ARTICLES

PRESUMING WOMEN: REVISITING THE PRESUMPTION OF LEGITIMACY IN THE SAME-SEX COUPLES ERA

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Governor Mitt Romney's administration is advising [Massachusetts] hospitals to cross out the word father on birth certificates for the children of same-sex couples and instead write the phrase "second parent," angering gay and lesbian advocates and city and town clerks who warn that the altered documents could be legally questionable. . . . So far, only lesbian couples have been affected, advocates said.[1]

On a spring morning not long ago, Lura Stiller sat in her stocking feet in a sunny cottage in Cambridge, Mass., helping Cary Friedman and his partner, Rick Wellisch, calm their daughter, a 3-month-old in a pink T-shirt. . . . In December, Ms. Stiller [a homemaker from Dallas] gave birth to the baby, named Samantha, for Dr. Friedman and Dr. Wellisch, conceived with a donor egg and the sperm from one of the partners. (They chose not to know which.) In her decision to work with them Ms. Stiller is part of a small but growing movement of surrogate mothers choosing gay couples over traditional families.[2]

INTRODUCTION

One of family law's most venerable doctrines, the presumption of legitimacy, has reached a critical crossroads. On the one hand, this doctrine, which recognizes a woman's husband as the father of her children, has been eroding in recent years, thanks to both the decreasing disadvantages of illegitimacy and the increasing ability to determine genetic paternity.[3] On the other hand, this doctrine is getting a "second wind" as one of the traditional (and gendered) benefits of marriage that some states have newly made available to same-sex couples.[4]

[1] Michael Levenson, *Birth Certificate Policy Draws Fire: Change Affects Same-Sex Couples*, BOSTON GLOBE, July 22, 2005, at B1.

[2] Ginia Bellafante, *Surrogate Mothers' New Niche: Bearing Babies for Gay Couples*, N.Y. TIMES, May 27, 2005, at A1.

[3] *See, e.g.*, Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547 (2000).

[4] *See* CAL. FAM. CODE § 297.5(d) (2004); VT. STAT. ANN. tit. 15, § 1204(f) (2005); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003); *see also* 2005 Conn. Pub. Acts No. 05-10, § 14.

This unusual juncture – when the doctrine is simultaneously waning and waxing[5] – offers a particularly illuminating vantage point from which to examine the presumption's purposes, operation, evolution, and future. In addition, the presumption of legitimacy merits attention today, given the enthusiasm in much contemporary scholarship for critiquing the social construction of once taken-for-granted categories.[6] The status that the presumption creates, a legitimate parent-child relationship, has always been entirely socially constructed, as even the admittedly tradition-bound analysis of Justice Scalia has asserted.[7] The presumption, the status it yields, and the illegitimacy of members of the class defined by the absence of the status constitute "pure law" – presenting no inherent obstacles to continuation, modification, reinvention, or abolition.[8]

I emphasize the purely legal nature of the inquiry because the most interesting applications of the traditional presumption of legitimacy have always been those that diverge from genetic parentage. For example, in *Michael H. v. Gerald D.*, the presumption made Gerald the father of Victoria because he was married to her mother at the time of Victoria's birth,[9] notwithstanding both genetic tests establishing Michael's biological paternity and the relationship that Michael and Victoria had developed.[10] When the mother's husband really *is* the genetic father of her child, the presumption's operation seems unremarkable and generates virtually no controversy. (That is so, most probably, because we habitually invest genetics with enormous significance, understanding genetics to anchor a parent-child relationship in "biological reality."[11]) Put differently, a legal fiction[12] matters little when it coincides with an existing fact or datum deemed relevant.

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[5] Perhaps what I call the "waning and waxing" of the traditional presumption of legitimacy resembles what Janet Dolgin describes as the simultaneous "privileg[ing of] tradition over modernity" and the "ero[sion of] tradition by predicating it on the ideological foundations of modernity." Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 527 (2000).

[6] *See, e.g.*, JUDITH BUTLER, UNDOING GENDER (2004).

[7] More precisely, Justice Scalia has stated that the absence of legitimacy, illegitimacy, "is a legal construct, not a natural trait." Michael H. v. Gerald D., 491 U.S. 110, 131 (1989) (Scalia, J., plurality opinion); *see also* Dolgin, *supra* note 5, at 524 ("The term 'traditional family' refers here to a social construct . . . .").

[8] *See* Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 325 (2004) ("Law decides who is and who is not a parent and whether and on what basis someone who is a parent is allowed to stop being one.").

[9] 491 U.S. at 113.

[10] *Id.* at 114.

[11] This understanding of parentage privileges what Elizabeth Bartholet calls "biologism" and stigmatizes adoption as second best, prompting reliance on medical interventions for those experiencing infertility instead of exploration of other routes to parenting. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 93 (1993); *see also* THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH

As applied to same-sex couples, of course, the presumption and its variants[13] always diverge from genetic parentage and always produce what might be considered fictional or socially constructed results. Revisiting the presumption in the context of same-sex couples, then, highlights the way this long-established doctrine can construct a legal reality even in the face of conflicting biological facts.

Certainly, "biological reality" and "biological facts" themselves represent constructed points of departure for considering our understanding of family relationships.[14] Alternative realities, such as "functional reality" or "social reality" might well provide more attractive starting points for assessing the appropriate modern role of traditional rules like the presumption of legitimacy. Although this article's analysis ultimately embraces a functional test, my premises include assumptions that genetic relationships are "real," that the presumption of legitimacy defines legal parentage based on a criterion other than this particular "reality," and that the resulting legal fiction treats children covered by the presumption "as if" they were genetic offspring.[15] In other words, I confess at the outset that I understand the presumption as a legal fiction – even while conceding that this fiction itself might reflect a relationship as "real" as (if not more "real" than), say, genetic parentage.

Further, I hope that this analysis will contribute to several different, yet intersecting, conversations. First, states that have accorded same-sex relationships legal recognition through marriage or a status approximating marriage must determine how to apply a gendered marriage rule like the presumption of legitimacy to same-sex couples. So, this first conversation concerns how best to operationalize, within the framework of existing family laws, the increasing gender neutrality that legal recognition of same-sex

426 (8th ed. 1990) (listing as the first definition of "father" the following: "a man in relation to a child or children born from his fertilization of an ovum"); Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. L. FORUM 393, 432.

[12] *See, e.g.*, David Thomas Konig, *Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common Law Adjudication*, *in* THE MANY LEGALITIES OF EARLY AMERICA 97, 109-10 (Christopher H. Tomlins & Bruce H. Mann, eds. 2001).

[13] The primary variation is the rule that recognizes as a father a man who takes a child into his home and holds the child out as his own. *See, e.g.*, CAL. FAM. CODE § 7611(d) (2005)*; see also infra* notes 173-178, 183-188 and accompanying text.

[14] Indeed, many analyses of the presumption of legitimacy begin with the notion that "real" parentage is biological, although they go on to propose alternative criteria that the law should recognize. *See, e.g.*, June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL OF RTS. J. 1011, 1015 (2003); Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-Less When Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811, 815 (2004).

[15] MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 15-20 (2001) (critiquing the "as if" family).

couples compels. Indeed, the advent of same-sex marriages, civil unions, and domestic partnerships not only builds on contemporary equality principles and norms, which increasingly conceptualize "husband" and "wife" as virtually identical roles (when it does not do away with these categories altogether); these developments also reveal a new issue of gender equality or neutrality: the extent to which the law must or should treat alike male-female (traditional) couples, female-female (lesbian) couples, and male-male (gay male) couples. The presumption of legitimacy, an important incident of marriage,[16] raises this issue, while also exploring the boundaries that "real differences" purportedly impose on the constitutional guarantee of equal treatment.[17]

Beneath this initial conversation about existing family laws, the legal incidents of same-sex relationships, and gender neutrality, however, several more fundamental questions loom large. One such question concerns the increasingly apparent divide between some feminist legal theorists and gay rights advocates, despite their common pursuit of gender justice. Does the effort to formulate parentage rules accentuate this split, revealed earlier in the same-sex marriage debate?[18] Another underlying question asks about more basic matters of family law. To what extent should today's rapid changes in the field inspire a more thoroughgoing rethinking that would root out much of the existing regime and put in its place a new and better legal order defining and governing parent-child relationships across the board? Although this deeper conversation necessarily constitutes a long-term project that already

[16] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 957 (Mass. 2003).

[17] *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 64 (2001) (stating that the biological difference between mothers and fathers at the time of the child's birth warrants the gender-specific statute); Miller v. Albright, 523 U.S. 420, 444-45 (1998) (commenting that the statutory classification is appropriate because a mother by necessity is more likely to be present at the time of birth than the father); Michael M. v. Superior Court, 450 U.S. 464, 471 (1981) (Rehnquist, J., plurality opinion) ("Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity."). These opinions purport to invoke "real differences" to justify sex-based classifications. *See id.* at 469 (stating that the Court upholds classifications that "realistically [reflect] the fact that the sexes are not similarly situated in some circumstances").

[18] *Compare* Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, *in* LESBIANS, GAY MEN, AND THE LAW 398 (William B. Rubenstein ed., 1993) *with* Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *in* LESBIANS, GAY MEN, AND THE LAW, *supra*, at 401; *see also* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 51 (1996); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167, 174 (2000); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1993).

includes several different voices,[19] some of its challenges become particularly salient in light of the more immediate issues explored in this article.

Part I explores the current status of the presumption of legitimacy in the context of traditional couples. Part II, emphasizing the presumption's underlying policies, family law's increasing gender neutrality, and several recent parentage disputes, concludes that a modernized version of the presumption of legitimacy is worth preserving for traditional couples and worth extending to lesbian couples. Part III, however, shows that this analysis, which relies on a functional approach, cannot justify a similar extension of the presumption to gay male couples. This part also examines some of the implications of my conclusions, including alternative avenues for establishing parental rights, the significance of genetic evidence, and the sometimes divergent paths of feminist theorists and gay rights activists.

I. TRACING THE PRESUMPTION'S TRAJECTORY IN TRADITIONAL CASES

At one time, authorities routinely described the presumption of legitimacy as "one of the strongest known to the law"[20] – a generalization still invoked today.[21] Indeed, this very strength unmasked the term "presumption," which signals a mere rule of procedure, as an understatement. California law, for example, made the presumption of the husband's paternity conclusive under certain circumstances (when the husband and wife were cohabiting at the time of conception and the husband was not sterile or impotent),[22] and a conclusive

[19] *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD (1989); SHANLEY, *supra* note 15; Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1 (2004); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 295 (1988); 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. (forthcoming 2006).

[20] *E.g.*, *In re* Russell's Estate, 110 S.E. 791, 793 (S.C. 1922); *In re* Estate of Jones, 8 A.2d 631, 635 (Vt. 1939); Pierson v. Pierson, 214 P. 159, 159 (Wash. 1923).

[21] *E.g.*, R.N. v. J.M. 61 S.W.3d 149, 155 (Ark. 2001) ("[T]he strong presumption of the legitimacy of a child born of marriage continues to be one of the most powerful presumptions in Arkansas law."); N.A.H. v. S.L.S., 9 P.3d 354, 360 (Colo. 2000) (stating that the presumption of legitimacy is "one of the strongest presumptions known to the law") (quoting A.G. v. S.G., 609 P.2d 121, 124 (Colo. 1980)); Dep't of Revenue *ex rel*. Preston v. Cummings, 871 So. 2d 1055, 1059 (Fla. Dist. Ct. App. 2004) (describing the presumption as "one of the strongest rebuttable presumptions known to law"), *rev. granted*, 895 So. 2d 405 (Fla. 2005); *In re* K.H., 677 N.W.2d 800, 806 (Mich. 2004) ("*It is one of the strongest presumptions in the law.*"); *In re* Trust Created by Agreement Dated Dec. 20, 1961, 765 A.2d 746, 753 (N.J. 2001) ("[T]he presumption of legitimacy 'remains one of the strongest rebuttable presumptions known to the law . . . .'") (quoting 41 AM. JUR. 2D *Illegitimate Children* § 10 (1995)).

[22] *See* Kusior v. Silver, 354 P.2d 657, 659 (Cal. 1960).

or irrebuttable presumption amounts to a substantive rule of law, as the cases easily recognized.[23] This substantive rule had a procedural corollary, Lord Mansfield's rule, which barred both the husband and wife from testifying about the husband's non-access at the time of conception.[24]

Significantly, for purposes of this article, the presumption of legitimacy instantly designates a man as a child's legal father *at the time of birth*.[25] Although this man can relinquish his original parental rights so that someone else can adopt the child, his own *immediate* status as an "original parent" contrasts with other alternatives, such as becoming a father through adoption (a process entailing considerable state regulation, including some pre-adoption interval)[26] or acquiring parental rights through recognition as a "parent by estoppel" or a "de facto parent,"[27] labels that attach only after the passage of time[28] or that receive recognition only upon family dissolution.[29] Whether he is genetically related or not, the presumption makes the mother's husband automatically and immediately a full-fledged legal parent, without the need for any additional state intervention.[30] No particular behavior on his part is

[23] *See id.* at 668; *see also* Michael H. v. Gerald D., 491 U.S. 110, 119 (1989) (Scalia, J., plurality opinion).

[24] *See* HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 186, 544 (2d ed. 1988); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 220 (1985) (stating Lord Mansfield's rule); Mary Louise Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 COLUM. J. GENDER & L. 495, 498-99 (1993) (same).

[25] *E.g.*, LC v. TL, 870 P.2d 374, 380 (Wyo. 1994) (stating that "the presumption of legitimacy is actually a substantive rule of law based on an overriding social policy derived from the relationship of a presumed father and the child *at the time of birth*") (emphasis added).

[26] *See* Appleton, *supra* note 11, at 410-13.

[27] PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (2002).

[28] Although the *Principles* indicate that the obligation to pay child support makes one a parent by estoppel, *see id.* § 2.03(1)(b)(i), all the other triggers for this status require the passage of time. *See id.* § 2.03(1)(b)(ii), (iv) (requiring, inter alia, living with the child for two years); *id.* § 2.03(1)(b)(iii) (requiring, inter alia, living with the child since birth). Similarly, de facto parentage arises only after one has lived with the child "for a significant period of time not less than two years." *Id.* § 2.03(1)(c).

[29] Indeed, as their full name indicates, the *Principles* apply only upon family dissolution. *See supra* note 27.

[30] Generally, parentage entails a comprehensive bundle of rights and responsibilities. *See* Michael H. v. Gerald D., 491 U.S. 110, 118-19 (1989) (Scalia, J., plurality opinion). Further, traditionally parentage has been all-encompassing and exclusive, despite numerous suggestions for alternative approaches in a variety of contexts. *See, e.g.*, Baker, *supra* note 19; Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Marsha Garrison, *Parents' Rights v. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE, 371 (1996); David D. Meyer, *Family Ties:*

necessary, other than the earlier marriage and the cohabitation at the time of conception that trigger the presumption. Put differently, we might think of the presumption of legitimacy as a *default rule* that determines parentage in the absence of further action, whether an attempt to rebut the presumption (in those circumstances permitting rebuttal) or proceedings to transfer parental rights to another. Although this rule typically determines the names appearing on a child's birth certificate, the birth certificate does not always reflect the default position, as shown by the long-time adoption practice of replacing an adoptee's birth certificate with a new one and sealing the original[31] and by more contemporary pre-birth procedures in which those seeking parental status obtain from a court a declaratory judgment so that the birth certificate can reflect the desired family relationship.[32] The affirmative steps required by both adoption and pre-birth declarations contrast with the inaction characteristic of default rules of parentage.

Recent caselaw reveals four primary approaches to the presumption that American jurisdictions follow today.[33] The marital presumption remains strong, albeit not irrefutable, in approximately nine states, and in some of these only the mother or her husband has standing even to raise a challenge.[34] An

Solving the Constitutional Dilemma of the Faultless Father, 41 ARIZ. L. REV. 753, 833-45 (1999); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 474-82 (1990); *see also infra* note 94 and accompanying text (describing Louisiana's dual-paternity approach).

[31] *See* Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367 (2001); *cf.* Doe v. New York City Bd. of Health, 782 N.Y.S.2d 180, 185 (N.Y. Sup. Ct. 2004) (ordering that the original birth certificates be sealed in the case of a birth pursuant to a surrogacy arrangement); Davenport v. Little-Bowser, 611 S.E.2d 366, 372 (Va. 2005) (ordering the issuance of new birth certificates in the case of same-sex adoptive parents); Jeffrey A. Parness, *Federalizing Birth Certificate Procedures*, 42 BRANDEIS L.J. 105 (2003) (arguing that Congress should act to unify birth certificate practices nationwide for children born to unmarried mothers).

[32] *See generally* Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001); Belsito v. Clark, 67 Ohio Misc. 2d 54 (Ohio Com. Pl. 1994); *see also* Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 J.L. FAM. STUD. 1, 43-47 (2003).

[33] For another taxonomy, see Diane S. Kaplan, *Why Truth Is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69 (2000).

[34] I put in this category Alabama, Florida, Kansas, Kentucky, Louisiana, Michigan, New Jersey, Ohio, and Pennsylvania, even though they all have statutes permitting genetic testing to establish paternity. For example, Alabama permits the presumption to be challenged only in limited circumstances, notwithstanding a statute allowing a defendant to reopen paternity proceedings (with no mention of divorce proceedings) when scientific evidence shows that the declared legal father is not the genetic father. ALA. CODE § 26-17A-1 (1975 & Supp. 2005). *See Ex Parte* Presse, 554 So. 2d 406 (Ala. 1989) (denying putative father standing to challenge presumption when husband has not disclaimed fatherhood); P.G. v. G.H., 857 So. 2d 823 (Ala. Civ. App. 2002) (denying genetic father standing to challenge presumption

even greater number of jurisdictions, approximately twelve, however, now allow rebuttal of the presumption if doing so is deemed to serve the child's best interests.[35] Authorities in at least six jurisdictions allow a husband to

when mother and husband seek to maintain it); C.Y.M. v. P.E.K., 776 So. 2d 817, 818 (Ala. Civ. App. 2000) (denying putative father standing to challenge the presumption when presumed father is not party to case and has not relinquished paternity); *see also* FLA. STAT. § 742.12 (2005); Tijerino v. Estrella, 843 So. 2d 984, 985 (Fla. Dist. Ct. App. 2003); Bellomo v. Gagliano, 815 So. 2d 721, 722 (Fla. Dist. Ct. App. 2002); KAN. STAT. ANN. § 38-1118 (2000); *In re* Marriage of Phillips, 58 P.3d 680, 686 (Kan. 2002) (declining to allow mother to rebut presumption for children allegedly conceived via donor insemination); Ferguson v. Winston, 996 P.2d 841, 845 (Kan. Ct. App. 2000) (finding error in admission of DNA evidence to disestablish husband's paternity without any consideration of best interest of child, who reached majority during pendency of proceeding); KY. REV. STAT. ANN. § 406.111 (LexisNexis 1999); S.R.D. v. T.L.B., 174 S.W.3d 502 (Ky. Ct. App. 2005) (invoking estoppel and child's best interests to recognize former husband's legal paternity, notwithstanding conflicting genetic evidence); LA. REV. STAT. ANN. § 9:396 (2000); Leger v. Leger, 829 So. 2d 1101 (La. Ct. App. 2002) (disallowing rebuttal by mother); Hernandez v. Hernandez, 763 So. 2d 36, 39 (La. Ct. App. 2000); MICH. COMP. LAWS § 722.716 (1979 & Supp. 2000); Aichele v. Hodge, 673 N.W.2d 452 (Mich. Ct. App. 2003) (denying putative father standing to challenge presumption); N.J. STAT. ANN. § 9:17-52 (West 1999); *In re* Trust Created by Agreement Dated December 20, 1961, 765 A.2d 746, 759 (N.J. 2001) (denying third-party attack on presumption); OHIO REV. CODE ANN. § 3111.04 (LexisNexis 2003); Merkel v. Doe, 63 Ohio Misc. 2d 490, 496 (Ohio Com. Pl. 1993) (holding statute establishing right to bring paternity action unconstitutional infringement on privacy and integrity of marital family); 23 PA. CONS. STAT. § 5104 (g) (2001); Miscovich v. Miscovich, 688 A.2d 726, 733 (Pa. Super. Ct. 1997) (declining to allow husband to introduce exclusionary DNA evidence because paternity was established by estoppel), *aff'd by equally divided court*, 720 A.2d 764 (Pa. 1998). *Cf.* Fish v. Behers, 741 A.2d 721 (Pa. 1999) (declining to apply presumption because there was no longer a marriage to preserve, but estopping mother from challenging former husband's paternity because she continually held him out as biological father); *compare* Doran v. Doran, 820 A.2d 1279, 1284-85 (Pa. Super. Ct. 2003) (declining to apply estoppel to former husband once genetic evidence showed nonpaternity) *with* J.C. v. J.S., 826 A.2d 1 (Pa. Super. Ct. 2003) (estopping former husband from challenging paternity based on genetic testing).

[35] These states include Arkansas, California, Colorado, Georgia, Maine, Maryland, Missouri, New York, North Carolina, South Dakota, Wisconsin, and Wyoming. *See* R.N. v. J.M., 61 S.W.3d 149, 157 (Ark. 2001); *In re* Jesusa V., 85 P.3d 2 (Cal. 2004) (conflicting presumptions to be resolved according to weightier policy considerations); Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294 (Ct. App. 2000) (allowing challenge to marital presumption when putative father had established a relationship with the child); N.A.H. v. S.L.S., 9 P.3d 354, 366 (Colo. 2000); Baker v. Baker, 582 S.E.2d 102, 106 (Ga. 2003); Evans v. Wilson, 856 A.2d 679, 692 (Md. 2004); Jefferson v. Jefferson, 137 S.W.3d 510 (Mo. Ct. App. 2004); Hammack v. Hammack, 737 N.Y.S.2d 702 (App. Div. 2002) (relying on "best interests" language of N.Y. FAM. CT. ACT § 418(a)); Jeffries v. Moore, 559 S.E.2d 217, 221 (N.C. Ct. App. 2002) (suggesting relevance of racial characteristics in best-interests analysis); Dep't of Soc. Serv. *ex rel.* Wright v. Byer, 678 N.W.2d 586, 592 (S.D. 2004); *In re* Marriage/Children of Betty L.W. v. William E.W., 569 S.E.2d 77, 81 n.4 (W. Va. 2002) (per curiam); Randy A.J. v. Norma I.J., 677 N.W.2d 630, 639 (Wis. 2004); *see also* State

disestablish paternity at the time of divorce, regardless of the relationship he and the child had established during marriage, i.e., regardless of the child's best interests.[36] And a few states even recognize a "right" on the part of putative fathers to challenge a husband's status as father.[37]

To the extent that genetic evidence now has an important role to play, the law's escalating efforts to hold fathers responsible for the children born to unmarried mothers no doubt explains the trend.[38] Yet, as the various

Div. of Child Support Enforcement *ex rel.* N.D.B. v. E.K.B., 35 P.3d 1224, 1228 (Wyo. 2001) ("There are some circumstances where the best interests of the child are at issue in a paternity proceeding."); *cf. In re* Nicholas H., 46 P.3d 932, 937 (Cal. 2002); *In re* Paternity of Cheryl, 746 N.E.2d 488, 495-96 (Mass. 2001); Stitham v. Henderson, 768 A.2d 598, 603 (Me. 2001) (allowing mother's new husband to rebut presumption for child born during mother's previous marriage).

[36] These states include Alaska, Indiana, Mississippi, Oklahoma, Tennessee, and Virginia. *See* T.P.D. v. A.C.D., 981 P.2d 116, 120, 121 (Alaska 1999) (rejecting both equitable estoppel and paternity by laches when husband sought to disestablish paternity); Cochran v. Cochran, 717 N.E.2d 892, 894-95 (Ind. Ct. App. 1999) (allowing disestablishment and interpreting "child of the marriage" to include only those children biologically fathered by husband); Williams v. Williams, 843 So. 2d 720, 722 (Miss. 2003) (en banc) (emphasizing unfairness to former husband if he could not disestablish paternity); *In re* Estate of Tytanic, 61 P.3d 249, 252-53 (Okla. 2002) (holding that brother of deceased common-law husband can disestablish paternity in inheritance dispute, based on decedent's wishes and legislative support for genetic testing); Shell v. Law, 935 S.W.2d 402, 410 (Tenn. Ct. App. 1996); NPA v. WBA, 380 S.E.2d 178, 180-82 (Va. Ct. App. 1989) (rejecting arguments based on common law adoption, *in loco parentis*, implied contract, and equitable estoppel); *see generally* Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193 (2004).

[37] For instance, Iowa caselaw recognizes a putative (genetic) father's liberty interest under the state constitution in establishing paternity, notwithstanding the marital presumption; this liberty interest, however, is subject to waiver. *See* Callender v. Skiles, 591 N.W.2d 182, 190-91 (Iowa 1999); *see also* N.A.H. v. S.L.S., 9 P.3d 354, 371 (Colo. 2000) (Coats, J., dissenting) (rejecting majority's reliance on child's best interests in resolving conflicting presumptions because this approach "permits biological fathers to be divested of all parental rights without any showing of waiver, estoppel, or forfeiture brought about by their own conduct"); *In re* J.W.T., 872 S.W.2d 189, 198 (Tex. 1994) (recognizing state constitutional right of putative father to have an opportunity to establish paternity, notwithstanding presumption). Hawaii's statute requires genetic testing when requested by a party. HAW. REV. STAT. ANN. § 584-11 (LexisNexis 2005); *see* Doe v. Doe, 52 P.3d 278, 288 (Haw. Ct. App. 2001). Nonetheless, procedural doctrines of finality, such as issue preclusion and collateral estoppel, prevent genetics-based challenges to adjudicated determinations of the husband's presumed paternity. *See* Doe v. Doe, 52 P.3d 255 (Haw. 2002); *see also In re* Marriage/Children of Betty L.W. v. William E.W., 569 S.E.2d 77 (W. Va. 2002) (per curiam). *But see* Stitham v. Henderson, 768 A.2d 598 (Me. 2001) (allowing putative father who was not a party to divorce to establish paternity notwithstanding recognition of paternity of mother's husband in their divorce).

[38] That is, governmental efforts to make child support a private rather than a public responsibility have produced numerous legislative schemes designed to ensure that

approaches listed above indicate, sometimes the emphasis placed on genetic evidence in cases about the children of unmarried mothers has migrated to cases about the children of married mothers, conflicting with the operation of the presumption of legitimacy.[39]

Today, authorities disagree about the purpose of the presumption, with some emphasizing its role in promoting child welfare, others focusing on its protection of the public purse, and still others criticizing it as a means of imposing patriarchal and racist norms or protecting husbands' vanity.[40] Whatever the original or most authentic reasons for the doctrine, applications to same-sex couples unsettle the usual assumptions, in turn offering a productive context in which to explore these sometimes competing, sometimes complementary, rationales.

II. PRESUMING WOMEN: LESBIAN COUPLES

A. *A Gendered Rule in an Increasingly Gender-Neutral Regime*

In the cases in which the traditional presumption matters, a social relationship makes biology irrelevant. Whether regarded as a benefit for husbands or a burden to them, the presumption traditionally operates in a gendered way. For example, the presumption makes a married man the legal father of his wife's biological children, but does not make a married woman the legal mother of her husband's biological children.[41] Even the related rule that presumes a man to be the father of a child born outside of wedlock when he takes the child into his home and holds out the child as his own[42] operates asymmetrically: His legal relationship with the child becomes established by such conduct, but the child does not become the legal child of his wife.

unmarried mothers and genetic fathers share responsibility for their children. These schemes, which require identification of genetic fathers, have placed increasing emphasis on scientific evidence. *See* 42 U.S.C. § 666(a)(5)(F) (2000); Elisa B. v. Superior Court, 117 P.3d 660, 669 (Cal. 2005) ("There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award . . . .") (quoting legislative comment to CAL. FAM. CODE § 7570); Baker, *supra* note 19, at 20.

[39] *See, e.g.*, Dep't of Soc. Serv. *ex rel.* Wright v. Byer, 678 N.W.2d 586, 587 (S.D. 2004); Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 132 (2003). The conflict arises because children born to married mothers have a father – the mother's husband – and this relationship makes genetic evidence irrelevant.

[40] *See infra* Part II.C.

[41] *See* Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 789 (Ct. App. 2003). *But see* Fink & Carbone, *supra* note 32, at 46 ("Equal protection considerations would suggest that the wife of a legal father be accorded the same parental status [as the legal mother's husband].").

[42] *E.g.*, CAL. FAM. CODE § 7611(d) (2004).

Thus, although courts have focused on men's social relationships with their children in determining paternal status and rights,[43] the legal concept of maternity persistently has emphasized biological ties.[44] With biological ties essential for motherhood but not for fatherhood, explains Susan Dalton, "the courts create new social routes to parenthood for men that remain largely unavailable to women."[45] Dalton's analysis focuses specifically on the dissimilar treatment of husbands, on the one hand, and lesbian partners, on the other.[46] Put differently, she asks why the law will not presume that a mother's female partner is the second parent of the mother's child, just as it would for a mother's husband, and why acceptance of a child as one's own can establish parentage for a man, but not a woman, including a lesbian partner. When it comes to parentage, Dalton asserts, even-handed treatment of males and females eludes the courts because they "remain incapable of imagining a gender-free subject."[47]

Dalton's critique finds ample support in contemporary developments in family law and equality jurisprudence. Indeed, the laws governing the modern family have become increasingly gender neutral, thanks to the application of equality principles to many aspects of the traditional regime, including the old sex-specific role assignments in marriage.[48] Under today's rules, wives and husbands alike can be responsible for financial support of spouses, former spouses, and children;[49] fathers and mothers alike are involved parents and suitable caregivers for their children;[50] and any assumptions that mothers of young children will stay home to concentrate on rearing the next generation

[43] *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 651 (1972) (focusing on a man's interest "in the children he has sired and raised"); Caban v. Mohammed, 441 U.S. 380, 389 (1979) (emphasizing that father lived with mother and children "as a natural family for several years"); Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 644 (1993).

[44] *See* Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 289 (2003) (citing Dolgin, *supra* note 43, at 642-46).

[45] Dalton, *supra* note 44, at 281. *But see* Carbone & Cahn, *supra* note 14, at 1048.

[46] Dalton, *supra* note 44, at 261-62.

[47] *Id.* at 266.

[48] *See, e.g.*, Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 110-15 (2005).

[49] *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981) (management of community property); Orr v. Orr, 440 U.S. 268 (1979) (post-dissolution support duties); *see generally* Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017 (2000) (reviewing the general trend of twentieth-century family law in the U.S. away from a patriarchal model and toward a more egalitarian one).

[50] *See, e.g.*, MO. REV. STAT. § 452.375(8) (2003); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Stanley v. Illinois, 405 U.S. 645 (1972); Devine v. Devine, 398 So. 2d 686 (Ala. 1981).

have been uprooted by force of law.[51] Many of these changes stem from the Supreme Court's invalidation, as illegal discrimination, of classifications based on or justified by "archaic and overbroad"[52] gender stereotypes.[53] Indeed, the advent of same-sex marriage, domestic partnerships, and civil unions in some jurisdictions signals the next logical step in freeing spouses from the confines of the sex-based hierarchy[54] that once provided the fundamental organizing principle of family law.[55]

Although the Court's gender-equality doctrine leaves room for "inherent differences" to justify dissimilar treatment of males and females,[56] distinguishing such "real differences" from archaic gender stereotypes remains a controversial exercise. For example, in *Michael M. v. Superior Court*, a plurality of the Court upheld statutory rape laws that only males can violate and only with female sexual partners, on the theory that females' capacity for pregnancy constitutes the critical sex-based "real difference."[57] Dissenters in this case, however, discerned the law's true purpose in the stereotypical assumption that abstinence is best for young females, who – in contrast to young males – are supposedly incapable of understanding their own preferences and appreciating their own best interests.[58] Similarly, in *Nguyen v. INS*, the Court upheld the disparate treatment of nonmarital children born abroad to citizen fathers versus those to citizen mothers, because fathers –

[51] *See, e.g.*, 42 U.S.C. § 607(b)(5) (2000) (codifying "welfare reform" measure requiring single custodial parents to work outside the home unless the child is less than twelve months of age, subject to narrow exceptions); Stanton v. Abbey, 874 S.W.2d 493, 499-500 (Mo. Ct. App. 1994) (imputing former income to mother for purposes of calculating child support, despite her preference to forego work outside the home to care for her children).

[52] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135 (1994).

[53] *See Hibbs*, 538 U.S. at 731; United States v. Virginia, 518 U.S. 515, 533 (1996).

[54] *See* Appleton, *supra* note 48, at 116; *see generally* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988); *cf.* Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988).

[55] *See, e.g.*, NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 3 (2002) (describing marriage as "the vehicle through which the apparatus of state can shape the gender order").

[56] *Virginia*, 518 U.S. at 533 (contrasting supposed "inherent differences" that are impermissible to justify race or national-origin classifications and physical differences that may permit gender classifications).

[57] 450 U.S. 464, 469 (1981) (Rehquist, J., plurality opinion) (approving this gender-based classification because it "realistically reflects the fact that the sexes are not similarly situated in certain circumstances").

[58] *Id.* at 494-96 (Brennan, J., dissenting, joined by White and Marshall, JJ.); *id.* at 500-01 (Stevens, J., dissenting); *see* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 998-1001 (1984); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 404-06 (1984).

unlike mothers – need not be present at the child's birth and so documented.[59] The dissenting opinion in this case repudiated the majority's approach for using an overbroad sex-based generalization about what one's presence at birth means in terms of the opportunity to develop a parent-child relationship.[60]

B. *Extending the Presumption*

Notwithstanding the rulings in *Michael M.* and *Nguyen*[61] the Supreme Court's more general condemnation of gender stereotypes provides strong support for Dalton's critique of prevailing parentage rules. Further, new laws governing same-sex couples in a few states take the next step, establishing apparently gender-neutral parentage rules. For example, after the Supreme Court of Vermont determined that the state constitution's Common Benefits Clause required making the benefits of marriage available to same-sex couples,[62] the legislature enacted a civil union law, which includes what amounts to a presumption of legitimacy, making both parties to a civil union the legal parents of the child that either one of them has during the union.[63] California's domestic partnership legislation contains a similar provision.[64] Same-sex marriages in Massachusetts no doubt produce these consequences too; in fact, the Supreme Judicial Court in *Goodridge v. Department of Public Health* placed considerable weight on the unfair treatment of children when it held that the exclusion of same-sex couples from civil marriage and its

[59] 533 U.S. 53, 62-63 (2001).

[60] *Id.* at 86 (O'Connor, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.); *see* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 104 (2003); Caroline Rogus, Comment, *Conflating Women's Biological and Sociological Roles: The Ideal of Motherhood, Equal Protection, and the Implications of the* Nguyen v. INS *Opinion*, 5 U. PA. J. CONST. L. 803, 807 (2003).

[61] *See supra* notes 57-60 and accompanying text.

[62] Baker v. State, 744 A.2d 864, 886 (Vt. 1999).

[63] VT. STAT. ANN. tit. 15 § 1204(f) (2005):

> The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

[64] *See* CAL. FAM. CODE § 297.5(d) (West 2004) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."). Although less explicit on the issue of parentage, Connecticut's civil union statute suggests a similar effect. 2005 Conn. Pub. Acts No. 05-10, § 14 ("Parties to a civil union shall have the same benefits, protections, and responsibilities under law. . . as are granted to spouses in a marriage, which is defined as the union of one man and one woman."). By contrast, New Jersey's domestic partnership law and Hawaii's reciprocal beneficiaries law confer limited rights and responsibilities, not including parentage. *See* HAW. REV. STAT. § 572C-6 (2005); N.J. STAT. ANN. § 26:8A-6 (West 1996 & Supp. 2005).

incidents violates the liberty and equality provisions of the state constitution.[65] Thanks to these developments, the presumption of legitimacy seems alive and well, notwithstanding its gendered roots and the biological impossibility of the same-sex partner's or spouse's genetic parentage.[66]

Recent cases illustrate how the new applications operate in practice. In *Miller-Jenkins v. Miller-Jenkins*, a Vermont court recognized Janet Miller-Jenkins as the second parent of the child born to Lisa Miller-Jenkins during the course of the civil union that the women had celebrated in Vermont.[67] Despite Lisa's challenge to Janet's parentage after the dissolution of their relationship, the court explained that the civil union legislation gives couples the same benefits and responsibilities that marriage gives.[68] According to the court, if Lisa had been married to a man, her husband would have been the father of the child she conceived via artificial insemination using donor semen, without any need for an adoption proceeding to establish his parental status.[69] The child whom Lisa bore was conceived the same way, and the result for Janet, under Vermont's civil union law, should be the same as it would have been for Lisa's hypothetical husband.[70]

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[65] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 956-57, 962-64 (Mass. 2003). *But see* Levenson, *supra* note 1, at B1 (reporting Massachusetts policy of advising hospitals to cross out the word "father" on birth certificates for children of same-sex couples).

[66] I mean to distinguish those cases in which one female spouse or partner provides genetic material for a pregnancy gestated by the other female spouse or partner. *See, e.g.*, K.M. v. E.G., 117 P.3d 673, 681 (Cal. 2005) (recognizing both women as mothers because they intended to rear the children in their joint home and because this outcome gives the children no more than two parents); *In re* J.D.M., 2004 WL 2272063 (Ohio Ct. App. 2004) (remanding to determine whether shared parenting plan between woman who provided ovum and her partner who gestated the pregnancy would serve child's best interests). In such cases, one can justifiably say that both women are "biological mothers," although in different senses of that term. *Cf.* Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993) (using intent to break tie between gestational and genetic mothers in dispute following gestational surrogacy arrangement).

[67] Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 (Fam. Ct. Vt., Nov. 17, 2004) (ruling on plaintiff's motion to withdraw waiver to challenge presumption of parentage).

[68] *Id.* at 7.

[69] *Id.* at 10-11.

[70] *Id.* at 12. This case, however, now poses a conflict of laws problem because Lisa and the child have moved to Virginia, a state with legislation explicitly rejecting recognition of any unions other than marriage, and a Virginia court has asserted that it need not give full faith and credit to the Vermont court's determination of Janet's parental status. Miller-Jenkins v. Miller-Jenkins, No. CH04-280 (Ch. Va., Oct. 15, 2004); *see* Helene S. Shapo, Essay, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465, 473-74 (2006); Adam Liptak, *Custody After Civil Union Puts 2 Rulings in Conflict*, N.Y. TIMES, Sept. 8, 2005, at A1; *see also* Equality Virginia, Miller-Jenkins FAQ, http://www.equalityvirginia.org/site/pp.asp?c=dfIIITMIG&b=262607 (last visited Apr. 6, 2006). On Vermont law's treatment of assisted reproduction, see *infra* note 228 and accompanying text.

In *Elisa B. v. Superior Court*, the Supreme Court of California reasoned that the gender-neutral application of the state's paternity law, dictated by precedent, made Elisa the second parent of twins conceived by donor insemination and born to her former partner, Emily, during their relationship.[71] As a result of her parental status, Elisa must provide child support.[72] In so concluding, the court relied on a rule related to the presumption of legitimacy – the provision that establishes paternity for a man who takes a child into his home and holds the child out as his own.[73] Further, the court stated that, under California's domestic partnership law (which was not yet in effect at the time of this case's operative facts), "both parents of a child [can] be women"[74] because the partners' parental rights and obligations would be the same as those of spouses.[75] Indeed, in one of two companion cases decided the same day, the court had asked the parties to brief questions concerning not only the gender-neutral application of the parentage statutes but also the impact of California's domestic partnership legislation, which provides the same consequences as marriage.[76] Finally, as in the Vermont court's reasoning in *Miller-Jenkins*, the California court in *Elisa B.* emphasized that, with respect to resulting children, it was treating the mother's partner just as it would have treated a husband who had consented to the artificial insemination of his wife.[77]

C. *Revisiting the Presumption's Objectives and Policies in This New Context*

The scenarios depicted in *Miller-Jenkins* and *Elisa B.* establish a fruitful point of departure for revisiting the traditional presumption and evaluating the current vitality of its purposes and policy underpinnings. Of course, uncovering the original reasons for the presumption – assuming one could accurately determine them – would not contribute significantly to my objective. Rather, for my analysis, the critical issues concern whether any sound reasons support the application of the presumption today and whether those reasons support the same or different treatment of traditional couples, lesbian couples, and gay male couples.

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[71] 117 P.3d 660, 665, 670 (Cal. 2005).

[72] *Id.* at 672.

[73] *Id.* at 667-70.

[74] *Id.* at 666.

[75] *See id.* (citing CAL. FAM. CODE § 297.5(d)).

[76] *See* Kristine Renee H. v. Lisa Ann R., 2004 Cal. LEXIS 9106, at *1-2 (Cal. Sept. 22, 2004). The California Supreme Court resolved this case on the basis of general principles of estoppel. *See* Kristin H. v. Lisa R., 117 P.3d 690, 692 (Cal. 2005). For the third companion case, see K.M. v. E.G., 117 P.3d 673 (Cal. 2005); *supra* note 66 (summarizing *K.M.*).

[77] Elisa B. v. Superior Court, 117 P.3d 660, 670 (2005).

1. Child Welfare

According to one popular understanding today, the presumption of legitimacy has served and should continue to serve a child-welfare objective. At one time, birth out of wedlock initiated a life of stigma and material deprivations.[78] A "filius nullius" (child of no one)[79] certainly had no legally recognized father obligated to provide support; in some jurisdictions, maternal ties were also questionable.[80] Historian Michael Grossberg, tracing the development – and then the diffusion and solidification during the late nineteenth century – of a number of innovations in what once was called "bastardy law," emphasizes how the presumption of legitimacy and its corollaries elevated child welfare above adult interests.[81] For example, in commenting on American courts' adherence to Lord Mansfield's rule (which bars spousal testimony that might show another man's paternity), Grossberg writes: "By continuing to deny married couples the most effective means of establishing the illegitimacy of a child, the courts placed child welfare above parental rights, thus ignoring the growing conviction of jurists that litigants had the right to present all evidence that supported their causes."[82]

After the United States Supreme Court recognized the equal protection problems in discriminating against children for the purpose of modifying parental behavior,[83] official disadvantages for children of unmarried parents dwindled. Around the same time, and perhaps fueled by the Court's recognition of the unfairness of punishing children for the circumstances of

[78] Indeed, the legal disabilities of birth out of wedlock were considered so onerous that they prompted the first "wrongful life" suit, in which a son sought from his father civil damages for the harm inflicted by the son's illegitimate status. *See* Zepeda v. Zepeda, 190 N.E.2d 849 (Ill. App. Ct. 1963); Alexander Morgan Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 633 (1979).

[79] *E.g.*, GROSSBERG, *supra* note 24, at 197; HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 9 (1971).

[80] *See* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 24 (1994). *But see id.* at 22 (observing that, during colonial times, putative fathers were sometimes responsible for child support). *But see also* GROSSBERG, *supra* note 24, at 207 (commenting how "republican bastardy law lessened these disabilities by creating a new legal household and binding it together with inheritance rights . . . by turning the customary bonds between the bastard and its mother into a web of reciprocal legal rights and duties").

[81] GROSSBERG, *supra* note 24, at 218-19.

[82] *Id.* at 220; *see also id*. at 202 ("[T]he common law, first in England and then in America, generally made paternal rights defer to the larger goal of preserving family integrity.").

[83] *See* Levy v. Louisiana, 391 U.S. 68 (1968); *see also* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) ("[V]isiting this condemnation on the head of an infant is illogical and unjust."); *see generally* KRAUSE, *supra* note 79, at 65-70.

their conception, the stigma of illegitimacy faded in power and importance,[84] although changing views of women and the "sexual revolution" no doubt played a part as well.[85]

Despite these legal and social changes, some commentators have identified reasons why the presumption still might make sense today. For example, Theresa Glennon sees the presumption as a reflection of judicial consensus that "parenthood within marriage best protects children."[86] Although she remains agnostic on whether the law should perpetuate the presumption, she critiques its recent erosion in the absence of judicial attention to children's interests, the focus she believes ought to guide all considerations of this issue.[87] More specifically, Glennon targets the increasing ability of husbands to challenge the presumption at divorce by showing that they are not genetic fathers.[88] This approach, she notes, makes the husband's legal paternity voluntary or optional, at the expense of even the child who, based on the husband's behavior, had regarded him as the father throughout the mother's marriage.[89] Jurisdictions following this approach have used advances in paternity testing to elevate fairness to husbands (by allowing them to reject support duties to children conceived by other men) over and above protection of child welfare (by permitting disruption of well established, functional father-child relationships).[90]

Although the presumption historically promoted child welfare as a general matter, it never purported to rest on an individualized assessment of a given child's well-being. For example, as Glennon notes, the traditional presumption fails to recognize that a child might well benefit from a relationship with the biological father, even if he is not the mother's husband.[91]

Indeed, *Michael H.*[92] stands out as a poignant case precisely because of the sense that Victoria, in gaining the protections of a traditional "unitary family,"[93] also lost something valuable when the Court closed the door on her biological father's efforts to continue the relationship they had begun. Hence, several contemporary scholars propose dual paternity as a possible solution that would properly put the interests of children front and center by recognizing that sometimes children have ties worth maintaining with both a

[84] *See* RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION AND WELFARE IN THE UNITED STATES 67, 92-95 (2001).

[85] *See id.* at 22-23.

[86] Glennon, *supra* note 3, at 590-91.

[87] *See id.* at 605.

[88] *See id.* at 594-99; *supra* note 36 and accompanying text.

[89] *See id.* at 592-93.

[90] *See also, e.g.*, Jacobs, *supra* note 36.

[91] *See* Glennon, *supra* note 3, at 596-97.

[92] Michael H. v. Gerald D., 491 U.S. 110 (1989).

[93] *Id.* at 123 & n.3 (Scalia, J., plurality opinion); *see id.* at 130 n.7.

biological father and a mother's husband.[94] Those states that now consider the child's best interests in deciding whether or not the presumption controls[95] similarly emphasize the particular situation of the individual child, although they do not go so far as to recognize dual paternity.[96]

To the extent that a generalized preference for two parents joined by a legal relationship explains the presumption,[97] applying the presumption to lesbian couples joined in marriages, civil unions, or domestic partnerships furthers this goal. Such applications were, no doubt, envisioned by the *Goodridge* majority, which emphasized marriage's benefits to children in striking down the regime that excluded same-sex couples and their families:

> [N]o one disputes that, under the rubric of marriage, the State provides a cornucopia of substantial benefits to married parents and their children. The preferential treatment of civil marriage reflects the Legislature's conclusion that marriage "is the foremost setting for the education and socialization of children" precisely because it "encourages parents to remain committed to each other and to their children as they grow."[98]

Even a naysayer, such as Justice Cordy, dissenting in *Goodridge*, inadvertently makes the case for such extensions of the presumption, in spite of himself. He writes:

> Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by

[94] *See* Glennon, supra note 3, at 602-03; *see also* Fellows, *supra* note 24, at 508-09; Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL'Y 29, 69-72 (2003) (examining how children in some other cultures have multiple fathers). Moreover, Louisiana law permits dual paternity. *See* LA. CIV. CODE § 191 (2005); T.D. v. M.M.M., 730 So.2d 876 (La. 1999); Mouret v. Godeaux, 886 So.2d 1217 (La. Ct. App. 2004). The mother's husband remains the child's legal father, but the biological father "may assert some parental rights." *Mouret*, 886 So.2d at 1221. The plurality in *Michael H.* declined to consider this possibility, given California law. 491 U.S. at 118 (Scalia, J., plurality opinion) ("California law, like nature herself, makes no provision for dual fatherhood.").

[95] *See supra* note 35 (listing these states).

[96] *See, e.g.*, N.A.H. v. S.L.S., 9 P.3d 354 (Colo. 2000); Evans v. Wilson, 856 A.2d 679 (Md. 2004).

[97] *See* Glennon, *supra* note 3, at 604.

[98] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 964 (quoting Cordy, J., dissenting, *id*. at 996).

> formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood.[99]

Justice Cordy describes a legal connection between the mother's spouse and the mother's child that need not depend on the gender of the mother's spouse, despite his use of terms such as "father," "man," and "husband-father." In other words, the understanding of marriage – and its purported purpose – that emerges makes sense for lesbian couples as well. This point becomes clear in a footnote in which Justice Cordy points out: "Modern DNA testing may reveal actual paternity, but it establishes only a genetic relationship between father and child."[100] This simple assertion reveals that biological connections between the mother's child and the mother's spouse constitute something quite different from (and less significant than) the legal relationship that Justice Cordy emphasizes in his encomium to marriage.

This reasoning gains added force from the conventional approach to married couples' use of donor insemination. For the resulting child, legal parentage vests in the mother's husband, notwithstanding the absence of genetic paternity – precisely the result that the presumption of legitimacy would dictate.[101] Extension of this principle to lesbian couples not only promotes child welfare as a general matter;[102] it also addresses the particular sex discrimination that Dalton criticizes[103] by achieving parental parity between lesbian couples and their traditional counterparts. Indeed, these points seem to underlie both the conclusion of the Vermont court in *Miller-Jenkins* that the couple's previously celebrated civil union makes Janet the parent of the child conceived through donor insemination and born to Lisa (the same result that would have followed for Lisa's husband in a traditional marriage)[104] and the parallel reasoning of the California court in *Elisa B.*[105]

2. Public Funds

A less altruistic version of the child-welfare rationale for the presumption of legitimacy shifts the focus to the public or society in general. On a purely practical level, the law's preference for the marital family long has helped protect the public purse[106] and the public interest in clear rules of descent.[107]

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[99] *Id.* at 996 (Cordy, J., dissenting) (footnote omitted).

[100] *Id.* at 996 n.16 (Cordy, J., dissenting).

[101] *See, e.g.*, *In re* Adoption of Anonymous, 345 N.Y.S.2d 430 (Sur. Ct. 1973); *see generally* Appleton, *supra* note 11, at 414-16.

[102] *See, e.g.*, ROTHMAN, *supra* note 19, at 201.

[103] *See* Dalton, *supra* note 44.

[104] *See supra* text accompanying notes 67-70.

[105] *See supra* text accompanying notes 76-77.

[106] Mary Ann Mason recounts how the passage of the English Poor Law of 1576 imposed support responsibilities on unwed mothers and fathers. *See* MASON, *supra* note 80, at 25. This approach was imported to the colonies. GROSSBERG, *supra* note 24, at 198; *see also id.* at 215-33.

Before the scientific developments that now permit accurate paternity testing, the presumption definitively identified a legal father responsible for child support[108] and this man's legal heirs.[109] These consequences, particularly the former, ease the financial and administrative burdens on the state, at least in theory,[110] particularly when familial economic power resides exclusively in men.[111] To the extent that some states consider likely financial support as part of a best-interests analysis when deciding how to resolve a conflict between the traditional presumption and a more modern paternity presumption based on genetic testing,[112] a concern about public funds no doubt is at work.

Such practical concerns support extending the traditional presumption to lesbian couples and their children. Once again, the conventional treatment of donor insemination – the method of conception in both *Miller-Jenkins* and *Elisa B.* (as well as *Elisa B.*'s companion cases[113]) – adds force to this conclusion. The same approach that makes a married woman's husband the father of children that she bears via donor insemination also dictates that the semen donor has no legal status.[114] Applied to women without husbands, the

[107] *See* Glennon, *supra* note 3, at 563. Although originally the children of no one ("fillius nullius"), "bastard children" acquired rights to maternal inheritance long before they could inherit from their fathers. *See* MASON, *supra* note 80, at 30, 69; *see also supra* note 80 (quoting Grossberg).

[108] *See* Dalton, *supra* note 44, at 320; *see also* Baker, *supra* note 19, at 20 ("The obsession the law seems to have with protecting a child's 'right' to support from someone in addition to the mother helps keep children's dependency private . . . ."); Carbone & Cahn, *supra* note 14, at 1069.

[109] *See* Mary Louise Fellows, *A Feminist Interpretation of the Law of Legitimacy*, 7 TEX. J. WOMEN & L. 195, 196-97 (1998).

[110] Of course, child support continues to present very real enforcement challenges. *See, e.g.*, Blessing v. Freestone, 520 U.S. 329 (1997); State v. Oakley, 629 N.W.2d 200, *reconsideration denied & opinion clarified*, 635 N.W.2d 760 (Wis. 2001); Paul K. Legler, *The Impact of Welfare Reform on the Child Support Enforcement System*, *in* CHILD SUPPORT: THE NEXT FRONTIER 46 (J. Thomas Oldham & Marygold S. Melli eds., 2000).

[111] *See* Kording, *supra* note 14, at 818.

[112] *See, e.g.*, N.A.H. v. S.L.S., 9 P.3d 354, 366 (Colo. 2000); Dep't of Soc. Servs. *ex rel.* Wright v. Byer, 678 N.W.2d 586, 592 (S.D. 2004).

[113] *See supra* note 76 and accompanying text.

[114] True, the presumption did not traditionally apply when the husband was sterile or impotent. *See supra* note 22 and accompanying text. Yet, the foundational cases on parentage of children conceived by donor insemination (a method of conception often used when the husband has fertility problems) sidestep this issue, emphasizing principles of estoppel as well as the public policy favoring legitimacy. *See, e.g.*, People v. Sorenson, 437 P.2d 495 (Cal. 1968); *In re* Adoption of Anonymous, 345 N.Y.S.2d 430, 434-36 (Sur. Ct. 1973). Indeed, read together, the significant decisions of the Supreme Court of California recognizing the legal parentage of a mother's lesbian partner demonstrate the interrelationship between estoppel-based reasoning, on the one hand, and the presumption and its variants, on the other. *See generally* Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005); K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Elisa B. v. Superior Court, 117 P.3d 660

approach results in children with only one parent – a mother.[115] To the extent that recognition of two legal parents better ensures private financial support of children than recognition of only one, extending the presumption to lesbian couples advances this objective and protects the public purse.[116]

3. Public Norms: The Model Family

The public stake in the presumption has had a more normative dimension as well. Harsh treatment of illegitimate children for the purpose of policing sexual conduct and promoting the patriarchal transmission of property, a well-established practice in England, traveled to colonial America.[117] Against this background, the presumption of legitimacy serves to establish the unitary family or the marital family as the normative family.[118] Apart from the interests of individual children for whom parentage might be up for grabs, all children are said to benefit from exposure to this "model family," in which the husband is the father and his wife is the mother.[119]

Today, of course, the scope of this norm is fiercely contested. Both proponents of the Bush administration's "marriage initiative"[120] and opponents

(Cal. 2005); *cf. K.M.*, 117 P.3d at 684 n.3 (Kennard, J., dissenting) (noting the inapplicability to this case of the subsequently effective domestic partnership law).

[115] *See* Appleton, *supra* note 11, at 415-16; *see also* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 903-10 (2000).

[116] *See Elisa B.*, 117 P.3d at 660; Baker, *supra* note 19, at 20. *But see* T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004) (rejecting mother's claim, based on parentage contract, for child support from former same-sex partner); Wakeman v. Dixon, 921 So. 2d 669 (Fla. Dist. Ct. App. 2006) (holding unenforceable visitation agreement between child's legal parent and her former partner).

[117] GROSSBERG, *supra* note 24, at 198; *id.* at 202 (identifying a further goal of "preserving family integrity").

[118] *See, e.g.*, Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 317. I borrow the phrase "normative family" from Julie Berebitsky's historical work on adoption. JULIE BEREBITSKY, LIKE OUR VERY OWN: ADOPTION AND THE CHANGING CULTURE OF MOTHERHOOD, 1851-1950, at 6 (2000). For some *unmarried* mothers, these norms have taken a more coercive turn. Rickie Solinger recounts the pressures on white women who conceived outside wedlock to surrender their babies for adoption to more worthy marital couples. SOLINGER, *supra* note 84, at 68-71. While Solinger focuses her analysis on the 1950s and 1960s, Berebitsky documents the force of the "normative family" in earlier adoption policies from around 1920-1950. BEREBITSKY, *supra*, at 128.

[119] *See* Appleton, *supra* note 48, at 129 n.223 (noting statements to this effect made on the floor of the United States Senate, in support of the proposed Federal Marriage Amendment).

[120] *See* Angela Onwuachi-Willig, *The Return of the Ring:Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1676-82 (2005); Robert Pear & David D. Kirkpatrick, *Bush Plans $1.5 Billion Drive for Promotion of Marriage*, N.Y. TIMES, Jan. 14, 2004, at A1.

of same-sex marriage[121] embrace the rhetoric of a normative family consisting of one man and one woman. Even the latter concede that children can thrive outside this ideal setting and that many exemplary parents are not married; still, they insist on the value of establishing and glorifying a norm.[122] Still others, including a few labeled "conservative," champion families headed by married (or legally attached) spouses but without imposing traditional gendered entry requirements.[123] Hence, whether or not extending the presumption to families like those in *Miller-Jenkins* and *Elisa B.* furthers the presumption's purposes depends on how narrowly or how broadly one describes the "model."

The traditional presumption has served to establish a normative family in another way. In terms of legal consequences, the presumption sweeps under the rug any extramarital liaisons that the mother-wife might have had. As far as the law is concerned, the presumption makes the mother, her child, and her husband members of an intact "unitary family," regardless of the circumstances of the child's actual conception.[124] At the same time, the law gives the husband an economic incentive to control his wife's sexuality (or fertility); if he allows her to stray, he may nonetheless be financially responsible for any children she might conceive with other men. Finally, the presumption shields marital families from attack by "outsiders" like Michael in *Michael H.*[125] Accordingly, the constitutional right to privacy or family

[121] *See, e.g.*, Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & its Predecessors*, 16 STAN. L. & POL'Y REV. 135 (2005).

[122] *See, e.g.*, Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 819, 822-23 (11th Cir. 2004) (upholding Florida's ban on adoptions by gays and lesbians), *cert. denied*, 129 S. Ct. 869 (2005); *cf.* Bartlett, *supra* note 19, at 313 (observing, in debate about whether to permit "nonmarital motherhood by choice," "that society already depends heavily upon unmarried women to raise its children"); Dalton, *supra* note 44, at 308-09 (citing JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 36 (1990), to critique the construction of "the traditional nuclear family as the only natural family type").

[123] *See* Jonathan Rauch, *What I Learned at AEI*, 156 PUB. INT. 17 (2004); David Brooks, *The Power of Marriage*, N.Y. TIMES, Nov. 22, 2003, at A15 (explaining why conservatives should insist on marriage for same-sex couples); *see also* JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004). A related point of contention surfaces in the views of those who support legally recognized unions for same-sex couples while seeking to reserve marriage for male-female couples alone. *See* David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL'Y REV. 73 (2005) (rejecting same-sex unions and advocating same-sex marriage).

[124] According to an often-invoked slogan, "[t]he law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy." *E.g.*, *In re* Estate of Matthews, 47 N.E. 901, 903 (N.Y. 1897); Sam v. Sam, 45 P.2d 462, 466 (Okla. 1935).

[125] *See* Michael H. v. Gerald D., 491 U.S. 110, 125 (1989) (Scalia, J., plurality opinion); Jacqulyn A. West, Comment, *Maintaining the Legal Fiction: Application of the Presumption of Paternity and Paternity by Estoppel in Pennsylvania*, 42 DUQ. L. REV. 577,

integrity might well be at stake.[126] Those states that today allow a husband and wife to maintain a family, even in the face of genetic evidence showing that another (interested) man fathered the children, reflect this approach.[127]

Again, the current push and pull on same-sex marriage creates uncertainty about the application of these policy considerations to same-sex couples and their families. For those who see no meaningful difference between traditional different-sex and nontraditional same-sex families, protecting the "unitary family" regardless of its members' gender should follow. On the other hand, some proponents of same-sex marriage explicitly rest their arguments on the anticipation that marriage will change in a positive way once it has been liberated from more traditional norms and expectations.[128] From this perspective, the premium traditionally placed on protecting the family from outsiders or masking extra-marital liaisons might simply evaporate. This analysis also requires assessing whether the norms for civil unions and domestic partnerships ought to imitate exactly those for traditional marriages or whether these new paths to official family status ought to fork off in different directions. A complete dissection of this issue calls for determining what those who support civil unions or domestic partnerships, but seek to reserve marriage exclusively for traditional couples, regard as the differences, if any, among these statuses – and what public understanding of these new institutions these observers contemplate.[129] Put differently, what do those who support civil unions but oppose same-sex marriage envision for the former?

579-80 (2004). Similarly, even in states that treated illegitimate children more inclusively, these children had no right to intrude into their biological father's family if he were married to someone other than the mother. MASON, *supra* note 80, at 97 (describing North Dakota statute).

[126] *See, e.g.*, Merkel v. Doe, 635 N.E.2d 70 (Ohio Ct. Com. Pl. 1993) (declaring unconstitutional a statute that would allow putative father to bring paternity action over objection of mother and her husband).

[127] *See supra* note 34 (listing states).

[128] *See* William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's* Sex and Reason*: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 356 (1992) ("Recognizing same-sex marriage would contribute to the erosion of gender-based hierarchy within the family, because in a same-sex marriage there can be no division of labor according to gender."); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 17 (1991); Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 312-14 (2000) (discussing how same-sex marriage will make marriage "less sexist"); *cf.* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004).

[129] *Cf.* Buckel, *supra* note 123, at 73-74. *Compare* Baker v. State, 744 A.2d 864, 886-87 (Vt. 1999) (permitting civil unions as a remedy to address the violation of the state constitution caused by the exclusion of same-sex couples from marriage and its benefits) *with In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 569, 572 (Mass. 2004) (rejecting civil unions as a remedy for violation of state constitution caused by the exclusion of same-sex couples from civil marriage and its benefits).

To what extent do "unitariness" and privacy constitute part of the vision of these new relationships?

Finally, the analysis must include the views of those whose objections to legal recognition of same-sex couples would lead them to support any and all efforts to undermine such families. For example, in *Miller-Jenkins*, Vermont Renewal, an organization opposed to Vermont's civil union law, has raised funds for Lisa's efforts to deny the parental status of Janet, her partner in a now dissolved civil union.[130] Vermont Renewal's call for donations describes Lisa as a "former lesbian" who is trying to protect her (biological) child from "a harmful, confusing, tormenting and psychologically damaging environment."[131] Such views stand out as utterly incompatible with the objective of protecting nontraditional families from outside intruders or establishing a norm of "unitariness" for such families.

In sum, whether or not extending the presumption to families like those in *Miller-Jenkins* and *Elisa B.*[132] helps promote a model family all depends on the eye of the beholder. The volatility of and variation among different views on same-sex relationships prevents determination of the underlying norm, a necessary element in answering the question.

4. Patriarchy and Husbands' Vanity

a. *"Biological Reality" Versus Appearances*

Both the child-welfare and the public-welfare understandings of the presumption of legitimacy fail to take account of important exceptions that traditionally have qualified the doctrine. The conclusive presumption did not apply unless the husband and wife were cohabiting – that is, simply sharing a home, with or without sexual intimacy.[133] In addition, the presumption never applied when the husband was sterile or impotent or when he was "beyond the four seas" for more than nine months.[134] Perhaps more significantly, a child whose race did not match the husband's was not covered by the presumption.[135] (Here, read: a Caucasian mother's child, who appeared to have been fathered by an African-American, was not presumed to be the child of the mother's Caucasian husband, although this race-based exception probably applied to protect Caucasian husbands from legal paternity of other

[130] *See* Liptak, *supra* note 70; Christina Nuckols, *Two Women, Two States, One Child*, VIRGINIAN-PILOT, Dec. 13, 2004, at A1; *see also supra* notes 67-70 and accompanying text (discussing *Miller-Jenkins*).

[131] Nuckols, *supra* note 130.

[132] *See supra* notes 67-77 and accompanying text (discussing *Miller-Jenkins* and *Elisa B.*).

[133] *See* Michael H. v. Gerald D., 491 U.S. 110, 155 (1989) (Brennan, J., dissenting).

[134] GROSSBERG, *supra* note 24, at 201.

[135] *See id.* at 203.

"other" children as well.[136]) Indeed, some judges follow this approach even today.[137]

These exceptions stand out because of the lengths to which the law otherwise has gone to confer legitimacy whenever possible.[138] Many laws have recognized as legitimate even the children of void and annulled marriages.[139]

Obviously, if a source of child support or the benefits of living in a "unitary family" free from outside intruders were the primary objectives of the presumption, then these exceptions would be difficult to justify. Some commentators have emphasized that these exceptions reveal the presumption as a crude proxy for biological paternity, developed in the absence of accurate genetic testing.[140] If a man might have or could have been the child's father, the presumption treated him as such. Proponents of legal fictions like the presumption of legitimacy were willing to extend them only so far, however, as when impotence, sterility, or racial differences meant that a husband could not possibly have sired a particular child.

If the traditional presumption served simply as an early, albeit less than accurate, test for genetic paternity, then it should have no role in families headed by same-sex couples who, more often than not, fail the test of "biological reality." Of course, today some lesbian couples use assisted reproductive technologies to divide between them genetic and gestational contributions,[141] creating biological ties between the child and both women – even though the need for donated semen makes such cases different from those that the hypothesized "biological reality" standard envisioned. Indeed, in the first major case to examine the parentage of children born from such an arrangement, the Supreme Court of California left unclear the precise role that

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[136] *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 267-68 (1997).

[137] *E.g.*, Jeffries v. Moore, 559 S.E.2d 217, 221 (N.C. Ct. App. 2002).

[138] *See, e.g.*, MASON, *supra* note 80, at 71; *see also* GROSSBERG, *supra* note 24, at 201-03, 221 (discussing how the law recognized as legitimate children of annulled marriages and other unions that various impediments prevented from being recognized as valid marriages).

[139] *See, e.g.*, Evatt v. Miller, 169 S.W. 817 (Ark. 1914) (applying statute that recognizes as legitimate offspring of bigamous and void marriages); Fuss v. Fuss, 368 N.E.2d 271 (Mass. 1977) (applying New York law to recognize as legitimate children of a void Mexican marriage).

[140] Professor Marjorie Shultz asserts that, before the days of accurate paternity testing, the presumption offered "the best available method of determining factual biological paternity." Shultz, *supra* note 118, at 317; *see* Michael H. v. Gerald D., 491 U.S. 110, 152-53 (1989) (Brennan, J., dissenting); Dolgin, *supra* note 5, at 527-29; Kording, *supra* note 14, at 817-21; *cf.* Carbone & Cahn, *supra* note 14, at 1019 (indicating "continuing tensions between the genetic tie and socially constructed ties").

[141] *See, e.g.*, K.M. v. E.G., 117 P.3d 673, 676 (Cal. 2005); *In re* J.D.M., 2004 WL 2272063, at *1 (Ohio Ct. App. 2004); Ryiah Lilith, *The G.I.F.T. of Two Biological and Legal Mothers*, 9 AM. U. J. GENDER SOC. POL'Y & L. 207, 209-10 (2001).

such biological connections play.[142] In any event, a simplistic response dismissing application of the presumption to same-sex couples because of biology ignores several significant factors – suggesting that something other than a quest for genetic history has always been at work.[143]

First, even our understanding of "biological reality" carries significant contextual baggage. For example, Dorothy Roberts points out how men today consider their genetic ties to children enormously significant, as shown by those who hire "surrogate mothers" rather than adopting.[144] She also observes that during the slavery era male owners often conceived children with their female slaves, although these genetic ties did not make the offspring part of the owner's legal family,[145] in significant part because of the economic losses that giving these children their father's status (free) rather than their mother's (slave) would entail.[146]

Second, closer inspection reveals appearances, not biology, to be the decisive variable. If a child could "pass" as the husband's own, then the law made the husband the father. On the other hand, if one could see through the charade, then the presumption would not apply. Under this rationale, the obligation to support a child whom others might know that the husband had not fathered perhaps would add too much insult to injury.

Although Justice Scalia contends that the presumption's goal was simply to protect the unknowing husband himself from exposure to upsetting information (making safeguarding the male ego the principal objective),[147] this understanding seems unlikely. In cases governed by the presumption, a husband could neither challenge it nor introduce rebuttal evidence, even if he *knew* that his wife had strayed.[148] Moreover, the wife's paramour or the wife

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[142] *See K.M.*, 117 P.3d at 684-85 (Kennard, J., dissenting); *id.* at 685-90 (Werdegar, J., dissenting).

[143] For an analysis theorizing that the determinative variables are labor (parental function) and the mother's consent, see Spitko, *supra* note 19 (manuscript at *3).

[144] *See* Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 937 (1996); *see also* Marcia C. Inhorn, *Global Infertility and the Globalization of New Reproductive Technologies: Illustrations from Egypt*, 56 SOC. SCI. & MED. 1837, 1846 (2003) (discussing how some previously infertile Egyptian men divorce and find new, younger wives to take advantage of new techniques in assisted reproduction, specifically intracytoplasmic sperm injection).

[145] *See* ROBERTS, *supra* note 136, at 267-68.

[146] *See* MASON, *supra* note 80, at 42-43; *see also* Fellows, *supra* note 24, at 500-03.

[147] *See* Michael H. v. Gerald D., 491 U.S. 110, 120 n.1 (1989) (Scalia, J., plurality opinion) (noting that, in the situations in which California law allows rebuttal of the presumption, "it is more likely that the husband already knows the child is not his").

[148] *See id.* at 124-25; Fellows, *supra* note 24, at 513-16. *But see Michael H.*, 491 U.S. at 162 n.4 (White, J., dissenting) (tracking change in California statutes, which originally disallowed the husband from introducing blood test evidence showing that he had not fathered the child, but more recently permit him to introduce such evidence within two years of the child's birth).

herself might convey the unsettling news to him, regardless of the legal import of such information.[149] In addition, the husband himself was probably the best source of evidence of his own impotence or sterility, although in earlier eras a determination of sterility would not have been readily available.[150] Such nuances in the rule signal an emphasis on the perceptions of others, not biology.

The cohabitation trigger for the presumption supports the importance of appearances and "passing." Defined to mean simply living under the same roof, "cohabitation" is an observable fact, akin to the "holding out" requirement for common-law marriage.[151] The traditional test for cohabitation made irrelevant the sexual intimacies that might or might not take place in the spouses' shared residence.[152]

The central role of appearances and "passing" should come as no surprise, given once prevailing (and, to some degree, continuing) adoption practices designed to "match" children and prospective adopters on a number of different bases so that adoption might "imitate nature" and the world might never know that the parent-child relationship was created by law, rather than birth and genetics.[153] And, similar to one exception carved out of the presumption, when a Caucasian adult adopts a child who later exhibits African-American characteristics, this "racial mistake" permits abrogation of the adoption, even today.[154]

This parallel from adoption law reinforces the conclusion that pretended biological relationships were to be regarded and treated as "real" familial relationships so long as the pretense was not obvious to the outside observer.[155]

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[149] *See Michael H.*, 491 U.S. at 155 n.11 (Brennan, J., dissenting).

[150] This conclusion is reinforced by the one-time belief that reproductive difficulties were always exclusively attributable to women. *See, e.g.*, ELAINE TYLER MAY, BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS 156 (1995) (observing how women were the focus of infertility treatment despite equal likelihood of male problems); *id.* at 38-39 (describing George Washington's probably erroneous assumptions that his wife, not he, was infertile).

[151] *See, e.g.*, Kusior v. Silver, 354 P.2d 657, 661-66 (Cal. 1960); Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 970-73 (2000).

[152] *See Michael H.*, 491 U.S. at 155 (Brennan, J., dissenting) (recognizing that "the wife and husband need not even share the same bed") (citing Vincent B. v. Joan R., 179 Cal. Rptr. 9 (Ct. App. 1981)).

[153] *See* MAY, *supra* note 150, at 144; SHANLEY, *supra* note 15, at 12, 15, 20 (critiquing the "as if" family).

[154] *E.g.*, KY. REV. STAT. ANN. § 199.540 (LexisNexis 1998) (allowing annulment of adoption if the child "reveals definite traits of ethnological ancestry different from those of the adoptive parents, and of which the adoptive parents had no knowledge or information prior to the adoption").

[155] Indeed, adoption itself might be regarded as a legal fiction. *See* Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 445-46 (1971).

The child successfully included in such legal fictions received economic and often emotional benefits, but the underlying purpose cannot be described as child-centered, given the readiness to exclude some children based on no fault of their own.[156] Instead, the emphasis on appearances provides additional support for understanding the presumption as an aid in the establishment of a normative (white) family.[157] Of course, today, with no consensus on what the "model" family looks like, the normative work of the traditional presumption and its extensions provides an unstable rationale for such rules.[158]

b. *Ownership of Children*

Bertrand Russell has written that "the whole conception of female virtue has been built up in order to make the patriarchal family possible."[159] Adrienne Rich has written that "[a]t the core of patriarchy is the individual family unit which originated with the idea of property and the desire to see one's property transmitted to one's biological descendants."[160] Mary Lyndon Shanley puts the point somewhat differently: Marriage and the presumption of legitimacy "allow[] a man to lay claim to [his] legitimate heirs (for without marriage, who would know for certain who the father of a child might be?) and to avoid . . . supporting other children," including the husband's own "'spurious' offspring," that is, his biological children born out of wedlock.[161] Looking more broadly at the institution of marriage in the United States, Nancy Cott characterizes it as "the vehicle through which the apparatus of state can shape the gender order,"[162] and she explains how anti-birth-control laws aimed "to stabilize the linkage of sexual adulthood to the roles of spouse and parent."[163]

From such perspectives, one might well see the presumption of legitimacy as a guarantee of the husband's legal claim to the children he sired with his wife. In the absence of accurate and reliable paternity testing, however, the

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[156] *See Michael H.*, 491 U.S. at 162 n.4 (White, J., dissenting) ("So much for the State's interest in protecting the child from the stigma of illegitimacy!").

[157] The "whiteness" of the normative family emerged in another way relevant to the presumption. Martha Davis contends that during the 1960s "illegitimacy had been used as a proxy for race in implementing public policy, particularly, in the area of welfare." Davis, *supra* note 60, at 107.

[158] *See supra* notes 106-130 and accompanying text.

[159] BERTRAND RUSSELL, MARRIAGE AND MORALS 19 (8th prtg. 1948); *see also* ROTHMAN, *supra* note 19, at 43 ("In a patriarchal society, men use women to have their children.").

[160] ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 60 (10th anniversary ed. 1986), *quoted in* Fellows, *supra* note 24, at 511.

[161] SHANLEY, *supra* note 15, at 50.

[162] COTT, *supra* note 55, at 3.

[163] *Id.* at 124. Cott continues: "Sexual relations should not only be enclosed by the wedding band but should mean motherhood for wives and the burden of providing for husbands." *Id.*

rule had to be overinclusive in order to achieve this goal.[164] In other words, the law could ensure that it would recognize the husband as the father of *all his genetic* children born to his wife only if it recognized him as the father of *all* children born to her – except those obviously fathered by someone else.[165] Hence, despite the risk of saddling husbands with paternal responsibility for other men's genetic children (other men who wrongfully appropriated the wife's sexual services, at that), the presumption provided the surest way to connect the husband to those children whom he had, in fact, fathered. Men who did not marry or those who engaged in intimacy with women other than their wives would not have the benefit of this protection, crude and inexact as it might be.[166]

Yet, even if we pursue this line of reasoning, the impulse to establish biological connections with the next generation need not be the driving force. Although we no longer regard marriage as primarily a property transaction, several modern theorists conceptualize contract as the animating principle of marriage and family law.[167] Marriage and its incidents continue to reflect a quid pro quo: For women, reproduction represents some period of dependency (whatever one's view about how long this period lasts and whatever one's understanding of the appropriate allocation of responsibility for the long-term dependency of the resulting child).[168] In the past, husbands not only assumed

[164] One might say that marriage gave the husband more (children) than he bargained for, just as the one-time legal impossibility of marital rape meant that marriage gave the wife more (sex) than she desired. *See, e.g.*, People v. Liberta, 474 N.E.2d 567, 575 (N.Y. 1985) (finding the traditional marital rape exemption unconstitutional). In both situations, marriage was deemed to signal continuing consent. *See id.* at 572. On the other hand, the presumption of legitimacy had exceptions, unlike the traditional nonrecognition of marital rape. *See supra* notes 133-135 and accompanying text. On the connection between same-sex marriage and marital rape, see Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1380-96 (2005).

[165] *See* Michael H. v. Gerald D., 491 U.S. 110, 161 (1989) (White, J., dissenting) ("Judicial process refused to declare that a child born in wedlock was illegitimate unless the proof was positive."); Kusior v. Silver, 354 P.2d 657, 661 (Cal. 1960) (conclusive presumption applied when it was "possible by the laws of nature for the husband to be the father").

[166] *Cf.* Shultz, *supra* note 118, at 317 ("The important issue [is] not who is, but who *should* be having sex with the mother: her husband.").

[167] *E.g.*, Baker, *supra* note 19; Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998). *But see* Mary Lyndon Shanley, *Just Marriage: On the Public Importance of Private Unions*, *in* JUST MARRIAGE 3 (Joshua Cohen & Deborah Chasman eds., 2004).

[168] *Compare* Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985) (arguing that males and females require different treatment only during reproductive "episodes") *with* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004) (finding a more prolonged period of dependency for mothers). The PRINCIPLES recognize the economic dependency that results from care work. *See* PRINCIPLES, *supra* note 27, § 5.05 (2002) (providing compensatory

such duties in exchange for "wifely services";[169] they also traditionally became entitled to the services and earnings of their children as the children matured.[170] In other words, to focus exclusively on the presumed genetic connection between the husband and the wife's children would overlook the economic aspects of the bargain and its history. [171] Put yet another way and using a more contemporary perspective, marriage and its traditional parentage rules not only protect the welfare rolls from the needs of dependent children; these principles also ensure some economic benefits (at least some offset) to the husband. An understanding of children as the property of their fathers, [172] once reflected in the law, requires no leap from these starting points.

This perspective on the presumption also sheds light on related rules, such as the traditional rule recognizing as a legal father a man who takes a child in to his home and holds the child out as his own (yet another reflection of the importance of appearances or the observations of others).[173] On the one hand, the rule most likely reflected a common-sense inference: Why would a man undertake such responsibility and public acknowledgment of a child unless he knew he had fathered this child? Indeed, when revising the Uniform Parentage Act in 2000, the drafters initially eliminated this rule, given the availability of accurate genetic testing for paternity – suggesting the establishment of a biological relationship as the rule's underlying purpose.[174] Yet, the drafters simultaneously retained the presumption of legitimacy,[175] notwithstanding the availability of accurate genetic testing. Because such revisions might produce

spousal payments for primary caretaker's residual loss in earning capacity); *id.* § 7.05 (permitting departures from agreements when "enforcement would work a substantial injustice," including when the couple had or adopted a child); *see also* Carbone & Cahn, *supra* note 14, at 1040 (invoking the "legacy of our hunter-gatherer ancestry").

[169] For the classic case reflecting the "reciprocal" duties of husbands for support and wives for domestic services, see McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953). For a modern critique, see Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1 (2003).

[170] *See, e.g.*, Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, *in* DIVORCE REFORM AT THE CROSSROADS 166, 178-79 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); *see also* Bartlett, *supra* note 19, at 297-98 (describing the reciprocal nature of traditional parent-child relationship).

[171] *Cf.* Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 42-43 (1989).

[172] *See generally* MASON, *supra* note 80; *see also, e.g.*, Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 848-54 (2004); Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

[173] For example, California legislation provides that a "man is presumed to be the natural father of a child if . . . [h]e receives the child into his home and openly holds out the child as his natural child." CAL. FAM. CODE § 7611(d) (West 2005); *see supra* notes 151-158 and accompanying text.

[174] UNIF. PARENTAGE ACT § 204 cmt. (amended 2002), 9B U.L.A. 16 (Supp. 2005).

[175] *Id.*

differential treatment of children depending on the marital status of their parents, however, the drafters reconsidered two years later. The 2002 revisions include a circumscribed "holding out" rule: In order for such conduct to create a presumption of paternity, "for the first two years of the child's life, [the man must have] resided in the same household with the child and openly held out the child as his own."[176]

In explaining why the requirement must be met during the first two years of the child's life, the drafters note that the same two-year period provides the window for attacking paternity presumptions.[177] And, certainly one can make a persuasive case for a regime that gets the issue of paternity settled once and for all before the child becomes too old (or "too attached"). Although the drafters do not articulate an additional rationale, however, one is detectible by reaching back to an earlier understanding of the father-child relationship: For a man presumptively to have access to the economic benefits that fatherhood once entailed, without marriage and without genetic testing, he must have "been there" when the dependency of both mother and child were greatest. Despite the rule's silence as to whether the man will be residing only with the child or with the mother as well, in either case he would meeting both of their needs at a critical time.[178]

Today, some states give the husband the best of both worlds. He can disestablish paternity at the time of divorce, notwithstanding a long parent-child relationship.[179] Or, he can decide to leave the presumption uncontested (and in some states he can take the additional step, if he chooses, of achieving recognition as an "equitable parent," despite the absence of genetic paternity).[180] These approaches challenge the concept of the presumption as either a child-welfare measure or the embodiment of a norm. Further, one could accept these developments as modern-day repudiations of the presumption or interpret them as additional evidence of the continuing husband-centered character of family law.

To the extent, then, that these traditional principles merely served to connect men and their likely genetic offspring, these principles would have no role to play for same-sex couples such as those in *Miller-Jenkins* and *Elisa B.*, in which no probable genetic tie exists between the child and the spouse or

[176] UNIF. PARENTAGE ACT § 204 (a)(5) (amended 2002), 9B U.L.A. 16 (Supp. 2005).

[177] UNIF. PARENTAGE ACT § 204 cmt. (amended 2002), 9B U.L.A. 16-17 (Supp. 2005); *see id.* § 607 cmt., 9B U.L.A. 31-32 (Supp. 2005).

[178] In other words, if the man and the mother are sharing a household, he "is there" for her and the child during the latter's infancy. If the mother resides in a different household from the home that the man shares with her infant, then she would be relieved of the dependency that she would otherwise experience as her infant's primary caregiver.

[179] *See supra* note 36 (listing states) and accompanying text.

[180] *E.g.*, *In re* Marriage of Gallagher, 539 N.W.2d 479, 482 (Iowa 1995); Atkinson v. Atkinson, 408 N.W.2d 516, 520 (Mich. Ct. App. 1987).

partner because genetic evidence will always rebut the presumption.[181] Further, patriarchy, male vanity, and ownership of children hardly appear to be the sorts of reasons to invoke today in support of the presumption of legitimacy and related rules, whatever the context.

To the extent, however, that these principles instead reflect a bargain designed to address the dependencies that procreation inevitably entails, then the "husband's" gender should not matter. Indeed, the extension of the presumption of legitimacy to these nontraditional families helps show that biology should remain quite beside the point, thus halting or reversing the recent erosion of the presumption by cases that allow rebuttal by genetic evidence of the husband's nonpaternity.[182] Hence, perhaps the extension of the presumption to lesbian couples who are legally joined in marriages, civil unions, or domestic partnerships will help work out new difficulties that have emerged in the context of traditional marriages.

In fact, the reasons examined in this section figured prominently in the court's analysis in *Elisa B.*, even though the facts of the case and their timing made the domestic partnership law, including its parentage provision, inapplicable. The court recited Emily's reliance on Elisa's support in deciding both to bear children and to serve as an "at-home mom"[183] and then invoked California's paternity presumption based on a man's receiving a "child into his home and openly [holding] out the child as his natural child."[184] Finding "no reason why both parents of a child cannot be women,"[185] the court determined that Elisa's behavior satisfied the statutory requirements.[186] Further, the court noted that the state's interest in the welfare and support of the children born to Emily required recognition of Elisa as their second parent.[187] To the extent that equitable principles, such as estoppel, have a role to play in such cases,[188] they reinforce the understanding of parentage as, at least in part, a bargain designed to address certain dependencies.[189]

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[181] This extension of the presumption and its subsidiary rules must be distinguished from other recent applications in which wives in female-male couples have been permitted to use genetic evidence to prove their maternity. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (gestational surrogacy arrangement); Soos v. Superior Court, 897 P.2d 1356 (Ariz. Ct. App. 1994) (same).

[182] *See supra* note 36 and accompanying text; *see generally* Dowd, *supra* note 39; Jacobs, *supra* note 36.

[183] Elisa B. v. Superior Court, 117 P.3d 660, 663 (Cal. 2005).

[184] *Id.* at 664 (quoting CAL. FAM. CODE § 7611(d)).

[185] *Id.* at 666.

[186] *Id.* at 669-70.

[187] *Id.*

[188] *See* Kristine H. v. Lisa R., 117 P.3d 690, 695-96 (Cal. 2005).

[189] Similarly, in *Goodridge*, the Supreme Judicial Court of Massachusetts rejected as irrational and conclusory the state's argument that same-sex couples do not need marriage because "same-sex couples are more financially independent than married couples and thus less needy of public marital benefits, such as tax advantages, or private marital benefits,

III. THE PROBLEM CHILD: GAY MALE COUPLES

Although some of the rationales for the presumption of legitimacy today appear outmoded and inconsistent with contemporary family law policies, others have retained their vitality. Specifically, concerns about child welfare and public funds remain significant; sound reasons exist for protecting the unitary family from outside intruders; and procreation continues to give rise to dependencies that need to be met. These considerations all support the application of the presumption of legitimacy to lesbian couples, notwithstanding both deep disagreement today about the normative family and contemporary resistance to explicitly patriarchal rules and objectives.[190] These considerations, together with the emerging rule of gender neutrality in family law,[191] all combine to support extending the presumption to a woman who is joined in marriage, a civil union, or a domestic partnership with a woman who has a child within the relationship. And any doubts about the feasibility of this extension should evaporate, given the opinions in *Elisa B.* and its companion cases, which illustrate the ease of gender-neutralizing paternity laws and following the law's preference for two-parent families to conclude that both parents can be women.[192]

On their face, the same policy reasons call for extension of the presumption to gay male couples as well as lesbian couples. Certainly, the *Goodridge* court made no distinction between lesbian women and gay men in explaining why the benefits of marriage must be available to same-sex couples;[193] nor does any such distinction explicitly appear in the statutory versions of the presumption in Vermont's civil union[194] or California's domestic partnership laws.[195]

Whatever the gendered stereotypes that might call to mind the lesbian couple and their children as the paradigm case for modernized parentage rules, gay male couples also have families that include children.[196] And, like their lesbian-couple counterparts, they must rely on assisted reproduction or adoption to achieve this goal. While lesbians can use donor insemination

such as employer-financed health plans that include spouses in their coverage." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 964 (Mass. 2003).

[190] *See supra* notes 117-189.

[191] *See supra* notes 48-60.

[192] *Elisa B.*, 117 P.3d at 666; *see also* Kristine H. v. Lisa R., 117 P.3d 690, 696 (Cal. 2005); K.M. v. E.G., 117 P.3d 673, 681 (Cal. 2005). Indeed, to the extent that this trilogy stands out as remarkable, the reason might well lie in the court's reliance on existing paternity statutes and well-established equitable doctrines such as estoppel. In that sense, the cases break no new ground.

[193] *See Goodridge*, 798 N.E.2d 941.

[194] *See* 15 VT. STAT. ANN. tit. 15, § 1204(f) (2002).

[195] *See* CAL. FAM. CODE § 297.5(d) (2004); *see also* 2005 Conn. Pub. Acts No. 05-10, § 14.

[196] *See generally* E. Gary Spitko, *From Queer to Paternity: How Primary Gay Fathers Are Changing Fatherhood and Gay Identity*, 24 ST. LOUIS U. PUB. L. REV. 195 (2005).

(sometimes called artificial or alternative insemination[197]), gay male couples must turn to some sort of surrogacy arrangement.[198] Indeed, the recent story in the *New York Times* quoted at the beginning of this article profiles an emerging preference among some "surrogate" mothers to bear children for gay male couples, because they "have developed a reputation as especially grateful clients, willing to meet a surrogate's often intense demands for emotional connection, though the relationships can give rise to other complications within the surrogate's family and community."[199]

Yet whom does the law recognize as the parents of a child born as the result of such arrangements? Put differently, precisely how, if at all, should the presumption operate for gay male couples? Consider the skeptical comments of Justice Cordy dissenting from the conclusion of the Supreme Judicial Court of Massachusetts that anything less than marriage would fail to remedy the constitutional violation found in *Goodridge*:

> [T]he presumption of paternity . . . reflects reality with respect to an overwhelming majority of those children born of a woman who is married to a man. As to same-sex couples, however, who cannot conceive and bear children without the aid of a third party, the presumption is, in every case, a physical and biological impossibility. It is also expressly gender based: if a married man impregnates a woman who is not his wife, the law contains no presumption that overrides the biological mother's status and presumes the child to be that of the biological father's wife. By comparison, if a married woman becomes impregnated by a man who is not her husband, the presumption makes her husband the legal father of the child, depriving the biological father of what would otherwise be his parental rights [citing, inter alia, *Michael H.*]. Applying these concepts to same-sex couples results in some troubling anomalies: applied literally, the presumption would mean very different things based on whether the same-sex couple was comprised of two women as opposed to two men. For the women, despite the necessary involvement of a third party, the law would recognize the rights of the "mother" who bore the child and presume that the mother's female spouse was the child's "father" or legal "parent." For the men, the necessary involvement of a third party would produce the exact opposite result – the biological mother of the child

[197] On terminology, see SHANLEY, *supra* note 15, at 80 (preferring "alternative" to "artificial").

[198] *See generally*, *e.g.*, Appleton, *supra* note 11, at 416-20 (describing different surrogacy arrangements and the variations in states' legal treatment thereof).

[199] Bellafante, *supra* note 2, at A1; *see also* Lisa Baker, *A Surrogate Dries Her Tears*, N.Y. TIMES, Dec. 11, 2005, § 9, at 8 ("Modern Love" column). Speculation based on anecdotal evidence explains the preference for gay male couples among many "surrogates" by the absence of competition from a new mother in the child's life; the same phenomenon has emerged in adoptive placements as well. I am grateful to my colleague Jennifer Rothman for informing me of this point.

> would retain all her rights, while one (but not both) of the male spouses could claim parental rights as the child's father. Would it not make sense to rethink precisely how this biologically impossible presumption of paternity ought to apply to same-sex couples, and perhaps make some modification that would clarify its operation in this novel context?[200]

Suppose we were to undertake the "rethinking" that Justice Cordy urges? As when confronting a maze, one sees several different paths (including some not-obvious-at-the-outset dead ends and false turns) from which to choose in addressing this doctrinal puzzle.

A. *Extending the Presumption to Men: Ignoring Gestation or Recognizing Three Legal Parents*

First, we might explore ways to make coherent application of the presumption to gay male couples, despite Justice Cordy's skepticism. In other words, one might begin by assuming that the *Goodridge* majority and the Vermont and California legislatures meant to extend the presumption to *all* same-sex couples joined in a legally recognized relationship. This approach would also accord with the family law's movement away from gender-based rules.[201]

Consider, for example, the Vermont statute:

> The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.[202]

One might read this provision to say that, when a man becomes a "natural parent," his male partner is presumed the child's second legal parent. Presumably, "natural parent" here must mean "genetic father," both because "natural" suggests a biological connection[203] and no relationship-based

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[200] *In re* Opinion of the Justices to the Senate, 802 N.E.2d 565, 577 n.3 (Mass. 2004) (Cordy, J., dissenting).

[201] *See supra* notes 48-60 and accompanying text.

[202] VT. STAT. ANN. tit. 15, § 1204(f) (2002).

[203] In the context of adoption, authorities routinely use "natural parent" to mean "biological parent" or "birth parent." *See, e.g.*, *In re* J.L., 884 A.2d 1072, 1076-77 (D.C. Ct. App. 2005); E.P. v. A.M., 159 S.W.3d 862, 865 (Mo. Ct. App. 2005). Adoption proponents, however, reject the use of "natural parent" because it suggests that adoptive parents are "unnatural." *See, e.g.*, Bobbi W.Y. Lum, Note, *Privacy v. Secrecy: The Open Adoption Records Movement and its Impact on Hawaii*, 15 U. HAW. L. REV. 483, 483 n.4 (1993).

Even in jurisdictions like California that have embraced expansive understandings of parentage, the term "natural" still suggests biological connections. For example, in *In re* Nicholas H., 46 P.3d 932 (Cal. 2002), the state supreme court interpreted the statutory provision that makes a man a presumed *natural* father of a child whom he takes into his home and openly holds out as his *natural* child. *Id.* at 936-38. Although the court's ruling (that evidence excluding the man's genetic paternity need not rebut his presumed status)

understanding of paternity (like the presumption of legitimacy) could be operative at this point of the analysis – unless we include the woman giving birth too. Yet difficulties emerge because parity between traditional and same-sex couples is the principle animating the Vermont law and the suggested reading would assign parental status to a genetic father's partner – a consequence that would not follow for a genetic father's wife in a traditional marriage.[204] In addition, this interpretation would also mean either that the child would have three legal parents (the male couple and the woman giving birth)[205] or, alternatively, that the birth mother would have no status as a legal parent (so that the gay male couple alone constitute the child's two legal parents[206]). True, one can imagine a regime embodying either of these alternatives or a new understanding of "natural parent." Still, each of these possibilities represents a sufficiently dramatic departure from ordinary parentage rules and terminology to require a more explicit directive – not just an inference from the rather meager language of the Vermont statute and its

moves beyond biology, the conclusion to be presumed and the behavior triggering the presumption still use a biological relationship as the baseline. *Id.* at 936. In other words, as interpreted by the court, the statute says that the law can continue to treat a man *as if* he were a biological father, notwithstanding conflicting genetic evidence, if he has behaved toward the child *as if* the child were his biological offspring.

[204] That is, when a married man conceives a genetic child with a woman other than his wife, his wife does not have the status of the child's mother or second parent. *See, e.g.*, Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 788-90 (Ct. App. 2003); *see also* Henne v. Wright, 904 F.2d 1208 (8th Cir. 1990) (implying the same point in analyzing restrictions on naming children).

[205] Even when courts – receptive to the existence of nontraditional families – have determined that the involvement of more than two adults would serve a child's best interests, these courts have stopped short of recognizing three legal parents. LaChapelle v. Mitten (*In re* L.M.K.O.), 607 N.W.2d 151, 161 (Minn. Ct. App. 2000) (affirming joint legal custody to birth mother and former lesbian partner, with visitation to biological father and rejecting argument that arrangement constitutes "an impermissible 'triumvirate' parenting scheme"); *see also* Michael H. v. Gerald D., 491 U.S. 110, 131 (1989) (Scalia, J., plurality opinion) (rejecting asserted right of child to multiple fathers, in addition to a mother); Johnson v. Calvert, 851 P.2d 776, 781 n.8 (Cal. 1993) (rejecting argument to recognize two legal mothers, in addition to a father, for child born pursuant to gestational surrogacy arrangement). *But see* Pamela Gatos, Note, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195, 211 (2001).

[206] John Robertson assumes, without analysis, that the presumption of legitimacy could apply to gay male couples without difficulties. John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 360 (2004) (stating that for gay males, "[o]ne incident of same-sex marriage and perhaps of civil unions is that the nonbiologic spouse would automatically become a parent if the child is born during their marriage or union").

counterparts or from the fairness principles articulated by the *Goodridge* majority.[207]

Perhaps "dual paternity," a concept that some scholars have advocated for children in the situation of Victoria in *Michael H.*, could work here, albeit with modification.[208] Still a minority view, dual paternity makes room for recognition of both the mother's husband and the child's genetic father, as well as the mother.[209] In the case of gay male couples, the birth mother might become analogous to the genetic father (who has very limited parental rights), while the gay male couple would assume the role played by the mother and her husband, who undertake primary rearing responsibilities and constitute the child's legal parents. Or, breaking even newer ground, commentators have proposed three-parent arrangements for children in families headed by same-sex couples[210] as well as even more flexible and inclusive schemes that depart from the traditional two-parent norm.[211] Although these approaches might well be plausible, they entail too many complexities to be impressed upon the Massachusetts, Vermont, and California schemes without a clearer signal in favor of this approach and more studied consideration of the implications for traditional couples, assuming that they stand in parity to their same-sex counterparts.

B. *A Limited Extension: Presuming Women Only*

Alternatively, if the goal discernible in the developments in Vermont, California, and Massachusetts is to have the operation of the presumption track as closely as possible its traditional applications while still making it available, when feasible, to same-sex couples,[212] then it might extend only to lesbian couples and not to gay male couples.[213] In other words, whatever the

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[207] *See supra* notes 63-65 and accompanying text. Similarly, the language in *Elisa B.* and its companion cases, although not addressing the presumption of legitimacy directly, makes clear that the law prefers two parents but, for now, rejects three. *See, e.g.*, K.M. v. E.G., 117 P.3d 673, 681-82 (Cal. 2005). *But see* Elisa B. v. Superior Court, 117 P.3d 660, 666 n.4 (Cal. 2005) ("We have not decided 'whether there exists an overriding legislative policy limiting a child to two parents.'" (quoting Sharon S. v. Superior Court, 73 P.3d 554, 561 (Cal. 2003)).

[208] *See supra* note 94 and accompanying text.

[209] *See id.*

[210] *See* Gatos, *supra* note 205.

[211] *See, e.g.*, Bartlett, *supra* note 30; Dowd, *supra* note 39.

[212] *See supra* note 192 (noting how *Elisa B.* and its companion cases relied on existing paternity laws and estoppel principles to recognize two women as legal parents, thus preserving those laws and principles for more traditional applications).

[213] Of course, if tradition and familiarity in operation provide the tests for the presumption's application, then the presumption probably would play no role for same-sex couples at all. Yet, clearly the Vermont and California statutes and the Massachusetts Supreme Judicial Court's opinion in *Goodridge* contemplate some extension of the presumption to same-sex couples.

complications that the need for a third-party woman poses for gay male couples, these difficulties do not stand in the way for lesbian couples. Perhaps, then, it is no coincidence that the cases introducing this subject all involve lesbian couples,[214] who also provided the focus for Susan Dalton's earlier critique of the sex-based discrimination inherent in the traditional presumption and related parentage rules.[215] And despite his general skepticism, Justice Cordy seems to find applying the presumption to lesbian couples less problematic than applying it to gay male couples.[216] In short, if the law can presume a mother's husband to be her child's legal parent, then the law can readily do the same for a mother's female spouse or partner, as the scenarios in *Miller-Jenkins* and *Elisa B.* illustrate.[217]

One might assert unfairness or sex discrimination in providing a legal rule that benefits lesbian couples (and their children) without doing so for their gay male counterparts. Yet, the presumption's traditional application was certainly sex-specific – and unfair, as Dalton's analysis explains.[218] Put differently, the fact that the presumption applied only to men for hundreds of years never stopped its use. Why should the difficulty of achieving complete gender neutrality create an obstacle now – just when women stand to be included?

There is an additional path that arrives at this particular destination (an extension of the presumption to lesbian couples only). Perhaps Justice Cordy's preoccupation with gender is misleading.[219] We might replace the focus on couples according to gender with a focus instead on the method of reproduction. For example, for all couples, regardless of gender, the presumption and the resulting default rule of parentage applies whenever sexual intercourse or donor insemination produces a child for the couple.[220] This category includes many traditional couples and also lesbian couples. For

[214] Here, I have the California trilogy in mind: Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005); and K.M. v. E.G., 117 P.3d 673 (Cal. 2005). *See also supra* notes 183-192 and accompanying text.

[215] *See supra* notes 43-47 and accompanying text; *see also, e.g.*, Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1 (2004) (using hypothetical case of lesbian couple to explore questions of out-of-state recognition of parentage); Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2005); Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683, 698-703 (2005) (reviewing caselaw about lesbian couples and unmarried male-female couples, without addressing how principles applied in such cases might apply to gay male couples).

[216] *See supra* text accompanying note 200.

[217] *See also, e.g.*, *In re* A.B., 818 N.E.2d 126, 131-32 (Ind. Ct. App. 2004), *vacated and remanded*, 837 N.E.2d 935 (Ind. 2005).

[218] *See generally* Dalton, *supra* note 44.

[219] *See supra* text accompanying note 200.

[220] *See* Appleton, *supra* note 11, at 414-16 (surveying U.S. laws that reach this result for traditional couples).

couples requiring the services of a "surrogate," established default rules do not reliably recognize the intended parent or parents as the exclusive legal parent or parents. To achieve the desired result, more onerous adoption or adoption-like procedures often become necessary.[221] Couples relying on this method of reproduction include all gay male couples wanting to have children, as well as some traditional and some lesbian couples.

Viewing the problem from this perspective requires consideration of the laws governing assisted reproduction in California, Massachusetts, and Vermont. Their approaches vary, even if they might reach similar results. California has both the most well-developed and "user-friendly" law on the subject, attaching great (but not always determinative) weight to the parenting arrangement intended by the parties when they initiated the process of assisted reproduction,[222] except for traditional surrogacy arrangements (those in which the woman gestates a pregnancy conceived from her own ovum).[223] Massachusetts recognizes a mother's husband as the father of a child conceived by donor insemination,[224] declines to enforce traditional surrogacy agreements[225] and parenting contracts between lesbian partners,[226] but facilitates the arrangement intended by the parties to a gestational surrogacy agreement (in which the intended mother's ovum is used),[227] at least for traditional couples. Vermont lacks statutes or caselaw directly on point, even for married couples who use donor insemination, though some decisions suggest the possibility of using genetic evidence to rebut the traditional marital presumption under some circumstances.[228]

The extant law in these particular jurisdictions, however, not only continues to evolve; it also fails to capture fully an emerging view that arrangements requiring gestational assistance should evoke a different legal response than

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[221] *Id.* at 417-19 (describing legal approaches to surrogacy in U.S.).

[222] *Compare* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (using intent as "tiebreaker" in a disputed gestational surrogacy arrangement), *and In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998) (recognizing originally intended parents despite absence of genetic or gestational relationship to child), *with* K.M. v. E.G., 117 P.3d 673 (Cal. 2005) (recognizing ovum donor as parent, despite pre-conception document relinquishing parental rights, because she and the gestational mother planned to rear the children in their joint home); *see also* MADELYN FREUNDLICH, ADOPTION AND ASSISTED REPRODUCTION 15 (2001) (observing the promotion of parentage based on intent by "fertility industry," because this approach helps attract consumers).

[223] *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 900 (Ct. App. 1994).

[224] MASS. GEN. LAWS ch. 46, § 4B (2004).

[225] R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998).

[226] T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004).

[227] *See* Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001); *see also* Hodas v. Morin, 814 N.E.2d 320 (Mass. 2004) (applying Massachusetts law based on contract and birth in Massachusetts).

[228] *See* Forman, *supra* note 215, at 10-17 (discussing existing Vermont law).

those requiring genetic contributions from others.[229] The default rule in this emerging, although not unanimous, view recognizes the woman giving birth as the child's mother,[230] presenting challenges to gay male couples seeking to become parents. Perhaps Justice Cordy's skepticism about a single across-the-board parentage rule applicable to all couples simply reflects this emerging view.[231] The analysis returns to this point again later.[232]

Beyond these uncertainties, several additional aspects of this temptingly simple response – taking as a given the prevailing law of reproduction, including assisted reproduction – should give us pause. Marsha Garrison has advanced cogent arguments against treating the method of reproduction as determinative;[233] she prefers to identify and make controlling analogous rules from traditional family law. John Robertson, in his call for wide-ranging protection for assisted and collaborative reproduction, also rejects distinctions based on methodology; he would extend to all reproduction the privacy and autonomy generally applicable to coital procreation.[234] Marjorie Shultz has effectively challenged the status quo on surrogacy arrangements, which fails to honor the parties' intent and misses an opportunity for a gender-neutral approach to parentage.[235]

And, indeed, as Shultz's analysis makes plain, emphasizing the method of reproduction does not extricate us from reliance on gender classifications and norms.[236] To honor intent in all collaborative reproductive arrangements except for surrogacy puts gestation – and hence woman's role in procreation – in a class by themselves. This is a sex-based rule, only thinly disguised, as a more familiar analogy reveals: Just as Congress and virtually all observers rejected as unpersuasive the Supreme Court's assertion that pregnancy-based discrimination does not constitute gender-based discrimination[237] (because the

[229] *See* UNIF. PARENTAGE ACT § 201(a)(1) (amended 2002), 9B U.L.A. 15 (Supp. 2005) (discussed *infra* notes 322-325 and accompanying text); *see also In re* C.K.G., 173 S.W.3d 714, 717 (Tenn. 2005) (treating gestation and giving birth as important factors in resolving parentage dispute of children born of egg-donor arrangement).

[230] *See, e.g.*, Shapo, *supra* note 70, at 474 (assuming that surrogacy requires adoption to transfer parental rights to intended parents).

[231] *See supra* note 200 and accompanying text.

[232] *See infra* notes 317-326 and accompanying text.

[233] *See* Garrison, *supra* note 115, at 895-98. The arguments are sufficiently cogent to require consideration even if we ultimately reject them. *See, e.g.*, Baker, *supra* note 19, at 24-26.

[234] JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994); *see also* Robertson, *supra* note 206.

[235] *See* Shultz, *supra* note 118.

[236] *Id.*

[237] 42 U.S.C. § 2000e(k) (2000) (amending Title VI to include pregnancy-based discrimination in definition of sex discrimination); *see generally* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. L. & SOC. CHANGE 325 (1984-1985).

complementary class, nonpregnant persons, includes both females and males[238]), I regard as gender-based an approach that excludes all gay male couples from the easy and beneficial default rule and makes them instead navigate more onerous and intrusive hurdles, even if some traditional and lesbian couples occasionally face such hurdles as well. Special rules for surrogacy do just that.

Departures from gender neutrality raise significant policy concerns that compel proceeding with caution. What message does the law signal in treating female and male parents differently?[239] Although a majority of the *Michael H.* Court did not find troubling the exclusion of an interested and committed biological father,[240] does an approach that appears to marginalize fathers and would-be fathers contradict today's efforts to cultivate and support paternal involvement?[241] And, of course, departures from gender neutrality risk reinforcing damaging stereotypes about women's primary role as mothers[242] and gay males' unsuitability for parental responsibilities.[243] Such inherent risks and disadvantages require exploration of the alternatives before settling on a rule that treats women and men differently.

C. *Abrogating the Presumption and Considering Its Successors*

The problems raised by extending the presumption while maintaining its basic operation and integrity suggest that we might abrogate such doctrines altogether, treating them as remnants of a bygone era.[244] How might a default rule identify a child's legal parents in the absence of a presumption of legitimacy? The thought exercises that follow show just how difficult it is to

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[238] *See* General Elec. v. Gilbert, 429 U.S. 125, 139 (1976); Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974).

[239] *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

[240] Michael H. v. Gerald D., 491 U.S. 110 (1989).

[241] *Cf.* Bartlett, *supra* note 19, at 322 ("The stronger the rules that both parents have responsibility, the more reinforced will be the norm that both parents should assume responsibility (reinforcement we may badly need)."); Carbone & Cahn, *supra* note 14, at 1065-66 (observing modern goal of promoting paternal involvement); Dowd, *supra* note 39 (seeking legal rules that base fatherhood on nurturing and that recognize interested fathers, even those who do not live with their children).

[242] *See, e.g.*, *Hibbs*, 538 U.S. 721 at 731; Shultz, *supra* note 118, at 384-95.

[243] *See* Spitko, *supra* note 196, at 207 (acknowledging stereotypes of gay men as "self-absorbed, untrustworthy, unfaithful, unable to commit to a long-term intimate relationship, and hypersexual").

[244] There are good reasons to abolish the presumption. *See, e.g.*, Dowd, *supra* note 39, at 144 ("To prefer fatherhood within marriage, and thus return to the distinction between children within and outside of marriage, defies demographic patterns but also, most significantly, stigmatizes and harms children for adult choices over which children have no control.").

disentangle the concept of parentage from its traditional and gender-specific roots.[245]

Here, two premises noted earlier bear emphasizing. First, the goal articulated in the Vermont and California statutes and Massachusetts's *Goodridge* opinion is to dismantle a legal regime that privileges traditional marriages while denying marriage's benefits to same-sex couples.[246] Even if not all same-sex couples can be included in the parentage rules that emerge from this analysis, still in Vermont, California, and Massachusetts the basis for distinction can no longer be marriage, so long as access is limited to heterosexual couples. This "parity goal" means, then, that parentage rules developed for same-sex couples legally joined in marriages, domestic partnerships, or civil unions should also apply to traditional couples.[247] Second, all lesbian couples and male couples must use either assisted reproduction or adoption to add children to their families. Some traditional couples rely on assisted reproduction and adoption as well. Although the law does not and perhaps need not treat all methods of assisted reproduction alike,[248] the parity goal does signal that, in the relevant states, the legal treatment of methods of assisted reproduction and the resulting children ought not to turn on a discriminatory and exclusive marriage regime.

1. Where to Start? Gestation and Genetics – or Just Genetics

Determining where to begin the formulation of new default rules reveals our reliance on assumptions about the essential elements for recognizing a parent-child relationship. Acknowledging such assumptions, the law might begin with the recognition that the woman giving birth is the mother, as the new

[245] As Barbara Katz Rothman points out: "[Q]uestions about motherhood are the most troubling, disconcerting, confounding, divisive and (therefore) interesting ones confronting feminism. By slicing right into the (biological) sex/(social) gender distinction, the issues of procreation raise all the essential – and essentializing – questions of feminism." ROTHMAN, *supra* note 19, at 197. Similarly, Molly Shanley describes as follows the challenge of proposing how the law should treat unmarried fathers: "This approach seeks to minimize the legal effects of biological asymmetry without ignoring altogether the relevance of sexual difference." SHANLEY, *supra* note 15, at 64.

[246] *See supra* notes 193-195 and accompanying text.

[247] This effect would turn on its head what Marc Spindelman calls "like-straight" reasoning, by which decision-makers assume that gay men and lesbians are just like their heterosexual counterparts and that heterosexual intimate relationships provide the baseline for judging same-sex intimate relationships. *See* Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1619-32 (2004) (critiquing "'like-straight' logic" in Lawrence v. Texas, 539 U.S. 558 (2003)). The "parity goal" that I posit would require any new rules developed for same-sex relationships to apply to traditional couples as well, thus perhaps changing the baseline and inviting "like-gay" reasoning.

[248] *See* Appleton, *supra* note 11, at 416 (contrasting regulation of surrogacy to a laissez-faire approach to donor insemination and other methods of assisted reproduction).

Uniform Parentage Act prescribes.[249] Genetic testing would determine the child's father or second parent. In gay male couples, for example, the man providing the semen would be the child's father.

Yet, if genetic testing is going to determine the child's second parent, perhaps genetic testing should identify the child's first parent. Genetics provides a gender-neutral criterion for parentage, because a DNA test can identify a genetic mother as well as a genetic father. Further, a gender-neutral rule is less vulnerable to criticism that it rests on or perpetuates impermissible stereotyping, even if it does not entirely foreclose such problems.[250] Hence, instead of assigning that status to the woman giving birth, the woman providing the egg might be deemed the mother, in the event that the two are different. Some states take this approach to determine parentage when a gestational "surrogate" is used to produce an intended mother's genetic child (who is often also the genetic child of her husband).[251]

Some feminist scholars, however, criticize this genetics-based approach for borrowing the patriarchal "seed" concept of parentage and applying it to women, in derogation of the unique and indispensable nurturing role played by the woman who provides gestation.[252] And, certainly, on closer inspection, the legal significance of genetic connection seems to have been often overstated.[253]

Every child (at least for now) has two genetic parents, one male and one female.[254] If we are searching for a default rule that would recognize parental rights in both parties in a same-sex couple, a genetics-based test misses the mark. And even if identifying only one genetic parent would suffice, some gay male couples purposefully keep such information unknown, as the story quoted at the beginning of this article notes.[255]

Although the means exist to determine every child's genetic parents within a high degree of certainty,[256] practical difficulties prove problematic. Making a genetic relationship the *sina qua non* of original legal parentage would require genetic tests of all children at the time of birth. The assumptions ordinarily made when a child is born would become inoperative. So, for example, we

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[249] UNIF. PARENTAGE ACT § 201(a)(1) (amended 2002), 9B U.L.A. 15 (Supp. 2005).

[250] Shultz, *supra* note 118, at 384-95.

[251] Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); *see also* Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001).

[252] *See, e.g.*, ROTHMAN, *supra* note 19, at 9, 57, 168, 194; SHANLEY, *supra* note 15, at 59.

[253] *See, e.g.*, Spitko, *supra* note 19 (manuscript at *7).

[254] Despite this long-standing reality, British scientists have created human embryos without sperm. Roger Highfield & Nic Fleming, *Embryo Created Without a Father*, DAILY TELEGRAPH (London), Sept. 10, 2005, at 1. They have also received government approval to create human embryos with two genetic mothers. *See* Steve Connor, *Scientists Given Right to Create Baby with Two Genetic Mothers*, THE INDEPENDENT (London), Sept. 9, 2005, News, at 18.

[255] *See supra* note 2 and accompanying text.

[256] *See, e.g.*, Dowd, *supra* note 39, at 132 ("We are poised at the threshold of establishing genetic fatherhood for all children.").

could not simply assume that the woman giving birth to a child is the mother or that her husband is the father because the child might have been born of a donated egg, donor semen, or an extramarital affair. And, if such facts obtained, then this child would have no mother or no father, as the case may be, under the default rule – unless and until the sources of the genetic material had been located and identified.[257] Although the child could acquire a "missing" parent or parents through adoption, adoption entails a judicial process and additional state intervention that make it a much less attractive route to parentage than automatic and immediate recognition.[258] Besides, sometimes newborns need immediate medical treatment, for which a simple and quick way to obtain parental consent or to ascertain insurance coverage makes sense.[259] The problems apparent in applying a default rule of genetic parentage to traditional couples together with the parity goal demonstrate why this rule also should not control for lesbian and gay male couples.

2. A Functional Approach

Alternatively, the law might adopt a strictly functional approach – a response that commentators have recommended for a wide variety of family law problems. Parental conduct and familial relationships, as actually experienced, would provide the criteria for determining parentage, without regard to gender. Mary Ann Mason has detailed how functional understandings of the parent-child relationship prevailed during colonial times in America.[260] Later, psychoanalysts Goldstein, Freud, and Solnit gave a boost to functional considerations when they propounded the concept of "psychological parent,"[261] which a number of courts followed[262] and many

[257] *Cf. In re* Nicholas H., 46 P.3d 932, 933-34 (Cal. 2002) (observing, in deciding to recognize the presumed father despite absence of genetic connection, that otherwise "this child will be rendered fatherless and homeless" because the biological father has never been judicially identified).

[258] *See* Appleton, *supra* note 11, at 410-13; *see also* Stanley v. Illinois, 405 U.S. 645, 648 (1972) (rejecting adoption as a means of asserting or protecting an unmarried father's parental rights). John Robertson notes the superiority of default rules of parentage. Robertson, *supra* note 206, at 357.

[259] *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 950 n.6 (Mass. 2003) (noting Hillary Goodridge's difficulty in gaining access to neonatal intensive care unit after Julie Goodridge gave birth to their daughter); *see generally* Mid-South Ins. Co. v. Doe, 274 F. Supp. 2d 757 (D.S.C. 2003) (litigating insurance coverage for medical expenses for an infant born pursuant to gestational surrogacy arrangement). Addressing such practical problems does not necessarily require the "default parents" to be present at birth, but it would require them to be clearly identified at the time of birth.

[260] MASON, *supra* note 80, at 4.

[261] JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17-20 (new ed. 1979).

[262] *E.g.*, Clifford K. v. Paul S. *ex rel.* Z.B.S., 619 S.E.2d 138, 157 (W. Va. 2005) (recognizing deceased mother's female partner as child's psychological parent, but not as

modern scholars embrace.[263] A functional approach purports to respect the interests of children in continuity of care.[264]

More recently, the American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations* adopted a functional approach by proposing recognition of "parents by estoppel" and "de facto parents," labels that attach based on the acceptance of parental responsibility, shared residence, and reliance.[265] Although the *Principles* prescribe that parents by estoppel have "all of the privileges of a legal parent," such parity arises in a limited context – the allocation of custodial and decision-making responsibility in the wake of family dissolution.[266] De facto parents have an even more explicitly "second-class status," while still acquiring some rights to seek custody and visitation. In the allocation of responsibility for children, the *Principles* explicitly accord priority to legal parents and parents by estoppel.[267] For "de facto parentage" to arise, the legal parent must have consented to another's acting as a primary parent or must have completely failed to perform a caregiving role.[268]

Judicial adherence to a functional approach typically reflects similar limits, which challenge the notion that this approach might offer a default rule of automatic or instant parentage to replace the presumption of legitimacy. First, although some courts have followed a functional approach to recognize a third party as a child's psychological parent with the same rights and responsibilities as a legal parent, several such cases accord less than full parental status.[269] In

his legal parent); *see generally* Peggy Cooper Davis, *"There Is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987) (analyzing judicial use of psychological parent theory of Goldstein, Freud, and Solnit).

[263] *See generally, e.g.*, ROTHMAN, *supra* note 19 (emphasizing mothering); Dowd, *supra* note 39 (emphasizing nurturing). Melanie Jacobs notes the anomaly produced by the increasing reliance on function to recognize adults as parents and the increasing reliance on DNA evidence to disestablish the parentage of even those who functioned as such. *See generally* Jacobs, *supra* note 36.

[264] *See, e.g.*, Dowd, *supra* note 39; Spikto, *supra* note 19 (manuscript at *5).

[265] *See* PRINCIPLES, *supra* note 27, § 2.03.

[266] *Id.* § 2.03 cmt. b; *see also id.* § 2.08. True, one ordered to pay child support becomes a "parent by estoppel"; still, the limited context means that this functional approach accords prerogatives that fall short of the full range of parental rights, specifically recognition while the family remains intact.

[267] *Id.* § 2.18 cmt. b.

[268] *Id.* § 2.03 cmt. c.

[269] *E.g.*, A.B. v. S.B., 837 N.E.2d 965 (Ind. 2005) (recognizing judicial authority to determine whether a mother's former partner has parental rights and responsibilities, based on child's best interests); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (enforcing parties' written agreement, embodied in previous consent order, to allow biological mother's former partner to have post-separation visitation); *In re* H.S.H-K., 533 N.W.2d 419, 435 (Wis. 1995); *see also* Chambers v. Chambers, 2005 Del. Fam. Ct. LEXIS 1 (2005) (recognizing mother's former partner as a de facto parent and estopping her from refusing to pay child

the words of one commentary on the caselaw that adopts a functional approach: "Although parental *rights* may be granted to the petitioning party [in a dispute about custody or visitation], parental *status* is in no way conferred."[270] Accordingly, those meeting the functional test often emerge with the sorts of protections typically provided to grandparents under their specific visitation statutes, which fall well short of the full scope of parental rights.[271]

Second, while some recent cases about lesbian couples reveal judicial willingness to move beyond the grandparent model, [272] the focus on function

support); E.N.O. v. L.M.M., 711 N.E.2d 886, 892-93 (Mass. 1999) (upholding visitation for a de facto parent); C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004) (citing ALI *Principles* and authorizing award of parental rights and responsibilities to de facto parent); *cf. id.* at 1153 (Clifford, J., concurring) (commenting that a court might well award a de facto parent "something less than full parental rights and responsibilities").

[270] *Developments in the Law – The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2063 (2003).

[271] *Id.* at 2062; *see also* Emily Buss, Essay, *"Parental" Rights*, 88 VA. L. REV. 635, 636 (2002) (critiquing the recent trend).

[272] One might discern a more expansive approach in some cases, indicating that equitable or de facto parents, once recognized, stand on par with other legal parents. For example, in *In re* Parentage of L.B., 122 P.3d 161, 163 (Wash. 2005), the court reaffirmed that Washington law recognizes de facto parents, who can "obtain the rights and responsibilities attendant to parentage." *See also id.* at 176. Similar suggestions appear in V.C. v. M.J.B., 748 A.2d 539, 551-52 (N.J. 2000), which recognizes a biological mother's former partner as a "psychological parent" under the following circumstances:

> [T]he legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must [have been] forged.

See also id. at 552 (clarifying that the third party's "participation in the decision to have a child is not a prerequisite to a finding that one has become a psychological parent to the child."). The court goes on to state:

> Once a third party has been determined to be a psychological parent to a child, under the previously described standards, he or she stands in parity with the legal parent. Custody and visitation issues between them are to be determined on a best interests standard giving weight to the factors set forth [in the New Jersey custody statute].

Id. at 554. (citations omitted). Nonetheless, the legal parent has connections (genetic? gestational?) that elevate her interests over the psychological parent's, according to the court:

> The legal parent's status is a significant weight in the best interests balance because eventually, in the search for self-knowledge, the child's interest in his or her roots will emerge. Thus, under ordinary circumstances when the evidence concerning the child's best interests (as between a legal parent and psychological parent) is in equipoise, custody will be awarded to the legal parent.

Id. at 554; *see also In re* Parentage of Robinson, 890 A.2d 1036 (N.J. Super. Ct. Ch. Div. 2005) (applying artificial insemination statute to recognize mother's partner as the child's presumed parent); Clifford K. v. Paul S. *ex rel.* Z.B.S., 619 S.E.2d 138 (W. Va. 2005) (recognizing mother's partner as child's psychological parent after mother's death).

typically requires the passage of time during which the adult performs a parental role.[273] Third, dissolution remains the trigger. Thus, although estoppel and function play a significant role in the opinions of the Supreme Court of California in *Elisa B.* and its companion cases, these parentage determinations all arose *after* the dissolution of the couples' relationships.[274] Of course, these precedents – which do accord full parental status to a mother's former female partner – can help pave the way for effective default or "automatic" rules of the future. Further, the California court acknowledged that such default rules would make two women the parents of a child of either under the state's domestic partnership legislation,[275] but provided no clue about how such default rules would operate for gay male couples registered as domestic partners.

Additional limitations on current applications of a functional approach become apparent when one considers the caselaw in Michigan, for example, where a mother's husband who is not a biological father can receive full parental rights under the "equitable parent doctrine,"[276] but a cohabitant who has performed precisely the same function in rearing the child cannot.[277] In other words, although Michigan has adopted a functional test enabling those without biological connection to attain full parental status vis-à-vis a child, the cases explicitly limit the test to *husbands* – reflecting precisely the narrow, patriarchal understanding that the presumption itself traditionally embodies.

Yet, limitations like those in Michigan might make sense if one assumes that a child can have no more than two parents. Absent polygamy, parentage rules limited by marriage can yield only two parents. In contrast, a purely functional test for legal parentage invites the possibility that several adults might meet the standard.[278] For example, Nancy Dowd, an advocate of a functional approach, urges basing fatherhood on nurturing while describing her ideal as "nonexclusive, cooperative parenting."[279] Similarly, Elizabeth Bartholet would impose financial responsibilities on genetic fathers, without according them full parental rights, thus abandoning the assumption that parentage compels an "all or nothing" relationship.[280]

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[273] *See* cases cited *supra* notes 269 & 272; *see also* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 640 (2002).

[274] Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005); K.M. v. E.G., 117 P.3d 673 (Cal. 2005).

[275] *Elisa B.*, 117 P.3d at 666.

[276] Atkinson v. Atkinson, 408 N.W.2d 516, 517 (Mich. Ct. App. 1987).

[277] *See* Van v. Zahorik, 597 N.W.2d 15, 20 (Mich. Ct. App. 1999).

[278] *See* SHANLEY, *supra* note 15, at 133, 140-142.

[279] Dowd, *supra* note 39, at 135.

[280] *See, e.g.*, Bartholet, *supra* note 8, at 339-42. She would also impose financial responsibility on any man who let the child become dependent on him, whether or not the genetic father. *Id.* at 341.

Because legal parents have the right to direct the upbringing of their child, including decisions regarding with whom their child associates,[281] the more adults with full parental rights, the greater the possibility of family strife.[282] Critics contend that the family privacy doctrine often masks intrafamily conflict;[283] the problem will become significantly messier once we increase the number of adults with legal authority to make important decisions about a child. As an illustration of this point, consider the disputes over clashing childrearing practices between adoptive parents and birth parents when courts try to enforce open-adoption arrangements.[284]

Of course, we might respond to this difficulty by developing rules under which functional parents acquire rights at the expense of biological parents, thus reducing the number of legal parents back to the familiar number of no more than two. Indeed, that is how the presumption of legitimacy traditionally has operated, using marriage as a sort of functional litmus test to trump the claims of a biological parent, just as *Michael H.* illustrates.[285] Once again, transposing a similar functional approach to lesbian couples presents no insurmountable problems. If we find it unfair to cut off a biological father's parentage claims by recognizing the mother's lesbian spouse as a legal parent, then we should find equally unfair the more traditional applications of the presumption of legitimacy.[286]

Yet, even if we trim the number of functional parents to the smallest possible number, the gay male couple and the "surrogate" whom they engage present a challenge. Try as I might, I cannot escape the conclusion that, in applying a functional test to construct a default rule operative at the time of birth, the woman gestating the pregnancy – the "surrogate" – will always have met the test, given the unique parental functions she has performed during pregnancy, including prenatal shelter, nurture, sustenance, and protection of the child-to-be.[287] (I take some comfort in knowing that other contemporary

[281] *See, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000); *see also* Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925).

[282] Katharine Baker and Emily Buss have recognized this problem as well. Baker, *supra* note 19, at 48 ("The more people there are with parental rights vis-à-vis the same child, the greater the likelihood that a judge will be deciding what is in that child's best interests."); Buss, *supra* note 271, at 644, 646 (acknowledging "problems of custodial proliferation" and critiquing the "fragmentation of parental authority").

[283] *E.g.*, David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527 (2000).

[284] *See, e.g.*, Groves v. Clark, 982 P.2d 446 (Mont. 1999).

[285] *See supra* text accompanying notes 9 & 82.

[286] *Cf.* SHANLEY, *supra* note 15, at 140 (suggesting that post-dissolution custody disputes between lesbian co-mothers should be decided the same as such disputes between former spouses).

[287] Pregnancy imposes unique burdens on women. For a judicial effort to describe the physical aspects of pregnancy in a gender-neutral manner so that we might imagine how a man would experience them, see the opinion in a recent "contraceptive equity" case, *In re* Union Pac. R.R. Emp. Practices Litig., 378 F. Supp.2d 1139, 1147-48 (D. Neb. 2005).

scholars who are skeptical of the usual gender-based classifications also regard gestation as an important parental function capable of conferring parental rights.[288])

Of course, both men in the surrogacy arrangement might well meet a functional test too, by supporting the woman (financially and emotionally) during her pregnancy, assisting her with prenatal care, and otherwise acting as fully involved fathers of the fetus – all with or without a genetic tie.[289] Put somewhat differently, this woman need not be the *sole* functional parent even at the moment of birth. Nonetheless, I would find it impossible to conclude that the men's pre-birth conduct (or anyone else's behavior during that time) could so overwhelm the parental contributions of the gestating woman that they would satisfy a functional test more certainly than she would. As a result, nothing in this functional analysis answers the question how, *at the time of birth*, a default rule could identify as a child's two (and only two) parents a gay male couple, whether same-sex spouses or domestic partners.[290]

3. Intent-Based Parentage

An alternative path would follow the recommendations of Marjorie Shultz, who has spelled out the reasons why "intent-based parenthood" makes sense, especially for children conceived by means of reproductive technology, which separates sexual intimacy from procreation and often divides unitary concepts of parentage into several discrete contributions – genetic, gestational, and anticipated childrearing.[291] As a default rule, Shultz proposes that "[w]ithin the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to

Nevertheless, my argument rests not on the discomfort, physical sacrifice, and risk, or "sweat equity" of the pregnant woman, but rather on her performance (however passive or "unwilled") of caregiving functions for the child-to-be.

[288] *E.g.*, Baker, *supra* note 19, at 44-48; Spitko, *supra* note 19 (manuscript at *3); *see generally* Pamela Laufer-Ukeles, Essay, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 VT. L. REV. 407 (2002).

[289] *See, e.g.*, Bellafante, *supra* note 2, at A1 (describing supportive relationship between gay couple and "surrogate" as she attempted to become pregnant for them); *cf.* Lehr v. Robertson, 463 U.S. 248, 268-69 (1983) (White, J., dissenting) (observing that Lehr alleged that he lived with the child's mother "approximately two years, until [his biological child's] birth in 1976"); Spitko, *supra* note 19 (manuscript at *55).

[290] Of course, some analyses would allow the woman who gestates the pregnancy to contract away her parental rights. *E.g.*, *In re* J.D.M., 2004 WL 2272063 (Ohio Ct. App. 2004) (relying on *In re* Bonfield, 780 N.E.2d 241 (Ohio 2002)); Shultz, *supra* note 118, at 398; Spitko, *supra* note 19 (manuscript at *6); *see generally* Shoshana L. Gillers, Note, *A Labor Theory of Legal Parenthood*, 110 YALE L.J. 691 (2001).

[291] *See generally* Shultz, *supra* note 118. Richard Storrow does not regard intent and function as alternative tests, but instead regards "intentional parenthood as subsumed by the notion of functional parenthood." Storrow, *supra* note 273, at 602.

determine legal parenthood."[292] Not only do intentions loom large in this context because they constitute a but-for cause of the existence of the very child in question,[293] but in addition, relying on intent to determine parentage holds promise for freeing family law from gender stereotypes and assumptions about biology as destiny.[294] An intent-based test puts males and females on equal footing, offsetting rather than reinforcing biological sex differences[295] and offering what Shultz calls "an opportunity for gender neutrality."[296] For example, courts have followed this approach to recognize an intended mother who provided the ovum, over a "gestational surrogate," when a written agreement showed that the parties intended for the former to rear the child,[297] and to recognize the parentage (without adoption) of a biological mother's female partner, based on their agreement that the former would conceive a child by donor insemination for the two of them to rear.[298]

Although recent cases have shown the limits of Shultz's intent-based test for parentage, particularly when the participants tell different stories about their

[292] *See* Shultz, *supra* note 118, at 323; *see also id.* at 324.

[293] *See id.* at 395 (discussing *Baby M* case and stating that, without the original intent of the parties, the child would not exist); *see also* Baker, *supra* note 19, at 27 (discussing a gestational surrogacy case, and concluding "intent, not action, was at the core of the decision"); Shultz, *supra* note 118, at 343; Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

[294] Shultz, *supra* note 118, at 378-95.

[295] *Id.* at 303.

[296] Shultz, *supra* note 118, at 387. Examining the famous *Baby M* case (*In re* Baby M, 537 A.2d 1227 (N.J. 1988)), Shultz asks what more a man like William Stern could have done to have and rear his child. *Id.*

[297] Johnson v. Calvert, 851 P.2d 776, 782-83 (Cal. 1993) (citing Shultz to recognize claims of intended parents); *see also In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998). In *In re* C.K.G., the court emphasized intent as an important, although not determinative, factor in deciding to recognize as a parent the unmarried gestational mother, who had no genetic connection to the triplets. *In re* C.K.G. 173 S.W.3d 714, 728 (Tenn. 2005).

[298] *In re* A.B., 818 N.E.2d 126, 131-32 (Ind. Ct. App. 2004) (holding "when two women involved in a domestic relationship agree to bear and raise a child together by artificial insemination of one of the partners with donor semen, both women are the legal parents of the resulting child," though not citing Shultz), *vacated and remanded*, 837 N.E.2d 965 (Ind. 2005); *see also* A.G. v. D.W., B175367 (L.A. County Super. Ct. No. BD399555) (Cal. Ct. App., June 21, 2005), *available at* http://pub.bna.com/fl/175367.pdf (summarized in 31 Fam. L. Rptr. 1393, 6/28/05) (using intent as an alternative basis to recognize parentage of mother's former partner of child they agreed to conceive by donor insemination during their relationship). *But see* Wakeman v. Dixon, 921 So. 2d 669 (Fla. Dist. Ct. App. 2006); T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004) (declining to recognize parentage in biological mother's former partner based on contract they had executed prior to child's conception).

initial intentions,[299] when they change their minds,[300] or when "mix-ups" at the fertility clinic upset original plans,[301] nonetheless this test uniquely provides a way to treat parentage the same for all couples, whether male-female, female-female, or male-male. In other words, intent provides a modern successor to the presumption of legitimacy that works without regard to the sex of the parents.

For example, based on California precedents that rest parentage on intent when conflicting parentage rules yield a "tie," such as in disputes following gestational surrogacy arrangements, one could envision the following scenario: Two male domestic partners arrange for a "surrogate" to bear a child for them. To create a "tie," they use a second woman's ovum – an increasingly common practice precisely because of the legal uncertainty that it raises regarding maternity.[302] (California precedent finds a "tie" in such cases because of the co-existence of authority recognizing parentage based on genetics and authority identifying the woman giving birth as the child's mother.[303]) Intent becomes an especially powerful determinant when neither the ovum donor nor the gestational "surrogate" claims parental status.[304] With intent as the

[299] *See, e.g.*, K.M. v. E.G., 117 P.3d 673, 681 (Cal. 2005); Peggy Orenstein, *The Other Mother*, N.Y. TIMES, July 25, 2004, § 6, at 24 (describing K.M.'s situation prior to the California Supreme Court's decision).

[300] *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 669 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690, 692 (Cal. 2005).

[301] *See, e.g.*, Robert B. v. Susan B., 135 Cal. Rptr.2d 785 (Ct. App. 2003); Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000), *appeal denied*, 754 N.E.2d 199 (N.Y. 2001); *see generally* Alice M. Noble-Allgire, *Switched at the Fertility Clinic: Determining Maternal Rights When a Child is Born from Stolen or Misdelivered Genetic Material*, 64 MO. L. REV. 517 (1999).

[302] UNIF. PARENTAGE ACT, art. 8 cmt. (2002), 9B U.L.A. 44-45 (Supp. 2005). Texas has adopted this version of the Uniform Parentage Act, while providing explicitly that "the gestational mother's eggs may not be used in the assisted reproduction procedure." TEX. FAM. CODE ANN. § 160.754(c) (2005). Splitting gestation from genetics also provides a response to the contention that surrogacy constitutes babyselling; when the "surrogate" provides only gestation, one can argue that she is selling merely reproductive services, not her child. *See* Laufer-Ukeles, *supra* note 288, at 430.

[303] Johnson v. Calvert, 851 P.2d 776, 781-82 (Cal. 1993); *see also In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 290-91 (Ct. App. 1998).

[304] *Compare Buzzanca*, 72 Cal. Rptr. 2d at 282, *and In re* C.K.G., 173 S.W.3d 714, 730 (Tenn. 2005), *with* K.M. v. E.G., 117 P.3d 673, 681 (Cal. 2005). Nothing in the recent California opinions recognizing the parentage of the mothers' former female partners, based on estoppel or existing paternity statutes, expressly repudiates the intent test, although one majority opinion points out its failure to ensure predictability. *K.M.*, 117 P.3d at 681-82 (distinguishing Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), a gestational surrogacy case in which the intended mother supplied the ovum; refusing to extend intent test beyond surrogacy arrangements; and stating that the intent test does not provide predictability). Moreover, the *K.M.* dissenters critique what they perceive as the majority's departure from the intent standard. *See id.* at 685 (Kennard, J., dissenting); *id.* at 685-86 (Werdeger, J.,

"tiebreaker," the two men are the child's only parents – assuming California law remains as content to declare that a child has no mother as it is to declare that a child has no father, as when a single woman uses anonymous donor insemination.[305] Further, with the recent cases recognizing two women as parents and reading paternity statutes in a gender-neutral manner,[306] California law should not resist the conclusion that a child's two parents can both be men.

Indeed, while Shultz focuses on children created by reproductive technology, she notes that this approach might lend itself to wider application.[307] In other words, read broadly, Shultz's approach could provide an all-encompassing theory of parentage. Katharine Baker's thesis, which bases parentage on commitment and contract, reflects this theme, albeit with significant variations.[308]

An all-encompassing intent-based approach to parentage would no doubt require rules to determine the parentage of "unintended" children resulting from coital conception.[309] If these additional rules were sex-based, however, then some of the theoretical advantages of Shultz's approach would evaporate, and the analysis would return to the conundrum encountered before – how to achieve parity among all different couples. Moreover, Shultz foresees that intent-based parentage invites variation in the number of legal parents a child might have.[310] Although the use of donor insemination by single women has accustomed us to children with only one legal parent,[311] the law remains

dissenting). For a different analysis of *K.M.* (written before the state supreme court's decision) that argues for recognition of both women as parents, see Jacobs, *supra* note 215.

[305] *E.g.*, Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986) (limiting to those who use medical assistance rule that a man donating sperm to a woman not his wife is not a legal parent). *But see* J.F. v. D.B., 2004 WL 1570142, at *32 (Pa. Ct. Com. Pleas 2004) (declaring surrogacy agreement void for failing to specify a legal mother for triplets, and as unconscionable because it "signed away certain legal rights belonging to" the children).

[306] Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005); *K.M.*, 117 P.3d 673 (Cal. 2005).

[307] Shultz, *supra* note 118, at 323-24; *see also* Laufer-Ukeles, *supra* note 288, at 429 (commenting on Shultz).

[308] Baker, *supra* note 19; *see generally* Gillers, *supra* note 290.

[309] *Compare K.M.*, 117 P.3d at 681-82 (worrying about use of intent test as applied to coital procreation) *with id.* at 687 (Werdeger, J., dissenting) ("[N]o one, to my knowledge, proposes to apply the intent test to determine the parentage of children conceived through ordinary sexual reproduction.").

[310] Shultz, *supra* note 118, at 344.

[311] *See generally* Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES, March 19, 2006, § 6 (Magazine), at 46 (describing how single women decide to use donor insemination). *But see* Garrison, *supra* note 115, at 904-10 (criticizing as anomalous rules that allow children of single women using donor insemination to have no father). Of course, before the "illegitimacy revolution," the law regarded a child born outside marriage as "filius nullius." *See, e.g.*, KRAUSE, *supra* note 79, at 9.

resistant to recognizing more than two legal parents for a child.[312] Should the law cabin the intent test so that it yields no more than two legal parents? If so, how? And on what grounds? Notwithstanding these difficulties and questions, one committed to complete gender neutrality should find intent-based parentage the most promising reply to Justice Cordy's skepticism.

Yet, even if intent determines parentage only in cases of assisted reproduction (which all same-sex couples and some traditional couples use), additional considerations deserve attention. Perhaps the most powerful objection to Shultz's theory challenges the very objective of gender neutrality. For example, emphasizing nurturing as the central element of parenting (really, mothering), Barbara Katz Rothman insists that intent cannot serve as "a substitute for relationship, for love."[313] More pointedly, Rothman argues that the distinctive contribution of the pregnant woman renders gender neutrality a wrong-headed goal that undervalues the unique gestational function[314] and attempts to understand parentage from an exclusively male – and patriarchal – perspective.[315] Even if we should not "essentialize" gestation, by assuming that it is always the same for every woman and regardless of the state of mind with which one performs this parental function, still Rothman's argument makes a powerful appeal to those already critical of the pervasive male norm.[316]

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[312] *Compare* Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (Scalia, J., plurality opinion) ("California law, like nature itself, makes no provision for dual fatherhood.") *with* Polikoff, *supra* note 30, at 573; *see also K.M.*, 117 P.3d at 681-82 (distinguishing Johnson v. Calvert, 19 Cal. Rpt. 2d 494 (2003), a gestational surrogacy case, in which recognition of gestational "surrogate" and ovum supplier and her husband would have resulted in three parents).

[313] ROTHMAN, *supra* note 19, at 91; *see also* SHANLEY, *supra* note 15, at 132 (critiquing intent test because it assumes that adults "own" their genetic material and can control its disposition).

[314] *See, e.g.*, ROTHMAN, *supra* note 19, at 82. Rothman's approach would support *In re Baby M*, 537 A.2d 1227 (N.J. 1988), which refused to enforce the surrogacy contract and recognized the "surrogate" as the child's mother. *Id.* at 8, 158-72. Shultz criticizes the case, in particular the court's rejection of intention, a gender-neutral variable, in favor of "gender stereotypes." Shultz, *supra* note 118, at 379. Indeed, the *Baby M* court explicitly repudiated the argument that "surrogate mothers" and semen donors merit the same treatment, asserting the dissimilarity of the two situations. 537 A.2d at 1254-55. In contrast, the lower court had said failure to treat the two situations alike "denies equal protection of the law to the childless couple, the surrogate, whether male or female, and the unborn child." *In re* Baby M, 525 A.2d 1128, 1165 (N.J. Super. Ct. Ch. Div. 1987).

[315] *See also* Laufer-Ukeles, *supra* note 288.

[316] *See, e.g.*, Susan Frelich Appleton, *Contesting Gender in Popular Culture and Family Law:* Middlesex *and Other Transgender Tales*, 80 IND. L.J. 391, 413 (2005) (noting examples).

Indeed, the "emerging consensus"[317] does not apply a straightforward intent-based default rule to surrogacy arrangements, even if intent dictates the outcome of other assisted reproductive arrangements, including donor insemination, ovum donation, and embryo donation. Rather, in traditional surrogacy arrangements, the "surrogate" is regarded as the mother, requiring adoption proceedings to transfer parental rights to those intending to rear the child, even in California.[318] A few jurisdictions (including California) recognize exceptions when the intended mother's ovum is used (usually called "gestational surrogacy" in contrast to "traditional surrogacy"),[319] but with no suggestion that an intended father's genetic contribution alone would yield the same result. And while California courts have let intent alone control when the gestational "surrogate" asserts no parentage claim, it remains unclear how a court would resolve a dispute between this woman and intended parents who had no genetic relationship to the child[320] or a second intended father who is the spouse or partner of the genetic (and intended) father.[321]

Reflecting this emerging consensus, the Uniform Parentage Act propounds a *default* rule that recognizes as the mother the woman who gives birth, regardless of intent.[322] This approach applies as well to "gestational surrogates" carrying pregnancies conceived with donor eggs (that is, ova from neither the intended mother nor the "surrogate" herself).

True, the Uniform Parentage Act allows for departures from the default, when the intended parents and "surrogate" (called a "gestational mother") go to court and obtain judicial validation of their "gestational agreement" before impregnation occurs.[323] Although one should not minimize the benefits to the

[317] I have borrowed this phrase from Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 225 (1998), although her analysis and conclusions differ significantly from mine.

[318] *See, e.g.*, *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Cal Ct. App. 1994); R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998); Dolgin, *supra* note 317, at 234-35.

[319] Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001); Belsito v. Clark, 644 N.E.2d 760 (Ohio Com. Pleas 1994).

[320] For example, suppose the gestational surrogate in *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998), had sought to assert parental rights. *Cf. In re* C.K.G., 173 S.W.3d 714, 730 (Tenn. 2005).

[321] Would the majority's analysis in *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005), prove sufficiently powerful to overcome the competing claims of the gestational surrogate in a dispute with an intended but not genetically related co-parent? *See supra* note 66 (summarizing case). *K.M.* purports to limit its analysis to the facts before the court. *Id.* at 679. *See* Deborah Wald, *California Supreme Court Rules on Trio of Lesbian Custody Cases*, FAMILY LAW FOR THE 21ST CENTURY, September, 2005, http://waldlaw.net/new_this_month.html (expressing concerns of San Francisco attorney about implications of *K.M.* for gay male clients).

[322] UNIF. PARENTAGE ACT § 201(a)(1) (amended 2002), 9B U.L.A. 15 (Supp. 2005).

[323] *See id.* § 801.

intended parents (and probably the resulting child as well) of scheduling such state intervention before pregnancy rather than after birth, still – for all practical purposes – this is an early adoption proceeding, complete with residency requirements, home visitation, and judicial review.[324] In other words, although the Uniform Parentage Act provides a way to make the parties' intent effective and enforceable, this mechanism differs significantly from the instantaneous and "automatic" parentage that the presumption of legitimacy conveys by default. Such procedural hurdles should come as no surprise, however. As a number of contested cases have demonstrated, intent can be an elusive, imprecise, and mutating variable.[325] Official measures designed to "nail down" and memorialize intent emerge as wise, and probably necessary, regulations.[326]

D. *The Indispensability of Gestation: The Presumption (and a Woman-Centered Rule) Redux*

1. The First Parent

Exploring this doctrinal maze yields several different lessons. First, gender neutrality seems to have its limits, both in law and in our cultural imaginations. The law in California, Vermont, and Massachusetts has shown us how women can easily assume the position traditionally accorded to legal fathers (regardless of the wording on the birth certificate and the current dispute in Massachusetts),[327] because fatherhood has long been constructed as a status stemming from a man's legally recognized relationship to a child's mother. Although the required legal relationship to the mother often coincides with a genetic relationship to the child, traditionally the genetic relationship was neither necessary nor sufficient to trigger legal paternity. Only recently have these foundations begun to crumble, with the recognition of genetic fathers for some nonmarital children and the move by some states to let genetic evidence displace the traditional presumption of legitimacy.[328] Still, fatherhood remains, in significant part, a "secondary" or derivative relationship that requires an initial determination of the child's first or "primary" parent, the mother. (This hierarchical list does not signal that mothers are more important

[324] *Id.* § 803.

[325] *See, e.g.*, *K.M.*, 117 P.3d at 682; *Buzzanca*, 72 Cal. Rptr. 2d 280; *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

[326] California cases making intent determinative fail to make clear whether going to court in every case is necessary for official recognition of the parties' intent or whether the judicial involvement came about only because of the disputes in these particular cases. *See generally* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); *Buzzanca*, 72 Cal. Rptr. 2d 280; *see also infra* notes 362-364 and accompanying text.

[327] *See* Levenson, *supra* note 1.

[328] *See supra* notes 35-37 and accompanying text.

than fathers, although some have made that argument;[329] rather, this ranking indicates that, in many cases, to identify a child's father, we must identify the mother first.[330]) And a woman as well as a man can meet the requirements for this derivative relationship with a "primary" parent's child, as *Miller-Jenkins* and *Elisa B*. illustrate.[331]

Yet the push toward gender neutrality encounters obstacles in the identification of the first, original, or "primary" parent. What rule would allow us to recognize a man as the first parent, so that his male spouse or partner takes the derivative status? A default rule based on genetics would recognize not only the man who provided the semen but also the woman who provided the ovum. More problematically, however, even if limited to cases of assisted reproduction, this approach would wreak havoc on the practice of donor insemination and ovum donation for both traditional and lesbian couples and would require routine genetic testing at birth. A pure intent-based test achieves the desired goal, but requires state intervention at some stage to translate a mental state into a fixed and reliable status, as a majority of the Supreme Court of California recently observed.[332] Hence, intent fails to provide a default or "automatic" rule.[333]

More significantly, both genetics and intent simpliciter depart from the functional approach advocated persuasively by contemporary theorists.[334] No doubt, a functional test has its own slippery quality, just like intent. Yet at the time of birth, as I confessed before, I find inescapable the conclusion that the woman who gestated the child has met the functional test, in an objectively ascertainable way.[335] In other words, she must always be recognized as an original or "primary" parent – not because traditional rules or gendered stereotypes so regard her but rather because a modern, functional approach makes caregiving definitive. This generalization holds true whether this woman is a spouse in a traditional or lesbian couple or a "surrogate" assisting a gay male couple or others.

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[329] *See generally, e.g.*, FINEMAN, *supra* note 19.

[330] For other analyses that arrive at a similar conclusion, see, for example, Baker, *supra* note 19; Spitko, *supra* note 19 (manuscript at *3).

[331] *See supra* notes 67-77 and accompanying text.

[332] K.M. v. E.G., 117 P.3d 673, 682 (Cal. 2005) ("Rather than provide predictability . . . using the intent test would rest the determination of parentage upon a later judicial determination of intent made years after the birth of the child.").

[333] Although one can memorialize intent in a private contract (without state intervention), such agreements cannot effectively establish parental rights, as adoption law makes plain. *See also, e.g.*, Wakeman v. Dixon, 921 So. 2d 669 (Fla. Dist. Ct. App. 2006); T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004). *But see In re* J.D.M., 2004 WL 2272063 (Ohio Ct. App. 2004). More fundamentally, intent arguably provides an incomplete theory by failing to indicate "where the initial entitlements lie." Gillers, *supra* note 290, at 702-03.

[334] *But see supra* note 273 (noting Richard Storrow's argument that intent is subsumed within a functional test); *see generally* Jacobs, *supra* note 215.

[335] *See supra* note 287 and accompanying text.

In sum, I reject both genetics and intent alone to determine parentage in favor of a functional test; I emphasize the nine months of gestation rather than zeroing in exclusively on the act of giving birth; and I regard gestation as the performance of parental functions.[336] At the time of birth, the pregnant woman certainly has provided the caregiving and nurturing that accord parental status and rights.[337] Her function, not her state of mind, is controlling. Of course, this is simply a default rule. A woman who performs such work can relinquish her status and rights so that others can become parents,[338] but in the absence of other action she is an original parent when the child is born, whether or not they share a genetic relationship.

Although I reach this conclusion based on functional considerations (an approach that, in the abstract and at the outset, is attractive because of its apparent gender neutrality, its rejection of limiting stereotypes, and its compatibility with a focus on children's interests), the bottom line has a familiar ring. The significance that I ultimately attach to gestation, a function that only women can perform, [339] yields a legal rule that might have been reached in a more conclusory way through the Supreme Court's sometime reliance on "real" or "inherent" sex-based differences.[340] Further, the destination is one that cultural feminists might well reach through their emphasis on the relational, "connected" nature of women's lives and experiences, as exemplified by pregnancy.[341]

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[336] *Compare* Bartlett, *supra* note 19, at 330-31 (rejecting argument that gestation gives mother "rights" to child) *with id.* at 333 (emphasizing gestation as a relationship).

[337] A Note by Shoshana Gillers calls this approach a "labor theory of legal parenthood." Gillers, *supra* note 290.

[338] Generally, states reject pre-birth relinquishments of children for adoption and impose some waiting period before the birth parent's consent becomes irrevocable. *E.g.*, KAN. STAT. ANN. § 59-2116 (2005); N.J. STAT. ANN. § 9:3-41 (1988); UNIF. ADOPTION ACT § 2-408 (1994), 9 (Pt. IA) U.L.A. 60-61 (1999).

[339] *See* Bartlett, *supra* note 19, at 339 (examining why women "win").

[340] *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 62-63 (2001). For critiques and more thoughtful (and less conclusory) analyses of biological differences, see Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1478-83 (2000); Davis, *supra* note 60; and Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995).

[341] *See, e.g.*, Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 209-10 (2000) (republication in celebration of journal's fifteenth anniversary); Robin L. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14-38 (1988); *see generally* Laufer-Ukeles, *supra* note 288. *But see* West, *Jurisprudence and Gender*, *supra*, at 28-37 (commenting that radical feminists might also emphasize pregnancy but see it as an invasion).

This initial determination of the primary parent leaves two important issues to resolve: the test for identifying additional parents, if any, and the limits, if any, on the relinquishment of the primary parent's rights and responsibilities.

2. The Second, or Derivative, Parent

First, we might stop with the identification of the child's mother, notwithstanding the law's preference for two legal parents. To the extent that gestation is unique,[342] we could say that gestators alone constitute "original parents"[343] and that additional legal parents must be created by adoption (as in stepparent adoptions or second-parent adoptions, which do not require termination of the existing parent's rights[344]). Mother-centered analyses of dependence and caregiving, such as Martha Fineman's critique of marriage, offer persuasive reasons to follow this approach[345] – but only if the state steps in to help support all children.[346] Otherwise, child support will become, even more than it is now, solely a mother's responsibility.[347] Hence, this thought exercise about the presumption of legitimacy might not be the best place to scrap the common understanding that most children have two parents.

In determining the child's "other" or second parent, some of the policy considerations underlying the presumption of legitimacy prove useful. Using both the functional and the intent-based approaches,[348] we can now see the presumption not as assumption of the husband's probable genetic connection to the child. Instead, the presumption today reflects the belief that someone legally connected to the woman bearing the child[349] likely planned for the

[342] Mothers, in the sense of gestational parents, have always been the easiest to identify and hence the first to be recognized legally. For example, as the disabilities of legitimacy first began to soften in the nineteenth century, the law started to recognize the unmarried mother and her child as a family – well before comparable acknowledgment of the father-child relationship. *See* GROSSBERG, *supra* note 24, at 207, 224-25, 229-30. Later, Bertrand Russell made a similar point in asserting that fatherhood is at best indirect and inferential. *See* RUSSELL, *supra* 159, at 20.

[343] One might single out gestation for a functional analysis without presuming that men lack all connection and concern for their children. *Cf.* Stanley v. Illinois, 405 U.S. 645, 665 (1972) (Burger, C.J., dissenting).

[344] *See, e.g.*, *In re* Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993); UNIF. ADOPTION ACT § 4-103(b)(1) (1994), 9 (Part IA) U.L.A. 106 (1999).

[345] *E.g.*, FINEMAN, *supra* note 168.

[346] *See id.* at 263-91; *see also* Baker, *supra* note 19, at 65-68.

[347] *See, e.g.*, State v. Oakley, 629 N.W.2d 200, 203-04 (Wis. 2001), *reconsideration denied & opinion clarified*, 635 N.W.2d 760 (Wis. 2001) (observing failure of many mothers to receive child support for their children). This worry assumes that responsibility for child support follows a determination of parentage. Of course, one might imagine different schemes that impose financial duties on nonparents.

[348] *See supra* note 260-326 and accompanying text.

[349] *See* Dolgin, *supra* note 43, at 671 (theorizing that the existence of "an appropriate relationship between the man and the child's mother" constitutes the key variable in the

child, demonstrated a willingness to assume responsibility, or provided support (emotional and/or economic) during the pregnancy, in turn supporting the expected child. In other words, an adult legally connected to the mother is likely even before the child's birth to have played a functional role, albeit without the intimate physical dimensions of the mother's role. Moreover, this legal connection to the mother gives rise to obligations, specifically support duties, and provides benefits – parental rights – that constitute part of the marriage (or domestic-partner or civil-union) bargain.[350] All these reasons justify a default rule recognizing a gestational mother's husband or female partner as the child's second legal parent at the time of birth.

Yet, just as its predecessor did, this modern presumption might go beyond both functional and intent-based approaches by recognizing as a second parent a person legally connected to the mother who *never* expressed interest in the child (as opposed to changing his mind about an accepted child after his relationship with the mother breaks down). In the classic illustration, the betrayed husband learns that his wife is giving birth to another man's genetic child; he rejects this child, has no intent to be a father, and refuses to function as one.[351] Nonetheless, the law traditionally treats him as this child's legal father, with full responsibilities and rights.[352] The spouse of a commissioned "gestational surrogate" evokes similar questions. Whether we want to retain the traditional "assumption-of-the-risk" approach to all formalized coupling (that is, marriages, civil unions, and domestic partnerships) or hew more closely to a functional analysis might well be one of the issues that the inclusion of same-sex couples in default rules of parentage will help us work out.[353]

Supreme Court's unmarried fathers cases); *see also* Carbone & Cahn, *supra* note 14, at 1047 (asking "to what extent does a relationship with a nurturing parent depend on that parent's relationship with the other parent" and whether "children's interests [are] best served by precommitment strategies or recognition of past events").

[350] For alternative routes that approach this destination, see generally Baker, *supra* note 19; Spitko, *supra* note 19.

[351] *E.g.*, Miscovich v. Miscovich, 688 A.2d 726 (Pa. Super. Ct. 1997) (declining to allow husband to introduce exclusionary DNA evidence because paternity established by estoppel), *aff'd by equally divided court*, 720 A.2d 764 (Pa. 1998). In many such cases that arise today, however, courts will examine whether the husband developed a functional relationship with the child before discovering the absence of a genetic relationship. *See supra* notes 34-35.

[352] *E.g.*, *Miscovich*, 688 A.2d at 733.

[353] *Compare, e.g.*, T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004) (refusing to recognize parentage by agreement, when couple separated before birth, so mother's former partner not obligated to pay child support) *with, e.g.*, *In re* Bonfield, 780 N.E.2d 241 (Ohio 2002) (authorizing juvenile court to accept partners' shared parenting agreement if it serves the child's best interests). Katharine Baker would limit the obligations that can be forced upon mothers' one-time partners. *See* Baker, *supra* note 19, at 64-65.

3. Beyond the Default Rule

a. *Judicial and Administrative Procedures*

This exercise has sought to explore the application of a traditional default rule, the presumption of legitimacy, to same-sex couples, against two related backdrops: the required parity of treatment among all legally joined couples in some states and the increasing gender neutrality of family law. The difficulty encountered in developing principles of "automatic parentage" for gay male couples, however, necessarily raises questions that take the analysis beyond such default rules. Can gay male couples become parents only by adoption, following the termination of rights of the child's original parent or parents? The considerable state intervention required by the process, with some states exercising the option of prohibiting all adoptions by gays,[354] reveals just what is at stake. Further, conventional adoption jurisprudence rejects pre-birth relinquishments and mandates a waiting period for the birth parents' effective consent,[355] thereby precluding recognition of the gay male couple as the child's parents at the time of birth.

The Uniform Parentage Act's (UPA) treatment of "gestational agreements" permits parties to enter a binding surrogacy arrangement, under judicial supervision, before pregnancy begins.[356] The procedure resembles adoption in that the statute calls for a home study and requires a judge's approval, but the timing is designed to secure official recognition of the intended parents while the investments remain low.[357] For example, a couple seeking a woman to carry a pre-embryo that they have created or obtained can walk away from a "failed" arrangement with the pre-embryo, in the hopes of finding a new "surrogate" and a more favorable judicial reaction later. The central dilemma of the notorious *Baby M* case, a fight over a child who would not have existed but for the agreement that the court refused to recognize,[358] could not materialize in a UPA regime. Under the UPA, even after judicial validation, any of the parties can terminate the agreement only if pregnancy has not yet begun.[359] Finally, because "donors" of genetic material "lose" their parental rights at the time of donation, the recognition of new parental rights before

[354] *See* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) (upholding Florida's prohibition against adoption by gays and lesbians under rational basis review), *cert. denied*, 543 U.S. 1081 (2005); *see also* Appleton, *supra* note 11, at 410-13; Andrea Stone, *Drives to Ban Gay Adoption Heat Up; In 16 States, Laws or Ballot Votes Proposed*, USA TODAY, Feb. 21, 2006, at A1.

[355] *See supra* note 338.

[356] *See* UNIF. PARENTAGE ACT art. 8 (2002), 9B U.L.A. 360-70 (2001); *id.* at 44-50 (Supp. 2005).

[357] *Id.* § 803, 9B U.L.A. 47 (Supp. 2005).

[358] *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

[359] UNIF. PARENTAGE ACT § 806 (2002), 9B U.L.A. 367 (2001).

conception allows the expected child to have the full complement of parents throughout gestation.[360]

Although the UPA provides a more favorable timetable for a gay male couple seeking to have a child than traditional adoption law offers, a judicial imprimatur remains a critical element. Further, as drafted by the National Conference of Commissioners on Uniform State Laws, the arrangement does not contemplate gay male couples, as shown by its language: "The *man* and the *woman* who are the intended parents must be parties to the gestational agreement."[361] In short, the opportunities for state intervention and rejection of the gay couple's plans create a significant gulf between the UPA approach and the default rule, whose automatic designation of parental rights is available only to traditional couples and lesbian couples.

Some jurisdictions have begun to grant pre-birth (but post-conception) declaratory judgments that recognize as the expected child's parents those who intend to rear him or her, regardless of genetic or gestational ties. According to Howard Fink and June Carbone, the most frequent users of this nascent practice in California are gay male and lesbian couples.[362] In *Kristine H. v. Lisa R.* the Supreme Court of California held that one such stipulated judgment estopped Kristine from challenging parentage after the women's relationship dissolved, although the court declined to rule on the judgment's validity for other purposes.[363] While this approach requires judicial action, Fink and Carbone see fewer opportunities than in a conventional adoption for official disapproval of the intended parents based on their nontraditional family form.[364] Still, they wonder whether "this process should be combined with

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[360] Howard Fink and June Carbone have advanced this observation. Fink & Carbone, *supra* note 32, at 56-57; *see also* Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 436-37 (2004).

The term "donor" begs some important questions. As the foregoing analysis suggests, existing law allows easy "donation" of genetic material but makes more complicated efforts to "donate" gestational services.

[361] UNIF. PARENTAGE ACT § 801(b) (2002), 9B U.L.A. 45 (Supp. 2005) (emphasis added); *see also* J.F. v. D.B., 2004 WL 1570142, at *22 (Pa. Ct. Com. Pleas 2004) (declaring surrogacy agreement void for failing to specify a legal mother for triplets). For a critique of similar statutory language, see Brooke Dianah Rodgers-Miller, Note, *Adam and Steve and Eve: Why Sexuality Segregation in Assisted Reproduction in Virginia Is No Longer Acceptable*, 11 WM. & MARY J. WOMEN & L. 293 (2005).

[362] Fink & Carbone, *supra* note 32, at 45. *But see* Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633 (2005) (surveying different approaches in various states, including those unsupportive of such decrees).

[363] *See* 117 P.3d at 695. For another judicial reference to this practice, see K.M. v. E.G., 117 P.3d 673, 684-85 (Cal. 2005) (Kennard, J., dissenting).

[364] Fink & Carbone, *supra* note 32, at 47 (hypothesizing caseworker disapproval of lesbian couple pursuing adoption, in contrast to prebirth declarations). *But see* Snyder &

adoption procedures designed to safeguard the interests of the child."[365] And, indeed, the practical advice given in California to gay male couples even after the effective date of the domestic partnership legislation (the focus of my inquiry) recommends a pre-birth judgment of paternity or a paternity action for the man who is the genetic father, followed by a post-birth adoption by his partner.[366] In other words, the default rule of parentage spelled out in the domestic partnership legislation does not make the gay male couple any better off than they were before: adoption – with all its risks and pitfalls – is still required to create their family.

Even if gay male couples experience "smooth sailing" when they go to court for such decrees, the requirement imposes a legally constructed burden that other couples do not encounter. Even if the requirement reduces to purely a formal requirement, it is a second formal requirement because, by hypothesis, this gay couple had previously celebrated a marriage or registered their civil union or domestic partnership. Although all gay male couples certainly must make biological arrangements that many traditional and lesbian couples can avoid, the issue here concerns how the law chooses to respond. In short, the law has begun to provide avenues that gay male couples can follow in seeking to establish parental rights, but all these avenues require taking affirmative legal steps. These emerging reforms, however, underscore the difficulty of developing a default rule to cover such situations – that is, a rule that would achieve the same outcome without any affirmative legal steps by gay males.

Compared to adoptions or pre-birth declarations, perhaps the least onerous and intrusive response would entail a pre-conception or pre-birth registration procedure for gay male couples and the women who agree to bear children for them (and these women's spouses or legal partners). Just as California requires domestic partners to register in order to become a legally recognized couple and some states require unmarried putative fathers to file with a paternity registry to gain legal recognition,[367] so too the state could require the gay male couple and those who might otherwise have default parental rights to register documents showing who will serve as the child-to-be's parents.[368]

Byrn, *supra* note 362, at 645 (concluding that "prebirth parentage agreements are clearly permitted under California's statutory scheme, but only for two *genetically related* intended parents who have valid presumptions of *both paternity and maternity* under the applicable parentage statutes") (emphasis added).

[365] Fink & Carbone, supra note 32, at 50.

[366] *See* Deborah Wald, *California Supreme Court Rules on Trio of Lesbian Custody Cases*, FAMILY LAW FOR THE 21ST CENTURY, April 2005, http://waldlaw.net/new_this_month.html (advice from San Francisco attorney). *See also* Wald, *supra* note 321 (describing problems posed by recent California cases for gay male couples).

[367] *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 263-65 (1983).

[368] Some commentators suggest that private contracts ought to suffice to transfer rights from default parents to intended parents. *See, e.g.*, Gillers, *supra* note 290, at 694; Spitko, *supra* note 19 (manuscript at *10). Making such agreements "official," however, might

Although such registration does not prevent all subsequent controversies and poses problems for children whose parents fail to register,[369] it provides a way to solidify and memorialize intent and gain state recognition – a conclusive step in cases with no dispute and a starting point in disputed cases. Although a simple registration requirement is not the same as a default rule, it emerges as the closest approximation for gay male couples seeking children – and hence for all intended parents entering a surrogacy arrangement, regardless of the gender of either spouse or partner.

On the other hand, a registration does not evoke the same strict full faith and credit obligation in other states that governs judicial decrees, such as adoptions and pre-birth declarations.[370] This vulnerability to challenge in other states, however, presents a problem not just for those who rely on parentage-by-registration but also those who rely on a default rule, like the presumption of legitimacy, which some jurisdictions might choose not to respect.[371]

b. *A Word About Rebuttal*

Because I do not envision my proposed default rule as a presumption, but rather a substantive rule of law (like the conclusive presumption of earlier

remain an important step given the limitations of existing law even in states hospitable to same-sex couples. *See* T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004) (refusing to recognize parentage by agreement when couple separated before birth, thus relieving mother's same-sex partner from any child support obligation).

[369] *See* Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1578-80 (2004) (comparing American emphasis on formal requirements with other countries' emphases on function); *see also* Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 680-82 (2002). Both authors worry about functional family relationships that the law ought to recognize but refuses to recognize because of failure to comply with a formal requirement, like registration. Gary proposes a multifactor test to identify such functional parent-child relationships for purposes of intestate succession, while hesitating "to rethink the definition of parents and child." *Id.* at 680. By contrast, my quest for a default rule of parentage seeks to accomplish what she avoids.

[370] U.S. CONST. art. IV; 28 U.S.C. § 1738 (2000).

[371] The difference here is the full faith and credit owed to other states' laws, which permits the second forum to refuse recognition based on its own public policy, versus the full faith and credit owed to other states' judgments and decrees, which leaves no room for nonrecognition based on public policy. *Compare, e.g.*, Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751 (2003), *and* Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples from Other States*, 40 TULSA L. REV. 467 (2005), *with* Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 AVE MARIA L. REV. 561 (2005). *See also* Shapo, *supra* note 70, at 473-74 (describing conflict of laws issues presented by *Miller-Jenkins* case, discussed *supra* notes 67-70 and accompanying text).

times), I would allow no space for rebuttal by genetic evidence. Consider the absurdity of an approach that allows genetic evidence to rebut the parentage of a mother's lesbian partner or spouse during the dissolution of their legally recognized relationship. For example, in a case like *Miller-Jenkins*, summarized earlier,[372] rebuttal by genetic evidence would make the default rule useless in an acrimonious dissolution. To prevent such problems, lesbian couples would need to pursue the same second-parent adoption decrees that they have used, where permitted, before they acquired the benefits of marriage, civil unions, or domestic partnerships.[373]

If the law permits rebuttal by genetic evidence, then applying the same principles to lesbian couples provides them and their children precious little. On the other hand, if this approach leads to the conclusion that genetic evidence is irrelevant to the parentage of lesbian couples, then the "parity goal" indicates that the same principles should apply to traditional couples,[374] making genetic evidence irrelevant for them as well.

Nonetheless, I would leave open the possibility that the functional test which led to my default rule might allow rebuttal for a designated parent who never performed any parental functions for the child in question. Of course, this possibility itself raises a number of subsidiary questions – including whether there should be limitations on standing to introduce such rebuttal evidence, whether there should be a limited time period for such challenges, what the standard of proof should be, and whether the gestational mother could ever use a "rebuttal" approach to extricate herself from parentage instead of taking the other steps discussed above to achieve termination or relinquishment of her parental rights. Again, I regard all of the open issues as problems for another day, beyond this preliminary effort to identify a default rule. Yet, I would emphasize that, whatever solutions might emerge, they ought both to respect my recommended functional test and to achieve, to the extent possible, full parity among all couples.

c. *Some Thoughts About Stereotypes, Feminism, and Gay Rights*

How should we think about a rule that makes gestation so central? Does incorporating gestation in a modern functional approach return us to an understanding of women as a class whose defining and inevitable social contribution is to bear children? The risks are considerable. At least part of the problem of pernicious gender stereotypes, however, arises from the patriarchal (and racist) context in which we have traditionally approached marriage, reproduction, and family law more generally. The expressed aspiration that extending the presumption to lesbian couples will help "work out" various problems arising in the context of traditional couples, such as

[372] *See supra* notes 67-70 and accompanying text.

[373] *See, e.g.*, VT. STAT. ANN. tit. 15A § 1-102(b) (2004); Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).

[374] *See supra* note 227 and accompanying text.

demonstrating the irrelevance of genetic evidence[375] or clarifying the legal status of a never-involved spouse or partner of the mother,[376] offers additional promise as well. As some advocates of same-sex marriage have hypothesized, same-sex couples can help dust off, revitalize, and improve traditional institutions by eliminating the inequalities and stereotypes historically associated with them.[377]

Yet, certainly, not all feminists or queer theorists agree.[378] Some specifically fear the replication of inequalities and power imbalances, including domestic violence, in same-sex marriages that have come to light in different-sex marriages.[379] Others condemn the state's privileging of marital relationships over alternative arrangements and bonds.[380] A rule triggered by marriage or its functional equivalent (civil unions or domestic partnerships) reinforces a system in which some are officially "in," while others remain outsiders. Too often children pay the price for parental failures to "opt in" to specified formal requirements, as the Supreme Court's illegitimacy cases explained.[381]

Still more problematic is that the privilege represented by my default rule (instantaneous and automatic parentage) is not available on an even-handed basis. Traditional couples and lesbian couples (and their children) need not take the additional legal steps required of gay males. Aside from the practical difficulties, the different treatment marginalizes male couples and sends a signal that nurturing and parenting do not come "naturally" to gay men. Perhaps automatic parentage for gay male couples seems to pose problems because it challenges, in the starkest terms, our understanding of "mother" even more than that of "father." In addition to reinforcing negative stereotypes

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[375] *See supra* note 181 and accompanying text.

[376] *See supra* notes 351-353 and accompanying text.

[377] *See* Eskridge, *supra* note 128, at 356; Hunter, *supra* note 128, at 17; Peggy Pascoe, *Sex, Gender and Same-Sex Marriage*, *in* IS ACADEMIC FEMINISM DEAD? THEORY IN PRACTICE 86, 88 (2002); *cf.* Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 193 (2003) (generally rejecting a state-imposed "gender script" in marriage).

[378] *See, e.g.*, Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, *supra* note 18; Polikoff, *We Will Get What We Ask For*, *supra* note 18.

[379] *E.g.*, Spindelman, *supra* note 164.

[380] *E.g.*, BUTLER, *supra* note 6, at 105-12; Michael Warner, *Beyond Gay Marriage*, *in* LEFT LEGALISM/LEFT CRITIQUE 259 (Wendy Brown & Janet Halley eds., 2002). *But see* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1772-74 (2005) (observing that marriage currently allows more flexibility than domestic partnerships and other alternatives).

[381] *See, e.g.*, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) ("[V]isiting this condemnation on the head of an infant is illogical and unjust"); Levy v. Louisiana, 391 U.S. 68, 72 (1968); *see also* Blumberg, *supra* note 369, at 1578-80; Gary, *supra* note 369, at 674-77; Jacobs, *supra* note 215, at 437-38; *see generally* KRAUSE, *supra* note 79.

that Gary Spitko has elaborated,[382] this different treatment burdens precisely those men who can most effectively resist the patriarchal norms and gendered expectations that feminists have sought to challenge. Thus, in extending to women (in formalized lesbian relationships) a prerogative that traditionally belonged to men (in traditional marriages) but denying a similar extension to men (in formalized gay relationships), should we claim a small triumph or a failure of feminism? Might the discomfort over the exclusion of gay males, after centuries of excluding all women, simply reflect habitual assumptions that, when the law provides privileges, men expect to enjoy them – while women, more accustomed to unfavorable treatment, more readily tolerate such disadvantages?

Such difficulties highlight that default parentage rules, like all legal classifications, reflect choices made by the rulemaker.[383] Justice Cordy's skepticism about a single across-the-board parentage rule for all couples constituted one reason he cited for opposing civil marriage for same-sex couples.[384] I would make a different choice. Whatever one might think of marriage for same-sex couples on the merits, the elusiveness of perfect gender neutrality does not justify limiting marriage access to male-female couples, in my view. The obstacles to extending to gay male couples parentage principles like my gestational starting point and the traditional presumption of legitimacy do not justify withholding the extension from lesbian couples.

CONCLUSION

In the end, several paths lead back to a default rule in which gender has a reduced yet still important role to play. In the process, the recommended treatment of lesbian couples like their traditional counterparts emphasizes that the presumption of legitimacy and related rules are designed to operate as a legal fiction in which genetic parentage remains irrelevant. With lesbian couples, the gulf between "biological reality" and legal rules of parentage becomes impossible to ignore. As a result, the "growing pains" that more traditional applications of the presumption have experienced, with the development of advanced genetic testing, can be left behind. The presumption's objective, today, is not to identify a likely genetic parent. Its purpose is to bring official recognition to a child's functional family and the web of obligations that family membership imposes.[385] Accordingly, genetic evidence should not rebut the presumption. Likewise, this new application of a rule resembling the traditional presumption invites us to reconsider some other troublesome areas, namely, whether the rule should confer parentage on a mother's legal partner in the absence of intent to parent or parental function.

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[382] *See* Spitko, *supra* note 196, at 198-99.

[383] *See supra* note 8.

[384] *See supra* note 200 and accompanying text.

[385] *See, e.g.*, *In re* Nicholas H., 46 P.3d 932 (Cal. 2002); *In re* Paternity of Cheryl, 746 N.E.2d 488 (Mass. 2001).

Although female partners and spouses can step into the position of derivative parents traditionally occupied by husbands at the time of birth, children of gay male couples, however, cannot have this benefit without either trivializing the parental functions performed by the woman who gestates the pregnancy or, alternatively, recognizing three legal parents for such children. Each of these alternatives raises difficulties that require further analysis and consideration before absorption into the existing legal framework. In the meantime, the conclusions reached reflect the "emerging consensus" that has developed when similar issues have been examined through a different categorical lens: how to determine parentage for children born of assisted reproductive technologies. Here, the prevailing approach defers to intent for most such methods of reproduction, while placing surrogacy (gestational or traditional) in a class by itself requiring state intervention.

The resulting uneven application of parentage rules itself raises interesting questions over which gay rights advocates and feminists might argue in earnest, despite their shared opposition to gender stereotypes. The fate of the presumption of legitimacy ultimately will depend on the value accorded to gender neutrality, the role given to functional analysis, and the room left for officially privileged relationships in contemporary family law.