

²⁴ See, e.g., KATHERINE FRANKE, WEDLOCKED 220-21 (2016)(discussing the disadvantages of marriages for same-sex couples who may prefer alternative terms for their unions).

forcing a reconsideration of legal standards that reflect elite and gendered assumptions about reproduction that do not hold for everyone.

The first section will examine the interaction between the role of intent in the early assisted reproduction cases and its expanded role in securing recognition of same-sex partners. The second section will show the rejection of intent in cases of unassisted reproduction, and the growing use of biology to assign parental rights and responsibilities in some areas of the country. The third section will consider the potential impact of *Obergefell* on this dichotomy. Same-sex couples have led in the efforts to use intent as the lynchpin for the recognition of parentage. Now that they can marry, scholars are shifting their attention to those who choose not to marry.²⁵ Will these comparisons between married and unmarried couples redefine the role of intent in determining parenthood? Will they assume that married couples consent to an equal assumption of parental roles while unmarried couples do not? Or will they increase the pressure for equal treatment of married and unmarried parents, which ironically may place greater weight on the role of biology and adoption.

I. ART and the Birth of Intent-Based Parenthood

The earliest ART cases called attention to the distinction between use of the marital presumption as a presumption that a biological tie existed between father and child, and use of the marital presumption as an estoppel system that ratified the spouses' decisions to assume parental roles and prevented them from later changing their minds.

Historically, the marital presumption served as a presumption that the husband was the biological father of the child. The presumption could be rebutted by proof that the husband was impotent or "beyond the four seas" and not around at the time of conception, and thus could not have fathered the child.²⁶ The law, however, has often precluded the testimony that could rebut the presumption, effectively making it irrefutable. For centuries, courts ruled inadmissible the testimony most likely to rebut the presumption – testimony that the wife had been unfaithful.²⁷ And in cases where a man married a woman already pregnant with another man's child, knowing that he could not be the father, courts often used estoppel principles to lock in the man's financial responsibility for the child at divorce.²⁸ Even today, some states will rule out DNA tests that could establish paternity with certainty where the child's interests lie with continuation of a husband's role as the child's father.²⁹ In these cases, the marital presumption,

²⁵ See, e.g., *id.*; Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 240 (2015)

²⁶ Glennon, *supra* note 4, *Somebody's Child*, at 573.

²⁷ *Id.* at 573, 564 (2000).

²⁸ *Id.*

²⁹ See, e.g., *Shondel J. v. Mark D.*, 853 N.E.2d 610, 620 (N.Y. 2006) (finding it in the child's interest not to let the man who had acted as the father to disestablish paternity); *Juanita A. v. Kenneth Mark N.*, 930 N.E.2d 214, 216 (N.Y. 2010) (preventing the biological

though starting as presumption of biology, in fact served to ratify the intent to parent and the assumption of a parental role.³⁰

If intent were the only factor in determining parenthood, however, the marital presumption should have been applicable in the early assisted reproduction cases. These cases involved artificial insemination by donor. Doctors inseminated women unable to conceive with donor sperm (often from medical students), and they usually did so with the husband's consent. Husbands' and wives' names went on the birth certificate as the legal parents, and no one else needed to know – unless a divorce occurred. The first cases to challenge the husband's paternity came from the husbands themselves, typically where a husband at divorce wished to escape responsibility for a child to whom he was not biologically related.³¹

The marital presumption did apply to these cases at the child's birth (that is, the father's name could be entered onto the birth certificate and he could assume a parental role without any action to establish paternity) and estoppel principles could and, in some cases, did estop husbands who had consented to the insemination from later contesting paternity. Nonetheless, given the indisputable fact of the husband's lack of biological paternity, the child might still be considered "illegitimate."³² In these cases, intent alone was not enough to establish legal parenthood. The marital presumption might not be rebuttable where the courts kept the biological evidence out of the record, but not where the truth of paternity had been clearly established.

Together with adoption,³³ these cases represent the earliest efforts to separate parenthood from biology. Many state legislatures, sympathetic to the use of artificial insemination to aid infertile couples and concerned by the prospect of children left without support, chose to remedy the situation. Today, the states take one of three different approaches to AID. One group of states has adopted sperm donor laws that automatically terminate the parental status of the donor so long as a doctor performs the insemination, and recognize the parent status of a consenting husband.³⁴ A second (and smaller) group of states severs the parental status of the donor only if the woman inseminated is married. In these states, a woman can still be recognized as the sole legal parent, if the donor cannot be identified. A third group of states has enacted no laws on the subject, but most of these states apply estoppel principles to prevent a consenting husband from later changing his mind.³⁵ As a practical matter, these states have used the principle of consent to establish the husband's parental status without biology and without adoption, though some states continue to require

father from establishing paternity where it would disturb the child's relationship with someone else).

³⁰ See Baker, *Legitimate Families and Equal Protection*, *supra* note , at 14 (observing that the marital presumption continues to be the most common way to recognize a second legal parent after the birth mother).

³¹ See TEST TUBE FAMILIES, *supra* note ___.

³² *Gursky v. Gursky*, 242 N.Y.S.2d 406, 411 (Sup. Ct. 1963)(child conceived through artificial insemination during marriage was not legitimate child of marriage, although husband was still responsible for child support).

³³ See Naomi Cahn, *Perfect Substitutes or the Real Thing*, 52 DUKE L.J. 1077 (2003).

³⁴ Most statutes provide for the termination of the parental status of the donor if a doctor performs the insemination. See Naomi Cahn, *The New Kinship*, 100 Geo. L.J. 367 (2012).

³⁵ For discussion of parenthood by estoppel, see HARRIS ET AL., *supra* note , at 914–27.

both marriage and explicit consent to the assumption of a parental role.

Termination of the donor's status has also required express statutory authorization.³⁶ Intent alone, even if both biological parents agree, is ordinarily not enough to terminate a man's responsibility for his biological offspring.³⁷ Instead, such termination typically requires statutory authorization, contribution of the sperm to a doctor for insemination, and some indication of intent not to be a parent, which may be derived from use of the doctor or from signing the appropriate consents.³⁸ Today, additional statutory authorization permits an agreement for one party to use of jointly created frozen embryos after a divorce without imposing parental status on the other progenitor.³⁹

Motherhood, unlike fatherhood, has until the modern era never really been in doubt, and legal maternity has ordinarily corresponded with the facts of biology. The advent of gestational surrogacy has called that into question, and the first significant case to resolve the matter rested its decision on intent. In *Johnson v. Calvert*,⁴⁰ doctors implanted an embryo created with an egg from Cristina Calvert and her husband's sperm into Anna Johnson's womb. When Johnson later claimed recognition of the child's mother, the California Supreme Court observed that both women satisfied the statutory criteria for motherhood – Johnson because she gave birth, and Calvert because she supplied the egg and, like a man who supplied sperm, could be recognized as a parent on the basis of the genetic connection to the child. The Court then held that "intent" was the "tiebreaker" and it ruled for Calvert on the basis of the parties' agreement that the Calverts would be parents and would raise the child.

Since then, while the states have taken various approaches to gestational surrogacy and egg donation, intent influenced the direction of California law.⁴¹ The

³⁶ *Id.*

³⁷ *But see* *Ferguson v. McKiernan*, 940 A.2d 1236 (PA 2007) (holding that sperm donor who contributed to a former intimate partner for conception in a clinical setting was not a legal parent despite absence of a statute authorizing severance of parental status).

³⁸ *Id.* Indeed, California law had initially assumed that any man contributing sperm for artificial insemination to a woman "not his wife" would not want recognition as a father, and the statute automatically terminated his parental status without specifically requiring consent to the termination of parental status. And women have in fact wanted security in using sperm from a known donor that parental status could be severed. See discussion of *Jason Patric*, *infra*, at note 89 and accompanying text.

³⁹ *See, e.g.*, § Tex. Fam. Code § 160.706 (2016); Unif. Parentage Act Sec. 706. A tentative draft of the Property Restatement provides: "Any person who is a party to an action for divorce or annulment commenced by filing before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless" the physician does not know of the divorce filing or the second parent consents in a writing. Restatement (Third) of Property (Wills & Don. Trans.) § 14.8 TD No 4 (2004).

⁴⁰ *See Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993).

⁴¹ California was particularly influential both because of the role of ART and LGBT advocacy in the state, given the large communities supporting both, *see* *Nejamie supra*, and

most influential (and unusual case) following *Calvert* was that of the Buzzancas.⁴² The Buzzancas arranged for a surrogate to carry an embryo created by donor egg and sperm. While the child was in utero, Mr. Buzzanca filed for divorce, and asserted that there were no children born to the marriage. Although the trial court concluded that the child had no legal parents, the California Court of Appeal held that since the Buzzancas had engineered the situation, arranging for the child's birth and securing the termination of every other possible parent's legal status, they were the parents. Ms. Buzzanca thus received custody and Mr. Buzzanca owed support. The result was in effect an estoppel ruling; since the Buzzancas had arranged for the child's birth, they were estopped from denying parenthood. The court held, as a practical matter, that intent alone, without biological connection or adoption, conferred legal parenthood on the Buzzancas.⁴³

The *Buzzanca* case might have been limited to its unusual facts but for the actions of Governor Pete Wilson. At a time when he faced a tight reelection race, he ordered the state social services agency to stop approving second parent adoptions, that is, adoptions by a second parent of the same sex.⁴⁴ State adoption law did not limit adoptions to married or to heterosexual couples, and lower court judges had been allowing same-sex partners to adopt their partners' children. These adoptions required a home study, and Wilson's edict effectively meant that the social workers would not approve these adoptions. While the courts could still permit them, in effect overruling the home study findings, the process became more difficult and more emotionally stressful.

LGBT couples began to look for another way to win recognition of their families, and they decided to use the *Buzzanca* ruling.⁴⁵ Many of the cases involved lesbian couples who had arranged for the birth of a child through use of artificial insemination by donor. While the child was in utero, the partners would go to court and seek a declaration of parentage pursuant to the Uniform Parentage Act (UPA), which had also governed the *Calvert* and *Buzzanca* cases. Some involved women who contributed an egg to their partner. They argued that, as in *Calvert v. Johnson*, both women had a biological tie to the child, and a decision in accordance with their intent would recognize both women as mothers. In other cases, only one woman was related to the child, but the couple argued that they had secured the termination of the parental status of the donor, just as the Buzzancas had, with the intent that the partner would become the second parent.

Other cases involved women who used both an egg and sperm donor, and had no genetic connection to the child, though one of the two women gave birth. And

because the California Supreme Court has been willing to tackle difficult decisions in reported opinions to a greater degree than other states.

⁴² *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, (4th Dist. 1998).

⁴³ Doug Nejaime treats the case as using a combination of marriage and intent. Nejaime, *Marriage Equality*, *supra* note __, at 1211 ("Marriage served as a way to understand and legally recognize the intent to parent"). The court, however, placed considerable emphasis on the Buzzancas role in arranging for the birth and terminating other parents' legal status.

⁴⁴ See June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 Cap. U. L. Rev. 341, 372 (2006); Nejaime, *Marriage Equality*, *supra* note __, at 1208.

⁴⁵ *See id.* at 1212.

eventually the cases would include two men who arranged for birth of a child through use of one of the partner's sperm and a gestational carrier. These couples all argued that intent, as they asserted it to the court and as evidenced by their actions in arranging for the birth of these children, established a foundation for recognition of their status as legal parents. The courts agreed and issued what came to be called "UPA Declarations" that recognized their parental status and provided court orders to enter both parents' names on the child's birth certificates.⁴⁶ The UPA declarations effectively replaced second-parent adoptions as the principal way same sex couples established parental status in California.

In a parallel fashion, courts in other parts of the country came to accord parenthood to same-sex partners, without marriage, adoption or biology, on the basis of consent and function. Wisconsin provided one of the earliest examples. It recognized "de facto parents" who had assumed a parental role with the consent of an initial legal parent.⁴⁷ The initial parent had either adopted the child or, more typically, given birth through use of a donor, often with the two women jointly participating in the arrangements that led to the birth with the intention that they would jointly raise the child. Where the partner in fact assumed such a parental role after the birth, the courts extended recognition, granting the partner standing to seek custodial rights following a break-up. The ALI Principles of Family Dissolution formalized recognition of this doctrine, grounding it in estoppel principles.⁴⁸ Other states recognized this type of parenthood by estoppel, under a variety of labels. These cases extended recognition to parents who either could not or did not wish to marry on the basis of a combination of function, that is, assumption of a parental role, and the consent and encouragement of the first parent to creation of the second parent's relationship with the child.

These doctrines, which started with cases addressing assisted reproduction, gained force as a way to recognize LGBT families in the era before *Obergefell*. Whereas the initial sperm donor statutes required marriage *and* consent to substitute a husband for a sperm donor as the child's legal father, the new group of cases dispensed with marriage and relied on intent alone. In many cases, as a practical matter, they also relied on severance of the donor's parental status either by operation of law or by the inability to identify the donor; nonetheless a growing group of states found ways to ratify the parental status of a partner by choice.

These developments paralleled elite practices for those engaged in unassisted reproduction. Between the early nineties and today, unintended pregnancies fell by half for those earning above 200 per cent of the poverty line. Abortions remained higher, however, as a percentage of unintended pregnancies, for this group than for

⁴⁶ See Carbone, *The Role of Adoption*, *supra* note ___, at 372; June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 La. L. Rev. 1295, 1302 n. 41 (2005).

⁴⁷ See *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419 (Wis. 1995).

⁴⁸ See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)–(c) (AM. LAW INST. 2002).

any other.⁴⁹ The average age of first marriage and first birth increased steadily not just for those with higher incomes, but for college graduates as a whole, making them older and more mature by the time they had children. Intentional parenthood with self-conscious choices about getting pregnant, carrying the pregnancy to term, choosing a partner, and supporting that partner's involvement in the child's life came to characterize both the formal law and the informal norms of the group.

At the same time, however, legal parentage in the context of elite unassisted reproduction rarely turns on intent alone; couples achieve secure recognition of parentage on terms of their choosing by taking the additional step of formalizing their desired outcome according to a state-authorized procedure, such as through filing adoption papers, signing ART consents, seeking court-ordered birth certificates, entering into formal agreements,⁵⁰ or getting married. And when legislatures have sought to institutionalize practices such as artificial insemination by donor or gestational surrogacy, they typically establish formal requirements rather than make individualized determinations in accordance with the parties' specific intentions.⁵¹

Legal institutionalization sets default rules: a husband⁵² will be a parent *unless* someone challenges the marital presumption, a sperm donor in Kansas who provides sperm to a doctor for insemination of a woman not his wife will not be a legal parent *unless* he specifically states a contrary intention in writing, and at divorce, a child's interests will be presumed to lie with continued contact with both legal parents *absent* a showing to the contrary. These provisions correspond to elite family norms, and sophisticated parties internalize the legal requirements and either establish conventionally married families or use a mix of alternative provisions such as adoption or private agreements to create families on terms of their own.⁵³ In this context, parenthood by intention became a workaround, ratifying the actions of couples like the Buzzancas or same-sex parents such as those in *Elisa B.*, who created families that did not fit in the conventional world of unassisted reproduction.⁵⁴ With increasing acceptance of ART and LGBT parenting and the possibility of greater institutionalization of the practices, it remains to be seen what role intent will continue to play.

⁴⁹ Overall, the number abortions still declined because of the drop in unintended pregnancies. Guttmacher, Fact Sheet: Unintended Pregnancy in the United States (2016).

⁵⁰ See, e.g., MARTHA ERTMAN, *LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (2015); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 *Stan. J. C.R. & C.L.*, 201, 247 (2009).

⁵¹ California has gone further than the rest of the country in recognizing parents on the basis of function, but it remains an outlier. See June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood*, 7 *WHITTIER J. CHILD & FAM. ADVOC.* 3 (2007).

⁵² And, increasingly, the second spouse.

⁵³ See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

⁵⁴ *Elisa B. v. Superior Court*, 117 P.3d 660 (2005).

II. Unassisted Reproduction and Parenthood by Imposition

Marriage has historically served to institutionalize unassisted reproduction and it did so (and continues to do so) by establishing terms that order both spouses' understanding of the institution. After all, while unintended pregnancies are common, accidental marriages are harder to imagine.⁵⁵ And the process of getting married, with the requirement of a state-granted license and the custom of a ceremony before friends and family, helps create shared understandings. At one point the rules associated with marriage created clear understandings about parenthood, creating all or nothing systems of recognition that linked paternity exclusively to marriage.

In accordance with this earlier body of law, a man who wished recognition as a legal parent needed to marry the mother. If he did, he assumed the role as head of household in accordance with the gendered expectations of the time. If he did not, he forfeited a right to a role in the child's life. Kathy Edin and Tim Nelson have described this system of parentage as a "package deal,"⁵⁶ marriage and parenthood came together as a package, and men and women understood that in the face of an unplanned pregnancy, the couple were expected to marry or break up, with a break-up effectively ending the father's relationship to the child.

Two parallel movements challenged this system, establishing parenthood regardless of intent (or marriage). The first sought to impose the responsibilities of parenthood on what were thought to be absent fathers who had abandoned their children.⁵⁷ Over the course of the eighties and nineties, Congress repeatedly created incentives for the states to streamline paternity establishment and improve child support collection efforts.⁵⁸ With the expansion of public benefits in the sixties and early seventies came an effort to hold the "real culprits" responsible: the supposedly

⁵⁵ *But see* KATHERINE FRANKE, WEDLOCKED 132-33 (2016) (describing how freed slaves, who could not marry during slavery, were deemed "married" following emancipation, in some cases to their surprise as they entered new relationships and found that they could be accused of bigamy or adultery and similarly some same-sex couples who had entered into civil unions or domestic partnerships found themselves married as the states converted the statuses).

⁵⁶ Edin and Nelson, *supra* note , at 85-86.

⁵⁷ In accordance with the earlier system, a pregnancy prompted a decision to marry or break up. As nonmarital births became more common, however, unmarried mothers and the fathers of their children often moved in together or maintained a relationship. Sara McLanahan's fragile families studies dramatically changed the image of nonmarital families when her research in the nineties showed that the majority of unmarried fathers were living with the mothers at the time of the birth, and the majority remained involved with the child for at least a period after the break-up. These patterns, however, differ by race. The older emphasis on pregnancy triggering a decision to marry or break-up has long described whites more than African-Americans, with African-American men more likely than white men to remain involved with the child after a break-up. These racial differences have been narrowing, however, as whites have also become less likely to marry.

⁵⁸ *Id.* at n. 52.

ne'er do well men who had fathered the children receiving state support and then abandoned mother and children. The system stigmatized the available benefits and conditioned them on the mother's cooperation with the state in establishing paternity and securing child support. Driven by federal efforts to minimize costs, the regulations eventually produced a much greater degree of national standardization in paternity establishment and child support enforcement than in other areas of family law. While the efforts began in the seventies, they did not fully bear fruit until the nineties. Between 1992 and 2010, the number of paternity establishments tripled.⁵⁹

The most important innovation involved state recognition of Voluntary Acknowledgments of Paternity, often referred to as "VAPs."⁶⁰ VAPs created a process where unmarried fathers and mothers could sign a recognition of paternity in the hospital at the time of the child's birth. By law, these documents have the same force as a paternity judgment.⁶¹ Once signed, they are rarely set aside,⁶² although the men may later challenge paternity if they believe that they have been duped into supporting a child to whom they are not biologically related.⁶³ The couples who signed these documents clearly agreed to one thing: acknowledgment of the father's biological relationship to the child and establishment of his legal paternity. Unlike the marital presumption, however, these acknowledgements were not part of a broader, community-based set of understandings about what roles the mothers and fathers would assume in the child's life.⁶⁴

Instead, the system altered the default terms that governed such relationships. The older system had produced agreements to marry by stigmatizing single women who gave birth and denying unmarried men a role in their children's lives. As the number of single parents increased, the new system sought to increase the fathers' financial responsibilities. Yet, over time, decisions not to marry became more complex than the story of deadbeat dads deserting the women they impregnated. Women as well as men became warier of marriage, and the majority of nonmarital fathers provided at least some support to their children.⁶⁵ Within this system, however, the fathers

⁵⁹ *Id.* at n. 53.

⁶⁰ 42 U.S.C.A. § 666(a)(5)(C) (2015) ("Voluntary paternity acknowledgment"); Harris, *Reforming Paternity*, *supra* note 15, at 1305.

⁶¹ 42 U.S.C. § 666(a)(5)(D) (2015). They do not require paternity testing or judicial action and, unlike birth certificates, they required the participation of father and mother. Harris, *Reforming Paternity*, *supra* note 15, at 1306.

⁶² *Id.* at 1318.

⁶³ *Id.* at 1306-07. In addition, in at least 19 states a man is presumed to be a legal father if he lives with the mother and holds out the child as his own. *Id.* at 1319.

⁶⁴ Edin and Nelson note that, as a practical matter, unmarried fathers saw the mother as a "gatekeeper," who controlled access to the child, and often limited fathers' participation or conditioned it on contributions to the mother to a greater degree than the fathers liked. Kathryn Edin and Timothy J. Nelson, *Doing the Best I Can: Fatherhood in the Inner City* 157, 169, 208, 214 (2013).

⁶⁵ Among cohabitants between the ages of 18 and 29 who had not graduated from high school, for example, the women were much less likely than men to indicate that they expected to marry their current partner (47 percent compared to 67 percent of the men). Young, better educated men in contrast are more likely to report concerns about relationships holding them back, and among cohabitants with at least some college, the gender differences reverse, with

could be subject to punitive and counterproductive state actions for support, even if fathers and mothers had other understandings,⁶⁶ and they could be liable to mother-initiated support actions, even if the mother had agreed to treat the father as a sperm donor who would have no liability for support.⁶⁷ These results did not necessarily reflect the parties' intent or institutionalization of their relationships in a manner likely to produce agreement.⁶⁸ Instead, they involved the imposition of parenthood irrespective of intent.

The second change away from the older system involved expansion of unmarried fathers' custodial rights. Starting in 1972, the Supreme Court chipped away at the complete refusal to recognize unmarried fathers as parents. That year, it held unconstitutional an Illinois law accorded Peter Stanley, an unmarried father who had lived with his four children and their mother off and on for eighteen years, no recognition as a parent when the mother died, instead placing the children in foster care.⁶⁹ The Court struck down the statute as violative of the Fourteenth Amendment's due process and equal protection clauses, finding that Illinois had incorrectly presumed that all nonmarital fathers were unfit parents.⁷⁰

In the seventeen years following *Stanley*, the Supreme Court struggled further with the question of whether fathers has a constitutionally protected right to a relationship with their children.⁷¹ In this line of cases, the Court held that an

68 percent of women and 46 percent of the men expecting to marry their current partner. Kay Hymowitz, et al., *Knot Yet: The Benefits and Costs of Delayed Marriage in America* 8 (2013), <http://nationalmarriageproject.org/wp-content/uploads/2013/03/KnotYet-FinalForWeb.pdf>. See also Amanda J. Miller, Sharon Sassler, & Dela Kusi-Appouh, *The Specter of Divorce: Views From Working- and Middle-Class Cohabitators*. 60 FAM. REL. 602, 613 (2011). , observing that "Working-class cohabitators—particularly the women—were more than twice as likely to express concerns regarding how hard marriage was to exit than were middle-class respondents, emphasizing the legal and financial challenges of unraveling a marriage. . ."

⁶⁶ Harris, *Reforming Paternity*, *supra* note 15, at ____.

⁶⁷ See Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L.Q. 93, 95 (2015) (describing case of Kansas sperm donor, William Marotta, who was found liable for child support after he responded to a Craigslist ad posted by a same-sex couple who did not use a doctor for the insemination).

⁶⁸ Fathers and mothers do report, however, some understanding of the default rules. See Edin and Nelson (mother as gatekeeper).

⁶⁹ *Stanley v. Illinois*, 405 U.S. 645, 663 (1972).

⁷⁰ The Court held only that Peter Stanley had a right to a hearing as to whether he should receive custody of his children, rather than finding an automatic right as the surviving parent; the state could not treat him as a stranger to the children he had helped to raise. Stanley may not in fact have been a fit parent (he was an alcoholic who had already lost custody of an older daughter due to allegations of sexual abuse), but Illinois had denied him custody on the basis of his status as an unmarried father rather than his behavior. See Josh Gupta-Kagan, *In re Sanders and the Resurrection of Stanley v. Illinois*, 5 CAL. L. REV. CIR. 333, 383 (2014).

⁷¹ See also *Lehr v. Robertson*, 463 U.S. 248, 261–62. In *Lehr*, the Court held that the biological relationship between a nonmarital father and a child does not warrant constitutional protection unless the father had developed a substantial relationship with the

unmarried biological father who had assumed the responsibilities of parenthood was constitutionally entitled to recognition, but it stopped short of saying either that the father's rights rested on biology alone or that the mother was compelled to allow a father who wished to assume parental responsibilities to do so.⁷² The Court rejected the unequal treatment of fathers on the basis of marriage, but it has never held that recognition of unmarried fathers turned either on the father's desire for recognition in itself or that it necessarily rested on the mother's consent to the father's involvement.⁷³ Instead, the Court, while mandating some recognition for unmarried fathers, left these thornier issues to the states.⁷⁴

Since then, the paternity statutes inspired by the efforts to increase child support enforcement have also made it easier for unmarried fathers to receive greater recognition.⁷⁵ Many of these fathers have in turn sought greater custodial rights.⁷⁶ While the likelihood that a father has a custodial order correlates both with marriage and with the father's income,⁷⁷ custodial law does not necessarily take either marriage or the parents' relationship into account.⁷⁸ The single most common state

child. Because *Lehr* had neither provided support nor lived with the child, the state's interest in protecting the child outweighed the putative father's interest in blocking the adoption. Dissenting Justices White, Marshall, and Blackmun characterized the putative father's rights quite differently. They noted that *Lehr* had attempted to establish a relationship with his child but that the mother had concealed her location from him, thereby thwarting him in his efforts to visit. *Id.* at 268–69 (White, J., dissenting). “The ‘biological connection’ is itself a relationship that creates a protected interest.” *Id.* at 271–72, 275–76.

⁷² For a summary of these cases, see JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* Chap. 19 (2000).

⁷³ See Janet L. Dolgin, *Just A Gene: Judicial Assumptions About Parenthood*, 40 *UCLA L. REV.* 637, 647 (1993) (reviewing post-*Stanley* decisions and concluded that the rested on establishment of a “unitary family”).

⁷⁴ The Supreme Court's more recent decisions continue to reference this conclusion. Even dissenting Justices Sotomayor, Ginsburg, Kagan and Scalia opined: “Although the Constitution does not compel the protection of a biological father's parent-child relationship until he has taken steps to cultivate it, this Court has nevertheless recognized that “the biological connection . . . offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.” *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2575 (2013) (Sotomayor, J., dissenting) (internal citations omitted).

⁷⁵ Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, And Class Inequality*, 2013 *MICH. ST. L. REV.* 1295, 1300, 1308–13 (2013) (hereinafter *Reforming Paternity*).

⁷⁶ See PATRICIA BROWN & STEVEN T. COOK, *CHILDREN'S PLACEMENT ARRANGEMENTS IN DIVORCE AND PATERNITY CASES IN WISCONSIN* 2, 9–12, 18–19 (2012), available at http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2009-11/Task4A_CS_09-11_Final_revi2012.pdf; Maria Cancian et al., *Who Gets Custody Now? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 *J. DEMOG.* 1381 (2014).

⁷⁷ Brown & Cook, *supra* note __.

⁷⁸ One state, Massachusetts, however, explicitly applies different custody standards to married and unmarried parents. MASS. GEN. LAWS 209C § 10 (2015); see, e.g., *Smith v. McDonald*, 941 N.E.2d 1, 10 (Ma. 2010) (holding that a nonmarital father had no legal rights prior to paternity establishment, but that once established, visitation was appropriate). Second, for married parents, their rights “shall, in the absence of misconduct, be held to be

provision to address unmarried parents directly, adopted in fifteen states, presumptively awards custody of a child born to unmarried parents to the mother alone,⁷⁹ but if a father establishes paternity and challenges custody most custody statutes do not distinguish explicitly between married and unmarried parents.⁸⁰ Instead, in every state, the courts apply a best interest of the child determination that favors case specific determinations,⁸¹ and many states presumes that the child's interest lies in continuing contact with both parents.⁸²

Like parenthood by imposition in the context of child support, these custody laws constitute a type of parenthood by imposition on unmarried parents who have assumed primary responsibility for their children. Married parents effectively consent to the inclusion of the other parent as an equal partner in childrearing, and the judicial insistence on promoting the continued involvement of both parent following a break-up can be seen as implementation of the mutual assumption of responsibility for children within marriage.⁸³ Ethnographic studies, however, describe unmarried parents as giving mothers greater authority over children in the event of disagreement. In poorer communities, unmarried fathers' relationships with their children occur in the context of the contingent relationships they negotiate with the mothers, and studies indicate that the father's continuing relationship with his children depends on how he manages the relationship with the mother.⁸⁴ The access to the child that the mother allows often depends on the

equal . . . until a judgment on the merits is rendered, absent emergency conditions, abuse or neglect, the parents shall have temporary shared legal custody of any minor child of the marriage." MASS. GEN. LAWS. 208 § 31 (2015). Some states provide that a nonmarital mother is entitled to custody when the child is born. Huntington, *Postmarital Family Law*, *supra* note 10, at 204; Clare Huntington, Family Law and Nonmarital Families, 53 Fam. Ct. Rev. 233, 237 (2015).

⁷⁹ In fifteen states, however, state statutes expressly adopt a default rule that custody of a nonmarital child shall lie with the mother absent a ruling to the contrary. *Id.* at 204; Clare Huntington, Family Law and Nonmarital Families, 53 Fam. Ct. Rev. 233, 237 (2015).

⁸⁰ One state, Massachusetts, explicitly applies different custody standards to married and unmarried parents. MASS. GEN. LAWS 209C § 10 (2015).

⁸¹ Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best Interest Standard*, 77 L. & CONTEMP. PROB. 69, 83-88 (2014) (difficulty of validating domestic violence allegations).

⁸² See, e.g., HARRIS ET AL., FAMILY LAW 626 (5th ed. 2014); J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 216-17, 225 (2014) (stating that almost all states have adopted policies favoring the child's continuing contact with both parents).

⁸³ Ashley M. Votruba et al., *Moral Intuitions about Fault, Parenting, and Child Custody After Divorce*, 20 PSYCHOL. PUB. POL'Y & L. 251, 256 (2014).

⁸⁴ The mothers' entry into new relationships also has an impact. See Laura Tach, Ronald Mincy, & Kathryn Edin, *Parenting as a "Package Deal"*; *Relationships, Fertility, and Nonresident Father Involvement Among Unmarried Parents*, 47 DEMOG. 181 (2010). There are racial variations in the rate of positive coparenting, with black mothers reporting higher rates of effective co-parenting and more involvement from black fathers than other races.

father's willingness to cooperate with the mother and assist financially and socially with the child when she needs help.⁸⁵ And women encourage the greater involvement of the men who contribute to their children, either financially or otherwise, and often form new relationships when the father does not remain involved.⁸⁶ Women try to create stable environments for their children and are frustrated when the men cycle into and out of familial life.⁸⁷

Yet, unmarried fathers who have the resources to fight for greater custodial rights have become more likely to prevail, and the courts may threaten the custodial parent with loss of custody in the absence of support for the child's relationship with the other parent.⁸⁸ The result reflects changing elite norms, which treat parents as equally entitled to a role in the child's life. But the same outcomes destabilize community norms in poorer communities, which entrust the mother with primary responsibility for the child's welfare in the context of unstable relationships.

Consider the case of actor Jason Patric and his onetime girlfriend, Danielle Schreiber, which involves a clash between the intent-based norms of the elite and

See Calvin Z. Ellerbe, Jerrett B. Jones, and Marcia J. Carlson, *Nonresident Fathers' Involvement after a Nonmarital Birth: Exploring Differences by Race/Ethnicity* 9-10, 20, 22 (2014), <http://crcw.princeton.edu/workingpapers/WP14-07-FF.pdf>.

⁸⁵ See NANCY E. DOWD, *REDEFINING FATHERHOOD* 3 (2000); Katharine K. Baker, *Or Biology? The History and Future of Paternity Law and Parental Status*, 14 *Cornell J. L. & Pub. Pol'y* 1 (2004); Leslie . Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 *FAM. L.Q.* 157 (2011). Sociologists have found that the mothers valued fathers' contributions not by the amount of financial support, but by non-economic factors, such as role modeling. *E.g.*, Maureen R. Waller, *Viewing Low-Income Fathers' Ties to Families through a Cultural Lens: Insights for Research and Policy*, 629 *ANNALS OF THE AM ACAD. POLITICAL & SOC. SCI.* 102 (2010).

⁸⁶ Baker, *Or Biology*, *supra* note ___, at 37. Men are also more likely to establish paternity if they have a close relationship with the mother. See Ronald Mincy, Irwin Garfinkel & Lenna Nepomnyaschy, *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 *J. MARRIAGE & FAM.* 611, 615 (2005). A smaller Wisconsin study found that almost half of the unmarried parents in the state filed VAPs within a few months of birth for children born in 2005. The parents were more likely to use VAPs if they were older or college educated, and less likely to do so if the mother was on receiving public support. Patricia R. Brown & Steven T. Cook, *A Decade of Voluntary Paternity Acknowledgement in Wisconsin 1997-2007* (May 2008), http://www.irp.wisc.edu/research/childsup/pubtopics/paternity_estab.htm.

⁸⁶ Baker, *Or Biology*, *supra* note ___, at 37. Men are also more likely to establish paternity if they have a close relationship with the mother. See Ronald Mincy, Irwin Garfinkel & Lenna Nepomnyaschy, *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 *J. MARRIAGE & FAM.* 611, 615 (2005). A smaller Wisconsin study found that almost half of the unmarried parents in the state filed VAPs within a few months of birth for children born in 2005. The parents were more likely to use VAPs if they were older or college educated, and less likely to do so if the mother was on receiving public support. Patricia R. Brown & Steven T. Cook, *A Decade of Voluntary Paternity Acknowledgement in Wisconsin 1997-2007* (May 2008), http://www.irp.wisc.edu/research/childsup/pubtopics/paternity_estab.htm.

⁸⁷ See, *e.g.*, Edin & Nelson, *supra* note __.

⁸⁸ See, *e.g.*, *In re Mannion*, 917 A.2d 1272, 1275-76 (N.H. 2007) (summarizing trends).

parenthood by imposition more typical of non-elite relationships.⁸⁹ The case illustrates the difference between parenthood based on intentions established at birth versus function occurring after birth, without the two parents necessarily agreeing on the nature of their relationship.

In the case, Schreiber, after her relationship with Patric ended, wished to have a child, and Patric consented to provide sperm for conception through in vitro fertilization.⁹⁰ At the time he contributed sperm and at the time of the child's birth, Patric indicated that he did not want to be recognized as a father, his name did not appear on the birth certificate, and Schreiber brought the child home from the hospital as a single parent. She and Patric later resumed their relationship, although on a long distance basis. It ended with Schreiber receiving a domestic violence restraining order against Patric, and Patric seek parenting time with their son, Gus.⁹¹

Schreiber argued for application of the laws governing sperm donation, which would have focused on the parties' intent at the time of the donation to Schreiber. So long as Patric was seen as a donor, who contributed sperm for in vitro fertilization in a doctor's office, Patric's written intention not to be a father should have prevailed.⁹² In that case, he would lack standing to seeking parenting time with Gus. Such a result would have been consistent with elite norms that emphasize planning and defer to the parties' agreements about the terms of their relationships.

Patric, however, argued for a result based on function and on state policy favoring two parent families. He maintained that once Schreiber allowed him to develop a relationship with Gus and he was able to "hold out the child as own," a different body of law recognizing Patric's paternity prevailed. And, as a legal parent, Patric enjoyed a strong presumption that the child's interest lay with the continuing involvement of both parents.

Patric and Schneider certainly count as elite actors, and their ability to pursue high profile litigation into the appellate courts exceeds the means of less prominent parents. Moreover, their saga differs from most accounts of parenthood by imposition in an important respect: Gus's birth, if not their relationship, was intentional in every way. Yet, once Schreiber opened the door to Patric's formation of a relationship with Gus, their mutual intent at the time of the child's birth no long prevailed; instead, Patric became a father with parental rights comparable to hers, even though the result contradicted the parties' expectations at

⁸⁹ *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 790 (Cal..Ct. App.), *review denied*, (Cal. Ct. App. 2014).

⁹⁰ *Id.* at 792.

⁹¹ Patricia Glaser, "Why Won't Danielle Schreiber Allow Jason Patric to Have Contact with Her Son Gus," *The Huffington Post*, July 7, 2014, http://www.huffingtonpost.com/patricia-glaser/why-wont-danielle-schreib_b_5551655.html.

⁹² *Jason P.*, *supra*, at 792 (describing letter Patric sent indicating that he did not want to be acknowledged as the father).

the time of Gus's birth and Schreiber's expectations as to the status of their relationship.

III. A New Institutionalization of Parental Rights and Obligations

The birth of parenthood by intent alone arose from the desire to recognize a new set of parental relationships: those arising with the separation of parenthood and biology and the emergence of new sets of parents, who were raising children together, but who could not marry.⁹³ These developments have led to new doctrines that expanded recognition of parental status outside of marriage, as courts and legislatures sought to support the two parent model of parenthood these parents had adopted.⁹⁴

The creation of parenthood by imposition is rooted in a different set of developments; the growing number of unmarried parents, stereotypically poor, who do not necessarily plan their pregnancies, drift into and out of relationships, and often find support for their children difficult or in doubt.⁹⁵ Since the late nineties, these couples have seen their unintended pregnancy rates rise substantially, access to abortion fall, and fathers' income become less reliable.⁹⁶ By contrast, at the top of the socio-economic scale, families tend to be fairly traditional; that is, parents overwhelmingly marry before they have children, divorce rates are relatively low, husbands tend to have higher incomes than their wives, and children are overwhelmingly raised within two parent families.⁹⁷ The rate of unplanned

⁹³ Indeed, one of the reasons that the Supreme Court gave for adoption marriage equality was the impact on children of their parents' inability to marry in light of marriage's role in securing community recognition. *Obergefell, supra*, at 2597 (noting marriage involves affirming the couples' commitment to each other before their community); *id.* at 2600 (marriage establishes a concord with other families in the community); *id.* at 2601 ("Marriage remains a building block for our national community"); *see also* NeJaime, *The New Parenthood* (documenting how LGBT advocates sought to establish parentage based on intentional and functional relationships).

⁹⁴ In California, LGBT advocates deliberately framed the litigation to emphasize the two parent model, while leaving open the possibility of future recognition of three parents. *See* June Carbone, From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?, 7 WHITTIER J. CHILD & FAM. ADVOC. 3, 8 (2007).

⁹⁵ For a comprehensive examination of these trends, *see* Carbone & Cahn, Marriage Markets, *supra* note __; Kathryn Edin, Paula England, & Kathryn Linnenberg, *Love and Distrust Among Unmarried Parents, Presentation at the National Poverty Center Conference 6-7* (2003), available at https://www.researchgate.net/profile/Kathryn_Edin/publication/246728505_Love_and_Distrust_Among_Unmarried_Parents/links/558aed4808ae31beb1003ab0.pdf (indicating that unmarried couples who cohabit before the birth of a child often did so though drift, while couples who do so after the birth of a child may believe they should live as a family); *accord*, ISABEL V. SAWHILL, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE (2013).

⁹⁶ Naomi Cahn, June Carbone, & Howard Lavine, *New Perspectives on the Family and Demographic Change* (forthcoming 2016).

⁹⁷ Carbone and Cahn, *supra* note __, at .

childbirth is less than one-fifth that of poor women, and the rate of usage of assisted reproductive technology is almost twice as high as for low-income women.⁹⁸ Gay married couples, who are likely to use surrogacy to become parents, have even higher incomes than heterosexual couples, and are more likely to be highly educated.

The nonmarital birth rates for white college graduates as a group barely changed between the mid-eighties and the mid-2000s and while they increased to a small degree since the Great Recession, they remain low and are likely to continue to do so.⁹⁹ The group's unplanned pregnancy rate has fallen steadily since 1990.¹⁰⁰

The law that governs nonmarital parents often proceeds from disapproval of their choices¹⁰¹ and a desire to impose the two parent norms of the elite. A growing number of parents deal with this system by staying away from government benefits and staying out of court, giving them greater autonomy to craft families of their choosing.¹⁰²

Both of these developments – recognition for LGBT parenthood and the increasing rate of nonmarital parenthood -- contribute to what has been called the “deinstitutionalization of marriage;” that is, the decline of the traditional institution that guided behavior in ways that aligned prospective parents’ reasonable expectations of each other.¹⁰³ Yet, ironically, the success of efforts to win recognition of marriage equality calls into question continued reliance on intent as a way to govern alternative families.¹⁰⁴ Moreover, it is the success of unmarried women in achieving a measure of autonomy that has led to intensified calls to increase men’s custodial rights – and to reimpose a two parent model in the process.

This section of the article examines the likely impact of marriage equality on the role of intent in assisted reproduction cases and the corresponding impact of parenthood by imposition on unassisted parenthood. The section concludes that any greater emphasis on the formalities of parenthood, whether through IVF

⁹⁸ See Lawrence B. Finer and Mia R. Zolna, Unintended pregnancy in the United States: incidence and disparities, 2006, 84 *Contraception*, 478 (2011).

⁹⁹ NAT’L MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2010, WHEN MARRIAGE DISAPPEARS: THE NEW MIDDLE AMERICA 21 fig.S3 (W. Bradford Wilcox & Elizabeth Marquardt eds., 2010), available at http://www.virginia.edu/marriageproject/pdfs/Union_11_12_10.pdf.

¹⁰⁰ Finer and Zolna, *supra* note . In addition, while the abortion rate for the group is low because of the low number of unplanned pregnancies, women in this group are more likely to terminate an unplanned pregnancy than women with a high school education or less, contributing to the low unintended birth rate. See discussion *supra*.

¹⁰¹ For an example of the type of social disapproval faced by these couples, see CHARLES MURRAY, COMING APART (2012).

¹⁰² See Carbone and Cahn, *Triple System of Family Law*, *supra* note ___.

¹⁰³ See Andrew J. Cherlin, The Deinstitutionalization of American Marriage, 66 *J. of Marriage and Family* 848 (2004), <http://www.casamariposa.org/Prop8/Attachments/DIX0049.pdf>.

¹⁰⁴ *But see* NeJaime, *Parenthood*, *supra* note ___.

consent forms or post-birth VAPs, will require greater attention to informal norms and alternative dispute resolution to succeed in linking parents to children.

A. Marriage Equality and the Role of Consent

With the ability of LGBT couples to wed and statutory regulation of at least some aspects of ART, the courts will have to revisit the relationship between marriage and parenthood and consider the continued vitality of consent-based doctrines.¹⁰⁵ In doing so, they will almost certainly apply the marital presumption in some form to same-sex couples – and in the process determine what role intent plays in conferring parenthood.

The marital presumption today, which no longer serves solely as a presumption of biology, reaffirms the connections between marriage and parenthood. That is, it makes parentage an “opt-out” status that automatically confers parental status on the spouse of a birth mother, and treats both spouses as equally responsible for the children born into the marriage. As an opt-out status, the presumption, both legally and practically, does not require spouses to take any action for both to receive recognition as parents, and their legal status continues unless someone takes action to challenge this status.¹⁰⁶ Custody and support laws then assign equal responsibility for the child to both parents and presume it is in the child’s interests to remain in continuing contact with both following a divorce.¹⁰⁷ In contrast, if a woman already has a child at the time of the marriage, and marries a spouse who is not the child’s legal father, the spouse assumes the status of stepparent,¹⁰⁸ a status that does not confer equal rights and responsibilities with the initial legal parent.¹⁰⁹

With the ability of same-sex couples to wed, courts will have to decide, first, how to apply the marital presumption, and second, what happens to couples who do not marry. In the process, intent is likely to be a factor that acts together with the new understandings of marriage, rather than as an independent principle. That is, a same-sex spouse should be presumed to consent, on the basis of the marriage,

¹⁰⁵ *Accord, id.*

¹⁰⁶ *See, e.g., In C.L.W. v. Madison County Dept. of Human Resources*, --- So.3d ---, 2014 WL 6844144 (Ala. Civ. App. 2014) (holding that the biological father lacked standing to assert paternity despite a DNA test showing 99.99% probability of paternity); Jessica Clarke, *Identity and Form*, 103 CALIF. L. REV. 747 (2015).

¹⁰⁷ *See DiFonzo, supra*,

¹⁰⁸ Indeed, the result may be true even if the spouse is the child’s biological father. *See* June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219 (2011) (describing Utah case upholding marital presumption and husband’s continuing paternity even where mother later married biological father and they jointly raised the child).

¹⁰⁹ Where the courts have granted visitation to step-parents on the basis of the functional relationship with the child, they typically stop short of granting equal decisionmaking or custodial rights with the primary parent. *See, e.g., McAllister v. McAllister*, 779 N.W.2d 652, 662 (N.D. 2010) (granting the birth mother “decisionmaking responsibility and primary residential responsibility,” while the former stepfather (as psychological parent) and the biological father were each granted visitation).

to assume a parental role with respect to her spouse's children, and the question will then be to determine when (if at all) such presumed consent can be rebutted.

The first question, whether the opt-out system used for different sex couples applies to same-sex couples, should be relatively straightforward¹¹⁰ and most courts to decide the issue to date have said yes.¹¹¹ This means that two same-sex couples will be automatically treated as parents of a child, without the need to take some action, such as adoption, to secure legal parenthood.¹¹²

The question of what role intent will play in these decisions, however, remains to be seen. Same-sex couples, of course, need to involve third parties in order to have a child and courts could rely on the laws governing sperm donation and surrogacy to require couples to expressly establish intent in order to acquire parental recognition.¹¹³ It seems more likely, however, that the courts will use marriage to ratify two parent families, without requiring a specific showing of intent.¹¹⁴

¹¹⁰ Jurisdictions can change their parentage statutes to apply the preemption explicitly to same-sex couples. *See, e.g.*, D.C. Code § 16-909(a-1)(2)(2015) ("There shall be a presumption that a woman is the mother of a child if she and the child's mother are or have been married, or in a domestic partnership, at the time of either conception or birth, or between conception or birth, and the child is born during the marriage or domestic partnership"); *see also* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L., 201, 247 (2009) (noting consideration or enactment of similar statutes elsewhere).

¹¹¹ *See* Barse v. Pasternak, 59 Conn. L. Rptr. 801 (Ct. Sup. Ct. 2015); Wendy G-M. v. Erin G-M., 45 Misc. 3d 574, 596, 985 N.Y.S.2d 845, 861 (Sup. Ct. 2014); . G-M v. G-M, 45 Misc. 3d 574, 985 N.Y.S.2d 845 (N.Y. Sup. Ct. 2014); Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013). *See also* Stankevich v. Milliron, 2015 BL 382443, Mich. Ct. App., No. 310710, 11/19/15, http://www.bloomberglaw.com/public/document/Stankevich_v_Milliron_No_310710_2015_BL_382443_Mich_Ct_App_Nov_19 (applying equitable estoppel to recognize parental status of same sex couple because of their Canadian marriage, which the Michigan courts found that they were required to recognize in light of *Obergefell*).

¹¹² Of course, in some states, same-sex couples have had to sue to get their names jointly entered onto a birth certificate in accordance with the marital presumption. *See, e.g.*, Smith v. Pavan, 2015 Ark. 474, available at

<http://opinions.aoc.arkansas.gov/WebLink8/0/doc/349300/Electronic.aspx> (recognizing lower court order holding state statute preventing recognition of same sex couples to be unconstitutional, but staying application to other courts during appeal). Once these situations work their way through the courts, however, recognition ought to become routine.

¹¹³ *See, e.g.*, Roe v. Patton, No. 2:15-CV-00253-DB, 2015 WL 4476734, at *2 (D. Utah July 22, 2015) (requiring that Utah apply the Uniform Parentage to same-couples using assisted reproduction in a gender neutral manner). Surrogacy laws may further require the birth mother to consent to severance of her parental rights and an adoption by the biological father's spouse to recognize parentage by the intended parents.

¹¹⁴ *See, e.g.*, Gartner, 830 N.W.2d 335 (concluding that marital presumption applied independently of the sperm donor laws). Surrogacy, however, is subject to a different set of rules: parenthood for a same-sex or different-sex couple that uses surrogacy is based on state

As lower court decisions in other states have observed, the distinction between the marital presumption and the sperm donor statutes is important because many spouses fail to comply with the statutory requirements.¹¹⁵ The marital presumption in these cases serves as a clean up doctrine to get around technicalities that would otherwise leave children with only one legal parent.¹¹⁶ Both of these doctrines can be said to rely on intent in some sense. It is just that the marital presumption, in the context of same-sex couples, presumes that marriage means consent to the assumption of equal parent rights and responsibilities for children born into the union, while gamete donor laws require proof of consent to the specific act of insemination before the courts will recognize the parental status of a party who is not biologically related to the child.¹¹⁷

In contrast, same-sex partners who do not consent to their spouse's production of a child will differ from opposite sex couples in that they will ordinarily know whether their spouse conceived a child without their consent. Husbands may never find out that their wives' cheated on them, or they may discover the truth years later. Same-sex couples will presumably know, perhaps from the moment of conception, whether or not they consented to the pregnancy.¹¹⁸ Husbands who find out that their wives have a child with someone else can choose to rebut the marital presumption and, if they act promptly, DNA tests in many states may seal the matter.¹¹⁹ A same-sex spouse will ordinarily have a similar opportunity to make a

surrogacy law, not the marital presumption, and the state vary widely. *See, e.g.*, Douglas NeJaime, *Griswold's Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality*, 124 *YALE L.J. FORUM* 340, 344 (2015); Andrea B. Carroll, *Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents through Surrogacy*, 88 *IND. L.J.* 1187, 1191 (2013).

¹¹⁵ In cases involving heterosexual couples as well, the courts have used the marital presumption to deal with cases where the parties failed to comply with statutory prerequisites for children conceived through artificial insemination by donor. *See, e.g.*, *In re Baby Doe*, 291 S.C. 389, 391, 353 S.E.2d 877 (Sup.Ct.S.C.1987) ("there was a rebuttable presumption that any child conceived by artificial insemination during the course of marriage has been conceived with the consent of the husband"); *K.S. v. G.S.*, 182 N.J.Sup. 102, 107, 440 A.2d 64 (1981).

¹¹⁶ *See Barse v. Pasternak*, 59 Conn. L. Rptr. 801 (Ct. Sup. Ct. 2015) (holding the marital presumption applies to couples who use artificial insemination but fail to file the requisite paperwork for recognition of the non-biological spouse under the Connecticut sperm donor statute); *accord, G-M v. G-M*, 45 Misc. 3d 574, 985 N.Y.S.2d 845 (N.Y. Sup. Ct. 2014)..

¹¹⁷ Even then, some states will acknowledge parentage only where the donation is to a married woman. *See discussion supra.*

¹¹⁸ In at least one case, however, a woman who consented to her partner's insemination later found that her partner had in fact conceived the child through intercourse with the man who had agreed to be a donor. In this case, the court concluded that the sperm donor laws did not apply, and remanded for a determination of whether all three should be recognized as parents. *See, e.g.*, *S.M. v. E.C.*, 2014 Cal. App. Unpub. LEXIS 4574 (2014) (recognizing a same-sex couple as parents, but remanding for consideration of whether the biological father, who had an affair with the biological mother and who later planned to marry her, should also receive recognition as a parent).

¹¹⁹ State vary considerably in how they apply the marital presumption; nonetheless, if the husband acts promptly to divorce the wife or disavow paternity soon after discovering the truth about paternity, he will not ordinarily be liable for support even in states that otherwise

much more considered decision about whether to assume a parental role if a spouse has a child without their consent, and if they say no, to avoid liability for child support.¹²⁰

If, however, a same-sex spouse wishes to exercise custodial rights over the objection of a biological parent, their relationships will be governed by state policy, not by intent. After all, such cases typically involve a conflict between a biological parent and a spouse, who both intend to be parents to the exclusion of the other, and a birth mother whose intent may change over time. In these cases, the states vary considerably in the respective weight they give to biology, marriage and function. Consider, for example, what to do with parenthood where a lesbian spouse has an affair with a man, reconciles with her wife, and both the wife and the biological father seek recognition as a parent. An intermediate court in New York recognized the father over the wife “based on essential biology.”¹²¹

The opinion is sure to be controversial, but the case cannot be resolved on the basis of intent (the three parties certainly differed in their intents at the time of conception and birth to the extent that they clearly thought about parentage at all). Instead, the states split into three groups:

Some states, such as Missouri, have staked out a strong stance that children’s interests lie in a relationship with both biological parents, and Missouri has made it difficult for mothers, for example, to place children for adoption without the father’s consent.¹²² Where a biological father wishes to contest the marital

adhere fairly strictly to the marital presumption. See, e.g., *Dep’t of Children & Family Servs. ex rel. A. L. v. Lowrie*, --- So.3d ---, 2015 WL 2164619 (La. May 5, 2015) (recognizing the biological father’s liability for support despite recognition of the mother’s husband as a legal parent).

¹²⁰ This assumes, however, that the birth mother wishes her spouse to play such a role. See, e.g., *S.M. v. E.C.*, 2014 Cal. App. Unpub. LEXIS 4574 (2014) (recognizing a same-sex couple as parents, but remanding for consideration of whether the biological father, who had an affair with the biological mother and who later planned to marry her, should also receive recognition as a parent).

As states move towards gender-neutral ART statutes, a lack of consent by a spouse should be evidence of a lack of intent to serve as a parent.

¹²¹ *Q.M. v. B. C.*, 995 N.Y.S.2d 470, 474 (Fam. Ct. 2014).

¹²² Approximately two-thirds of the states similarly allow the nonmarital father to challenge the marital presumption through either statute or case law. UNIF. PARENTAGE ACT § 607 cmt (2002). See, e.g., *Watermeier v. Moss*, No. W2009-00789-COA-R3-JV, 2009 WL 3486426, at *2 (Tenn. Ct. App. Oct. 29, 2009) (holding that a Tennessee statute required that, for the marital presumption to preclude paternity for the biological father, the married couple needed to have lived together at the time of conception, to have remained together through the filing of the petition, and that the husband and mother needed to sign an affidavit attesting to biological paternity); *Draper v. Com.*, ex rel. Heacock, No. 2010-CA-000112-ME, 2011 WL 181355 (Ky. Ct. App. Jan. 21, 2011), opinion not to be published (Aug. 17, 2011) (refusing to apply the marital presumption to block recognition of the biological father of a five-year-old, where the mother remarried her ex-husband one day before the child was born and divorced him three years later, before the paternity action was brought). In New York, a request for DNA tests is subject to a best interest standard. See

presumption, these states grant him standing to do so.¹²³ He would win in a case like that in New York, whether the spouses were same-sex or different sex.¹²⁴ As a practical matter, therefore, the Missouri courts establish a default rule that encourages fathers' rights and involvement. Intent matters only where the biological father consistently supports the mother's course of action. These decisions are gendered -- the courts believe it is important for a child to have a relationship with the biological father -- but marriage makes relatively little difference. Marriage equality is thus unlikely to change the outcome of these cases; the biological father is likely to prevail against either a husband or a wife who is not genetically related to the child.

In states like Louisiana, Michigan or Utah, the courts place more weight on marriage and would ordinarily recognize the spouse over a biological father, where the spouse wishes to play a parental role.¹²⁵ Marriage rather than biology plays the more important role in these states.¹²⁶ As a practical matter therefore, the agreements that matter are those of a married couple to accept joint responsibility for a child. The mother must allow the husband to assume such a role and the husband must consent to do so, but once they do, the courts honor their agreement. Michigan has recently extended these principles to same-sex couples so long as

Shondel J. v. Mark D., 853 N.E.2d 610, 620 (N.Y. 2006) (finding it in the child's interest not to let the man who had acted as the father to disestablish paternity); Juanita A. v. Kenneth Mark N., 930 N.E.2d 214, 216 (N.Y. 2010) (preventing the biological father from establishing paternity where it would disturb the child's relationship with someone else).¹²³ The New York court in *Q.M.*, 995 N.Y.S.2d at 474 appeared to take this position when it described the second spouse as occupying "the position of many loving step-parents, male and female, who are not legal parents and are not entitled to court ordered custody or visitation with their step-children."

¹²⁴ Approximately two-thirds of the states similarly allow the nonmarital father to challenge the marital presumption through either statute or case law. UNIF. PARENTAGE ACT § 607 cmt (2002). See, e.g., *Watermeier v. Moss*, No. W2009-00789-COA-R3-JV, 2009 WL 3486426, at *2 (Tenn. Ct. App. Oct. 29, 2009) (holding that a Tennessee statute required that, for the marital presumption to preclude paternity for the biological father, the married couple needed to have lived together at the time of conception, to have remained together through the filing of the petition, and that the husband and mother needed to sign an affidavit attesting to biological paternity); *Draper v. Com., ex rel. Heacock*, No. 2010-CA-000112-ME, 2011 WL 181355 (Ky. Ct. App. Jan. 21, 2011), opinion not to be published (Aug. 17, 2011) (refusing to apply the marital presumption to block recognition of the biological father of a five-year-old, where the mother remarried her ex-husband one day before the child was born and divorced him three years later, before the paternity action was brought). In New York, a request for DNA tests is subject to a best interest standard. See *Shondel J. v. Mark D.*, 853 N.E.2d 610, 620 (N.Y. 2006) (finding it in the child's interest not to let the man who had acted as the father to disestablish paternity); *Juanita A. v. Kenneth Mark N.*, 930 N.E.2d 214, 216 (N.Y. 2010) (preventing the biological father from establishing paternity where it would disturb the child's relationship with someone else).

¹²⁵ Indeed, *Wendy G-M. v. Erin G-M.*, 45 Misc. 3d 574, 596, 985 N.Y.S.2d 845, 861 (Sup. Ct. 2014) reached the same result with the court in that case, opining that:

"The pervasive and powerful common law presumptions that link both spouses in a marriage to a child born of the marriage--the presumption of legitimacy within a marriage and the presumption of a spouse's consent to artificial insemination--apply to this couple."

¹²⁶ *Carbone and Cahn*, *supra*.

they are married¹²⁷ and Louisiana has indicated that, with respect to custodial rights, the marital bond is sufficiently important that the husband remains a legal father even when the biological father is assigned responsibility for support. In these states, marriage and function, but not biology, govern.

In states like California, the courts give more weight to function, preferring a person who has assumed a parental role over someone who has not. As a practical matter, therefore, California would favor the two women, though today California could also recognize all three.¹²⁸ California applies exactly the same principles to unmarried couples and does not ground this doctrine in the consent of the adults; the assumption of the functional role is more important than the parties' intentions at the child's birth.¹²⁹ Nonetheless, it is hard to imagine a second adult establishing a relationship with a child without the permission of the custodial parent. Jason Patric, after all, saw Gus only with Danielle's permission; the fact that she did not realize that his limited contact could lead to a basis for legal parenthood did not matter to the California courts.¹³⁰

What these states doctrines have in common is that, at least in hard cases such as that of an affair within marriage, they decide parentage in accordance with their definition of state policy, rather than a more hands off notion of deference to private decision-making.¹³¹ These policies result in determinations of parenthood—or the denial of parenthood—by imposition for at least one of the parties. While

¹²⁷ See *Stankevich v. Milliron*, 2015 BL 382443, Mich. Ct. App., No. 310710, 11/19/15, http://www.bloomberglaw.com/public/document/Stankevich_v_Milliron_No_310710_2015_BL_382443_Mich_Ct_App_Nov_19 (applying equitable estoppel to recognize parental status of same sex couple because of their Canadian marriage, which the Michigan courts found that they were required to recognize in light of *Obergefell*).

¹²⁸ See, e.g., *S.M. v. E.C.*, 2014 Cal. App. Unpub. LEXIS 4574 (2014) (recognizing a same-sex couple as parents, but remanding for consideration of whether the biological father, who had an affair with the biological mother and who later planned to marry her, should also receive recognition as a parent).

¹²⁹ See *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (holding that sperm donor laws did not apply where a woman donated egg to her partner, agreeing that the birth mother would be the sole legal parent, but that they would raise the child in their joint home).

¹³⁰ *Carbone*, supra, Whittier L. Rev. See also *In re Jesusa V.*, 85 P.3d 2, 13, 15 (Cal. 2004) (applying similar principles to mother who separated from her husband and entered into a new relationship with father of the child. In deciding parentage of that child, the concluded that the fact that the mother allowed the husband post-birth contact with the child was sufficient to allow recognition of the husband, rather than the biological father, as a legal parent in light of the weightier considerations of policy and logic).

¹³¹ New York ordinarily decides marital presumption cases in accordance with the child's interests. See note __, supra. It would not have been out of line with cases involving heterosexual couples if the court had recognized the child's interest in a relationship with a biological parent given the fragility of the marriage (if true) or the child's inevitable curiosity about his or her biological origins. The case, however, in talking about deprivation about the child's right to have a "father" seemed to value heterosexual parents more than same sex ones. This conclusion seems inconsistent with the traditional role of the marital presumption in prizing marital unity over biology.

the more mundane application of the marital presumption correspond more closely to the parties' presumed intent, they too reflect state policies about marriage – and formalism – rather than deference to the parties' desires. Both sets of cases set the stage for revisiting parenthood by imposition for unmarried couples. The policies in the marital presumption cases, while they may seem to be about marriage, in fact are about the *failure of marriage* to align behavior and intention, and thus the courts fall back on state policies that reflect policies similar to those that apply to the unmarried.¹³²

B. Parenthood by Imposition and the Survival of Autonomy

If same-sex have achieved hard sought recognition of the relationships, unmarried couples are under assault. They face less effective access to birth control, with their unintended pregnancy rates rising over the last decade and a half, and greater restrictions on their access to abortion. For college graduates, abortion is still an important factor in holding the line on childbirth with the wrong person, in the wrong circumstances. Abortion has declined as a factor for less educated woman.¹³³

Poor and less educated women have also become less likely to marry, even though they would ideally like to do so, in large part because it has become harder to find a man worth marrying.¹³⁴ Fifty percent of poor women's intimate relationships break up at least in part because of domestic violence,¹³⁵ and even where disqualifying behavior such as domestic violence is not an issue, unmarried couples report that the instability in their lives that comes from insecure employment, unstable income, substance abuse, and involvement with the criminal justice system undermines their relationships.¹³⁶ Moreover, unmarried relationships, in part because they do not involve the same commitment as

¹³² Indeed, Missouri's pro-biology, pro-father doctrines and California's pro-function doctrines produce the same results whether the parties are married or not. And while the stronger marital emphasis in Louisiana, Utah and Michigan does produce different results for the married (see Michigan case, *supra*), they do so in accordance with privileging of some decision-makers over others. Thus, the husband who wishes custodial rights prevails over the biological father even whether the mother has married the biological father and prefers him as a parent (Utah case in FLQ), but the husband who is not genetically related to the child who does not wish to pay support prevails over the mother in divorce actions. (Utah, FLQ).

¹³⁴ See Carbone and Cahn, *Marriage Markets*, *supra*.

¹³⁵ KATHRYN EDIN & MARIA J. KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* 98 (2005) (domestic violence is the "chief culprit").

¹³⁶ See, e.g., WILLIAM J. WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 99 (1996). In their 2005 book, sociologists Kathy Edin and Maria Kefalas, for example, quote one young woman, a white high school dropout who had a child in her teens with a man who was awaiting trial: "That's when I really started [to get better], because I didn't have to worry about what *he* was doing, didn't have to worry about him *cheating* on me, all this stuff. [It was] then I realized that I had to do what I had to do to take care of my son." EDIN & KEFALAS, *PROMISES I CAN KEEP*, *supra* note **Error! Bookmark not defined.**, at 194.

marriage, are more likely than marriages to end because of sexual jealousy or other forms of mistrust.¹³⁷

In the face of these difficulties, women paired with unreliable men find marriage to be a bad deal. It does not reflect the realities nor the understood terms of their relationships. While elite male cohabitants express more reservations about marriage than their female partners, the least educated women express more reservations than middle class women or than their male partners about the trajectories of their relationships.¹³⁸

A major difference between married and unmarried relationships (and for the reservations of working class women) is the ease of exit. Women initiate two-thirds of all divorces, and less elite women initiate even more.¹³⁹ The party initiating a divorce bears the burden and expense of going to court and following through with the proceedings. In addition, if there are children born within the relationship, the court order will include and no judge will grant a divorce without a custodial order allocating the children's time with both parents.¹⁴⁰ Working class women cite the difficulty of getting a divorce as a reason for wariness about marriage.¹⁴¹

In contrast, if a nonmarital relationship ends, nothing happens: one party simply moves out. Custody typically remains with the mother and if the father wishes to see the children over the mother's objections, he needs to go to court and get an order. Relatively few unmarried men do so.¹⁴²

In this context, staying unmarried allows couples to craft relationships of their choosing – if they stay out of court.¹⁴³ To be sure, unmarried cohabitants are less likely to agree on the terms of their relationships than the married, but community

¹³⁷ EDIN & KEFALAS, PROMISES I CAN KEEP, *supra* note **Error! Bookmark not defined.**, at 81 (discussing infidelity and domestic violence); Heather D. Hill, *Steppin' Out: Infidelity and Sexual Jealousy among Unmarried Parents*, in UNMARRIED COUPLES WITH CHILDREN 104 (Paula England & Kathryn Edin eds., 2007); Joanna Reed, *Anatomy of the Break-up: How and Why Do Unmarried Couples with Children Break-Up?*, in *id.* at 133.

¹³⁸ Not Yet, *supra*.

¹³⁹ Margaret F. Brinig & Douglas W. Allen, "These Boots Are Made for Walking": Why Most Divorce Filers Are Women, 2 AM. L. & ECON. REV. 126, 128 tbl.1, 136-37 (2000) (stating that two-thirds of those filing for divorce are women and custody laws affect willingness to file).

¹⁴⁰ See BROWN & COOK, *supra* note 108, at 2, 9–12, 18–19; Maria Cancian et al., *Who Gets Custody Now? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 J. DEMOG. 1381 (2014).

¹⁴¹ See Amanda J. Miller, Sharon Sassler, & Dela Kusi-Appouh, *The Specter of Divorce: Views From Working- and Middle-Class Cohabitators*. 60 FAM. REL. 602, 613 (2011), observing that "Working-class cohabitators—particularly the women—were more than twice as likely to express concerns regarding how hard marriage was to exit than were middle-class respondents, emphasizing the legal and financial challenges of unraveling a marriage. . ."

¹⁴² See BROWN & COOK, *supra* note, at 2, 9–12, 18–19;

¹⁴³ Carbone and Cahn, Triple System, *supra* note .

norms do assign default rules and expectations, and they differ from the formal law. As a practical matter, mothers retain custody in accordance with a single parent, primary custody model that used to be the norm at divorce as well. Fathers expect to maintain a relationship with their children, and feel strong community pressures to do so, with African-Americans and Latinos more likely to have internalized such norms than whites.¹⁴⁴ Yet, they also recognize that they have to work with the mother in order to do so. Mothers expect that the fathers will assist with the child, contributing time and money, show respect for the mother and her parenting preferences, and stay out of the way of the mothers' new relationships. Some mothers, of course, do not wish to maintain the fathers' relationship with the child,¹⁴⁵ and some wish to have their current partner replace the biological father in the child's life, in a manner not so different from the marital presumption cases. Yet, the majority of these families are in fact two parent ones, with parents who work out their relationships in accordance with their respective circumstances and ability to reach resolutions influenced by community expectations. The fathers in these relationships have become increasingly likely to sign VAPs that establish their legal relationship to the child, but the piece of paper is less important to these relationships than the understandings of the adults.¹⁴⁶

Legal interventions and proposed reforms to strengthen recognition of unmarried parenthood tend to disrupt these arrangements. A growing number of scholars have called for treating married and unmarried couples alike,¹⁴⁷ increasing the support for parenthood by imposition, and the Obama Administration has called for reforms that would make it easier for unmarried men to get custodial orders.¹⁴⁸ These efforts tend to impose a two parent model on couples who have chosen a somewhat different set of terms, and reformers often seek explicitly to eliminate many of the distinctions between married and unmarried couples.¹⁴⁹ The results, however, change the balance between couples in these relationship, and often produce effects that do not reflect the couples' intent nor community norms

First, the law has attempted to make parenthood for unmarried couples much easier to opt into. The Clinton Administration in the nineties wanted to ensure two

¹⁴⁴ See Marcia J. Carlson, Sara S. McLanahan & Jeanne Brooks-Gunn, *Coparenting and Nonresident Fathers' Involvement with Young Children After a Nonmarital Birth*, 45 DEMOGRAPHY 461 (2008) (Black non-Hispanic men were more likely to have maintained contact with their children, to have seen them in the past month, and to have seen them frequently.)

¹⁴⁵ In many cases, for good reasons, given the high rates of domestic violence, substance abuse, and involvement with the criminal justice system in poor communities. See, e.g., EDIN & KEFALAS, *supra* note 81, 98 (2005) (domestic violence is the "chief culprit").

¹⁴⁶ The stronger the father's relationship with the mother, however, the more likely he is to sign a VAP. See Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 168 (2011)

¹⁴⁷ See, e.g., Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 240 (2015) (hereinafter *Postmarital Family Law*) (advocating greater equality between marital and nonmarital parents).

¹⁴⁸ See Stacy Brustin & Lisa Vollendorf Martin, *Paved with Good Intentions: Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803 (2015).

¹⁴⁹ See, e.g., Huntington, *supra* note ., at 240.

parents for every child, and put the VAP system in place in an effort to facilitate paternity establishment while the mother was still in the hospital. This system has in fact succeeded in dramatically increasing the rate of paternity establishment.¹⁵⁰ In principal, establishing the facts of paternity is useful and appropriate. The process of paternity establishment, however, does little to encourage couples to reach agreement on the terms of their relationships while it subjects them to the imposition of state-sanctioned relationship terms, including support and custody terms different from the ones to which they might agree on their own

Second, new reforms seek to make it easier for noncustodial fathers to have access to their children. Some propose making custodial and child support orders more routine, making it easier for courts to address the two in the same proceeding, and for unmarried fathers to get custodial rights soon after the child's birth.¹⁵¹ These proposals tend to assume that all fathers should be involved with their children, custodial mothers obstruct such efforts, and fathers without such orders do not have enough contact with children.¹⁵²

Third, the law that applies to these couples tends to treat mother and fathers equally, even where one has assumed primary responsibility for the child since birth.¹⁵³

These proposed reforms tend to impose the middle class norms associated with reproduction (and ordinarily implemented through marriage) on everyone else. They ignore the circumstances of non-elite reproduction, which often involve couples who do not have a stable working relationship, and who tend to involve more unequal assumptions of responsibility for childrearing.¹⁵⁴ Moreover, they disrupt the parties' informal arrangements where custodial parents often trade access for needed support. As we noted above, the child support literature indicates that child support enforcement efforts reduce father involvement both in the form of contact with the child, and in terms of his total contributions to the child's support. Greater custodial rights might also disrupt the balances in the existing

¹⁵⁰ Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1300, 1304 n. 51 (2013) (hereinafter *Reforming Paternity*).

¹⁵¹ See Brustin and Martin, *supra* note .

¹⁵² See Huntington, *Postmarital Family Law*, *supra* note 11, at 195 (observing that to "maintain the new relationship, it was easiest for the mother to keep the father away from the family").

¹⁵³ See J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 216 (2014) (observing that "the most significant trend in contemporary child custody law is toward greater active involvement by both parents in continued child rearing after separation").

¹⁵⁴ As we have noted elsewhere, the circumstances in which couples have the most unequal relationships (and where marriage makes the least sense) are when one parent is both the primary wage earner and the primary caretaker. In these cases, the imposition of equal rights and responsibilities typically means that resources the higher earning parent is using to care for the child have to be split with the other parent. See our BU piece on *The End of Men*.

system, giving the greatest power to those who seek to control the other parent. At their core, the proposals seek to expand and extend a parent by imposition model that once applied by coercing parties into marriage and today coerces them into shared parenthood, irrespective of intent or the informal community norms that shape parental expectations.¹⁵⁵

C. Same-sex couples and decisions not to marry

If conventional norms shape marriage and courts increasingly apply the same norms to parental relationships outside of marriage, what is likely to be the future of nonmarital relationships? The answer may be that just as LGBT couples are changing the legal definition of what marriage means, so too may they change the nature of what it means not to marry.

On the one hand, now that same-sex couples can marry, some of the doctrines that have permitted recognition of parental partnerships outside of marriage may disappear.¹⁵⁶ On the other hand, LGBT couples highlight some of the reasons that couples choose not to marry in ways that challenge the gendered assumptions that apply to other couples. Katherine Franke, in *Wedlocked*, provides an example that may change the ways we think about the exchanges at the core of relationships.¹⁵⁷

Franke described two men, Fred and Melvin, who lived together during a period when they could not marry. They arranged for the birth of a child through use of a surrogate and raised the child together. When the child was seven, they decided to marry after the state in which they lived changed the law to permit them to do so. They also signed a premarital agreement providing that Fred would have primary custody, while Melvin would have limited visitation and support equivalent to no more than 25 per cent of their combined responsibility for the child.¹⁵⁸ Franke's response is to ask, "why marry?" And it is a good question. Marriage today presumes that spouses assume equal rights and responsibilities for children, and this type of agreement is almost certain to be unenforceable, unless the couple affirms the agreement on their own in settling a divorce action. The more interesting question is what the agreement reflects.

Gendered divisions of responsibilities trade a higher income (typically the man's) for a larger share of domestic responsibilities (typically by the woman). With two men, differences in income do not necessarily stem from the assumption of domestic responsibilities, and an assumption of greater childcare responsibilities by one of the parties may simply indicate greater attachment to the child. Why not have the custodial relationships at divorce reflect the parties' respective views about the importance of time spent with the child? Within marriage, the answer is that the institution has become an assumption of equal responsibility for children and it is inconsistent with the ordinary assumptions of what marriage is about.

¹⁵⁵ At the same time, it also does nothing to increase the ability to make reproduction more intentional.

¹⁵⁶ See, e.g., Delaware case (or others) that have refused to extend doctrines that apply to same sex couples to stepparents or boyfriends.

¹⁵⁷ See FRANKE, *WEDLOCKED*, supra note ____

¹⁵⁸ *Id.* at 220-21.

Within gendered relationships, the concern is that the child will either be deprived of needed resources from the higher earning parent, or that the parent with the closer relationships with the child will be tempted to exchanged custodial time for needed support.

With same sex couples, however, the assumptions that gender explains the differences in income, the attachment to the child or the division of labor within the relationship disappear. Instead, it is entirely possible (Franke does not tell us) that the party with the closer attachment to the child also has the higher income, that the party with the higher income also took on the majority of the child's care, or that the party who took on greater domestic responsibilities does not have the closer relationship with the child. In all of these cases, the typical marital exchange makes no sense and the parties should prefer an individually negotiated solution. Outside of marriage, the couples need not go to court to end their relationship, and they may be better apply to implement their agreement, at least if the parent with 75% of the child's time has sufficient resources to care for the child.

The prospect of same-sex couples refusing to marry in order to preserve their ability to enter into such agreements may shed new light on the similar decisions different sex couples make. Where one party both earns the higher income and either takes on the majority of domestic responsibilities or has the closer relationship with the child, marriage, with its sharing principles, may not make sense. All couples enjoy greater (if not certain) ability to negotiate such agreements if they do not marry.¹⁵⁹ LGBT couples, who arrange for alternative means of reproduction and reach their own agreements about the terms of parentage, may increase acceptance of a move away from the all or nothing terms associated with marriage – and formal parenthood – in favor of greater acceptance of the parties' intent.

In California, the interaction between assisted production, LGBT relationships, and unassisted reproduction is already taking place. The California legislature has adopted a statute that permits recognition of three parents, where necessary to prevent "detriment to the child." One of the first cases to test application of the new law involved two women, who agreed that one of the women would become pregnant using artificial insemination from a known donor.¹⁶⁰ Instead, the intended mother became pregnant through intercourse with the known donor, who later wished to marry her. The court concluded that the two women, who had both intended to be parents, and who jointly raised the child for a period after birth were both legal parents. The appellate court, however, remanded for a determination of whether the child would experience detriment in the absence of some recognition

¹⁵⁹ Of course, a lower earning party who takes on the bulk of domestic responsibilities may have less ability to negotiate a favorable settlement outside of marriage. *See, e.g.,* *Connell v. Francisco*, 898 P. 2d 831 (WA 1995).

¹⁶⁰ *S.M. v. E.C.*, 2014 Cal. App. Unpub. LEXIS 4574 (2014) (recognizing a same-sex couple as parents, but remanding for consideration of whether the biological father, who had an affair with the biological mother and who later planned to marry her, should also receive recognition as a parent).

of the biological father. As a practical matter, the decision produces a primary parent (the biological mother) and two other parents who might play a role in the child's life on the basis their assumption of a parental role at the invitation of the biological mother. The formalities give way to the practical arrangements that the parties have put in place.

Same-sex couples using nontraditional means of reproduction may again lead the way in making visible alternative norms for ordering family life.

Conclusion

Recognition and support for a variety of families requires both better ways to encourage parental agreement and greater respect for parental agreements where they do occur. And for the law to fully support a variety of families, it must also recognize that parentage comes in a variety of forms, without insisting that all of them be equal to each other. In order to create such a system, it is necessary to understand how parties' intentions correspond to formal institutions such as marriage and adoption.

Obergefell creates an opportunity to revisit these issues. Same sex marriage will mean an opt out system in which the principal basis to opt out will be lack of consent. Nonmarriage should involve an opt in system in which the lack of commitment to equal parental rights should be recognized as a principal reason not to marry. Outside of marriage, proportional custody should be the rule. Legally, parenthood no longer has a single meaning. Marriage has become a model of co-equal parenthood, subject to a strong presumption that the child's interests lie with the continuing involvement of both parents. The new system accords well with the laws of ART; it enshrines parenthood as a mutually assumed and permanent obligation that survives the adult relationship and includes not only joint responsibilities to children but also a duty to foster the involvement of the other parent. Nonmarital relationships are subject to different assumptions. As the story of Fred and Melvin shows, there may be no intent to share parenting equally. And, particularly for women paired with unreliable male partners, there may similarly be no intent for equal sharing – nor may there be an ability to do so.

Unmarried parenthood thus does not necessarily come with either the same assumption of a coequal role, or the same presumption that the children's interests necessarily lie in the continuation of the relationship. Intent in these relationships deserves the same respect as intent in marital relationships, even where the result is not coequal parenting – and where it may be at odds with existing law and with elite family forms.