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## Jane the Virgin and Other Stories of Unintentional Parenthood

Naomi R. Cahn

*George Washington University Law School, [ncahn@law.gwu.edu](mailto:ncahn@law.gwu.edu)*

June Carbone

*University of Minnesota - Twin Cities*

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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 (ART) requires an intent to become a parent; outside of television programs such as *Jane the Virgin*,<sup>1</sup> accidental pregnancies through ART are rare. Each and every 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, while more sophisticated forms of ART involve the services of a fertility clinic, a physician, a surrogacy agency, and an egg donor. At each stage, the prospective parents consult with doctors and brokers to arrange for (1) the future parents to accept responsibility for the resulting child, (2) the gamete donors to sever their parental

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\* Robina Chair in Law, Science and Technology, University of Minnesota Law School.

\*\* Harold H. Greene Chair, George Washington University Law School. We thank Kathy Baker, Susanna Blumenthal, Jessica Clarke, Doug NeJaime, Leslie Harris, Clare Huntington, Neha Jain, Ethan Leib, Nancy Polikoff, and participants at the Baby Markets 2016 conference and faculty workshops at Fordham and Temple Law Schools. Thanks to Tracy Shoberg and Shiveta Vaid for research assistance. Thanks to Michele Goodwin for her support.

1. JANE THE VIRGIN (CW Television Network 2014–present). 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*, 117 COLUM. L. REV. 149 (2017).

connection to the child, and (3) the gestational carriers to recognize the intended parents' parental claims ahead of their own. Prospective parents have the opportunity that parties involved in unassisted responsibilities 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 parents' intent—at least within marriage. Initial sperm donor laws called for the 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.<sup>2</sup> These laws paralleled the operation of the marital presumption more generally; the law has long presumed that a child born to a married woman was her husband's child.<sup>3</sup> Artificial insemination by a donor differed from those cases because the existence of medical records documenting the husband's lack of biological ties made it much harder for courts to simply look the other way.<sup>4</sup> The husband's consent, as a practical matter, validated the continued role of marriage in establishing parenthood without the pretense of a biological relationship.<sup>5</sup>

With the extension of assisted reproduction outside of marriage, intent became that much more important.<sup>6</sup> 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.<sup>7</sup> They argued that where a woman uses 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.<sup>8</sup> In addition, these parties also maintained that where a woman, whether married, single, or cohabiting, used a donor, that the donor's parental status should be severed by operation of law in accordance with the presumed

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2. See, e.g., NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATIONS 16 (2009).

3. See June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 221 (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, 564, 573 (2000) [hereinafter Glennon, *Somebody's Child*]; 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. v. Gerald D.*, 491 U.S. 110, 130–32 (1989), the Supreme Court upheld the continued constitutionality of a case that affirmed a husband's parental status where he and the child's 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, for example, 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 also *Elisa B. v. Super. Ct.*, 37 Cal. 4th 108, 113–14 (2005); *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 1412–13 (1998).

intent of the donor and recipient.<sup>9</sup> 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.<sup>10</sup>

At the same time, however, courts also began to move away from intent toward a 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> And in all states where a man and woman conceive a child through sexual intercourse, the man cannot escape responsibility for support and the woman cannot escape his right to a relationship with the child on the basis of intent alone.<sup>14</sup> Moreover, once two adults receive recognition as legal parents, they have equal rights and responsibilities with respect to the child.<sup>15</sup> In many states, the law presumes that it is in the child's interest

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9. See Storrow, *supra* note 7, at 639–40.

10. The states vary widely on this topic, with some state legislatures continuing to sever the parental status of a sperm donor only with donation to a married woman. In addition, the states have varied widely in their 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: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 247 (2009).

11. See *Johnson v. Calvert*, 851 P.2d 776, 782, 787 (Cal. 1993).

12. Traci Dallas, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 371 (1988).

13. Where the biological father and the mother's spouse both have standing and both claim parental status, many courts determine the outcome based on the child's best interest. See, e.g., *Greer ex rel. Farbo v. Greer*, 324 P.3d 310 (Kan. App. 2014) (explaining role of best interest determination in paternity determinations). The states vary in the extent to which they apply the marital presumption to same-sex couples, particularly where the child is conceived as a result of a heterosexual affair. See *Wendy G-M. v. Erin G-M.*, 985 N.Y.S.2d 845, 860–61 (Sup. Ct. 2014); see also *Counihan v. Bishop*, 974 N.Y.S.2d 137, 139 (App. Div. 2013) (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 CARDOZO J.L. & GENDER 579, 583 (2013) (discussing the need to apply the presumption to same-sex couples, notwithstanding the lack of legal clarity).

14. 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); Brooke Lenington, *Sperm Donor Fights Back After State Forces Him to Pay Child Support*, ABC 8 NEWS, WRIC.COM (Sept. 2, 2015, 11:40 A.M.), <http://wric.com/2015/09/02/kansas-sperm-donor-fights-back-after-state-forces-him-to-pay-child-support/> [<https://perma.cc/WLU8-ET4V>].

15. Melanie B. Jacobs, *Why Just Two Parents? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 311 (2007).

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.<sup>16</sup>

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 opposite-sex couples. Instead, the distinctions correspond more broadly to differences between "elite" and "non-elite" reproduction.<sup>17</sup> Parents with higher incomes typically marry before they have children, with marriage establishing their commitment to shared parental rights or responsibilities,<sup>18</sup> or they secure the severance of a gamete donor's parental rights if they wish to be single parents.<sup>19</sup> The law of assisted reproduction ratifies and incorporates elite approaches to reproduction, which involve planning and consent. LGBT advocates incorporated these values into their fight for equal recognition of their families, often making the implicit values more visible in the process.<sup>20</sup> The result aligns emerging mainstream norms with practices that allow for legal ratification of families of choice.

Lower-income couples, 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.<sup>21</sup> Moreover, for this group, the law is more likely to be imposed rather than chosen as these couples are less likely to (1) know what the law is, (2) have the means to use it to advance their own purposes even if they are familiar with the law, and (3) face judges who will understand and apply the norms of their communities.<sup>22</sup> They therefore achieve greater autonomy 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.<sup>23</sup> While these families often reflect community norms for the conduct of relationships, they operate in the "shadow" of the law<sup>24</sup> without legal ratification or support for the results.

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16. Nina Camic, *Putting the Relational into the Heart of Family and Juvenile Court Proceedings*, 17 WIS. WOMEN'S L.J. 199, 205 (2002).

17. By "elite," we simply mean those who fall into the top third income bracket within the United States or, alternatively, the roughly one-third of young adults who are college graduates. See JUNE CARBONE & 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).

18. See June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 71, 89 (2016).

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

20. See, e.g., Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1186, 1188–89, 1240, 1247 (2016).

21. Carbone & Cahn, *supra* note 18, at 95.

22. June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1211–12 (2013). 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).

23. Carbone & Cahn, *supra* note 22, at 1226, 1228.

24. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69 (1979).

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 by crystallizing the 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 Douglas 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 the formalities of marriage, adoption, or biological ties.<sup>25</sup> Their success in winning formal legal regulation culminated in the Supreme Court's embrace of marriage equality in *Obergefell v. Hodges*,<sup>26</sup> 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. Non-elite 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-à-vis fathers outside of marriage than within it. While it is 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 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.<sup>27</sup> 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,<sup>28</sup>

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25. See NeJaime, *supra* note 20, at 1186, 1188–89. 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 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 148 and in the 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 partner's assumption of parental functions, without necessarily consenting to equal parental status, and the law that addresses stepparent status has historically recognized the distinction.

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

27. Carbone & Cahn, *supra* note 22, at 1186–87.

28. Indeed, it is arguable that to the extent LGBT couples and other couples using ART have received recognition as parents on the basis of intent, it has been intent together with a marriage-like relationship rather than intent alone. See *K.M. v. E.G.*, 37 Cal. 4th 130 (2005) (acknowledging parenthood of a woman who contributed an egg to her lesbian partner despite trial court findings that

and reforms are underway to reimpose elite family norms on non-elite parents, undermining their ability to create family terms on their own. However, 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.<sup>29</sup> For these reasons, LGBT couples who rely overwhelmingly on ART for reproduction may once again be important to forcing a reconsideration of legal standards that reflect elite and gendered assumptions about reproduction that do not hold for everyone.

The first Section of this Article 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 same-sex couples can marry, scholars are shifting their attention to those who choose not to marry.<sup>30</sup> 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 division 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.<sup>31</sup>

Historically, the marital presumption served as a presumption that the husband was the biological father of the child. The presumption could be rebutted through proof that the husband was impotent or "beyond the four seas," meaning he was not around at the time of conception, and thus could not have fathered the child.<sup>32</sup> The law, however, has often precluded testimony that could rebut the presumption, effectively

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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, *supra* note 20, at 1191.

29. See, e.g., KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 220–21 (Ann Pellegrini et al. eds., 2015) (discussing the disadvantages of marriages for same-sex couples who may prefer alternative terms for their unions).

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

31. Glennon, *Somebody's Child*, *supra* note 4, at 601.

32. *Id.* at 572.

making it irrefutable.<sup>33</sup> For centuries, courts have ruled that the testimony most likely to rebut the presumption—testimony that the wife had been unfaithful—is inadmissible.<sup>34</sup> In cases where a man married a woman who was 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.<sup>35</sup> Even today, some states rule out DNA tests that could establish paternity with certainty where the child's interests lie with the continuation of the husband's role as the child's father.<sup>36</sup> In these cases, the marital presumption, though starting as presumption of biology, served to ratify the intent to parent and the assumption of a parental role.<sup>37</sup>

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.<sup>38</sup> The husband and wife, through the marital presumption, were the legal parents, and no one else needed to know—unless a divorce occurred.<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> Nonetheless, given the indisputable fact of the husband's lack of biological paternity, the child might still be considered "illegitimate."<sup>42</sup> In these cases, intent alone

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33. *Id.* at 573.

34. *Id.* at 563–64.

35. *Id.* at 575.

36. *See, e.g.,* *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); *Shondel J. v. Mark D.*, 853 N.E.2d 610, 613–14, 617, 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).

37. *See* Kathy Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1683 (2015) (observing that the marital presumption continues to be the most common way to recognize a second legal parent after the birth mother).

38. As Professor Kara Swanson notes, "knowledgeable couples requested donor insemination, sometimes called 'semi-adoption.'" Kara W. Swanson, *Adultery by Doctor: Artificial Insemination, 1890-1945*, 87 CHI.-KENT L. REV. 591, 608 (2012).

39. *See id.*; CAHN, *supra* note 2, at 46–48; WENDY KRAMER & NAOMI CAHN, *FINDING OUR FAMILIES 2* (2013); Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1050 (2002); Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 697 (2016).

40. *See* CAHN, *supra* note 2.

41. *See, e.g.,* *Laura WW. v. Peter WW.*, 51 A.D.3d 211, 216, 856 N.Y.S.2d 258, 262–63 (App. Div. 2008) (summarizing case law and concluding that estoppel principles establish husband's paternity even where parties did not strictly comply with state's sperm donor statute).

42. *Gursky v. Gursky*, 242 N.Y.S.2d 406, 411 (App. Div. 1963), *superseded by statute*, 1974 N.Y. Laws 1105, *as recognized in* *Wendy G-M.*, 985 N.Y.S.2d 845 (noting that child conceived through



was not enough to establish legal parenthood.<sup>43</sup> 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.<sup>44</sup>

Together with adoption,<sup>45</sup> 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.<sup>46</sup> Today, the states take one of three different approaches to insemination by a donor. 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 parental status of a consenting husband.<sup>47</sup> A second (and smaller) group of states severs the parental status of the donor only if the woman inseminated is married.<sup>48</sup> 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.<sup>49</sup> As a practical matter, these states have used the principle of consent to establish the husband's parental status without biology or adoption, though some states continue to require both marriage and explicit consent to the assumption of a parental role.<sup>50</sup>

Termination of the donor's status has also required express statutory authorization.<sup>51</sup> Intent alone, even if both biological parents agree, is ordinarily not

artificial insemination during marriage was not legitimate child of marriage, although husband was still responsible for child support).

43. *Id.* at 408–09, 411–12 (presuming absent judicial or legislative intent to “modify the settled concept” of “the status of a child whose father was not married to its mother,” “the historical concept of illegitimacy [of] such a child remains in force and effect” and finding the husband's written consent to his wife's artificial insemination created an implied contract or equitable estoppel for support).

44. *Id.* at 411.

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

46. *Id.* at 1162–63; see Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 387–90 (2012).

47. Most statutes provide for the termination of the parental status of the donor if a doctor performs the insemination. See Cahn, *The New Kinship*, *supra* note 46, at 387, 390. Some states including Oklahoma and Georgia make alternative insemination illegal unless a physician is used. Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 631 (2016).

48. Cahn, *The New Kinship*, *supra* note 46, at 387–88, 390.

49. See Lauren Gill, Note, *Who's Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1738 (2013) (classifying states' three different approaches as follows: “some states have adopted statutes comparable to the 1973 UPA, providing that donors whose sperm is given to a **physician** for inseminating a married woman are not legal parents; other states have laws similar to the revised 2000 UPA, which provide a gender-neutral intent and effect by specifying that no **donor** will be considered a **parent**, regardless of the marital **status** of the parties; and finally, some states do not have a statute specifically concerning the parental status of sperm donors”) (emphasis added). For discussion of parenthood by estoppel, see LESLIE JOAN HARRIS ET AL., *FAMILY LAW* 914–27 (5th ed. 2014).

50. HARRIS ET AL., *supra* note 49, at 914–18; see also *Patton v. Vanterpool*, 2017 WL 4582398, at \*1 (2017) (concluding that the sperm donor laws do not apply to in vitro fertilization (IVF) and therefore a husband's consent to his wife's IVF does not create an irrebuttable presumption of paternity in circumstances where the divorce occurred before the birth).

51. *Id.* at 917–18.

enough to terminate a man's responsibility for his biological offspring.<sup>52</sup> Instead, such termination typically requires statutory authorization, the contribution of the sperm to a doctor for insemination, and some indication of intent not to be a parent—which may be derived from the involvement of the doctor or from signing the appropriate consent forms.<sup>53</sup> Today, additional statutory authorization permits an agreement for one party to use jointly created frozen embryos after a divorce without imposing parental status on the other progenitor.<sup>54</sup>

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 this notion into question, and the first significant case to resolve the matter rested its decision on intent.<sup>55</sup> In *Johnson v. Calvert*, doctors implanted into Anna Johnson's womb an embryo created with an egg from Cristina Calvert and her husband's sperm.<sup>56</sup> When Johnson later claimed recognition as 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 based on 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.<sup>57</sup>

Since then, while states have taken various approaches to gestational surrogacy and egg donation, intent has influenced the direction of California law.<sup>58</sup> The most influential (and unusual) case following *Calvert* was the *In re Marriage of Buzzanca* case.<sup>59</sup> The Buzzanca arranged for a surrogate to carry an embryo created by a donor egg and donor sperm. While the child was in utero, Mr. Buzzanca filed for divorce, and asserted

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52. *But see* *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007) (holding that a 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).

53. *Id.* Indeed, California law had initially assumed that any man contributing sperm for artificial insemination to a woman that was “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, in using sperm from a known donor, have in fact wanted security that parental status could be severed. See discussion of Jason Patric, *infra* note 124 and accompanying text.

54. *See, e.g.*, UNIF. PARENTAGE ACT § 706 (amended 2002), 9B U.L.A. 83 (2015); TEX. FAM. CODE ANN. § 160.706 (West, Westlaw through the end of the 2015 Legis. Sess.). 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 PROP.: WILLS AND DONATIVE TRANSFERS § 14.8 (AM. LAW INST., Tentative Draft No. 4, 2004).

55. *See Calvert*, 851 P.2d 776.

56. *Id.* at 787.

57. *Id.* at 782.

58. California was particularly influential both because of the role of ART and LGBT advocacy in the state, given the large communities supporting both, and because the California Supreme Court has been willing to tackle difficult decisions in reported opinions to a greater degree than other states. *See NeJaime, supra* note 20.

59. *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410.

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: because 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.<sup>60</sup>

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.<sup>61</sup> State adoption law did not limit adoptions to married or to heterosexual couples,<sup>62</sup> and lower court judges had been allowing same-sex partners to adopt their partners' children.<sup>63</sup> 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.<sup>64</sup> Many of the cases involved lesbian couples who had arranged for the birth of a child through use of artificial insemination by donor.<sup>65</sup> 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.<sup>66</sup> Some involved women who contributed an egg to their partner.<sup>67</sup> They argued that, as in *Calvert*, both women had a biological tie to the child, and a decision in accordance with their intent would recognize both women as mothers.<sup>68</sup> 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.<sup>69</sup>

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60. *Id.* at 1428. Doug NeJaime treats the case as using a combination of marriage and intent. NeJaime, *supra* note 20, 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. *In re Marriage of Buzzanca*, 61 Cal. App. 4th at 1425–26.

61. See June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U. L. REV. 341, 372 (2006); NeJaime, *supra* note 20, at 1208.

62. NeJaime, *supra* note 20, at 1208.

63. *See id.*

64. *See id.* at 1212.

65. *See e.g., Elisa B.*, 37 Cal. 4th 113; *Kristine H. v. Lisa R.*, 37 Cal. 4th 156, 160 (2005); *Charisma R. v. Kristina S.*, 175 Cal. App. 4th 361, 365 (2009).

66. *See e.g., Kristine H.*, 37 Cal. 4th at 160.

67. *See e.g., K.M.*, 37 Cal. 4th 130, 134.

68. *Id.* at 137–41.

69. *See e.g., Elisa B.*, 37 Cal. 4th at 123–24; *Kristine H.*, 37 Cal. 4th at 156.

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.<sup>70</sup> Eventually the cases would include two men who arranged for birth of a child through use of one of the partners' sperm and a gestational carrier.<sup>71</sup> These couples all argued that intent, as evidenced by their actions in arranging for the birth of these children, established a foundation for recognition of their status as legal parents.<sup>72</sup> The courts agreed and issued what came to be called "UPA Declarations" that recognized such parents' parental status and provided court orders to enter both parents' names on the child's birth certificates.<sup>73</sup> 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.<sup>74</sup> It recognized "de facto parents" who had assumed a parental role with the consent of an initial legal parent.<sup>75</sup> 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.<sup>76</sup> The ALI Principles of Family Dissolution formalized recognition of this doctrine, grounding it in estoppel principles.<sup>77</sup> Other states recognized this type of parenthood by estoppel under a variety of labels.<sup>78</sup> These cases extended recognition to

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70. *The Evolution of the "Second Parent,"* FINDLAW (2018), <http://corporate.findlaw.com/law-library/the-evolution-of-the-second-parent.html> [<https://perma.cc/N3NP-FCF4>] (indicating that UPA declarations had been used in ovum donation cases in California to establish the parentage of an intended parent genetically unrelated to a child).

71. For an argument that California law applies to two men using a gestational carrier, see Jessica Hawkins, *My Two Dads: Challenging Gender Stereotypes in Applying California's Recent Supreme Court Cases to Gay Couples*, 41 FAM. L.Q. 623, 636 (2007). For an account of how two men used a California parentage order to secure recognition of their parentage in a surrogate birth in Kentucky, see Joshua Gamson, *My New Kentucky Baby, Lives*, N.Y. TIMES MAGAZINE (May 22, 2011), <http://www.nytimes.com/2011/05/22/magazine/lives-my-new-kentucky-baby.html> [<https://web.archive.org/web/20110523213107/http://www.nytimes.com/2011/05/22/magazine/lives-my-new-kentucky-baby.html>]; see also Linda Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of their Relationship*, 5 PIERCE. L. REV. 1, 9–10 (2016) (discussing parentage in surrogacy cases using donor eggs and sperm).

72. See e.g., *Elisa B.*, 37 Cal. 4th 123–24; *K.M.*, 37 Cal. 4th 130, 135; *Kristine H.*, 37 Cal. 4th 156, 160; *Charisma R.*, 175 Cal. App. 4th 361, 366.

73. See Carbone, *supra* note 61, 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).

74. *In re H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

75. See *id.* at 451.

76. *Id.* at 423.

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

78. For a summary of these doctrines, see June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9 (2017) (describing "psychological parents" in N.J., at 29, in loco parentis in PA, at 28).

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. Many cases, as a practical matter, also relied on the severance of the donor's parental status either by operation of law or by the inability to identify the donor;<sup>79</sup> 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% of the poverty line.<sup>80</sup> Abortions remained higher, however, as a percentage of unintended pregnancies, for this group than for any other.<sup>81</sup>

The average age of first marriage and first birth increased steadily not just for those with higher incomes, but also for college graduates as a whole, which meant they were older and more mature by the time they had children.<sup>82</sup> 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 more 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; for example, they might file adoption papers, sign ART consents, seek court-ordered birth certificates,<sup>83</sup> or get 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.<sup>84</sup>

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79. See generally *In re I.H.*, 834 A.2d 922, 925 (Me. 2003) (holding that although notice to parents was required, it was not necessary to give notice to an anonymous sperm donor when biological mother and her "domestic partner" sought to be appointed as co-guardian with biological mother).

80. *Fact Sheet: Unintended Pregnancy in the United States*, GUTTMACHER INST. 3 (2016), [https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us\\_0.pdf](https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us_0.pdf) [<https://perma.cc/7SBS-FBHC>].

81. Overall, the number of abortions still declined because of the drop in unintended pregnancies. *Id.*

82. Lawrence B. Finer & Mia R. Zolna, *Shifts in Intended and Unintended Pregnancies in the United States, 2001–2008*, 104 AM. J. PUB. HEALTH S43, S45 (2014).

83. See, e.g., MARTHA M. ERTMAN, *LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (Michael Bronski ed., 2015); Polikoff, *supra* note 10, at 247. Contracts alone, however, do not bind the courts, though couples often use them to formalize their own expectations about their relationship to the child.

84. 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*

Legal institutionalization sets default rules: a husband<sup>85</sup> will be a parent *unless* someone challenges the marital presumption. Similarly, a sperm donor in Kansas who provides sperm to a doctor for insemination of a woman who is not his wife will not be a legal parent *unless* he specifically states a contrary intention in writing. Finally, during a 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.<sup>86</sup> 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. v. Superior Court*, who created families that did not fit in the conventional world of unassisted reproduction.<sup>87</sup> With increasing acceptance of ART and LGBT parenting as well as the possibility of greater institutionalization of the practices, it remains to be seen what role intent will continue to play.

## 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.<sup>88</sup> 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.<sup>89</sup> 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"<sup>90</sup>: marriage and parenthood came together

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*Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 3, 47 (2007).

85. And, increasingly, the second spouse.

86. See Mnookin & Kornhauser, *supra* note 24, at 954–55; *In re K.M.H.*, 285 Kan. 53, 169 P.3d 1025 (2007) (concluding that statutory terms severed donor's status even where the woman giving birth was a lawyer with more superior knowledge than the donor who believed he would have the ability to retain his relationship with the child).

87. *Elisa B.*, 37 Cal. 4th 113.

88. But see FRANKE, *supra* note 29, at 132–33 (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).

89. KATHERYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST THAT I CAN: FATHERHOOD IN THE INNER CITY* 202 (2013).

90. *Id.* at 85–86.

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.<sup>91</sup> 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.<sup>92</sup> With the expansion of public benefits in the sixties and early seventies came an effort to hold the “real culprits” responsible: the supposedly 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.<sup>93</sup>

The most important innovation involved state recognition of Voluntary Acknowledgments of Paternity, often referred to as “VAPs.”<sup>94</sup> 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.<sup>95</sup> Once signed, they are rarely set aside,<sup>96</sup> although the men may later challenge paternity if they believe that they have been duped into supporting a child

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91. 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. The Fragile Families studies dramatically changed the image of nonmarital families through research showing 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. *See, e.g.,* Marcia J. Carlson, Sara S. McLanahan & Jeanne Brooks-Gunn, *Coparenting and Nonresident Fathers' Involvement with Young Children After a Nonmarital Birth*, 45 *DEMOGRAPHY* 461, 473 (2008). These patterns, however, differ by race. *Id.* at 466. 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. *Id.* These racial differences have been narrowing, however, as whites have also become less likely to marry.

92. EDIN & NELSON, *supra* note 89, at 202 n.52.

93. *See* Mnookin & Kornhauser, *supra* note 24, at 954–55.

94. 42 U.S.C. § 666(a)(5)(C) (2012) (Voluntary paternity acknowledgment); Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 *MICH. ST. L. REV.* 1295, 1305 (2013).

95. 42 U.S.C. § 666(a)(5)(D) (2012) (status of signed paternity acknowledgment). They do not require paternity testing or judicial action and, unlike birth certificates, they require the participation of father and mother. Harris, *supra* note 94, at 1305–06.

96. Harris, *supra* note 94, at 1318.

to whom they are not biologically related.<sup>97</sup> The couples who signed these documents clearly agreed to one thing: acknowledgment of the father's biological relationship to the child and establishment of the father's 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.<sup>98</sup>

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.<sup>99</sup> Within this system, however, the fathers could be subject to punitive and counterproductive state actions for support, even if fathers and mothers had other understandings,<sup>100</sup> 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.<sup>101</sup> These results did not necessarily reflect the parties' intent or institutionalization of their relationships in a manner likely to produce an agreement.<sup>102</sup> Instead, they involved the imposition of parenthood irrespective of intent.

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97. *Id.* at 1306. In addition, in at least nineteen 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 1318.

98. 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. EDIN & NELSON, *supra* note 89, at 208, 214.

99. Among cohabitants between the ages of eighteen and twenty-nine who had not graduated from high school, for example, the women are much less likely than men to indicate that they expected to marry their current partner (forty-seven percent compared to sixty-seven percent of the men). Kay Hymowitz et al., *Knot Yet: The Benefits and Costs of Delayed Marriage in America*, THE RELATE INST.: THE NAT'L MARRIAGE PROJECT AT THE U. OF VA. 1, 28 (2013), [http://twentysomethingmarriage.org/\[https://perma.cc/J9ES-W44T\]](http://twentysomethingmarriage.org/[https://perma.cc/J9ES-W44T]). 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 education, the gender differences reverse, with sixty-eight percent of women and forty-six percent of men expecting to marry their current partner. *Id.*; see also Amanda J. Miller et al., *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 . . .").

100. Harris, *supra* note 94, at 1327.

101. 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).

102. Fathers and mothers do report, however, some understanding of community-based default rules that treat mothers as primary parents absent marriage. See EDIN & NELSON, *supra* note 89, at 169 (referencing a mother as a gatekeeper).



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.<sup>103</sup> That year, in *Stanley v. Illinois*, it held unconstitutional an Illinois law that 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.<sup>104</sup> 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.<sup>105</sup>

In the seventeen years following *Stanley*, the Supreme Court struggled further with the question of whether fathers have a constitutionally protected right to a relationship with their children.<sup>106</sup> In this line of cases, the Court held that an 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.<sup>107</sup> 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.<sup>108</sup> Instead, the Court, while mandating some recognition for unmarried fathers, left these thornier issues to the states.<sup>109</sup>

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103. Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2294 (2016).

104. *Stanley v. Illinois*, 405 U.S. 646, 658 (1972).

105. 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. 383, 383–84 (2014).

106. See *Lehr v. Robertson*, 463 U.S. 248 (1983). 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 child. *Id.* at 261–62. 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. *Id.* at 265. 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 272.

107. For a summary of these cases, see JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 164–79 (2000).

108. See Janet L. Dolgin, *Just A Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 667–68 (1993) (reviewing post-*Stanley* decisions and concluding that the Court rested on establishment of a “unitary family”).

109. 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

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.<sup>110</sup> Many of these fathers have in turn sought greater custodial rights.<sup>111</sup> While the likelihood that a father has a custodial order correlates both with marriage and with the father's income,<sup>112</sup> custodial laws are rarely explicit about taking marriage into account.<sup>113</sup> The single most common state provision to address unmarried parents directly, adopted in fifteen states, presumptively awards custody of a child born to unmarried parents to the mother alone,<sup>114</sup> but if a father establishes paternity and challenges custody, most custody statutes do not distinguish explicitly between married and unmarried parents.<sup>115</sup> Instead, in every state, the courts apply a best interest of the child determination that favors case-specific determinations,<sup>116</sup> and many states presume that the child's interest lies in continuing contact with both parents.<sup>117</sup>

Like parenthood by imposition in the context of child support, these custody laws constitute a type of parenthood by imposition on unmarried custodial 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 parents following a break-up can be seen as an implementation of the mutual assumption of responsibility for

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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).

110. Harris, *supra* note 94, at 1306, 1308–13.

111. See PATRICIA BROWN & STEVEN T. COOK, CHILDREN'S PLACEMENT ARRANGEMENTS IN DIVORCE AND PATERNITY CASES IN WISCONSIN 9–12, 18–19 (rev. ed. 2012); Maria Cancian et al., *Who Gets Custody Now? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 J. DEMOG. 1381 (2014).

112. BROWN & COOK, *supra* note 111.

113. At least one state, Massachusetts, however, explicitly applies different custody standards to married and unmarried parents. MASS. GEN. LAWS ch. 209C, § 10 (2015); see also *Smith v. McDonald*, 941 N.E.2d 1, 10 (Mass. 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 equal . . . [U]ntil 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 ch. 208, § 31 (2015). Some states provide that an unmarried mother is entitled to custody when the child is born. Clare Huntington, *supra* note 30, at 204; Clare Huntington, *Family Law and Nonmarital Families*, 53 FAM. CT. REV. 233, 237 (2015) [hereinafter Huntington, *Family Law and Nonmarital Families*].

114. 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. See Huntington, *Family Law and Nonmarital Families*, *supra* note 113, at 237.

115. As discussed *supra* note 113, Massachusetts does so.

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

117. See, e.g., HARRIS ET AL., *supra* note 49, at 626; 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).

children within marriage.<sup>118</sup> Ethnographic studies, however, describe unmarried parents as giving mothers greater authority over children in the event of disagreement.<sup>119</sup> 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.<sup>120</sup> The access to the child that the mother allows often depends on the father's willingness to cooperate with the mother and assist financially and socially with the child when she needs help.<sup>121</sup> 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.<sup>122</sup> Women try to create stable environments for their children and are frustrated when the men cycle into and out of familial life.<sup>123</sup>

Yet, unmarried fathers who have the resources to fight for greater custodial rights have become more likely to prevail. The courts may threaten the custodial parent with the loss of custody in the absence of support for the child's relationship with the other parent.<sup>124</sup> 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

118. Ashley M. Votruba et al., *Moral Intuitions About Fault, Parenting, and Child Custody After Divorce*, 20 PSYCHOL. PUB. POL'Y & L. 251, 256 (2014); E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97 (2006).

119. E.g., EDIN & NELSON, *supra* note 89.

120. The mothers' entry into new relationships also has an impact. See Calvina Z. Ellerbe, Jerrett B. Jones & Marcia J. Carlson, *Nonresident Fathers' Involvement After a Nonmarital Birth: Exploring Differences by Race/Ethnicity*, 9–10, 20, 22 (Aug. 2014), <http://crcw.princeton.edu/workingpapers/WP14-07-FF.pdf> [<https://perma.cc/ZMK4-MH64>] (unpublished paper); Laura Tach, Ronald Mincy & Kathryn Edin, *Parenting as a "Package Deal": Relationships, Fertility, and Nonresident Father Involvement Among Unmarried Parents*, 47 DEMOGRAPHY 181, 181 (2010). There are racial variations in the rate of positive coparenting, with black mothers reporting higher rates of effective coparenting and more involvement from black fathers than other races. *Id.* at 182.

121. See NANCY E. DOWD, REDEFINING FATHERHOOD 3 (2000); Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 2, 2 (2004); Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 165–66 (2011). Sociologists have found that the mothers valued fathers' contributions not by the amount of financial support, but by noneconomic 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 AM. ACAD. POL. & SOC. SCI. 102, 109–10 (2010).

122. Baker, *supra* note 121, at 36–37. 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. PATRICIA R. BROWN & STEVEN T. COOK, A DECADE OF VOLUNTARY PATERNITY ACKNOWLEDGEMENT IN WISCONSIN: 1997–2007, at 13 (2008), <https://irp.wisc.edu/research/childsup/cspolicy/pdfs/T12-VolPat97-07-Report.pdf> [<http://perma.cc/5T2V-WSQ6>]. 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 receiving public support. *Id.* at 16–17, 25.

123. See, e.g., EDIN & NELSON, *supra* note 89, at 169.

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

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 parenthood by imposition more typical of non-elite relationships.<sup>125</sup> 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.<sup>126</sup> 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 seeking parenting time with their son, Gus.<sup>127</sup>

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.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup> He maintained that once Schreiber allowed him to develop a relationship with Gus and he was able to "receive[] the child into his . . . home," a different body of law recognizing Patric's paternity prevailed.<sup>131</sup> 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,

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125. *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789 (Ct. App. 2014).

126. *Id.* at 792.

127. Patricia Glaser, *Why Won't Danielle Schreiber Allow Jason Patric to Have Contact with Her Son Gus?*, HUFFINGTON POST: THE BLOG (July 7, 2014, 9:48 A.M.), [https://www.huffingtonpost.com/patricia-glaser/why-wont-danielle-schreib\\_b\\_5551655.html](https://www.huffingtonpost.com/patricia-glaser/why-wont-danielle-schreib_b_5551655.html) [<https://perma.cc/R2C6-F826>].

128. *Id.*

129. *Jason P.*, 171 Cal. Rptr. 3d at 792 (describing letter Patric sent indicating that he did not want to be acknowledged as the father).

130. *Id.*

131. *Id.* at 796.

their mutual intent at the time of the child's birth no longer prevailed; instead, Patric became a father with parental rights comparable to hers, even though the result contradicted the parties' expectations at 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

Both the rise of parenthood by intent alone and the rise of parenthood by imposition reflect policies that seek to facilitate recognition of two-parent families with more than one adult assuming responsibility for the child. In the case of parenthood by intent alone, the policies reflected the inability to marry; in the case of parenthood by imposition, the policies reflected the declining role of marriage in ordering parental relationships. In both cases, however, the question going forward will be whether changing legal doctrine effects a degree of convergence. Will the courts—and society—continue to insist on recognition of more than one parent and, if so, will that recognition turn on formal systems tied to marriage and VAPs or informal systems dependent on function?

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.<sup>132</sup> 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.<sup>133</sup>

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.<sup>134</sup> Since the late nineties, these couples have seen their unintended pregnancy rates rise substantially, access to abortion fall, and fathers' income become less reliable.<sup>135</sup> During the same time period, cohabitation has

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132. 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*, 135 S. Ct. at 2597 (noting marriage involves affirming the couples' commitment to each other before their community); *id.* at 2600 (observing that marriage establishes a concord with other families in the community); *id.* at 2601 ("Marriage remains a building block of our national community."); *see also* NeJaime, *Marriage Equality*, *supra* note 20, at 1186 (documenting how LGBT advocates sought to establish parentage based on intentional and functional relationships).

133. 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* Carbone, *supra* note 84, at 3, 19, 23.

134. For a comprehensive examination of these trends, *see* CARBONE & CAHN, *supra* note 17. *See also* KATHRYN EDIN, PAULA ENGLAND & KATHRYN DAVIES LINNENBERG, LOVE AND DISTRUST AMONG UNMARRIED PARENTS 4–5 (2003), <https://perma.cc/G7EV-WV24> (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 (2014).

135. NAOMI CAHN, JUNE CARBONE & HOWARD LAVINE, TWO PERSPECTIVES ON DEMOGRAPHIC CHANGE AND THE FUTURE OF THE FAMILY (2016), <https://perma.cc/F8LA-XD4F>.

increased. Fewer unmarried mothers are truly single; instead, they are typically living with the fathers of their children in relationships that involve varying degrees of commitment.<sup>136</sup>

The law that governs nonmarital parents often proceeds from disapproval of their choices<sup>137</sup> and a desire to impose the two-parent norms of the elite. At the top of the socioeconomic 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.<sup>138</sup> The rate of unplanned 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.<sup>139</sup> 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.<sup>140</sup> These two groups accordingly approach family formation in fundamentally different ways.

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.<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup>

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

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136. Carbone & Cahn, *supra* note 18.

137. For an example of the type of social disapproval faced by these couples, see CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA 1960–2010* (2012).

138. CARBONE & CAHN, *supra* note 17.

139. See *Finer & Zolna, supra* note 82, at 480.

140. GARY J. GATES, *DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY* 5 tbl.2 (2015); Danielle Kurtzleben, *Gay Couples More Educated, Higher-Income Than Heterosexual Couples*, U.S. NEWS & WORLD REP. (Mar. 1, 2013), <https://www.usnews.com/news/articles/2013/03/01/gay-couples-more-educated-higher-income-than-heterosexual-couples> [https://perma.cc/G6P2-8F93].

141. See Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 848 (2004).

142. *But see* NeJaime, *supra* note 20, at 1186.

143. See Carbone & Cahn, *supra* note 22, at 1211–12.

*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.<sup>144</sup> 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.<sup>145</sup> 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.<sup>146</sup> In contrast, if a woman already has a child at the time of the marriage, and then marries a spouse who is not the child’s legal father, the spouse assumes the status of stepparent,<sup>147</sup> a status that does not confer equal rights and responsibilities with the initial legal parent.<sup>148</sup>

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, 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 opposite-sex married couples applies to same-sex couples, should have been relatively straightforward<sup>149</sup> and,

144. *Acord id.*

145. *See, e.g., C.L.W. v. Madison Cty. Dep’t of Human Res.*, 170 So. 3d 669, 671, 673 (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 A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747, 789–90 (2015).

146. *See* DiFonzo, *supra* note 117, at 215–17.

147. Indeed, the result may be true even if the spouse is the child’s biological father. *See* Carbone & Cahn, *supra* note 3, at 225 (describing Utah case upholding marital presumption and husband’s continuing paternity even where mother later married biological father and they jointly raised the child).

148. Where the courts have granted visitation to stepparents on the basis of the functional relationship with the child, they typically stop short of granting equal decision-making 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).

149. 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

even prior to the Supreme Court's opinion in *Pavan v. Smith*<sup>150</sup>, many courts had said yes.<sup>151</sup> This means that two same-sex spouses will be treated as parents of a child, without the need to take some action, such as adoption, to secure legal parenthood.<sup>152</sup>

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.<sup>153</sup> It seems more likely, however, that the courts will use marriage to ratify two-parent families, without requiring a specific showing of intent.<sup>154</sup>

As lower-court decisions in other states have observed, the distinction between the marital presumption and the sperm-donor statutes is important because many

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born during the marriage or domestic partnership . . . ."); *see also* Polikoff, *supra* note 10, at 247 (noting consideration or enactment of similar statutes elsewhere).

150. *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

151. *See* *Barse v. Pasternak*, No. HHBFA124030541S, 2015 WL 600973, at \*1 (Conn. Super. Ct. Jan. 16, 2015); *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335 (Iowa 2013); *Wendy G-M.*, 985 N.Y.S.2d 861; *see also* *Stankevich v. Milliron*, 313 Mich. App. 233, 240, 242 (2015) (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*).

152. Some states, of course, will fight this conclusion, but unless the Supreme Court reverses *Obergefell*, their grounds for doing so, consistent with equal protection principles, will be limited. In Georgia, same-sex couples had to sue to get their names jointly entered onto a birth certificate in accordance with the marital presumption. *See, e.g.*, the lower courts' opinions in *Smith v. Pavan*, No. CV-15-988, 2015 WL 9259516, at \*3, \*4 (Ark. Dec. 10, 2015) (recognizing lower court order holding state statute preventing recognition of same-sex couples to be unconstitutional, but staying application to other courts during appeal). In *Pavan*, the Supreme Court relied in part on the fact that opposite-sex spouses could establish parenthood through consent to assisted reproduction using donor sperm and thus, the refusal to extend the same principle to same-sex couples violated equal protection. In an Alabama case, the couple had adopted outside of the state, and the Supreme Court required the state to grant full faith and credit to the Georgia adoption. *See* *V.L. v. E.L.*, 136 S. Ct. 1017 (2016). Indiana is resisting application of the marital presumption to same-sex couples, arguing that the marital presumption can always be rebutted by a showing that a spouse is not a biological parent, and therefore the presumption should not be applied at all to same-sex couples since the lack of a biological tie by one of the women is self-evident. This result, however, would suggest that third parties have the right in Indiana to rebut the presumption as well in cases of different-sex spouses, and that different-sex spouses who use artificial insemination by donor would not be entitled to recognition as parents absent adoption. *See* *Henderson v. Adams*, No. 17-1141 (7th Cir., filed Jan. 23, 2017).

153. *See, e.g.*, *Roe v. Patton*, No. 2:15-CV-00253-DB, 2015 WL 4476734, at \*4 (D. Utah July 22, 2015) (requiring that Utah apply the Uniform Parentage Act to same-sex 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.

154. *See, e.g.*, *Gartner*, 830 N.W.2d at 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 surrogacy law, not the marital presumption, and the states vary widely. *See, e.g.*, Andrea B. Carroll, *Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents through Surrogacy*, 88 IND. L.J. 1187, 1191 (2013); Douglas NeJaime, *Griswold's Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality*, 124 YALE L.J. FORUM 340, 344 (2015).



spouses fail to comply with the statutory requirements.<sup>155</sup> The marital presumption in these cases serves as a cleanup doctrine to get around technicalities that would otherwise leave children with only one legal parent.<sup>156</sup> 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.<sup>157</sup>

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.<sup>158</sup> 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.<sup>159</sup> A same-sex spouse will ordinarily have a similar opportunity to make a 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.<sup>160</sup>

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

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155. In cases involving heterosexual couples as well, 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.*, *K.S. v. G.S.*, 440 A.2d 64 (N.J. Super. Ct. 1981); *In re Baby Doe*, 353 S.E.2d 877, 878 (S.C. 1987) (“[T]here 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.”).

156. *See Barse*, 2015 WL 600973, at \*1 (holding the marital presumption applies to couples who use artificial insemination but fail to file the requisite paperwork for recognition of the nonbiological spouse under the Connecticut sperm donor statute); *accord Wendy G.-M.*, 985 N.Y.S.2d at 861.

157. Even then, some states will acknowledge parentage only where the donation is to a married woman. *See supra* note 48 and accompanying text.

158. 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.*, No. F065817, 2014 WL 2921905, at \*2, \*31 (Cal. Ct. App. June 27, 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).

159. States 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 adhere fairly strictly to the marital presumption. *See, e.g.*, *State, Dep't of Children & Family Servs. ex rel. A.L. v. Lowrie*, 167 So. 3d 573, 589–90 (La. 2015) (recognizing the biological father's liability for support despite recognition of the mother's husband as a legal parent).

160. This assumes, however, that the birth mother wishes her spouse to play such a role. *See, e.g.*, *S.M.*, 2014 WL 2921905, at \*2. 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.

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.”<sup>161</sup>

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.<sup>162</sup> Where a biological father wishes to contest the marital presumption, these states grant him standing to do so.<sup>163</sup> He would win in a case like that in New York, whether the spouses were same-sex or opposite-sex.<sup>164</sup> As a practical matter, therefore, the Missouri courts established 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.

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

162. *See, e.g.*, MO. REV. STAT. § 210.826(1) (2010), *cited in* Courtney v. Roggy, 302 S.W.3d 141, 149 (Mo. Ct. App. 2009) (stating that the biological father is entitled to establish a relationship with the child unless “visitation would endanger the child’s physical health or impair his or her emotional development”) (internal quotation marks omitted).

163. The New York court in *Q.M.* 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.” *Q.M.*, 995 N.Y.S.2d at 474.

164. Approximately two-thirds of the states similarly allow the nonmarital father to challenge the marital presumption through either statute or case law. UNIF. PARENTHOOD ACT § 607 (UNIF. LAW COMM’N 2017). *See, e.g.*, Draper v. Commonwealth ex rel. Heacock, 2011 Ky. App. Unpub. LEXIS 1012, at \*1–\*3 (Ct. App. Jan. 21, 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); Watermeier v. Moss, No. W2009-00789-COA-R3-JV, 2009 WL 3486426 (Tenn. Ct. App. Oct. 29, 2009). 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, 616–17 (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).

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.<sup>165</sup> Marriage, rather than biology, plays the more important role in these states.<sup>166</sup> 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 they are married<sup>167</sup> 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.<sup>168</sup> 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.<sup>169</sup> 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.<sup>170</sup> 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 to legal parenthood did not matter to the California courts.<sup>171</sup>

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

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165. Indeed, *Wendy G-M. v. Erin G-M.*, 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."

166. Carbone & Cahn, *supra* note 3.

167. See *Stankevich v. Milliron*, 313 Mich. App. 233, 242 (2015) (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*).

168. Carbone, *supra* note 107, at 1341–42.

169. See, e.g., *S.M. v. E.C.*, No. F065817, 2014 WL 2921905, at \*2, \*31 (Cal. Ct. App. June 27, 2014).

170. See *K.M. v. E.G.*, 37 Cal. 4th 130, 143 (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).

171. Carbone, *supra* note 84. See also *In re Jesusa V.*, 32 Cal. 4th 588, 605–10 (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 court 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. *Id.*

decision-making.<sup>172</sup> These policies result in determinations of parenthood—or the denial of parenthood—by imposition for at least one of the parties. While the more mundane applications 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.<sup>173</sup>

### B. Parenthood by Imposition and the Survival of Autonomy

If same-sex couples have achieved hard-sought recognition of their 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.<sup>174</sup> Abortion has declined as a factor for less-educated woman.<sup>175</sup>

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.<sup>176</sup> Fifty percent of poor women's intimate relationships break up at least in part because of domestic violence,<sup>177</sup> 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,

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172. New York ordinarily decides marital presumption cases in accordance with the child's interests. See *Shondel J. v. Mark D.*, 853 N.E.2d 610, 612–13 (2006). 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.

173. 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 *Stankevich v. Milliron*, 313 Mich. App. 233 (2015)), they do so in accordance with the privileging of some decision-makers over others. Thus, the husband who wishes custodial rights prevails over the biological father even when the mother has married the biological father and prefers him as a parent, 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. Carbone & Cahn, *supra* note 3, at 220, 225.

174. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 115 tbl.5 (2005).

175. See CARBONE & CAHN, *supra* note 17, at 175–76.

176. See *id.* at 41–42.

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

and involvement with the criminal justice system, undermines their relationships.<sup>178</sup> Moreover, unmarried relationships, in part because they do not involve the same commitment as marriage, are more likely than marriages to end because of sexual jealousy or other forms of mistrust.<sup>179</sup>

In the face of these difficulties, women paired with unreliable men find marriage to be a bad deal. It does not reflect the realities or 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 their male partners about the trajectories of their relationships.<sup>180</sup>

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.<sup>181</sup> 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.<sup>182</sup> Working class women cite the difficulty of getting a divorce as a reason for wariness about marriage.<sup>183</sup>

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.<sup>184</sup>

In this context, staying unmarried allows couples to craft relationships of their choosing—if they stay out of court.<sup>185</sup> To be sure, unmarried cohabitants are less likely

178. See, e.g., WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 97 (1996). In their 2005 book, sociologists Kathryn 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, *supra* note 177, at 194.

179. EDIN & KEFALAS, *supra* note 177, 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 UNMARRIED COUPLES WITH CHILDREN 133 (Paula England & Kathryn Edin eds., 2007).

180. Hymowitz et al., *supra* note 99, at 23–25.

181. Margaret F. Brinig & Douglas W. Allen, “*These Boots Are Made for Walking*”: *Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 126–27, 136–37 (2000) (stating that two-thirds of those filing for divorce are women and custody laws affect willingness to file).

182. See BROWN & COOK, *supra* note 111, at 2, 9–12, 18–19; Cancian et al., *supra* note 111, at 1382.

183. See Miller et al., *supra* note 99, at 613 (observing that “[w]orking-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 . . .”).

184. See BROWN & COOK, *supra* note 111, at 2, 9–12, 18–19.

185. Carbone & Cahn, *supra* note 22, at 1211–12.

to agree on the terms of their relationships than the married, but community 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.<sup>186</sup> Yet, the fathers 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, contribute 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,<sup>187</sup> 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 are able 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.<sup>188</sup>

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,<sup>189</sup> increasing the support for parenthood by imposition, and the Obama Administration called for reforms that would make it easier for unmarried men to get custodial orders.<sup>190</sup> These efforts tend to impose a two-parent model on couples who have chosen a somewhat different set of terms; yet, reformers often seek explicitly to eliminate many of the legal distinctions between married and unmarried couples.<sup>191</sup> The results change the balance between couples in these relationships, and often produce effects that do not reflect either the couples' intent or community norms.

First, the law has attempted to make legal parenthood for unmarried couples much easier to opt into. The Clinton Administration in the nineties wanted to ensure two 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.<sup>192</sup> This system has in

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186. See Carlson et al., *supra* note 91, at 473 (noting that 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).

187. In many cases, this is 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 177, at 98 (domestic violence is the "chief culprit").

188. The stronger the father's relationship with the mother, however, the more likely he is to sign a VAP. See Harris, *supra* note 121, at 168.

189. See, e.g., Huntington, *supra* note 30, at 239–40 (advocating greater equality between marital and nonmarital parents).

190. See Brustin & Martin, *supra* note 14, at 820–21.

191. See, e.g., Huntington, *supra* note 30, at 240.

192. See HARRIS ET AL., *supra* note 49, at 1304–05.

fact succeeded in dramatically increasing the rate of paternity establishment.<sup>193</sup> 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.<sup>194</sup> 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.<sup>195</sup>

Third, the law that applies to these couples tends to treat mothers and fathers equally, even where one has assumed primary responsibility for the child since birth.<sup>196</sup>

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.<sup>197</sup> 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.<sup>198</sup> Greater custodial rights might also disrupt the balances in the existing system, giving the greatest power to those who seek to control the other parent. At their core, the proposals seek to expand and extend parenthood by the imposition model that once functioned by coercing parties into marriage and today coerces them into shared parenthood, irrespective of intent or the informal community norms that shape parental expectations.<sup>199</sup>

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193. *Id.* at 1304.

194. *See* Brustin & Martin, *supra* note 14, at 841–43.

195. *See* Huntington, *supra* note 30, at 195 (observing that to “maintain the new relationship, it was easiest for the mother to keep the father away from the family”).

196. *See* DiFonzo, *supra* note 117, at 216 (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”).

197. 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 the resources the higher earning parent is using to care for the child have to be split with the other parent. *See* June Carbone & Naomi Cahn, *The End of Men or the Rebirth of Class?*, 93 B.U.L. REV. 871, 872–74 (2013).

198. Harris, *supra* note 121, at 165–66.

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

*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.<sup>200</sup> 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.<sup>201</sup>

Franke described two men, Fred and Melvin, who lived together during a period when they could not marry.<sup>202</sup> They arranged for the birth of a child through use of a surrogate and raised the child together.<sup>203</sup> 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.<sup>204</sup> 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 twenty-five percent of their combined responsibility for the child.<sup>205</sup> Franke's response is to ask, "Why marry?" And it is a good question.<sup>206</sup> 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 ensure that 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 institutional norm has become an assumption of equal responsibility for children and it is inconsistent with the ordinary assumptions of what marriage is about. 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 relationship with the child will be tempted to exchange custodial time for needed support.

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200. See, e.g., *Bancroft v. Jameson*, 19 A.3d 730, 735–37, 742–50 (Del. Fam. Ct. 2010).

201. See FRANKE, *supra* note 29, at 220–21.

202. See *id.* at 220.

203. *Id.*

204. *Id.*

205. *Id.*

206. See *id.* at 221–22.



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 able to implement the agreements that they do reach, at least if the parent with seventy-five percent 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 opposite-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.<sup>207</sup> LGBT couples, who arrange for alternative means of reproduction and reach their own agreements about the terms of parentage, may increasingly accept 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."<sup>208</sup> In *S.M.*, one of the first cases to test application of the new law,<sup>209</sup> the court concluded that the two women, who had both intended to be parents, were both legal parents.<sup>210</sup> The appellate court, however, remanded for a determination of whether the child would experience detriment in the absence of some recognition of the biological father.<sup>211</sup> 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 of 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.

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207. Of course, a less-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*, 127 Wash. 2d 339, 344–45 (1995).

208. CAL. FAM. CODE § 7612 (West 2017).

209. *Id.* at \*2–\*4.

210. *Id.* at \*31.

211. *Id.* at \*31–\*32.

## 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 is likely to 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 coequal 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.

