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MARRIAGE EQUALITY AND THE NEW PARENTHOOD

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Douglas NeJaime[*]

Now that same-sex couples have a nationwide right to marry, a new generation of questions about the legal regulation of the family is emerging. While integral to the future of same-sex family formation, these questions also implicate the family law regime more generally. By integrating developments in family law governing different-sex and same-sex couples, biological and nonbiological parents, and marital and nonmarital families, this Article shows how marriage equality was enabled by — and in turn enables — significant shifts in the law's understanding of parenthood.

Using a case study of legal efforts in California from the mid-1980s to the mid-2000s, this Article recovers the role of marriage in early LGBT parenting litigation on behalf of unmarried parents. It shows how that litigation reshaped norms governing marriage and parenthood. In the late twentieth century, the law increasingly recognized (presumptively heterosexual) parents on grounds independent of marriage and biology. As the law protected the rights of unmarried, biological fathers, it also began to recognize married, nonbiological parents, largely in response to families formed through assisted reproductive technologies (ART) and to stepparent families. LGBT advocates leveraged both developments to elaborate a new model of parenthood capable of recognizing their constituents' nonmarital, nonbiological parent-child relationships. Eschewing formal parentage markers — including biology, gender, and marital status — advocates instead built parentage around intentional and functional relationships.

This new model of parenthood is embedded in marriage equality and is extended through a family law regime in which same-sex couples can marry. By uncovering these transformative aspects of marriage equality, this Article challenges some of the historical, normative, and predictive dimensions of prominent critiques of same-sex marriage as conservative and assimilationist. More broadly, it reveals how marriage equality can facilitate the expansion of intentional and functional parenthood for all families, and

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thereby can continue to reduce distinctions between same-sex and different-sex couples, biological and nonbiological parents, and perhaps even marital and nonmarital families.

INTRODUCTION

In *Obergefell v. Hodges*,[1] the U.S. Supreme Court extended the right to marry to same-sex couples nationwide.[2] For many supporters of lesbian, gay, bisexual, and transgender (LGBT)[3] rights, same-sex marriage does not mark a significant change in our legal understanding of the family.[4] In fact, some scholars criticize the same-sex marriage campaign for conforming to, rather than unsettling, dominant conceptions of the family.[5] But in analyzing marriage equality's antecedents and identifying a new generation of issues emerging in marriage equality's wake, this Article provides a different perspective.

By integrating developments in family law governing different-sex and same-sex couples, biological and nonbiological parents, and marital and nonmarital families, this Article shows how marriage equality was enabled by — and in turn enables — significant shifts in the law's understanding of parenthood. More specifically, it argues that the claim to *marriage* both seized on and extended the very model of parenthood forged by LGBT advocates in earlier work on behalf of *unmarried* parents. That model of parenthood is premised on *intentional* and *functional*, rather than biological and gendered, concepts of parentage. In this way, rather than affirming traditional norms governing the family, marriage equality and the model of parenthood it signals are transforming parenthood, marriage, and the relationship between them — for all families.[6]

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[1] 135 S. Ct. 2584 (2015).

[2] *See id.* at 2602, 2608.

[3] I use the term LGBT, the contemporary designation, to reflect the broader goals and effects of the efforts I describe, but I recognize that the developments I cover are focused on sexual orientation and not gender identity.

[4] Indeed, opponents of same-sex marriage have been those most likely to argue that same-sex couples are "redefining marriage." *See, e.g.*, SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? 7–8 (2012); Matthew J. Franck, *The Beauty of the Country of Marriage*, PUB. DISCOURSE (Oct. 7, 2014), http://www.thepublicdiscourse.com/2014/10/13869 [http://perma.cc/3MRZ-X9W2].

[5] *See infra* section III.A, pp. 1231–36.

[6] Of course, family law includes both adult and parent-child relationships. On the connections between same-sex relationship recognition and broader shifts in family law, see William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881 (2012), which situates same-sex marriage and nonmarital relationship forms within the shift toward utilitarian norms in family law; and Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014), which documents the ways in which marital norms shaped evolving forms of nonmarital recognition and suggests how such nonmarital recognition constructed same-sex couples' claims to marriage.

Beginning in the late 1960s, marriage and biology became increasingly less important to the recognition of (presumptively heterosexual) parents.[7] Through constitutional and state family law developments, unmarried biological fathers and their nonmarital children gained rights and recognition. While this vindication of unmarried parenthood was premised on biological connections, the law grew in ways that recognized nonbiological parent-child relationships formed within marital families. Nontraditional families — namely, stepparent families and families formed through assisted reproductive technologies (ART)[8] — drove this development inside marriage.[9] Family law increasingly deemed married individuals to be legal parents based not on presumed biological connections to their children, but rather on the deliberate parent-child relationships formed inside the marital family.

Well before marriage equality seemed possible, LGBT advocates leveraged both of these developments — the recognition of unmarried, biological fathers and married, nonbiological parents — to elaborate a new model of parenthood capable of recognizing their constituents' *nonmarital*, *nonbiological* parent-child relationships.[10] To extend nonbiological parentage to unmarried parents, advocates appealed to the marriage-like relationships of unmarried couples. Same-sex couples' adult relationships and the extent to which they evidenced committed family formation and function — in other words, whether they looked marriage-like — became a central way to observe and recognize nonbiological parent-child relationships formed outside marriage.[11] Yet even as LGBT advocates appealed to some traditional norms governing the marital family, they did so to unsettle others. They shifted the focus away from biological, dual-gender parenting and toward new concepts of parental intent and function.[12] Ultimate-

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[7] *See infra* Part I, pp. 1193–96.

[8] The focus here is on the use of third-party genetic material or gestational services. While some commentators limit the term ART to fertility procedures in which gametes are manipulated outside the body, in this Article I adhere to a broader (and more popular) definition that includes alternative insemination under the umbrella of ART.

[9] Of course, stranger adoption historically provided a mode of nonbiological parenthood.

[10] Attention to the relationship between law and mobilization brings into view how work outside marriage shaped contemporary marriage claims, and how more recent marriage advocacy extended insights emerging from that earlier work. For legal scholarship in the law-and-mobilization vein, see JACK M. BALKIN, CONSTITUTIONAL REDEMPTION (2011); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); and Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

[11] This dynamic resonates with Professor Ariela Dubler's "shadow of marriage" concept. *See* Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641 (2003).

[12] As other scholars have shown, an intentional and functional approach recognizes actual parent-child relationships and protects children's best interests by shifting the law's focus away

ly, intentional- and functional-parenthood principles would enable recognition of parents not on the basis of biology, gender, sexual orientation, or even marriage, but instead on the basis of actual familial relationships.[13]

This historical perspective is crucial to understanding the contemporary moment. It sheds important new light on the scholarly debate over the meaning and impact of marriage equality, and it suggests a path forward in the post–marriage equality world taking shape.

Debate continues over whether the campaign for marriage equality was counterproductive. Prominent family law and sexuality scholars, who view claims to marriage as conservative and assimilationist, criticize same-sex marriage and advocacy seeking it for failing to challenge dominant conceptions of the family and instead accepting same-sex-

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from formal status and toward familial conduct. On how functional parenthood can encompass intentional parenthood, see Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 674–75 (2002). For foundational works on intentional parenthood, see John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); and Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297. For foundational works on functional parenthood, see 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); Martha Minow, *All in the Family & in All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275 (1992–1993); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269 (1991); and 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 (1990). For more recent influential contributions, see Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008); and Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007). The ALI Principles also take a functional approach, recognizing parents by estoppel and de facto parents. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)–(c) (AM. LAW INST. 2002).

[13] Given that same-sex couples with children almost always have at least one nonbiological relationship, a legal regime that values same-sex partners' families prioritizes intentional and functional, rather than biological and gender-differentiated, routes to parentage. (Of course, some female same-sex couples divide gestation and genetics such that one woman is the gestational mother and the other is the genetic mother. Also, some same-sex couples choose donors related to the nonbiological parent, but this connection would not support a legally cognizable parent-child relationship.) Functional parenthood includes within its reach families formed through both ART and procreative sex. While intentional parenthood is most relevant specifically in the context of ART, it can have broader application in a family law regime that values chosen families. *See* Nicholas Bala & Christine Ashbourne, *The Widening Concept of "Parent" in Canada: Step-Parents, Same-Sex Partners, & Parents by ART*, 20 AM. U. J. GENDER SOC. POL'Y & L. 525, 542 (2012) (explaining that under Quebec's parentage regime, "[a] man may contribute to a 'parental project' for a couple who wishes to have a child either by providing semen for artificial insemination, or by means of sexual intercourse" (citing Civil Code of Québec, S.Q. 1991, c 64, art 538.2 (Can.))); *cf.* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 61 (2004) (arguing that contract and intent can provide general principles for the parentage regime and would erase distinctions "between 'technologically produced' and 'regularly produced' children, and . . . between straight parents and gay parents").

couple-headed families to the extent that they replicate heterosexual marital norms.[14] Yet this Article reveals how comparisons to married different-sex couples have historically been made — and are made today — not simply for the sake of conformity, but rather to unsettle norms that root parentage in biology, gender, and even marital status. Accordingly, it brings into view a different — and more transformative — account of marriage equality. In doing so, it challenges some of the historical, normative, and predictive dimensions of critiques of same-sex marriage.

More broadly, this Article analyzes marriage equality's impact on the larger body of family law, including emerging issues relating to the law of parenthood governing all families. It specifically shows how marriage equality can facilitate the expansion of intentional and functional parentage principles across family law — not only inside but also outside marriage, for both same-sex and different-sex couples.[15]

Inside the marital family, the logic of parenthood shifts as it accommodates same-sex couples. Consider the marital presumption. Traditionally, a man is presumed to be the biological, and thus legal, father of a child born to his wife. Yet under the same presumption, the nonbiological lesbian[16] co-parent is the mother of a child born during the marriage not because she is assumed to be biologically related to the child, but because she is the *intended* parent of the child and will *function* as the child's parent.[17] Challenges to the marital presumption's application to same-sex couples, which have proliferated in *Obergefell*'s wake, implicate not only sexual-orientation equality, but also the displacement of biological and gendered parentage principles.[18] Such principles bear on regulation of the heterosexual marital family, and are implicated, for example, in disputes over husbands seeking to disestablish paternity.[19]

Marriage equality's impact is not limited to regulation of the marital family.[20] Because marriage equality is premised on a sexual-orientation-equality principle articulated on family-based grounds, states that recognize parentage for unmarried different-sex parents us-

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[14] *See infra* section III.A, pp. 1231–36.

[15] The distinction between inside and outside marriage, or between marital and nonmarital relationships, connotes a formal, legal distinction.

[16] For readability and to reflect popular characterizations of the relevant cases, this Article at times employs the shorthand of "lesbian" and "gay." Nonetheless, I recognize that these usages may be imprecise in regards to bisexual individuals in same-sex couples. On bisexual erasure, see generally Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

[17] *See infra* Part IV, pp. 1240–49.

[18] *See* Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013).

[19] *See infra* Part IV, pp. 1240–49.

[20] *See infra* Part V, pp. 1249–65.

ing ART may be pushed to include unmarried same-sex parents on the same terms.[21] In fact, legal decisions favoring same-sex marriage can serve as precedents for the recognition of unmarried intended parents.[22] In this way, instead of redrawing parentage through marriage, same-sex marriage has the capacity to further the erosion of the line between marital and nonmarital parental recognition.

These effects are not limited to same-sex couples. Marriage equality may push state family law regimes to accommodate same-sex family formation in ways that yield greater recognition of intentional and functional parentage in all families. For example, surrogacy, which in many states remains controversial and restricted, may gain greater legal acceptance as marriage equality further validates the rights of same-sex couples to form families with children.[23] And with greater acceptance of assisted reproduction may come greater acceptance of nonbiological parenthood. Moreover, the recognition of *multiple* parents may flow from the recognition of same-sex marriage.[24] A parentage regime that fully integrates same-sex couples reduces the salience of biology and gender and instead centers parental conduct, which need not be cabined by a dyadic parental unit, either inside or outside marriage.

By placing marriage equality along a broader horizon of demographic and legal developments decentering traditional notions of marriage and parenting, this Article begins to theorize marriage equality's family law implications.[25] In doing so, it resists both wholesale assessments of marriage equality and a clear dichotomy between marriage and nonmarriage. To be clear, this is not an argument that reservations about same-sex marriage expressed by family law and sexuality scholars are simply unconvincing. Indeed, I share some of

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[21] *See infra* section V.A, pp. 1250–59. For instance, in Florida, a state notoriously hostile to LGBT parents, the state supreme court ruled that the state must give *unmarried* same-sex couples using ART "the same opportunity as [unmarried] heterosexual couples to demonstrate [parental] intent." D.M.T. v. T.M.H., 129 So. 3d 320, 343 (Fla. 2013). The decision, though, was tethered to biology to the extent that the case arose in the context of a genetic mother being denied access to her child after her relationship with the birth mother dissolved. *See id.* at 327.

[22] The *D.M.T.* court invoked the constitutional principles emerging from the U.S. Supreme Court's 2013 decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which struck down section 3 of the federal Defense of Marriage Act. *See D.M.T.*, 129 So. 3d at 337.

[23] *See* Douglas NeJaime, Griswold*'s Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality*, 124 YALE L.J.F. 340, 346–48 (2015).

[24] *See infra* section V.B, pp. 1259–65.

[25] For other work in this vein, see CARLOS A. BALL, SAME-SEX MARRIAGE AND CHILDREN (2014); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006); Eskridge, *supra* note 6; and Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567 (2009).

the concerns that other scholars have raised.[26] While this Article's account challenges the view of marriage equality as generally conservative and assimilationist, it leaves largely undisturbed the critique that marriage equality accepts the channeling of benefits to marital families.[27] Nonetheless, the analysis presented here reveals how marriage and nonmarriage have become dynamic, contingent, and mutually constitutive relationships. Ultimately, it suggests how marriage equality may accelerate, rather than stunt, wide-ranging shifts in regulation of the family.

The remainder of this Article proceeds in five Parts. Part I provides a brief summary of national family law developments beginning in the late 1960s related to heterosexual family formation. It shows how, primarily for fathers, the law came to recognize both nonmarital, biological and marital, nonbiological parent-child relationships.

Part II presents a case study of LGBT parenting advocacy in California from the mid-1980s through the mid-2000s, documenting how lawyers representing same-sex parents drew from legal developments in heterosexual family formation to argue for the recognition of nonmarital, nonbiological parents.[28] By focusing on the marriage-like relationships formed by same-sex couples living outside marriage, lawyers constructed an intentional and functional model of parenthood that could accommodate same-sex couples' families. The case study relies on a variety of sources, including case files, briefs, and judicial decisions;[29] lawyers' personal files; state legislation, legislative and administrative materials, and task force reports; organizational materials, conference materials, advocates' contemporaneous statements, and public testimony; and mainstream and LGBT media coverage. It also

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[26] *See* Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219, 247–48 (2013).

[27] While the developments covered suggest that arguments to privatize child support animated earlier claims to *nonmarital* parentage and family recognition, this insight does not necessarily weaken the normative force of criticisms of marriage-equality arguments that relied on the privatization of dependency through marriage.

[28] For methodological reasons, the case study is cabined to one state. Important same-sex parenting developments, some of which have spread across the country, emerged in California, and one of the leading public interest law firms focusing on LGBT family law, the National Center for Lesbian Rights, is based in California. *See infra* Part II, pp. 1196–230. Nonetheless, it is important to recognize that family law varies by state, and California has developed a robust parentage regime with some unique features.

[29] Because these issues involve children, many of the case files were sealed or made confidential. Where possible, I obtained redacted versions of relevant pleadings and decisions. Also, because many of these cases, especially early on, were relatively low-salience events occurring in lower state courts and handled in part by private practitioners, files often have been destroyed, and very little has been organized into formal archives. Therefore, many of the central materials have come from personal files supplied to me by lawyers and are not publicly available.

relies on several interviews with lawyers and lobbyists active during the relevant time period.[30]

Part III connects the legacy of the parenting work documented in Part II's case study to the contemporary push for marriage, showing how marriage equality extends the intentional and functional model of parenthood developed in earlier nonmarital LGBT advocacy. Parts IV and V turn to a world with marriage equality. By examining the marital presumption, Part IV contemplates how, with married same-sex couples, intent and function become more generalizable principles through which to understand parentage in the marital family. Part V then considers how marriage equality can support the further elaboration of intentional and functional parenthood outside marriage, accelerating broader shifts toward more pluralistic family law and blurring the boundary between marital and nonmarital families for both same-sex and different-sex couples.

I. FAMILY LAW REVOLUTIONS: NONMARITAL AND NONBIOLOGICAL PARENTING

This Part highlights some of the constitutional and family law developments relating to heterosexual parental recognition that swept the country in the second half of the twentieth century. This brief examination of developments beginning in the late 1960s shows how marriage and biology began to lose their grip on parenting. Ultimately, the recognition of *nonmarital*, biological fathers and marital, *nonbiological* parents — in the context of heterosexual family formation — presented both opportunities and constraints for those who would represent same-sex parents seeking legal parental status.

A. Nonmarital, Biological Parenthood

Traditionally, marriage defined the scope of state-recognized parenting.[31] But as rates of nonmarital cohabitation and birth rose dramatically over the second half of the twentieth century,[32] developments

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[30] The historical research complements my earlier work on the relationship between marriage and the development of nonmarital relationship recognition beginning in the 1980s. *See* NeJaime, *supra* note 6. There I showed how marital norms anchored LGBT domestic partnership advocacy. *See id.* at 104–53. Those efforts, in turn, influenced the changing meaning of marriage — observable in subsequent same-sex marriage claims — by emphasizing intimate coupling and economic and emotional interdependence. *See id.* at 163–71.

[31] Nonmarital children were *filius nullius* (the child of no one) at common law. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH 197 (1985). Over time, the law recognized the parent-child relationships of unmarried mothers, but not fathers. *See* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81–82 (2003).

[32] *See* CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 93–97 (2010); NANCY F. COTT, PUBLIC VOWS 202–03 (2000); Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981).

in constitutional and family law eroded distinctions between marital and nonmarital parenthood. Beginning in 1968, the Supreme Court began to develop a body of equal protection law rejecting state laws that discriminated against "illegitimate," or nonmarital, children.[33] Around the same time, the Court also began to recognize the constitutional parental rights of unmarried fathers.[34] The Court continued to privilege the marital family — both legally and rhetorically — but nonetheless affirmed parent-child relationships outside marriage.[35] Indeed, in protecting an unmarried father's parental rights in *Stanley v. Illinois*,[36] the Court explained that "familial bonds" outside the context of marriage are "often as warm, enduring, and important as those arising within a more formally organized family unit."[37]

The emerging recognition of nonmarital parent-child relationships was limited to biological relationships.[38] Yet while biology provided the basis for nonmarital parental rights, the Court also required parental conduct from unmarried biological fathers. Over the course of several years, the Court arrived at a standard that situated the biological tie as a mere starting point.[39] As it explained in its 1983 *Lehr v. Robertson*[40] decision, "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."[41] The father must

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[33] *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 72 (1968); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 75–76 (1968). The campaign to remove legal distinctions based on "illegitimacy" gained support from Professor Harry Krause's pioneering work. *See* HARRY D. KRAUSE, ILLEGITIMACY (1971); Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967). Nonetheless, the Court continued to allow some legal distinctions between marital and nonmarital children. *See, e.g.*, Labine v. Vincent, 401 U.S. 532, 539 (1971) (allowing distinction in inheritance rights because the law did not create "an insurmountable barrier to [the] illegitimate child").

[34] *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding that the unmarried father "was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied [him] the equal protection of the laws").

[35] Professor Serena Mayeri's insightful historical work shows how the nonmarital birth cases accepted the privileging of marriage and relied on more conservative frames based on harm to children, in the process crowding out more progressive arguments based on sexual liberty and race, class, and gender inequality. *See* Serena Mayeri, Essay, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015).

[36] 405 U.S. 645.

[37] *Id.* at 652.

[38] As Professor Katharine Baker has observed, "[t]he liberal Justices who championed the rights of illegitimate children likely thought they needed to dismantle an archaic, moralistic system that linked legitimate parenthood to marriage, but all they knew to replace that system with was a parenthood regime based on genetic connection." Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1649–50 (2015).

[39] *See, e.g.*, Lehr v. Robertson, 463 U.S. 248 (1983); Lalli v. Lalli, 439 U.S. 259, 269 (1978) (plurality opinion); Quilloin v. Walcott, 434 U.S. 246 (1978).

[40] 463 U.S. 248.

[41] *Id.* at 262.

"grasp[] that opportunity and accept[] some measure of responsibility for the child's future."[42] Securing parental rights, in other words, required a showing of some parental conduct, in addition to the biological connection.

State family law doctrine, including primarily parentage law, shifted in response to the Court's decisions on "illegitimacy" and unmarried fathers. In 1973, the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws) promulgated the Uniform Parentage Act[43] (UPA), which many states eventually adopted. By supplying a series of presumptions to determine legal parentage, the UPA sought to remove distinctions based on marital birth while also providing ways to recognize the status of — and attach obligations to — unmarried fathers.[44] Although its focus on unmarried fathers' biological connections reflected anxiety over proof of paternity,[45] the model statute also integrated the Court's attention to biology-plus-conduct. One way to show a parent-child relationship — commonly referred to as the "holding out" presumption — required that the father "receives the child into his home and openly holds out the child as his natural child."[46]

B. Marital, Nonbiological Parenthood

The expanding recognition of nonmarital parent-child relationships was driven in part by Supreme Court case law, which itself responded to changes in American family life. At the same time, other developments in family formation patterns drove changes in state family law.

While the UPA and state law revisions focused on the recognition of nonmarital parent-child relationships, family law statutes also began to accommodate the use of ART. Importantly, even as the UPA was driven by the need to break down distinctions based on marital status, its regulation of ART focused specifically on married couples. The UPA addressed married couples' use of artificial insemination, or alternative insemination by donor (AID), by providing: "If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natu-

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[42] *Id.*

[43] UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 1973).

[44] *See* Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 359–60 (2012) (explaining that the UPA can be read to "synthesize the children's equality reading [of the Court's decisions] with the parental identification reading, seeking to provide content for the former by facilitating the identification of a child's second parent").

[45] *See* UNIF. PARENTAGE ACT §§ 11–12. This concern emerged in the Court's decisions, *see* Gomez v. Perez, 409 U.S. 535, 538 (1973) (per curiam), and in Krause's writing, *see* Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 9–11 (1974).

[46] UNIF. PARENTAGE ACT § 4(a)(4).

ral father of a child thereby conceived."[47] The sperm donor, in turn, has no claim to parentage based on his biological connection.[48] Instead, the married couple's intent to use alternative insemination to conceive a child they would raise together is determinative.

As developments in nonmarital families and reproductive technology took hold throughout the 1970s, no-fault divorce also spread across the country.[49] After California initiated a no-fault regime in 1969,[50] the Uniform Law Commission promulgated a Uniform Marriage and Divorce Act that provided a no-fault model.[51] With more divorces came more second marriages. As divorced parents formed blended families — and other unmarried women with children married — stepparents assumed parental roles.[52]

In response to these shifting demographic patterns, stepparent adoption became an increasingly common process — and a means of recognizing nonbiological functional parents within marital families.[53] Adoption ordinarily required the termination of the existing parents' legal rights. Stepparent adoption, however, constituted an exception in which the custodial parent (the stepparent's spouse) retained her parental status.[54]

As the next Part shows, the significant developments outlined here — the legal recognition of both nonmarital, biological parent-child relationships and marital, nonbiological parent-child relationships — formed an important foundation for LGBT parenting advocacy beginning in the 1980s.

II. LGBT PARENTING WORK IN CALIFORNIA, 1984–2005

This Part presents a case study of LGBT parenting efforts in California from the mid-1980s through the mid-2000s — before same-sex

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[47] *Id.* § 5(a).

[48] *Id.* § 5(b). On AID regulation, see Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035 (2002).

[49] *See, e.g.*, CONN. GEN. STAT. § 46b–40 (2009) (first enacted 1973); FLA. STAT. § 61.052 (2015) (first enacted 1971); 750 ILL. COMP. STAT. 5 / 401 (2014) (first enacted 1977).

[50] *See* CAL. CIV. CODE § 4506 (West 1969); *see also* REPORT OF THE GOVERNOR'S COMM'N ON THE FAMILY (1966).

[51] UNIF. MARRIAGE & DIVORCE ACT (UNIF. LAW COMM'N 1970).

[52] On stepparents' position in the law, see MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW (1994).

[53] *See id.* at 161. Absent adoption, the stepparent-child relationship is largely understood as derivative of the stepparent's relationship to the legal parent. *See* Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 52–53 (1984).

[54] *See, e.g.*, CAL. FAM. CODE §§ 8548, 8600–8622 (West 2013). Stepparent adoption generally requires the consent and relinquishment of parental rights by the noncustodial parent. On stepparent adoption procedures, see Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 88–97 (2006).

couples could legally marry in the state. The 1980s and 1990s saw what many commentators refer to as the "lesbian baby boom."[55] Particularly in progressive communities, same-sex couples began to form families with children through donor insemination and adoption, and many same-sex couples continued to raise children from previous different-sex relationships. Well before marriage occupied a position on the agendas of mainstream LGBT organizations, advocates sought legal recognition for the parent-child relationships formed in these same-sex-couple-headed families.[56]

By closely analyzing developments in California, the case study uncovers LGBT advocates' contributions to a new model of parenthood, the origins of which can be traced to shifts in heterosexual family formation both inside and outside marriage. The legal recognition of unmarried (presumptively heterosexual) fathers furnished openings for LGBT advocates to pursue parental rights for their constituents. Yet biology created an important divide between unwed fathers and many same-sex co-parents. To decrease the salience of biology, advocates looked to marriage, a domain in which the state increasingly recognized parent-child relationships formed through ART and in stepparent families. There, parental rights flowed to married parents in part because they intended to be parents or functioned as parents, regardless of their biological connections to the children.

Seizing on the recognition of both unmarried, biological fathers and married, nonbiological parents, LGBT advocates made analogies to marital family formation to secure nonmarital parental rights. If marriage demonstrated parental intent and function, marriage-like adult relationships — regardless of the relationships' legal status — could supply evidence to support the extension of those concepts to unmar-

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[55] *See, e.g.*, GEORGE CHAUNCEY, WHY MARRIAGE? 105–11 (2004); *cf.* Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 933 (2000) (citing Sue Anne Pressley & Nancy Andrews, *For Gay Couples, the Nursery Becomes the New Frontier*, WASH. POST, Dec. 20, 1992, at A1) (referring to "gay-by boom").

[56] Many disputes arose in the context of relationship dissolution. LGBT advocates mostly represented the nonbiological co-parent seeking legal recognition, but at times represented the biological parent attempting to impose obligations on the nonbiological co-parent. Lawyers also represented intact same-sex couples seeking to secure legal parental status for the nonbiological co-parent.

These efforts formed the second generation of LGBT parenting cases. First-generation cases, which continued as the second-generation cases gained prominence, featured custody disputes arising out of different-sex marriages in which one parent came out as LGBT. For an analysis that includes both types of parenting disputes, see KIMBERLY D. RICHMAN, COURTING CHANGE (2009); Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 LAW & SOC'Y REV. 285 (2002). On lesbian and gay parenting during the second half of the twentieth century, see DANIEL WINUNWE RIVERS, RADICAL RELATIONS (2013). While most advocacy focused on lesbian mothers, advocacy for gay fathers also existed. *See id.* at 111–38.

ried parents.[57] To the extent nonmarital same-sex-couple-headed families looked and acted like marital families, marriage seemed to constitute an arbitrary line. Critically, analogies to marriage were made in service of a new model of parenthood premised on intentional and functional relationships. This new parenthood minimized the significance of traditional markers of parentage, including biology, gender, sexual orientation, and even marital status.

This Part focuses on California not because it is representative of family law on a national scale, but instead because it was a leading site for LGBT parenting advocacy and provides a rich context in which to trace the evolution of claims to same-sex parental rights. The California-based National Center for Lesbian Rights (NCLR), which Donna Hitchens founded as the Lesbian Rights Project in 1977, became the LGBT movement organization focused primarily on parenting issues.[58] To develop cutting-edge tactics and carry out a careful, incremental strategy, NCLR convened and worked closely with private family law attorneys both in the state and nationwide.[59] In California specifically, other movement organizations, including Lambda Legal and the ACLU, devoted significant and increasing attention to parenting issues — and worked closely with NCLR.

Of course, efforts to achieve LGBT parental rights existed in other states. Since family law is primarily regulated at the state level, significant variation persists across states — even though uniform acts and constitutional principles have produced some consistency.[60] While many states remained hostile to LGBT parents during the era covered in the case study, others began to accommodate families formed by

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[57] To be clear, the reasoning here does not primarily connect the *legal recognition* of same-sex couples' relationships to claims to parentage, but rather focuses on how the presentation of same-sex couples' adult relationships, regardless of their legal status, was critical to securing parental recognition. For an exploration of the relationship between couple recognition and conflict over same-sex parenting, see Nancy D. Polikoff, *Recognizing Partners but Not Parents / Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 738–50 (2000).

[58] NCLR was founded to address family law issues, which were core lesbian concerns that NCLR's founders saw as marginalized by other organizations at the time. Telephone Interview with Roberta Achtenberg, Former Exec. Dir., NCLR (June 11, 2014) (on file with the Harvard Law School Library).

[59] Telephone Interview with Kate Kendell, Exec. Dir., NCLR (July 17, 2014) (on file with the Harvard Law School Library); Telephone Interview with Shannon Minter, Legal Dir., NCLR (June 5, 2014) (on file with the Harvard Law School Library).

[60] For example, in response to the Supreme Court's rulings, the UPA and similar statutes "shift[ed] away from reliance on marital status as a proxy for biological fatherhood." Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671, 701 (2012). In 1975, California adopted the UPA. *See* Press Release, Senator Anthony C. Beilenson, Statement on Senate Bill 347 (Oct. 2, 1975) (on file with the Harvard Law School Library); *see also* Johanna Neuman, *Committee Passes Bill Giving Unwed Fathers Custody Rights*, L.A. DAILY J., Aug. 15, 1975, at 1.

same-sex couples — with some doing so on a statewide basis well ahead of California.[61] Even among states that granted rights to LGBT and other nonbiological parents, California took different doctrinal routes than some of its counterparts.[62]

Nonetheless, California emerged as a leader in the development of intentional- and functional-parenthood principles and their application to same-sex parents. The state's accommodation of same-sex parenting through second-parent adoption and the UPA influenced the law in other jurisdictions.[63] California law also shaped other states' regulation of parenthood more generally.[64] Specifically in the domain of ART, California's early recognition of gestational surrogacy as a legitimate way to create parent-child relationships powerfully shifted national attention toward gestational, rather than traditional, surrogacy.[65] Even today, California law on parentage, including LGBT parental rights, continues to influence the law in other states.[66]

While the California case study is structured chronologically, it covers three specific doctrinal areas: de facto parenthood, second-parent adoption, and presumptions of parentage under the state's UPA. Assisted reproduction, by both different-sex and same-sex couples, pervades these three domains.[67] Although the focus is on parent-child re-

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[61] Throughout this Part, I note (often in footnotes) some important developments in other states.

[62] While some states have robust equitable parenthood doctrines, as this Part shows, California uses other mechanisms, such as presumptions of parentage under the UPA, to protect nonmarital, nonbiological relationships.

[63] *See, e.g.*, *In re* Parental Responsibilities of A.R.L., 318 P.3d 581, 587 (Colo. App. 2013) (UPA presumptions); *In re* Adoption of K.S.P., 804 N.E.2d 1253, 1258 (Ind. Ct. App. 2004) (second-parent adoption); Chatterjee v. King, 280 P.3d 283, 289–90 (N.M. 2012) (UPA presumptions).

[64] California's application of parentage presumptions to unmarried, nonbiological fathers has supported the shift away from biology in other states. *See, e.g.*, *In re* A.D., 240 P.3d 488, 491–92 (Colo. App. 2010).

[65] *See* Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993). Courts in other states relied on *Johnson* to recognize intended parents. *See, e.g.*, McDonald v. McDonald, 608 N.Y.S.2d 477, 479–80 (App. Div. 1994); *In re* C.K.G., No. M2003-01320-COA-R3-JV, 2004 WL 1402560, at *9 (Tenn. Ct. App. June 22, 2004).

[66] For recent examples, see *St. Mary v. Damon*, 309 P.3d 1027, 1033–34 (Nev. 2013), which allowed for parental recognition of both a genetic mother and a gestational mother in a same-sex relationship); and *In re Guardianship of Madelyn B.*, 98 A.3d 494, 499 (N.H. 2014), which applied the parentage statute's "holding out" presumption to a nonbiological mother in a same-sex relationship).

[67] Even while ART destabilizes biological notions of parenthood, it is often driven, in contrast to adoption, by desires for biological or genetic parenthood. *See* ELIZABETH BARTHOLET, FAMILY BONDS 220–21 (1993). In fact, as Professor Dorothy Roberts has shown, ART may reinscribe the traditional family by privileging men's genetic connections, facilitating family formation by married, different-sex couples, and enforcing racial hierarchy. *See* Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 935–37 (1996). Of course, as Professor Elizabeth Bartholet has argued, even the regulation of adoption historically has been animated by what she calls "'biologism,' the idea that what is 'natural' in the context of the biologic family is what is normal and desirable in the context of adoption." BARTHOLET, *supra*, at 93.

lationships formed in same-sex-couple-headed families, legal responses to heterosexual family formation built the foundation for same-sex parental recognition. Accordingly, the case study includes developments, some of which LGBT advocates participated in shaping, generally relating to California's recognition of nonbiological parents and parents using ART.

A. 1984–1998: Marital Parenthood, Biological Parenthood, and the Precarious Position of Same-Sex Couples

In the 1980s and 1990s, LGBT advocates pursued a range of doctrinal paths as they attempted to persuade courts to provide parental rights to same-sex parents. During this time, the innovative concept of second-parent adoption increasingly offered a path to parental status for intact couples. But in the absence of such adoptions, nonbiological lesbian mothers lacked legal rights to their children. During the 1990s, even as same-sex parents struggled to achieve parental status, California courts began to develop a doctrine of intentional parenthood for married different-sex couples using new forms of reproductive technology. This doctrine eventually would create openings for same-sex couples.

1. Early Efforts on Behalf of Nonbiological Parents in Same-Sex Couples. — With the rise of alternative insemination in the late 1970s and 1980s, the number of lesbian couples starting families skyrocketed.[68] California's Uniform Parentage Act (UPA),[69] adopted in 1975, included the AID provision from the model UPA, recognizing the husband, rather than the sperm donor, as the legal father of the resulting child.[70] Yet while the model act disclaimed parental rights for sperm donors only in situations involving *married* women, California's law went further. It allowed not only married but also *unmarried* women to use AID without fear of sperm donors' parental rights assertions. To avail themselves of these protections, women had to use the assistance of a licensed physician.[71]

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[68] *See* CARLOS A. BALL, THE RIGHT TO BE PARENTS 10 (2012); *see also* LAURA MAMO, QUEERING REPRODUCTION 23–57 (2007) (describing the development of lesbian reproduction through alternative insemination from the 1970s to the 1990s).

[69] The California UPA eventually moved from the Civil Code to the Family Code. *See* 1992 Cal. Stat. 463, 548–49. Because the time period covered in this Article spans this move, I use the subsequent Family Code references in text.

[70] 1975 Cal. Stat. 3197–98 (codified as amended at CAL. FAM. CODE § 7613 (West 2013)). This provision was consistent with a 1968 California Supreme Court decision attaching parental obligations to a husband who consented to his wife's insemination with another man's sperm. *See* People v. Sorensen, 437 P.2d 495, 497–98 (Cal. 1968).

[71] *See* CAL. FAM. CODE § 7613(b). In a case in which a physician was not involved, a California court granted parental status to a sperm donor over the objection of the biological mother. *See* Jhordan C. v. Mary K., 179 Cal. App. 3d 386 (1986). Women in California could avoid that result by using a licensed physician in the process. In addition, the Lesbian Rights Project ad-

Despite opening more space for unmarried women to use AID, the statute retained distinctions based on marriage. For both same-sex and different-sex couples, no parental rights were recognized for the biological mother's unmarried partner.[72] That unmarried partner, in other words, was not analogous to the husband who consents to his wife's insemination and thereby becomes the legal (nonbiological) father.

Without a route to parentage through the UPA's regulation of AID, the nonmarital, nonbiological parent had to hope she could form a legal parent-child relationship through adoption. This, too, presented challenges. Stepparent adoption constituted a carveout from standard adoption procedures — allowing adoption without terminating the parental rights of the existing, custodial parent.[73] Same-sex couples, excluded from marriage, had no recourse to this specific mechanism. Instead, they pursued what they termed second-parent adoptions, which adapted stepparent adoption to protect intentional and functional (nonbiological) parenting in nonmarital families.

In California, second-parent adoption followed traditional adoption routes (rather than stepparent adoption processes), but required the Department of Social Services (DSS) and judges to set additional terms so that the legal parent would retain her rights.[74] Lawyers began to obtain second-parent adoptions for same-sex couples in progressive, urban California counties in the mid-1980s.[75]

Yet this route to parental rights was not without challenges. In 1987, Republican Governor George Deukmejian ordered DSS to adopt a policy against adoption by unmarried couples, including same-sex couples seeking joint and second-parent adoptions.[76] While framed around marital status, the policy emerged in response to a lesbian

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vised using unknown donors as a way to avoid parental claims. *See* DONNA J. HITCHENS, LEGAL ISSUES IN DONOR INSEMINATION 6 (1984 ed.).

[72] *See* CAL. FAM. CODE § 7613(a).

[73] The California Supreme Court sanctioned stepparent adoption in 1925. *See* Marshall v. Marshall, 239 P. 36, 38 (Cal. 1925). The state's adoption statutes included stepparent adoption in 1931, and stepparent adoptions were excluded from some statutory requirements for adoption. *See* 1931 Cal. Stat. 2402–03.

[74] On second-parent adoption's origins, see Nancy D. Polikoff, *Raising Children: Lesbian and Gay Parents Face the Public and the Courts*, *in* CREATING CHANGE 305, 320 (John D'Emilio et al. eds., 2000).

[75] The first such adoption was granted in 1985 in Alaska. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE 53 (2008). In California, the first was granted within months of the Alaska adoption. *Id.*; Telephone Interview with Roberta Achtenberg, *supra* note 58; Telephone Interview with Donna Hitchens, Founder, Lesbian Rights Project (July 25, 2014) (on file with the Harvard Law School Library). The first reported trial court opinion in the country emerged in 1991 from the District of Columbia. *See In re* Adoption of Minor (T. & M.), 17 Fam. L. Rep. (BNA) 1523 (D.C. Super. Ct. 1991). For a description of these developments, see Polikoff, *supra* note 57, at 731–32.

[76] *See* Cal. Dep't of Soc. Servs., All County Letter No. 87-80 (June 15, 1987).

mother's second-parent adoption petition and to outrage over a child's death after his placement with a male same-sex couple.[77] Still, despite the DSS policy, many social workers provided favorable reports on same-sex couples seeking adoption, and since no state law expressly precluded adoptions by unmarried couples, some courts continued to grant second-parent adoptions.[78] Consequently, for same-sex couples using AID, second-parent adoption increasingly offered a way for the nonbiological, unmarried mother to create a legal relationship with the child.

But for those couples whose relationships dissolved before second-parent adoption gained traction or who otherwise failed to complete an adoption, the nonbiological mother was a legal stranger to her child. Nancy Springer and Michele Graham-Newlin were one of those couples. While they considered seeking a second-parent adoption *after* the dissolution of their relationship (during a time when they continued to share custody of their two children), they were discouraged from bringing a post-dissolution adoption petition.[79] Because second-parent adoption remained controversial, lawyers thought it best to present courts with intact, model same-sex couples.[80]

Even though lesbian couples had been raising children together for many years and some of them had broken up, disputes testing the application of parentage law in this context did not yield California appellate rulings until the early 1990s.[81] The 1991 decision in Nancy and

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[77] *See* Wendell Ricketts & Roberta Achtenberg, *Adoption and Foster Parenting for Lesbians and Gay Men: Creating New Traditions in Family*, 14 MARRIAGE & FAM. REV. 83, 109 (1989). The adoption petition was that of Donna Hitchens's partner, Nancy Davis. *See* Marie-Amélie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 52 HARV. C.R.-C.L. L. REV. (forthcoming 2016) (manuscript at 45) (on file with the Harvard Law School Library).

[78] *See* George, *supra* note 77 (manuscript at 46–47); Ricketts & Achtenberg, *supra* note 77, at 110; Telephone Interview with Emily Doskow, Attorney and Mediator (May 20, 2014) (on file with the Harvard Law School Library).

[79] *See* Telephone Interview with Amy Oppenheimer, Attorney, Law Offices of Amy Oppenheimer (May 23, 2014) (on file with the Harvard Law School Library).

[80] *See* NAT'L CTR. FOR LESBIAN RIGHTS, LESBIANS CHOOSING MOTHERHOOD: LEGAL IMPLICATIONS OF DONOR INSEMINATION AND CO-PARENTING 28–29 (Maria Gil de Lamadrid ed., 2d ed. 1991) (explaining the importance of "the longevity of the adult relationship," *id.* at 28, and, in all but a few jurisdictions, the "'white picket fence' standard" for lesbians seeking second-parent adoption, *id.* at 29).

[81] LGBT advocates convinced constituents to avoid precedential rulings and instead to form families with children without forcing the issue in court. Telephone Interview with Roberta Achtenberg, Former Exec. Dir., NCLR (July 7, 2014) (on file with the Harvard Law School Library). To this end, NCLR published pamphlets on lesbian parenting. The 1984 pamphlet, *Legal Issues in Donor Insemination*, included guidance on drafting co-parenting agreements. *See* HITCHENS, *supra* note 71, at 19–21. The hope was that agreements would not only help avoid litigation, but also, if litigation ensued, protect the nonbiological mother by providing evidence of pre-conception intent. Telephone Interview with Donna Hitchens, *supra* note 75.

Michele's case was the most noteworthy and important in the state. In *Nancy S. v. Michele G.*,[82] Roberta Achtenberg of NCLR, Paula Ettelbrick of Lambda Legal,[83] and Bay Area attorneys Amy Oppenheimer and Shannan Wilber represented Michele, the nonbiological mother seeking parental recognition.

Given the UPA's focus on marriage in the alternative insemination context and its emphasis on biology for unmarried parents, the lawyers determined that the statutory parentage framework offered no help.[84] In fact, they conceded that a "natural" parent, the language used in the UPA, meant a "biological" parent such that the UPA "has no bearing on the rights of a non-biological co-parent."[85] Instead, to claim parental rights for Michele, the lawyers relied on equitable and common law theories that could recognize a de facto, or functional, parent.[86] Courts around the country had granted limited rights to individuals who

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Not all disputes avoided the courts. In 1984, a trial judge in Oakland approved visitation rights for a nonbiological mother who had been in a same-sex relationship with the child's biological mother. *See Woman Wins Right to Visits to Child of Lesbian Ex-Lover*, N.Y. TIMES, Nov. 23, 1984, at A27. The couple, Linda Jean Loftin and Mary Elizabeth Flournoy, had "exchanged vows in a church ceremony in 1977" and had listed Loftin "as the father on the child's birth certificate." *Lesbians' Custody Fight on Coast Raises Novel Issues in Family Law*, N.Y. TIMES, Sept. 9, 1984, at 44. For a recounting, see E. Donald Shapiro & Lisa Schultz, Legal Essay, *Single-Sex Families: The Impact of Birth Innovations upon Traditional Family Notions*, 24 J. FAM. L. 271 (1985). The court explained that it had no authority to "proceed under the Family Law Act and . . . the Uniform Parentage Act" and could not "enforce custody or visitation rights pursuant to a private contract between two women." *Id.* at 272 (quoting Reporter's Transcript of Proceedings at 11, Loftin v. Flournoy, No. 569630-7 (Cal. Super. Ct. Sept. 4, 1984)). Yet the court found that Loftin had standing to seek visitation as a "psychological parent." *Id.* at 273 (quoting Reporter's Transcript of Proceedings, *supra*, at 19). Ultimately, the court allowed Loftin to proceed based on "the general custody law of this State that is embedded in statutes and cases although no case or no statute specifically or expressly affords her that right." *Id.* at 274 n.15 (emphasis omitted) (quoting Reporter's Transcript of Proceedings, *supra*, at 21).

[82] 279 Cal. Rptr. 212 (Ct. App. 1991).

[83] Ettelbrick wrote the foundational essay arguing that the LGBT movement should not prioritize marriage. *See* Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9, 14–17. For Ettelbrick's perspective on parenting litigation around this time, see Paula L. Ettelbrick, *Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513 (1993).

[84] *See* Telephone Interview with Shannan Wilber, Youth Policy Dir., NCLR (June 13, 2014) (on file with the Harvard Law School Library); Telephone Interview with Amy Oppenheimer, *supra* note 79.

[85] Appellant's Opening Brief at 12, Michele G. v. Nancy S., 279 Cal. Rptr. 212 (Ct. App. 1991) (No. A045463). The U.S. Supreme Court had used the term "natural" to refer to biological parents in its unmarried fathers and nonmarital birth cases. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 258 (1983); Caban v. Mohammed, 441 U.S. 380, 382 (1979). In addition, the term usually refers to the biological parent in the adoption context. *See, e.g.*, *In re* J.L., 884 A.2d 1072, 1076–77 (D.C. 2005).

[86] *See* Telephone Interview with Shannan Wilber, *supra* note 84.

served in parental roles, even as many of the individuals who successfully made such claims were stepparents.[87]

Even though *Nancy S.* involved an unmarried couple, the relationship between marriage and parenthood shaped arguments on both sides of the case. In order to discredit Michele's claim to functional parenthood, Carol Amyx — a local family law attorney representing Nancy, the biological mother — situated marriage as a formal boundary. She consistently noted that because Michele "is not the stepfather"[88] or "the husband of [the children's] mother," cases involving functional parents in marital families "do not support her claim to parental rights."[89] For Amyx, if marriage lost its gatekeeping function in this context, other legal strangers would threaten the rights of biological parents.[90] Michele's claim would open the door to similar claims by babysitters, nannies, and childcare providers, all of whom can "get very attached."[91] To the press, Amyx declared: "If you want to be really harsh about it, wet nurses don't get parental rights."[92] Under this view, the nonbiological mother was not even a family member; instead, she was a legal stranger with no relationship worthy of the law's protection.

In response, Achtenberg, Ettelbrick, Oppenheimer, and Wilber used the marriage-like relationship between Nancy and Michele as a way to understand the intentional and functional parent-child relationships between Michele and her children. The attorneys explained that Nancy and Michele "regarded themselves, and were regarded by others, as a married couple."[93] In fact, "[i]f the law had permitted it, they would have legally formalized their union."[94] They decided, like other couples, to have children. Their children were given Michele's family name as their last name,[95] and both Nancy and Michele were listed on

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[87] *See* BALL, *supra* note 68, at 91; Polikoff, *supra* note 12, at 497–521. And the concept of a "psychological parent" had gained prominence. *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 98 (1973); *see also* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 248, 282–83.

[88] Respondent's Brief at 24, Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1991) (No. A045463).

[89] *Id.* at 27.

[90] *See* Telephone Interview with Carol Amyx, Attorney, Law Office of Carol Amyx (June 12, 2014) (on file with the Harvard Law School Library).

[91] Kathleen Hendrix, *A Case of 2 "Moms" Tests Definition of Parenthood*, L.A. TIMES, Aug. 15, 1990, at E1.

[92] *Id.*

[93] Appellant's Opening Brief, *supra* note 85, at 2.

[94] *Id.* at 2–3.

[95] *Id.* at 3–4.

the birth certificates.[96] Their deliberate family formation, in other words, looked very much like that of married couples.[97]

Michele's lawyers suggested that even though the parties could not have had a legal marriage, they had a marriage in practical terms and thus should be treated accordingly. As the attorneys argued: "The parties in this case cannot petition for dissolution of their marriage because, under the current statutory scheme, their marriage cannot be sanctioned by the state."[98] In other words, Nancy and Michele had a marriage, even if not recognized as a legal matter, and they needed the equivalent of a divorce, with the attendant determinations of child custody and visitation.[99] If divorce were available, Michele's standing would not be in question, even though she had no biological connection to the children.[100] Married men enjoyed presumptions of parentage — a conclusive presumption in California[101] — based on marriage to the child's mother.[102] And California courts could order visitation for stepparents upon divorce regardless of whether those stepparents had adopted the children.[103] Marriage (and divorce), Michele's lawyers suggested, provided a lens through which to understand the women's parental intent and conduct and yet furnished no principled basis on which to exclude Michele's parent-child relationships.[104]

Nonetheless, the court prioritized biological and marital parenthood as a formal matter and expressed concern over opening the door to nonparents. Rejecting Michele's claim, the court explained that "expanding the definition of a 'parent' in the manner advocated

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[96] *Id.* On the relationship between marriage law and social norms, see Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000).

[97] As amicus curiae, the ACLU, including the leaders of its LGBT advocacy arm, staked out the constitutional significance of Michele's parent-child relationship by appealing to the family unit formed by the two women. *See* Brief of Amici Curiae American Civil Liberties Union Foundation, Inc. & American Civil Liberties Union Foundation of Northern California, Inc. at 1, Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1991) (No. A045463).

[98] Appellant's Opening Brief, *supra* note 85, at 12.

[99] *See* David Margolick, *Lesbian Child-Custody Cases Test Frontiers of Family Law*, N.Y. TIMES, July 4, 1990, at 1 ("[J]udges face the daunting task of handling what amount to divorces involving people who cannot legally marry."); Anne Stroock, *Gay "Divorces" Complicated by Lack of Laws*, S.F. CHRON., May 14, 1990, at A4 ("There are increasing numbers of these long-term relationships, and when they break up, there is no simple divorce.").

[100] *See* NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 80, at 25–26 ("The necessity of a pending divorce proceeding makes it virtually impossible for lesbian co-parents to use," *id.* at 26, statutes providing "visitation rights for non-biologically related adults," *id.* at 25.).

[101] CAL. EVID. CODE § 621 (West 1990) (conclusive presumption provided husband was not impotent or sterile). The revised form of this presumption is section 7540 of the Family Code. CAL. FAM. CODE § 7540 (West 2013). A rebuttable marital presumption appears in section 7611 of the Family Code. *Id.* § 7611(a).

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

[103] CAL. CIV. CODE § 4351.5 (West 1983).

[104] To the press, NCLR's Maria Gil de Lamadrid argued, "[i]f there were marriage [for homosexuals], we would not be before the court." Hendrix, *supra* note 91 (alteration in original).

by [Michele] could expose other natural parents to litigation brought by child-care providers of long standing."[105] Even though Michele had a committed relationship with the biological parent, participated in the decision to have children, and actually raised the children, the court refused to recognize her as a *legal* parent.[106]

Nancy S. was one of a handful of California cases around this time that rejected the claims of nonbiological lesbian co-parents.[107] California courts felt constrained by the lack of legislative recognition for the couple's family relationship. According to the California Court of Appeal in the 1990 *Curiale v. Reagan*[108] decision, the country's first appellate ruling on a custody dispute between a lesbian couple, "[t]he [California] Legislature ha[d] not conferred upon . . . a nonparent *in a same-sex bilateral relationship*[] any right of custody or visitation upon the termination of the relationship."[109] The logic was rooted less in the quality of the parent-child relationship and more in the lack of formal recognition for the adult relationship. In fact, the *Nancy S.* court recognized that its ruling produced a "tragic" result for the children.[110]

Similar results in the California Courts of Appeal appeared toward the end of the decade. In 1997, in *West v. Superior Court*,[111] the nonbiological co-parent argued that "since the *Nancy S.* and *Curiale* decisions were rendered," the court no doubt had become "more keenly aware of non-traditional families" such that it should see the need "to extend the protections afforded to the children of married families to the children developed in loving, nurturing but not as yet legally for-

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105 Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 (Ct. App. 1991).

106 The court refused to adopt the concept of functional parenthood, *id.* at 219, rejected claims based on doctrines of equitable estoppel, *id.* at 217–19, and *in loco parentis*, *id.* at 217, and found that the de facto parent claim failed because Nancy's custody had not been shown to be detrimental to the children, *id.* at 216–17.

107 *See, e.g.*, Curiale v. Reagan, 272 Cal. Rptr. 520 (Ct. App. 1990); Mindy Ridgway, *Biology Is Destiny? Sonoma Court Rules Only One Mom Allowed*, S.F. BAY TIMES, Feb. 10, 1994, at 6 (discussing case of Prescott and Kerry B.). Amyx also represented the biological mother in *Prescott*.

108 272 Cal. Rptr. 520.

109 *Id.* at 522 (emphasis added).

110 279 Cal. Rptr. at 219. Litigation losses produced heartrending stories of mothers torn from their children. None was more poignant than Michele's. In 1997, Nancy was killed in a car accident in Oklahoma. Her son, Micah, also in the car, was airlifted to a hospital. Michele rushed to Oklahoma. With no recognition as Micah's parent, Michele prepared to litigate to have Micah released to her. The night before her court date, a sympathetic state employee released Micah to her. Ultimately, Michele became both children's legal guardian. *See* Elaine Herscher, *Family Circle*, SFGATE (Aug. 29, 1999, 4:00 AM), http://www.sfgate.com/news/article/Family-Circle-For-Nancy-Springer-a-1991-court-2911717.php [http://perma.cc/9J3F-PMJV].

111 69 Cal. Rptr. 2d 160 (Ct. App. 1997).

malized families[,] in the best interests of the child."[112] Yet once again the court resisted, noting the legislature's continued inaction.[113]

California was not unusual. Even as courts across the country began to impose obligations on unmarried, nonbiological parents in different-sex-couple-headed families,[114] nonbiological mothers in same-sex-couple-headed families were routinely turned away.[115] In rejecting their claims, courts prioritized both marital *and* biological connections. The emphasis on marital parenthood allowed courts to distinguish between same-sex couples and married different-sex couples that included nonbiological parents. The emphasis on biology allowed courts to distinguish between same-sex couples and the paradigmatic unmarried, heterosexual parent — the unwed father at the center of both constitutional litigation and the UPA. Through a commingled focus on marriage and biology, courts drew a sharp sexual orientation–based distinction.

With nonbiological mothers particularly vulnerable upon dissolution of their same-sex relationships, it became increasingly important to secure their parental rights during the relationships. Even as the *Nancy S.* court rejected Michele's attempt to establish her parental status, it suggested that she could have obtained such status by adopting the children.[116] At that time, for intact families formed by same-sex couples, adoption constituted the only way to achieve parental recognition for the nonbiological parent.[117]

Of course, this path continued to pose challenges. The 1987 DSS policy against adoption by unmarried couples remained in effect until

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[112] *Id.* at 162.

[113] *Id.* Again, in 1999, in *Guardianship of Z.C.W.*, the court rejected a nonbiological lesbian coparent's claim to guardianship. 84 Cal. Rptr. 2d 48, 50 (Ct. App. 1999). This guardianship claim attempted to work around *Nancy S.*'s rejection of equitable parenthood. *See* Telephone Interview with Joan Hollinger, John and Elizabeth Boalt Lecturer in Residence (retired), U.C. Berkeley Sch. of Law (Jan. 15, 2015) (on file with the Harvard Law School Library).

[114] *See* Polikoff, *supra* note 12, at 497.

[115] A similar result emerged from New York around the same time as *Nancy S.* *See* Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); *see also* Nancy D. Polikoff, *The Impact of* Troxel v. Granville *on Lesbian and Gay Parents*, 32 RUTGERS L.J. 825, 843 (2001) (explaining that in the early 1990s, "legally unrecognized lesbian mothers were usually rebuffed by courts").

Eventually, in some other jurisdictions, functional-parenthood claims proved more successful. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000); Holtzman v. Knott *(In re* Custody of H.S.H.-K.*)*, 533 N.W.2d 419, 435 (Wis. 1995). On the shift toward recognition of functional parenthood in this context, see *Developments in the Law — The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2059–64 (2003).

[116] Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 n.8 (Ct. App. 1991).

[117] In the 1990s, appellate courts in some other jurisdictions approved second-parent adoptions by same-sex couples. *See, e.g.*, *In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995); Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271 (Vt. 1993). Of course, even as some states allowed same-sex couples to seek second-parent adoptions, other states maintained far-reaching bans on lesbian and gay adoption. *See* Polikoff, *supra* note 57, at 734 (discussing restrictions in Florida and Utah).

1994, when DSS announced that decisions would "be made on a case-by-case basis according to the best interest of the child."[118] But in early 1995, Republican Governor Pete Wilson ordered that the new policy be "rescinded" and the 1987 policy "reinstated."[119] At that time, support for restricting adoption by unmarried couples came from social-conservative leaders, who appealed to the importance of dual-gender parenting.[120] The Reverend Louis Sheldon, head of the Orange County–based Traditional Values Coalition, declared: "When [children] see father committed with the paycheck. When they see mother committed with the grocery list. When they see these things, they are learning the socialization process."[121] At stake in the DSS policy was not simply support for marriage, but rather the maintenance of a gender-differentiated, breadwinner/homemaker model of marriage and parenting — one that, by definition, excluded same-sex couples.

Nonetheless, with many at DSS opposed to the policy, social workers often gave judges the evidence, without the official recommendation, to grant the adoption.[122] For their part, judges continued to grant second-parent adoptions to same-sex couples. Accordingly, many nonbiological parents in same-sex relationships attained legal parental status despite a relatively hostile state-law environment.

2. Different-Sex Married Couples and Intentional Parenthood. — During the 1990s, while nonbiological parents in same-sex relation-

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118 Cal. Dep't of Soc. Servs., All-County Letter No. 94-104, at 2 (Dec. 5, 1994).

119 Cal. Dep't of Soc. Servs., All-County Letter No. 95-13 (Mar. 11, 1995); *see* Dan Morain, *Governor Overturns Policy for Adoptions*, L.A. TIMES (Mar. 14, 1995), http://articles.latimes.com/1995-03-14/news/mn-42688_1_unmarried-couples [http://perma.cc/6Y6Q-3236]. Many viewed Wilson's action as an attempt to appeal to "pro-family" conservatives as he contemplated a presidential run. *Id.* Indeed, given the Hawaii marriage litigation, same-sex marriage and parenting had become significant national issues. NeJaime, *supra* note 6, at 106.

120 After the Wilson Administration promulgated draft regulations on the topic, DSS held hearings around the state. *See* David Reyes, *Adoption Proposal Sparks Sharp Debate*, L.A. TIMES (Sept. 6, 1996), http://articles.latimes.com/1996-09-06/news/mn-41066_1_adoption-agencies [http://perma.cc/YSB9-U4QZ]. In response to the proposed regulations, Assembly Member Kevin Murray introduced a bill explicitly authorizing adoption by unmarried couples. Assemb. B. 53, 1997–1998 Leg., Reg. Sess. (Cal. 1996). The bill eventually died. Official California Legislative Information, Complete Bill History: A.B. No. 53, http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0051-0100/ab_53_bill_19980202_history.html [http://perma.cc/SQ2U-ADXQ] (noting that the bill died on inactive file Feb. 2, 1998). Wilson's proposed regulations never became final, largely because of the actions of DSS officials opposed to the policy. *See* George, *supra* note 77 (manuscript at 49). But the 1995 letter remained effective until 1999, when, under new Democratic Governor Gray Davis, DSS adopted a policy allowing unmarried couples to be recommended for adoption. Cal. Dep't of Soc. Servs., All County Letter No. 99-100 (Nov. 15, 1999).

121 Reyes, *supra* note 120 (alteration in original).

122 *See Adoption Options for Same-Sex Couples: An Interview with California Adoption Lawyer Emily Doskow*, 20 FAM. ADVOC. 41, 43 (1997); Telephone Interview with Emily Doskow, *supra* note 78. On the role of government social workers in securing parental rights for gays and lesbians, see George, *supra* note 77; Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 361–62 (2015).

ships struggled to achieve legal parentage and found themselves limited to a controversial adoption process, California courts began to expand parentage principles to address emerging issues in the context of different-sex married couples using ART. The UPA itself remained largely unchanged and therefore regulated only AID. Yet newer forms of ART, including gestational surrogacy, raised novel questions of legal motherhood.[123] California courts began to interpret and apply the UPA in these unforeseen situations by looking to *intent*, essentially adapting the logic of the donor-insemination provision to new scenarios. For these courts, marriage provided a way to uncover intent, and intent provided a way to determine parentage: because the married couple deliberately set the procreative process in motion, they would be deemed the resulting child's legal parents.

Surrogacy became the subject of nationwide debate with the infamous *In re Baby M*[124] case, in which the New Jersey Supreme Court in 1988 found surrogacy agreements unenforceable.[125] In response, states around the country moved to regulate surrogacy.[126] California saw efforts both to allow and to bar surrogacy, but the state failed to enact any surrogacy law.[127] Accordingly, when in 1993 the California Supreme Court confronted a surrogacy dispute, it took up the issue without legislative guidance.[128] Unlike *Baby M*, which involved tradi-

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[123] In 1988, the Uniform Law Commission promulgated the Uniform Status of Children of Assisted Conception Act, which included two alternatives for surrogacy: one provided for regulation of agreements, and the other declared such agreements void. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT at Prefatory Note & § 5 (UNIF. LAW COMM'N 1988).

[124] 537 A.2d 1227 (N.J. 1988).

[125] *Id.* at 1234.

[126] On anti-surrogacy activism, see Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, LAW & CONTEMP. PROBS., Summer 2009, at 109, 117–20. For influential arguments against the commercialization of surrogacy and the enforceability of surrogacy contracts, see MARTHA A. FIELD, SURROGATE MOTHERHOOD (1988); MARGARET JANE RADIN, CONTESTED COMMODITIES 140–48 (1996); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1928–36 (1987).

[127] In 1992, Governor Wilson vetoed a bill that would have allowed and regulated surrogacy agreements. *See* S.B. 937, 1991–1992 Leg., Reg. Sess. (Cal. 1992); Governor's Veto Message to Senate on Senate Bill No. 937 (Sept. 26, 1992), in 4 JOURNAL OF THE SENATE: LEGISLATURE OF THE STATE OF CALIFORNIA 8315 (1992). Before that, Assembly Member Sunny Mojonnier unsuccessfully attempted to ban surrogacy in California. *See* Letter from Sunny Mojonnier, Assemblywoman, to John K. Van de Kamp, Att'y Gen. of Cal., at 1 (Apr. 6, 1988); *id.* at 2 (describing the attached formal petition). In 1990, a legislative committee studying surrogacy suggested, on the recommendation of its expert advisory panel, that "surrogacy contracts [be] void and unenforceable." JOINT LEGIS. COMM. ON SURROGATE PARENTING, COMMERCIAL AND NONCOMMERCIAL SURROGATE PARENTING 13 (Nov. 1990). Earlier, in 1983, DSS had issued an all-county letter concluding that parentage through surrogacy required adoption. *See* Cal. Dep't of Soc. Servs., All-County Letter No. 83-131 (Dec. 30, 1983).

[128] *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

tional surrogacy, the California Supreme Court addressed gestational surrogacy, where gestation is detached from genetics.[129]

In *Johnson v. Calvert*,[130] an agreement between a married couple and a gestational surrogate fell apart. In the ensuing litigation, Crispina, the genetic mother, along with Mark, her husband and the biological father, claimed to be the legal parents to the exclusion of Anna, the (surrogate) birth mother.[131] Given that the validity of surrogacy agreements remained unclear, Crispina did not rely solely on enforcement of the agreement and instead used her genetic tie as a basis for parentage. Each woman claimed (exclusive) parentage under the UPA based on either her gestational or her genetic connection.[132] For its part, the ACLU of Southern California — in an amicus curiae brief drafted by Jon Davidson, who would eventually move to Lambda Legal — urged the court to recognize both women's parental rights.[133] But the court resisted, explaining that "for any child California law recognizes only one natural mother."[134]

Ultimately, the court rooted parentage in the intended parents, Crispina and Mark.[135] The court attached parentage to the married couple without expressly determining the enforceability of their surrogacy contract, instead merely using the agreement as evidence of intent.[136] Even as the court rested its holding on the continued rele-

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[129] *See id.* at 778.

[130] 851 P.2d 776.

[131] *Id.* at 778.

[132] *Id.* at 779.

[133] Brief *Amicus Curiae* of the American Civil Liberties Union of Southern California at 4, *Johnson*, 851 P.2d 776 (No. S023721) ("*[B]oth* Anna J. and Crispina C. hold maternal rights and responsibilities toward the child who would not have been born had not both women been involved."). LGBT rights organizations did not participate in *Johnson*. The ACLU of Southern California's briefs derived from the organization's women's rights section, but were drafted by Davidson, an attorney with the organization's Lesbian and Gay Rights Project. Davidson was cognizant of the case's potential impact on the families of same-sex couples. *See* Interview with Jon Davidson, Legal Dir., Lambda Legal, in L.A., Cal. (May 12, 2014) (on file with the Harvard Law School Library). In arguing that all three individuals should potentially be considered parents, Davidson appealed to the increase in "'step-parent' and other 'non-traditional' families," Brief *Amicus Curiae* of the American Civil Liberties Union of Southern California at 2, Anna J. v. Mark C., 286 Cal. Rptr. 369 (Ct. App. 1991) (No. G010225), and cited increases in "unmarried cohabitation among both heterosexuals and homosexuals," *id.* at 2 n.3 (quoting Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1640 (1991)).

[134] *Johnson*, 851 P.2d at 781.

[135] *See id.* at 782 ("[S]he who intended to procreate the child — that is, she who intended to bring about the birth of a child that she intended to raise as her own — is the natural mother under California law.").

[136] *See id.* at 783 ("In deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy."). The UPA also specified, in the provisions relating to paternity, that if two or more presumptions arise, "the presumption which

vance of biological or genetic parentage, it articulated a principle of intent that could render biology less important.

Eventually, the California courts extended *Johnson*'s intentional-parenthood principle to nonbiological, nongenetic parentage. In 1998, the California Court of Appeal in *In re Marriage of Buzzanca*[137] determined that a divorcing husband and wife were the parents of a child born through ART to whom neither parent was biologically or genetically related.[138] The couple had used anonymous sperm and egg donors and a gestational surrogate, none of whom claimed parental status.[139] In seeking a divorce after conception but before the child's birth, John Buzzanca disclaimed any parental responsibilities, arguing that he was not the child's father; John also argued that there was no legal basis to render his wife a parent, even though she willingly accepted her parental obligations.[140]

The trial court had left the child without legal parents, a result that clearly disturbed the reviewing court.[141] In reversing, the appellate court relied on *Johnson* to stress the couple's "initiating role as the intended parents in [the child's] conception and birth."[142] To maintain the private welfare function of the family, the court detached *Johnson*'s notion of intent from biology. Identifying the Buzzancas as parents allowed the court not only to grant parental rights but also to impose parental obligations.

Marriage served as a way to understand and legally recognize the intent to parent. The court extended the rationale of the alternative insemination statute, section 7613, to the Buzzancas:

> Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband *and* wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf.[143]

Within the logic of the statute, the biological connection receded in importance because of the marital family inside which the decision to become a parent took place. The statute could be put to gender-neutral use — identifying a father *and* mother — even as it retained its marital-status distinction.

In fact, the court felt compelled to distinguish, based on marriage, John Buzzanca from nonbiological lesbian co-parents. John had com-

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on the facts is founded on the weightier considerations of policy and logic controls." CAL. CIV. CODE § 7004(c) (West 1993) (later CAL. FAM. CODE § 7612(b) (West 2013)).

137 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

138 *Id.* at 282.

139 *See id.*

140 *Id.*

141 *See id.*

142 *Id.* at 293.

143 *Id.* at 282.

pared himself to the mothers who were denied parental rights in the California Courts of Appeal in cases like *Nancy S.* and *West*.[144] Yet, for the *Buzzanca* court, because those cases "involve[d] *non* married couples at the time of the artificial insemination, they are distinguishable."[145] The court was "dealing with a man and woman who were married at the time of conception and signing of the surrogacy agreement, and [was] reasoning from a statute, section 7613, which contemplates parenthood on the part of a married man without biological connection to the child borne by his wife."[146] Even as the court suggested that it was unclear whether section 7613 would apply in the nonmarital context,[147] marriage provided the legal distinction that allowed the result in *Buzzanca* to exist alongside the results in *Nancy S.* and *West*.[148]

Nonetheless, as the next section shows, LGBT advocates would leverage *Johnson* and *Buzzanca* by showing how same-sex couples acted like married couples in ways that suggested principles of intent should apply equally — regardless of the formal recognition of the parents' relationship. Accordingly, advocates would draw on marital parenthood to extend intentional and functional parenthood to nonmarital families.

B. 1999–2003: Securing Rights for Nonmarital, Nonbiological Parents

While lawyers representing same-sex parents continued to pursue second-parent adoptions, they worried about the validity of that mechanism in the event of a challenge in the appellate courts.[149] And setbacks on second-parent adoption in other states drove LGBT advocates to pursue alternative paths to parental rights.[150] Accordingly,

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144 *See* Respondent/Petitioner's Brief, *Buzzanca*, 72 Cal. Rptr. 2d 280 (Nos. G022147, G022157), 1997 WL 33560808, at *7–9.

145 72 Cal. Rptr. 2d at 287 n.11.

146 *Id.*

147 *See id.*

148 While neither NCLR nor Lambda Legal participated in *Buzzanca*, the ACLU of Southern California submitted an amicus brief authored primarily by UCLA professor Seana Shiffrin, in coordination with the ACLU of Southern California's Taylor Flynn and Mark Rosenbaum. That brief focused on the child's interest in parental relationships and support, and also argued that the intentional-parenthood principles from *Johnson* should govern. *See* Brief of Amicus Curiae, *Buzzanca*, 72 Cal. Rptr. 2d 280 (Nos. G022147, G022157) (on file with the Harvard Law School Library).

149 For couples initially turned down, lawyers pursued subsequent petitions with different judges. Advocates hoped that the more adoptions they accumulated, the more reluctant an appellate court would be to disturb those established parent-child relationships. Telephone Interview with Shannon Minter, *supra* note 59.

150 The Wisconsin Supreme Court's decision recognizing a functional-parenthood claim in *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419 (Wis. 1995), came after the court rejected second-parent adoption. *See* Georgina G. v. Terry M. (*In re* Angel Lace M.), 516 N.W.2d 678 (Wis. 1994). And the Colorado courts began to grant parentage judgments under the

even as they continued to seek and defend adoptions in California, lawyers began to secure parentage judgments under the UPA. They did so first by relying on the principles of intentional parenthood that emerged from *Johnson* and *Buzzanca*, and then by capitalizing on the principles of functional parenthood that emerged from the recognition of unmarried, nonbiological fathers. Throughout this work, lawyers pointed to same-sex couples' marriage-like relationships to identify and explain their parental intent and conduct.

1. Intentional Parenthood and Same-Sex Couples Under the UPA. — While LGBT advocates had in the early 1990s disclaimed resort to the UPA to establish parental rights for nonbiological lesbian mothers, by the end of the decade they shifted course, finding new promise in the UPA.[151] Lawyers at NCLR, in conjunction with leading private family law practitioners in California organized by NCLR into a group called the Brain Trust, developed arguments for lesbian parentage based on the UPA.[152] The UPA was meant to erase distinctions between marital and nonmarital children and to identify unmarried fathers. In addition, it provided that, "[i]nsofar as practicable, the provisions . . . applicable to the father and child relationship apply" to establishing the mother-child relationship.[153] Based on these features, LGBT advocates claimed that presumptions applicable to *married fathers* should also apply to *unmarried mothers*. Accordingly, they argued that the general principles of intentional parenthood espoused in *Johnson* and *Buzzanca* should apply regardless of marital status, and that section 7613, the alternative insemination statute, should apply in a marital-status- and gender-neutral fashion.

These UPA arguments met with success. As the 1990s closed, the Brain Trust lawyers secured uncontested parentage judgments based on the concept of intentional parenthood.[154] Their first attempts, in 1999, leveraged biological connections to map more neatly onto *Johnson* and to seem in some ways less radical than *Buzzanca*.[155] Deborah Wald, a member of the Brain Trust, filed the first uncontested petition in a "co-maternity" situation, in which one woman was the gestational mother and the other was the genetic mother.[156] She submitted a pro-

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state's UPA after a state appellate court rejected a claim to second-parent adoption. *See* Polikoff, *supra* note 57, at 732–33 (discussing *In re* G.P.A., No. 99-JV-440 (D. Colo. Nov. 10, 1999)).

151 Telephone Interview with Kate Kendell, *supra* note 59.

152 Telephone Interview with Shannon Minter, *supra* note 59; Telephone Interview with Deborah Wald, Attorney, Wald Law Grp. (June 29, 2014) (on file with the Harvard Law School Library).

153 CAL. FAM. CODE § 7650(a) (West 2013).

154 Telephone Interview with Shannon Minter, *supra* note 59.

155 Telephone Interview with Deborah Wald, *supra* note 152.

156 *Id.*

posed order that relied on *Johnson* and *Buzzanca* to support the UPA claim.[157]

In May of 1999, NCLR founder Donna Hitchens, by then a San Francisco Superior Court judge, granted the judgment of parentage — the first of its kind.[158] Signing the order, Judge Hitchens recognized both women as mothers under the UPA:

> [The gestational mother] is a legal parent because she is the birth mother. In addition, she consented to and intended to give birth and raise the child with [the genetic mother]. . . . [The genetic mother] is also a legal parent because of her genetic link to the child, her intention to create this child and to raise the child with [the gestational mother], and her consent to the medical procedures which made it possible.[159]

The reasoning pressed by Wald and accepted by Judge Hitchens leveraged each woman's gestational or genetic connection but also pushed intentional parenthood in a way that could extend to nonbiological mothers. And it grafted the situation onto the logic of section 7613, noting that the genetic mother "consented to the medical procedures."[160] The women were the legal mothers not only because they had a gestational or genetic connection to the child, but also because they intended to have a child and to raise that child together.

After that, LGBT advocates pursued UPA arguments in the more common scenario — on behalf of nonbiological mothers who consented to their unmarried partners' insemination.[161] Advocates pressed this position not only in uncontested UPA actions, but also in settings in which state actors pushed back. They achieved an important victory at the California Board of Equalization, where NCLR represented Helmi Hisserich after she claimed head-of-household filing status on her personal income tax return.[162] The specific issue involved whether Hisserich could identify as her dependent the child she was raising with her registered domestic partner, Tori Patterson; Patterson had conceived the child through donor insemination.[163] NCLR's Shannon

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157 Statement of Decision, *In re* [Genetic Mother and Gestational Mother], No. [redacted] (S.F. Super. Ct. May 25, 1999), *reprinted in* Deborah Wald, Establishing Lesbian Parentage Under the Uniform Parentage Act, Materials For: Advising the Client Who Wants to Have a Child, Lavender Law, Vol. II (Oct. 22–24, 1999) (on file with the Harvard Law School Library).

158 *Id.*; *see also* Telephone Interview with Donna Hitchens, *supra* note 75.

159 Statement of Decision, *supra* note 157, at 6.

160 *See id.* at 4.

161 Telephone Interview with Deborah Wald, *supra* note 152. Wald filed the first of such actions in 1999. *Id.* Wald shared sample pleadings with family law attorneys from across the country at the National LGBT Bar Association's 1999 Lavender Law conference. *See* Memorandum of Points & Authorities in Support of Petition to Establish Parental Relationship (Draft), *in* Wald, *supra* note 157.

162 *See In re* Hisserich, No. 99A-0341, 2000 WL 1880484 (Cal. St. Bd. Equalization Nov. 1, 2000).

163 *Id.* at *1.

Minter argued that Hisserich, the nonbiological parent, was a parent based on the "doctrine of intentional parenthood" embraced in *Johnson* and *Buzzanca*.[164]

In its 2000 decision, the Board of Equalization accepted this position. In doing so, it first noted that Hisserich and Patterson were "unable to marry under California law," but were "registered as domestic partners with the city, county, and state."[165] The Board then focused on the parental intent and conduct seen in the couple's family formation:

> [T]hey maintained a committed relationship for a substantial period of time prior to the decision to have a child; they decided to have a child together with the specific *intent* to rear the child together; they voluntarily and knowingly consented to the artificial insemination of Ms. Patterson with a licensed California sperm bank under the direction of a licensed California physician; appellant further exhibited her *intent* to be Madeline's parent by initiating adoption proceedings following Madeline's birth; and they lived together, *conducted* themselves, and *held themselves out* to the community as a family following the birth of Madeline.[166]

The relationship between Hisserich and Patterson, while of no independent legal force with regard to their child, provided evidence of their intent to co-parent. In other words, their unmarried relationship and their joint decision to have and raise a child within that relationship brought them within the intent-based principles articulated in *Johnson* and *Buzzanca*, which had involved married couples, and section 7613, which applied to husbands and wives.

A vigorous dissent focused on the importance of "either a blood relationship or a specifically defined legal relationship"[167] and impugned the majority for "promot[ing] a public policy that discourages marriage and legal adoption."[168] For the dissenters, recognition of parentage based on marriage-like conduct outside of marriage threatened the centrality of marriage.

2. Functional Parenthood and Nonmarital, Nonbiological Parents Under the UPA. — While section 7613, the alternative insemination statute, attached rights to *married*, nonbiological parents based on intent to parent, a different UPA provision began to attach parental rights to *unmarried*, nonbiological parents based on parental conduct.[169] The UPA's "holding out" provision, section 7611(d), was designed for unmarried, biological fathers. It provided that one is a pre-

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164 *Id.* at *2.

165 *Id.* at *4.

166 *Id.* (emphases added).

167 *Id.* at *6 (dissenting opinion of Chairman Andal & Vice Chairman Parrish).

168 *Id.* at *8.

169 *See* CAL. FAM. CODE § 7611(d) (West 2014) (originally CAL. CIV. CODE § 7004(a)(4) (West 1993)).

sumed father if "he receives the child into his home and openly holds out the child as his *natural* child."[170] While the provision focused on unmarried fathers' parental conduct, it seemed — with the term "natural" — constrained by biology.[171]

A gender-neutral reading of section 7611(d) could help lesbian coparents only if the presumption could capture purely functional, rather than biological, parentage. On this point, a case from dependency court involving a heterosexual, unmarried, nonbiological father offered an important opportunity for LGBT advocates. In *In re Nicholas H.*,[172] Thomas — who at all times admitted that he had no biological connection to Nicholas — claimed to be Nicholas's father, over the objection of Kimberly — Nicholas's mother and Thomas's exgirlfriend.[173] In 2001, the California Court of Appeal rejected Thomas's conduct-based claim to parentage because "the presumption set forth in section 7611 is a presumption that a man is the natural, *biological* father of the child in question."[174] The case then rose to the California Supreme Court.[175]

Thomas's court-appointed lawyer, Frank Free, sought out U.C. Berkeley law professor Joan Hollinger for assistance.[176] Professor Hollinger connected Free with NCLR.[177] While the situation arose in the context of a different-sex relationship, Minter and Wald, acting on behalf of NCLR, stepped in and drafted the briefs on behalf of Thomas, the nonbiological father.[178] From behind the scenes, they pushed concepts at the California Supreme Court that would accrue to the benefit of same-sex parents.[179]

The lawyers stressed the family unit formed by Thomas, Kimberly, and Nicholas. Thomas "moved in" with the mother "before [she] gave

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170 *Id.* (emphasis added).

171 The Revised UPA promulgated by the Uniform Law Commission in 2000 removed the "holding out" provision. *See* UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2000). Through the work of NCLR attorneys Shannon Minter and Courtney Joslin and U.C. Berkeley professor Joan Hollinger, the 2002 version restored the "holding out" provision. Interview with Courtney Joslin, Professor of Law, U.C. Davis School of Law, in Minneapolis, Minn. (May 29, 2014) (on file with the Harvard Law School Library); *see* UNIF. PARENTAGE ACT § 204 cmt. (UNIF. LAW COMM'N 2002).

172 110 Cal. Rptr. 2d 126 (Ct. App. 2001).

173 *Id.* at 128.

174 *Id.* at 141 (emphasis added).

175 *See In re* Nicholas H., 46 P.3d 932 (Cal. 2002).

176 Telephone Interview with Joan Hollinger, *supra* note 113.

177 *Id.*

178 Telephone Interview with Shannon Minter, *supra* note 59; Telephone Interview with Deborah Wald, *supra* note 152. Hollinger submitted an amicus curiae brief in the case. *See* Brief of Amici Curiae Legal Services for Children & Joan Heifetz Hollinger, Individually & as Director of the Child Advocacy Clinic of the University of California, Berkeley School of Law in Support of the Minor, *Nicholas H.*, 46 P.3d 932 (No. S100490).

179 Telephone Interview with Deborah Wald, *supra* note 152.

birth to Nicholas," "gave [her] emotional and financial support through the rest of the pregnancy," and "[t]hrough most of the first four years of Nicholas's life, the three lived together as a nuclear family."[180] The marriage-like adult relationship and the family formation it evidenced helped to make visible the functional parent-child relationship. While "not biologically linked to the child," Thomas "nevertheless ha[d] been the child's father in every social and cultural sense and ha[d] demonstrated a commitment to continuing to raise the child."[181]

Minter and Wald emphasized the importance of conduct, even in the presence of biological relationships. In fact, they recast cases on unmarried fathers, including the Supreme Court's cases from the 1970s and 1980s, as functional, rather than biological, parentage cases. Biology, they explained, is generally only the basis for, not the realization of, parental rights for unmarried fathers: "[A] man who proves himself through genetic testing to be the biological father has no parental rights unless . . . he '. . . demonstrates a full commitment to his parental responsibilities.'"[182] The lawyers attempted to transform biology (for unmarried parents) from a necessary starting point to an increasingly immaterial feature.

In response, the California Supreme Court, in its 2002 *Nicholas H.* decision, accepted Thomas's claim to parentage under section 7611(d) and held that Thomas's acknowledgement that he was not the biological father did not automatically rebut the parentage presumption.[183] The court sought to validate the strong relationship Nicholas had formed with his nonbiological father and to provide a means of support in the absence of the biological father claiming rights or responsibilities.[184] Accordingly, the meaning of "natural" appeared contingent, capable of describing a functional, rather than biological, parent, especially in service of the privatization of support and the recognition of two legal parents.[185] This marked an important turn from the general understanding that had formed the basis of the UPA and guided years of litigation under the statute.[186]

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[180] Petitioner Thomas G.'s Opening Brief on the Merits at 2, *Nicholas H.*, 46 P.3d 932 (No. S100490) [hereinafter Thomas G.'s Opening Brief].

[181] Petition for Review of Decision of the Court of Appeal First Appellate District at 17, *Nicholas H.*, 46 P.3d 932 (No. S100490).

[182] Thomas G.'s Opening Brief, *supra* note 180, at 32 (quoting Adoption of Kelsey S., 823 P.2d 1216, 1236 (Cal. 1992)).

[183] 46 P.3d at 936.

[184] *See id.* at 937–38.

[185] *See* June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 3, 8 (2007).

[186] For two earlier decisions recognizing nonbiological fathers under section 7611(d), see *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294 (Ct. App. 2000); and *Steven W. v. Matthew S.*, 39 Cal. Rptr. 2d 535 (Ct. App. 1995).

While LGBT advocates' uncontested UPA actions included both intent- and conduct-based arguments before *Nicholas H.*,[187] that decision provided substantial new support to advocates' section 7611(d) claims on behalf of lesbian co-parents.[188] Those claims were bolstered by two appellate rulings in non-LGBT scenarios that affirmed the presumption's gender-neutral application.[189]

In *In re Karen C.*,[190] a married couple gave their newborn baby, Karen, to Leticia, who then raised the child as her own.[191] The juvenile court had denied Leticia's claim that a legal mother-child relationship existed, reasoning that "the law does not provide that a woman who is neither a child's birth mother nor a child's genetic mother may be the child's mother."[192] But in 2002, the appellate court vacated that decision. Relying on the UPA's instruction that paternity statutes apply "[i]nsofar as practicable" to mother-child relationships,[193] the court held that "the decision reached in *Nicholas H.* applies with equal force to a woman, as a presumed mother."[194]

A year later, in *In re Salvador M.*,[195] the California Court of Appeal affirmed the principle that the "holding out" presumption can apply to a nonbiological mother. In that case, Monica had raised her much younger half-brother, Salvador, as her own child, after their mother's death.[196] Quoting *Nicholas H.*, the court explained that a "familial relationship . . . resulting from years of living together in a purported parent/child relationship[] is 'considerably more palpable than the biological relationship.'"[197] Not only did the *Karen C.* and *Salvador M.* courts find that the "holding out" presumption can apply to nonbiological mothers, but they did so outside the context of marriage-like relationships. In this way, even as courts routinely rea-

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187 *See* Memorandum of Points & Authorities in Support of Petition to Establish Parental Relationship, *In re* Bio Mom & Non-Bio Mom (Nov. 2000) (redacted version on file with the Harvard Law School Library) (relying on *Steven W.*, 39 Cal. Rptr. 2d 535, and *Brian C.*, 92 Cal. Rptr. 2d 294); *see also* Email from Emily Doskow to author (July 17, 2014, 9:42 AM) (on file with the Harvard Law School Library).

188 Another case, *In re Jesusa V.*, 118 Cal. Rptr. 2d 683 (Ct. App. 2002), *rev'd in part on other grounds*, 85 P.3d 2 (Cal. 2004), also provided support by favoring a stepfather, under section 7611(d), over the biological father.

189 *In re* Salvador M., 4 Cal. Rptr. 3d 705 (Ct. App. 2003); *In re* Karen C., 124 Cal. Rptr. 2d 677 (Ct. App. 2002). Section 7611(d) is now written in gender-neutral terms. *See* CAL. FAM. CODE § 7611(d) (West 2014) ("The presumed parent receives the child into his or her home and openly holds out the child as his or her natural child.").

190 124 Cal. Rptr. 2d 677.

191 *Id.* at 678.

192 *Id.*

193 *Id.* at 680 (alteration in original).

194 *Id.* at 677.

195 4 Cal. Rptr. 3d 705 (Ct. App. 2003).

196 *Id.* at 706.

197 *Id.* at 708 (quoting *In re* Nicholas H., 46 P.3d 932, 938 (Cal. 2002)).

soned in terms of marriage-like relationships, such relationships did not formally cabin the presumption's reach.

LGBT advocates leveraged *Nicholas H.*, *Karen C.*, and *Salvador M.* to secure parentage judgments on behalf of lesbian couples, but they were still navigating uncharted waters. The validity of same-sex couples' UPA judgments and the substantive arguments on which they were based would eventually be challenged in the appellate courts. First, though, LGBT advocates had to defend the second-parent adoption process.

3. Cementing Second-Parent Adoption. — Same-sex couples in California continued to obtain second-parent adoptions throughout the 1990s, even as DSS policy opposed the practice until 1999.[198] Even then, the legal status of second-parent adoption remained unclear, since under the state's adoption laws only stepparents had the explicit ability to adopt without termination of the custodial parent's rights. Accordingly, LGBT advocates were eventually forced to defend second-parent adoption in the appellate courts.

In *Sharon S. v. Superior Court*,[199] the legal mother, Sharon, sought to remove her consent from an adoption petition that she and her same-sex partner, Annette, had filed.[200] The couple had executed an earlier second-parent adoption for their first child, but separated while the adoption petition for their second child was pending.[201] Sharon's attorneys made arguments that bled outside the bounds of the specific adoption at issue, claiming that the second-parent adoption procedure itself was legally unauthorized. The 2001 decision of the California Court of Appeal accepting that argument[202] threatened not only the earlier adoption completed by Sharon and Annette, but also the hundreds of adoptions that had been granted throughout the state up to that point, including some to LGBT advocates themselves.[203]

Just as with the earlier parental rights disputes, the relationship between marriage and parenthood shaped the litigation. Those seeking to block lesbian and gay parental rights drew sharp marital status–based distinctions. Sharon's attorneys argued that a "primary difference between [stepparent adoption] and the instant case is marriage, which is prohibited for lesbian couples."[204] Opposition to second-parent adoption came not only from family law practitioners, but also

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198 *See* Cal. Dep't of Soc. Servs., All County Letter No. 99-100 (Nov. 15, 1999) (rescinding a previous categorical prohibition on recommending such adoptions).

199 73 P.3d 554 (Cal. 2003).

200 *Id.* at 558–59.

201 *Id.*

202 *See* Sharon S. v. Superior Court, 113 Cal. Rptr. 2d 107 (Ct. App. 2001).

203 *See* Telephone Interview with Deborah Wald, *supra* note 152.

204 Answer to Petition for Review at 22, *Sharon S.*, 73 P.3d 554 (No. S102671).

from social-conservative activists aligned against LGBT rights. A group of advocates defending Proposition 22, the 2001 California voter initiative that statutorily banned recognition of same-sex marriage,[205] submitted an amicus curiae brief. It argued that "two women may not legally marry in this state,"[206] but allowing second-parent adoption "would have the practical effect of treating Annette as a 'spouse.'"[207] Through this lens, second-parent adoption (unlawfully) eroded the line between marital and nonmarital parents.

In response, lawyers at the leading LGBT legal organizations, participating as amici curiae and assisting Annette's counsel,[208] embraced a robust model of nonmarital family formation, yet connected nonmarital families to marital families. "Second-parent adoptions," the advocates explained, "follow the same legal path" as stepparent adoptions.[209] Through this lens, same-sex couples merely sought a form of family recognition made available to married couples with nonbiological parents. Given that same-sex couples acted like married couples — indeed, Sharon and Annette "lived together in a committed domestic relationship for more than a decade"[210] — the nonrecognition of second-parent adoption seemed arbitrary. In fact, LGBT advocates argued that to refuse to extend stepparent adoption to unmarried couples "would raise serious constitutional questions" by discriminating against children based on their parents' marital status.[211]

Nonetheless, the analogy to stepparent adoption was complicated by the legislature's recent extension of that mechanism to registered domestic partners, most of whom were same-sex couples.[212] Social-

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[205] CAL. FAM. CODE § 308.5 (West 2004), *invalidated by In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). While the Family Code already included a different-sex marriage requirement, the Proposition responded to developments around same-sex relationship recognition in Hawaii and Vermont. *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1260 (2010).

[206] Amicus Curiae Brief of Proposition 22 Legal Defense & Education Fund in Support of Sharon S. at 7, *Sharon S.*, 73 P.3d 554 (No. S102671) [hereinafter Prop 22 Brief].

[207] *Id.* at 8. As Professor Nancy Polikoff has shown, same-sex couples' adoption rights suffered setbacks across the country as the issue became entangled, for social conservatives, with partnership recognition. *See* Polikoff, *supra* note 57.

[208] Telephone Interview with Shannon Minter, *supra* note 59.

[209] Brief of *Amici Curiae* Children of Lesbians & Gays Everywhere, et al., in Support of Neither Party at 9, *Sharon S.*, 73 P.3d 554 (No. S102671) [hereinafter COLAGE Brief]. Children of Lesbians and Gays Everywhere (COLAGE) grew out of the 1990 conference of Gay and Lesbian Parents Coalition International (GLPCI). The ACLU, Lambda Legal, and NCLR joined the COLAGE brief as parties, and lawyers from those organizations were the attorneys of record.

[210] *Id.* at 4.

[211] *Id.* at 26 n.21.

[212] Assemb. B. 25, 2001–2002 Leg., Third Reading (Cal. 2001); Domestic Partnerships, ch. 893, 2001 Cal. Stat. 5634 §§ 5–8 (amending CAL. FAM. CODE §§ 9000, 9002, 9004, 9005 (West 2013)). Assembly Bill (AB) 25 built on the modest domestic partnership regime established in 1999. *See* Cummings & NeJaime, *supra* note 205, at 1258; *see also* Grace Ganz Blumberg, *The Regulariza-*

conservative advocates opposed both second-parent adoption and the extension of stepparent adoption to domestic partners.[213] For them, both violated Proposition 22 by treating same-sex couples like spouses, thus reducing the significance of marriage and creeping down the path to same-sex marriage.[214]

For their part, LGBT advocates defended both second-parent and stepparent adoption. To support the former, they appealed to robust notions of functional parenthood beyond marriage and domestic partnership. "There are many California children," they argued, "whose functional parents are neither legal spouses nor registered domestic partners. For example, a child may benefit greatly from adoption by a grandmother or aunt who is jointly raising a child with a birth parent who is disabled or terminally ill."[215] Even as second-parent adoption replicated stepparent adoption, it expanded the reach of functional parenthood beyond those in legally recognized, coupled relationships.

In its 2003 *Sharon S.* decision, the California Supreme Court approved the method of second-parent adoption.[216] Crucially, the legislature's extension of stepparent adoption to registered domestic partners supported, rather than undermined, the court's conclusion. In fact, the court explained, stepparent adoption for domestic partners "simply streamlines the adoption process for a subset of those who already were accessing second parent procedures."[217] In embracing second-parent adoption, the court, for the first time, accepted the idea that children could have two legal parents of the same sex.

Even with this important victory, the analogy to stepparent adoption would only do so much work for LGBT advocates. The stepparent family differs from the intentional family initiated by many same-sex couples using alternative insemination.[218] While stepparent adoptions generally recognize subsequent families formed by a legal parent and another adult, second-parent adoptions, as LGBT advo-

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tion of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State, 76 NOTRE DAME L. REV. 1265, 1280 (2001).

213 *See* Prop 22 Brief, *supra* note 206, at 1–2.

214 Before passage of AB 25, opponents, pointing specifically to the parental recognition provided by the legislation, registered their disapproval of the "expan[sion of] benefits to domestic partners in such a way as to further blur the lines between those associations and marriage." Letter from Cal. Catholic Conference (June 28, 2001), *quoted in* Assemb. B. 25, 2000–2001 Leg., Third Reading (Cal. 2001). After enactment, the Prop 22 Legal Defense and Education Fund unsuccessfully challenged the law in court. *See* Knight v. Schwarzenegger, Nos. 03AS05284, 03AS07035, 2004 WL 2011407 (Cal. Super. Ct. Sept. 8, 2004).

215 COLAGE Brief, *supra* note 209, at 13.

216 Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003).

217 *Id.* at 572.

218 *See* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 205–06 (2009).

cates noted in *Sharon S.*, were used to "strengthen families in which two adults have loved and cared for a child, *usually since birth*, and have both functioned in every way as parents."[219] Same-sex co-parents, quite reasonably, resented having to adopt their own children.[220] Accordingly, advocates would continue to pursue other routes, including through the UPA, to secure equal treatment of families formed by same-sex couples. Eventually, their arguments based on the UPA made their way to the California Supreme Court.

C. 2004–2005: Statewide Recognition of Intentional and Functional Parenthood Under the UPA for Same-Sex Couples

In 2004, three lesbian parenting cases — *K.M. v. E.G.*,[221] *Elisa B. v. Superior Court*,[222] and *Kristine H. v. Lisa R.*[223] — made their way simultaneously to the California Supreme Court. The cases, all of which arose out of relationship dissolution, posed related but distinct parentage issues: In *K.M.*, a genetic mother claimed parentage over the objection of her former partner, the gestational mother. In *Elisa B.*, a nonbiological mother denied her parental obligations after the county attempted to seek child support from her. And in *Kristine H.*, a biological mother challenged the validity of a pre-birth judgment naming her and her partner as legal parents of their child. While the court had not reviewed any of the lesbian co-parent cases in the 1990s, it was now set to confront the issue, though through the UPA rather than through equitable theories.

To the court, lawyers urging recognition of same-sex parents appealed to marriage and marriage-like adult relationships to frame same-sex parenting. Yet they did so to secure parental recognition without regard to biology, gender, sexual orientation, or marital (or domestic-partner) status.[224] The court handed down decisions in the cases on the same day in 2005, adopting intentional and functional principles of parenthood to recognize the rights of same-sex parents under the UPA.

1. "Co-Maternity." — K.M. provided her ova, which were fertilized with sperm from an anonymous donor, and the resulting embryos

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[219] COLAGE Brief, *supra* note 209, at 1 (emphasis added).

[220] *See* Telephone Interview with Deborah Wald, *supra* note 152.

[221] 117 P.3d 673 (Cal. 2005).

[222] 117 P.3d 660 (Cal. 2005).

[223] 117 P.3d 690 (Cal. 2005).

[224] By this time, same-sex marriage was at the center of legislation and litigation in California. In 2004, the state courts began considering the constitutionality of the statutory restriction on same-sex marriage. *See* Cummings & NeJaime, *supra* note 205, at 1281–83. In 2005, the legislature passed a marriage-equality bill, which Governor Arnold Schwarzenegger vetoed. *See id.* at 1290.

were implanted in her partner, E.G.[225] Upon dissolution of their relationship, E.G. argued that she intended to be the sole parent of the children, relying in part on an anonymous-donor form purporting to waive parental rights and signed by K.M. at the facility that handled the procedure.[226] K.M., however, claimed that she intended to co-parent the children and that in fact the women had been co-parenting the children since their birth.[227] Accordingly, K.M. made claims both to intent-based parentage (pursuant to case law and section 7613), and to conduct-based parentage (under section 7611(d)).[228]

Once again, the relationship between marriage and parenthood shaped each side's arguments. San Francisco family law attorney Jill Hersh, who had handled earlier lesbian co-parenting matters,[229] represented K.M. Hersh and her colleagues found support in *Johnson*, the 1993 gestational surrogacy decision, despite its rejection of dual motherhood. There, Hersh argued, "the intent of the genetic parents was *presumed* from the fact that they were a married couple living together in a committed relationship."[230] She cast committed married and unmarried couples as similarly situated: both represented "unitary famil[ies]" worthy of the law's protection.[231]

Inundating the courts with evidence of the couple's "ordinariness,"[232] Hersh emphasized K.M. and E.G.'s committed relationship to show parental intent.[233] She explained that the relationship was "marked by repeated acts of love and commitment to each other that included a 'marriage' ceremony after the children were born where

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[225] To protect the women's privacy, I follow the practice of the appellate courts and use only the women's initials.

[226] *K.M.*, 117 P.3d at 675–76.

[227] Appellant's Opening Brief at 66, K.M. v. E.G., 13 Cal. Rptr. 3d 136 (Ct. App. 2004) (No. A101754).

[228] Because K.M. had not made public her genetic connection to the children, her section 7611(d) claim relied on cases like *Nicholas H.* to claim parentage regardless of whether she held the children out as her biological children. *See id.* at 27–28.

[229] Telephone Interview with Jill Hersh, Attorney, Hersh FamilyLaw Practice (June 27, 2014) (on file with the Harvard Law School Library).

[230] Appellant's Opening Brief on the Merits at 44, *K.M.*, 117 P.3d 673 (No. S125643).

[231] *Id.* Even *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), which made the rights of the married, nonbiological father superior to the rights of the unmarried, biological father, was used to support K.M., the unmarried, genetic mother:

> Under *Michael H.*, a unitary family formed by the relationship of two unmarried persons, like K.M. and E.G., deserves similar recognition and protection.
>
> Following *Michael H.* and *Johnson*, the intent of K.M. and E.G. to have a family together is implied by the nature of their long term relationship as domestic partners.

Appellant's Opening Brief on the Merits, *supra* note 230, at 44–45.

[232] Telephone Interview with Jill Hersh, *supra* note 229.

[233] *See* Appellant's Petition for Review at 8, *K.M.*, 117 P.3d 673 (No. S125643) ("K.M. and E.G. lived together in a committed lesbian relationship for a period of seven years . . . . For more than six of those years they were registered as domestic partners with the City and County of San Francisco.").

they exchanged rings, the celebration of their anniversaries, and [municipal] registration as domestic partners for six and a half years."[234]

In response, E.G.'s attorneys minimized the adult relationship to discredit the parent-child relationship. The women, they asserted, did not evidence the commitment of a married couple but instead "registered as domestic partners . . . to qualify K.M. for a gym membership."[235] Invoking the prospect of claims by other nonparents, a lawyer for E.G. warned that "endless confusion would ensue if . . . [a]ny step parent, partner, informal or otherwise, grandparent, other relative, or friend could assert being a full parent because of the relationship he or she developed with a child while living with the parent, taking care of the child, stepping in, aiding."[236]

Responding to this line of argument, Hersh implicitly recalled the 1990s cases, like *Nancy S.*, suggesting that "to have the specter raised of nannies, grandparents, and babysitters and other interested but unattached people . . . is like an argument from some other decade and some other time."[237] Returning to the adult relationship, Hersh explained that the "evidence creates a very overwhelming picture of a two-parent, two-child family who operated and functioned in every way familiar to us."[238] E.G. and her attorney, she argued, "minimized entirely [the couple's] relationship"[239] — "the intimacy and the deep love they shared for each other and their marriage"[240] — because to acknowledge that would undermine E.G.'s claim to sole parentage.

For Hersh and her colleagues, the purpose of emphasizing the adult relationship was not that legal parentage sprung from the relationship, but rather that the relationship evidenced intent to parent:

> [T]he parties were living together in a committed relationship that antedated the children's conception; the parties were registered as domestic partners with the City and County of San Francisco; the parties *intended* "to remain together as a couple" after the birth of the children; the parties *intended* "to provide together a stable and nurturing home for the children" . . . .[241]

In fact, Hersh urged a "legal standard" for determining parentage that relied on, among other things, "[t]he intent of the parties implied by

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[234] Appellant's Reply Brief at 11, K.M. v. E.G., 13 Cal. Rptr. 3d 136 (Ct. App. 2004) (No. A101754).

[235] Respondent's Answer Brief on the Merits at 3, *K.M.*, 117 P.3d 673 (No. S125643).

[236] Trial Transcript at 806, [K.M.] v. [E.G.], No. CIV020777 (Marin Cty. Super. Ct. Feb. 14, 2002).

[237] *Id.* at 808–09.

[238] *Id.* at 811.

[239] *Id.*

[240] *Id.* at 812.

[241] Appellant's Petition for Review, *supra* note 233, at 19–20 (emphasis added).

the type of relationship they have to each other."[242] Indeed, she argued: "If these same facts arose between a husband and wife during a divorce proceeding in which both parties were the genetic and gestational parents of these children, there would not be any valid dispute over parentage."[243] On this view, K.M. and E.G. were both the legal parents, as evidenced by their marriage-like relationship. Even as marriage provided a way to understand parental intent and conduct, marital status furnished an artificial and arbitrary line through which to draw parentage. Marital and nonmarital families were essentially similarly situated with respect to principles of intent and function.

The lawyers also argued that women and men, and same-sex and different-sex couples, were similarly situated regarding intentional and functional parenthood. While the court in *Johnson* had expressed resistance to notions of dual motherhood, K.M.'s attorneys supported dual motherhood with constitutional arguments rooted in equality: "Because the only distinction between K.M. and similarly situated males (in whose favor the ['holding out'] presumption has been applied) is her gender, she has been denied equal protection based upon an impermissible classification."[244] Supporting K.M. as amicus curiae, NCLR attorneys Minter and Courtney Joslin argued that "[f]ailure to apply [intent- and conduct-based parentage] equally would . . . discriminate against parents on the basis of their gender and sexual orientation, in violation of the equal protection guarantees in the state and federal Constitutions."[245] Claims to intentional and functional parentage under the UPA constituted claims to equality. The advocates urged the court to apply antidiscrimination principles to family law, in order to provide equal recognition and support to families formed by same-sex couples.

In 2005, the California Supreme Court ruled in K.M.'s favor, and in doing so both distinguished its decision in *Johnson* and relied on that decision for support.[246] While the marriage in *Johnson* was crucial, its importance resided in the way that it pointed toward intent. Here, too, the couple "intended to produce a child that would be raised in their own home."[247] For support, the court emphasized that it was dealing with "a lesbian couple who registered as domestic partners."[248] Their registration had no explicit relationship to parental rights, but it

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[242] Appellant's Reply Brief, *supra* note 234, at 4.

[243] *Id.* at 11.

[244] Appellant's Opening Brief, *supra* note 227, at 30.

[245] Letter of Amici Curiae in Support of Petition for Review at 6, *K.M.*, 117 P.3d 673 (No. S125643).

[246] *See K.M.*, 117 P.3d 673, *passim* (discussing *Johnson* throughout).

[247] *Id.* at 679.

[248] *Id.* at 678 n.3.

provided evidence of a family unit with intentional parent-child relationships.[249] The court even pointed to the couple's private marital commitment — "E.G. asked K.M. to marry her, and on Christmas Day, the couple exchanged rings"[250] — despite the fact that their relationship could not qualify for legal marital status.

Nonetheless, the court did not definitively settle the question of intent. Because each woman could claim parentage under the UPA based on birth or genetics and because K.M. did "not claim to be the twins' mother *instead of* E.G., but *in addition to* E.G.," the court did not, as it had in *Johnson*, need to use intent to break a tie.[251]

LGBT advocates had worried about the significance of biology in the case, fearing that an undue focus on K.M.'s genetic claim to parentage would run against the parental status of nonbiological lesbian co-parents, including in the other cases before the court.[252] They hoped that, just as Wald's initial "co-maternity" UPA petition in 1999 built the foundation for application of intentional and functional parenthood to nonbiological co-parents, a focus on intent and conduct in *K.M.* could support recognition of the nonbiological co-parents in *Elisa B.* and *Kristine H.*[253] Ultimately, even though the *K.M.* court placed great weight on gestation and genetics, it announced a result that, contrary to *Johnson*, allowed a child conceived through ART to have two "natural" mothers pursuant to the UPA — an important precedent for other same-sex parenting cases.[254]

2. "Holding Out." — Legal parentage for the nonbiological mother in *Elisa B.* could not rest on birth or genetics and thus would have to be credited under a theory — either intent-based parentage under case law and section 7613 or conduct-based parentage under section 7611(d) — that the *K.M.* decision left unresolved. Unlike the conventional posture in the 1990s, where nonbiological mothers sought parental rights, in *Elisa B.*, the nonbiological mother *sought to avoid* parental obligations to the children she had been raising with her partner, Emily. In a sign of how legal treatment of same-sex parenting had shifted even as the government maintained its commitment to privatizing support, the county had attempted to collect support from the

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[249] *See id.* at 680.

[250] *Id.* at 676.

[251] *Id.* at 681. In fact, as the dissent pointed out, the court cast aside the trial court's determination that K.M. did not intend to be a parent and that E.G. intended to be the sole parent. *Id.* at 686 (Werdegar, J., dissenting).

[252] *See* Telephone Interview with Shannon Minter, *supra* note 59. While K.M. had made a claim under section 7611(d) that did not turn on her biological connection to the children, the court did not reach that argument.

[253] *See id.*

[254] *K.M.*, 117 P.3d at 681.

nonbiological mother when, after dissolution of the relationship, the biological mother sought government aid.[255]

As it had in earlier conflicts, same-sex couples' exclusion from marriage provided a way to argue against the parental recognition of nonbiological lesbian mothers. Seeking to avoid parental responsibilities, Elisa and her lawyers claimed that finding her to be a legal parent would "legitimize, as spouses, a same-sex relationship which is illegitimate as a form of marriage."[256] For support, they cited the 1990s lesbian co-parent cases and invoked the familiar slippery slope, arguing: "If Elisa is determined to be a 'parent' or otherwise financially responsible for children who are not biologically related or adopted, then it will open a floodgate of litigation on all types of . . . caretakers [and] cohabitators . . . ."[257] Their argument was supported by the social-conservative organization Liberty Counsel, which filed an amicus curiae brief on behalf of a biological mother whom it was representing against her former partner in the lower courts.[258] Liberty Counsel, which was simultaneously challenging the domestic partnership regime as a violation of the voter initiative banning same-sex marriage,[259] urged the court to root parentage exclusively in the formal markers of marriage, biology, and adoption.[260]

In response, NCLR attorneys, who represented Emily — the biological mother asserting that her former partner was also a legal parent — focused on the marriage-like, adult relationship as a way to understand the formation of the parent-child relationship. "Elisa and Emily," they explained, "were in a committed relationship for more than six years[,] . . . had a commitment ceremony, exchanged rings, . . . pooled their finances[, and] . . . decided to have children together."[261] NCLR's separate amicus curiae brief with Lambda Legal, filed across all three cases, drew attention to the families deliberately formed by the same-sex couples in each case. Each "couple[] maintained a committed, cohabiting relationship of at least six years. Each couple planned together for pregnancy . . . . [A]ll three were financially interdependent. Each bought their home together. All three presented

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[255] *See* Elisa B. v. Superior Court, 117 P.3d 660, 662–64 (Cal. 2005).

[256] Consolidated Answer Brief on the Merits at 39, *Elisa B.*, 117 P.3d 660 (No. S125912).

[257] *Id.* at 48.

[258] *See* Amicus Curiae Brief of Kristina Sica in Support of Appellant at 1–2, 13–16, Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005) (No. S126945).

[259] *See* Campaign for Cal. Families v. Schwarzenegger, No. C048303, 2006 WL 205118 (Cal. Ct. App. Jan. 27, 2006). The California courts upheld the domestic partnership law. Knight v. Superior Court, 26 Cal. Rptr. 3d 687, 689–90 (Ct. App. 2005); Knight v. Schwarzenegger, Nos. 03AS05284, 03AS07035, 2004 WL 2011407, at *1 (Cal. Super. Ct. Sept. 8, 2004).

[260] *See* Amicus Curiae Brief of Kristina Sica in Support of Appellant, *supra* note 258, at 7–12.

[261] Opening Brief of Real Party in Interest Emily B. at 7, *Elisa B.*, 117 P.3d 660 (No. S125912) (internal citations omitted).

themselves publicly as intact families during the time the couples lived together."[262] The family units formed by the same-sex couples provided evidence of their intent to co-parent and demonstrated parental conduct. All three could come within a reading of section 7613 that did not draw distinctions based on gender, sexual orientation, or marital status, and a reading of section 7611(d) that did not draw distinctions based on gender, sexual orientation, or biology.[263]

Again, NCLR's Minter and Joslin used constitutional equality principles to support their position. They claimed that refusing to find Elisa to be a legal parent "is inconsistent with the UPA's goal of providing equality for nonmarital children and with the equal protection guarantees of the California and federal constitutions."[264] The various precedents based on intent and conduct in the heterosexual context provided the building blocks for this equality-based argument:

> [U]nder any form of equal protection analysis, . . . [i]t is patently irrational to recognize as legal parents: (1) a wife who consents to the insemination of a gestational surrogate by her husband, as in *Johnson*; (2) a wife and a husband who consent to the insemination of a gestational surrogate using a donated egg and donated sperm, as in *Buzzanca*; (3) a man who holds himself out as a child's father, but is neither married to the child's mother nor biologically related to the child, as in *Nicholas H.*; and (4) a woman who holds herself out as a child's mother, but is neither married to the child's father nor biologically related to the child, as in *Karen C.*, but to deny legal parentage to a lesbian who consented to her partner's artificial insemination with the *intention* of parenting the resulting children and who subsequently assumed parental responsibility for the children and *held herself out* as their parent to the world.[265]

On this account, the key family law cases in California, while decided under the UPA, formed a line of evolving constitutional principles. Their recognition of intentional and functional parentage regardless of marital status, biology, or gender should, on a reading consistent with sexual-orientation equality, apply to same-sex-couple-headed families.

Ultimately, in a decision issued alongside *K.M.*, the California Supreme Court held Elisa to be a legal parent under section 7611(d),

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[262] Brief of *Amici Curiae* Children of Lesbians & Gays Everywhere, et al., in Support of Lisa Ann R., Real Party in Interest at 8–9, *Kristine H.*, 117 P.3d 690 (No. S126945).

[263] *See id.* at 3–4. Despite *Nicholas H.*, a case decided in the dependency context, biology proved a sticking point. Lawyers representing the parties seeking to preclude rights and obligations for the nonbiological mothers sought to use the unmarried fathers cases — and the UPA's response to those cases — in their favor. *See* Consolidated Answer Brief on the Merits, *supra* note 256, at 36 ("[N]atural . . . means biological."). In response, the LGBT rights lawyers argued: "[T]he term 'natural parent' in the UPA simply means legal parent, regardless of that person's biological connection to the child." Opening Brief of Real Party in Interest Emily B., *supra* note 261, at 27.

[264] Opening Brief of Real Party in Interest Emily B., *supra* note 261, at 14.

[265] *Id.* at 38 (emphasis added).

finding that Elisa held the children out as her own.[266] The marriage-like adult relationship, to which the court referred at length, offered a way to conceptualize the family unit — even though the couple was unmarried.[267] Moreover, while the court did not formally decide the case on the basis of section 7613, it credited the analogy; Elisa was like "a husband who consented to the artificial insemination of his wife using an anonymous sperm donor."[268] Furthermore, the court cast aside the earlier lesbian co-parent cases, explaining that *Nancy S.*, *Curiale*, and *West* "did not have the benefit of [the *Nicholas H.* line of] authority and did not consider the applicability of [the UPA's 'holding out' presumption]."[269] The claims to parental rights rejected in the 1990s now prevailed in a different doctrinal form. Quoting *Salvador M.*, the court explained that "[t]he paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family."[270] Parental conduct, rather than biology, was paramount.[271]

In the third lesbian parenting decision handed down that day, *Kristine H.*, the court ruled that the biological mother was estopped from contesting the stipulated judgment of joint legal parentage.[272] Accordingly, it left intact the parentage of the nonbiological co-parent. Ultimately, with its trio of decisions, the California Supreme Court embraced intentional and functional parenthood as it recognized unmarried same-sex parents.

* * *

This Part's case study documented the elaboration of an intentional and functional model of parenthood that straddled the line between marital and nonmarital families. While the recognition of unmarried fathers that began in the late 1960s opened space for LGBT advocates to pursue rights for unmarried parents, biology constituted a decisive distinction between the paradigmatic unmarried father and many

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[266] *See Elisa B.*, 117 P.3d at 670.

[267] *See id.* at 663 ("They introduced each other to friends as their 'partner,' exchanged rings, opened a joint bank account, and believed they were in a committed relationship. Elisa and Emily discussed having children and decided that they both wished to give birth. Because Elisa earned more than twice as much money as Emily, they decided that Emily 'would be the stay-at-home mother' and Elisa 'would be the primary breadwinner for the family.' At a sperm bank, they chose a donor they both would use so the children would 'be biological brothers and sisters.'").

[268] *Id.* at 670.

[269] *Id.* at 672.

[270] *Id.* at 668 (quoting *In re* Salvador M., 4 Cal. Rptr. 3d 705, 708 (Ct. App. 2003)).

[271] The focus on function over biology allowed for the privatization of support within a two-parent family. *See* Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985, 2017 (2015).

[272] Kristine H. v. Lisa R., 117 P.3d 690, 696 (Cal. 2005).

same-sex co-parents. Marriage, however, offered potential for the vindication of nonbiological parenthood. As the state came to grips with families formed through ART and stepparent families, the law increasingly recognized married parents who intended to parent or functioned as parents, even without a biological connection to their children.

To leverage the recognition of both unmarried, biological fathers and married, nonbiological parents, beginning in the 1980s LGBT advocates relied on analogies to marital family formation and parenting. They argued that if same-sex couples acted like married couples — by deliberately forming families through ART and developing nonbiological parent-child relationships — then they deserved parental recognition, even if outside of marriage, on the same terms. Crucially, the analogy to marriage was made to advance more inclusive parentage principles.[273] The new model of intentional and functional parenthood forged by LGBT advocates had the capacity to render formal markers such as biology, gender, sexual orientation, and even marital status less salient to parentage. Moreover, while strategically shaped with reference to marriage-like, adult relationships, the parentage doctrine that emerged did not expressly require any such relationship.[274]

III. MARRIAGE (EQUALITY) AND PARENTHOOD

The case study in Part II traces how earlier LGBT family law advocacy contributed to the development of new and expansive parentage principles outside the formal space of marriage. This Part explores how those principles relate to marriage equality. Digging deeper into the conceptual moves bound up in the acceptance of same-sex couples' claims to marriage yields a fuller understanding of how marriage equality extends insights emerging from earlier LGBT family law work.[275]

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[273] Legitimate concerns can be raised about a doctrine that looks in part to the intimate relationship that the biological parent formed with the individual claiming parentage. Such a doctrine may threaten the parental rights of women; for example, former boyfriends may assert claims to parental status, and may do so merely to harass the mother. *Cf.* Carbone, *supra* note 185, at 6 (identifying open questions regarding the extent to which a mother's partners would be presumed to have paternity given recent California cases).

[274] *See, e.g.*, *Salvador M.*, 4 Cal. Rptr. 3d 705; *In re* Karen C., 124 Cal. Rptr. 2d 677 (Ct. App. 2002); *In re* Kiana A., 113 Cal. Rptr. 2d 669 (Ct. App. 2001).

[275] Other scholars have considered how same-sex marriage may reshape gender in the family, in ways that are related to but distinct from the arguments presented here. *See, e.g.*, Mary Anne Case, Commentary, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1665–66 (1993); Barbara J. Cox, *Marriage Equality Is Both Feminist and Progressive*, 17 RICH. J.L. & PUB. INT. 707, 715–16 (2014); Nan D. Hunter, *Introduction: The Future Impact of Same-Sex Marriage: More Questions than Answers*, 100 GEO. L.J. 1855, 1864–65 (2012); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 17 (1991); Suzanne A. Kim, *Skeptical Marriage Equal-*

The marriage claim made explicit an often-overlooked argument common in advocacy on behalf of unmarried parents — that marriage-like adult relationships provide a way to understand and identify parent-child relationships. Of course, this is a fairly conventional vision that derives parentage from adults' intimate coupled relationships. Yet by stressing same-sex couples' assimilation to some marital and parental norms, the marriage-equality claim continued to unsettle others. The relevant basis for comparison — how exactly same-sex couples are like married different-sex couples — has implications for our understanding of a family law regime that includes both same-sex and different-sex couples. More specifically, marriage equality pushes against biological procreation and gender differentiation and instead centers on intentional and functional parenthood. Accordingly, contrary to the claims of some marriage critics and family law and sexuality scholars, this account suggests more continuity between earlier nonmarital LGBT work — of the kind documented in Part II — and more recent marriage-centered work. Through this lens, marriage equality may facilitate, rather than disrupt, the new model of parenthood built in earlier nonmarital work.

A. How Marriage Matters

Prominent family law and sexuality scholars have articulated powerful critiques of same-sex marriage, with specific attention to child-centered justifications. These scholars resist same-sex marriage as a positive development from a family law, rather than a civil rights, perspective.[276] On this view, bestowing rights and recognition based on marriage compels same-sex couples to conform to conventional norms of the heterosexual marital family and accepts marriage as the primary location for family formation and recognition.[277] More specifically, understanding marriage as a solution to same-sex couples' lack of family recognition and parent-child protections validates the notion that rights should depend on adult relationship recognition rather than track actual dependency relationships formed in a range of family set-

ity, 34 HARV. J.L. & GENDER 37, 70–71 (2011); Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 771–92 (2012); 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) (book review).

[276] *See, e.g.*, POLIKOFF, *supra* note 75, at 84 (distinguishing family law objectives from "equal civil rights for gay men and lesbians").

[277] *See, e.g.*, Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron's* Dignity, Rights, and Responsibilities, 43 ARIZ. ST. L.J. 1177, 1197 (2011) (book review) ("I am concerned that an opportunity has been lost in the same-sex marriage cases to expand the social and legal ideal of family beyond a fairly traditional model.").

tings.[278] Accordingly, same-sex marriage affirms the privileged position of marriage and uses form, rather than function, to allocate parental rights.[279] Through this lens, marriage equality accepts, rather than challenges, dominant conceptions of the family, and thereby runs against a family-pluralism agenda that values unconventional and nonmarital families.[280]

These scholars challenge not only the substantive family law arguments for same-sex marriage, but also the rhetorical framing on family-based terms. The marriage claim, Professor Melissa Murray argues, relies on "contrasting [same-sex couples'] conformity with marriage's norms of respectability and discipline with the deviance of those who could marry and do not."[281] Putting it more strongly, Professor Katherine Franke asserts that some same-sex marriage arguments portray "the non-married parent . . . as a site of pathology, stigma, and injury to children."[282] On this account, as Murray explains, "the marriage equality movement[] . . . implicitly affirms the inherent worthiness of marriage relative to the alternative (nonmarriage) and the goal of locating reproduction in marriage."[283]

This scholarly position often includes a historical component, embracing earlier LGBT family law work on behalf of *unmarried* same-sex parents and contrasting that work with more recent marriage-centered efforts. Through this lens, same-sex marriage advocacy turned its back on the progressive family-pluralism agenda that historically characterized the LGBT movement.[284] According to Professor Nancy Polikoff:

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[278] *See* Rosenbury, *supra* note 12, at 198 ("[A]cknowledgment that state constructions and recognition of marriage privilege some family forms over others has caused some family law scholars to question whether advocating for same-sex marriage is wise . . . ."); *see also* Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 203 (2003) (arguing that linking family-based rights and benefits to marriage "is not optimal family policy").

[279] *See* Nancy D. Polikoff, *Law that Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 85, 87 (2009).

[280] *See, e.g.*, Franke, *supra* note 277, at 1183; Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 419, 432 (2012); Dean Spade, *Under the Cover of Gay Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 79, 84 (2013); Dean Spade & Craig Willse, *I Still Think Marriage Is the Wrong Goal*, *in* AGAINST EQUALITY: QUEER CRITIQUES OF GAY MARRIAGE 19, 20 (Ryan Conrad ed., 2010).

[281] Murray, *supra* note 280, at 423.

[282] Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 242 (2006).

[283] Murray, *supra* note 280, at 419.

[284] *See* Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 300–01 (2009); Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y.C. L. REV. 573, 590 (2005). Pluralistic family law is associated with the use of function, rather than form, to recognize family relationships — thus valuing the "families we choose." KATH WESTON, FAMILIES WE CHOOSE 107 (1991).

> While advocates for lesbian and gay parents once saw themselves as part of a larger movement to promote respect, nondiscrimination, and recognition of diverse family forms, some now appear to embrace a privileged position for marriage. They thus abandon a longstanding commitment to defining and evaluating families based on function rather than form, distancing themselves from single-parent and divorced families, extended families, and other stigmatized childrearing units.[285]

This historical claim draws a sharp contrast between work that accepts and work that rejects marriage as a model of family formation and recognition. According to Professor John D'Emilio, "[i]n the 1980's and early 1990's, imaginative queer activists invented such things as 'domestic partnership' and 'second-parent adoption'" — nonmarital innovations — "as ways of recognizing the plethora of family arrangements that exist throughout the United States."[286] But more recently, they abandoned that agenda in the name of marriage.[287] As Professor Kaaryn Gustafson describes it, rather than continue to pursue nonmarital avenues, the movement "focused on marriage . . . , reinforcing rather than re-envisioning notions of family."[288] In this way, a historical perspective is used to support a broader normative position oriented against marriage.

The case study in Part II sheds new light on some of these historical and normative claims, showing that the scholarly critique of marriage often overstates the marginalization of marriage in the past and thereby misapprehends some of marriage's contemporary implications.[289] As the case study reveals, LGBT advocates' acceptance of marriage as a model of family formation and their corresponding attempt to locate same-sex couples with children in close proximity to marital families are not new. Historically, marital norms made legible same-sex couples' nonmarital parent-child relationships.

The focus on marriage-like adult relationships to expand the scope of parental recognition is not only familiar from an LGBT perspective. It is also consistent with other progressive, nonmarital family law reforms, specifically the recognition of unmarried, biological fathers and nonmarital children. Some scholars contrast those developments, viewed as positive family law shifts, with contemporary LGBT advo-

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[285] Polikoff, *supra* note 284, at 590; *see also* Murray, *supra* note 280, at 433 (arguing that LGBT advocates historically fought for the recognition of "*chosen* families" by "develop[ing] alternative family forms and structures").

[286] John D'Emilio, Essay, *The Marriage Fight Is Setting Us Back*, GAY & LESBIAN REV., Nov.–Dec. 2006, at 10, 11.

[287] *See id.* at 10.

[288] Gustafson, *supra* note 284, at 300.

[289] The historical premises have been subject to minimal scrutiny. For work challenging these premises, see NeJaime, *supra* note 6, at 114–49, 160–63; and William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1489 (1993).

cacy, viewed, to some extent, as a regressive turn.[290] The cases on unmarried fathers, however, were not only constrained by the emphasis on biology, but were also disciplined by the marriage-like relationships of the biological parents. As Professor Janet Dolgin has argued:

> [T]he cases make sense only if the apparently sufficient requirement for effecting legal paternity — that a father effect a social relationship with his biological child — is read as code for the requirement that he effect that relationship *within the context of family*, most easily identified in cases in which the father has established a marriage or marriage-like relationship, with the child's mother.[291]

Indeed, Murray's analysis of those cases demonstrates that the father's relationship with the child's mother served as a way to understand and ultimately judge his relationship to the child.[292] If the father, in Murray's words, "behaved like a *husband*," he exhibited the conduct demanded by the U.S. Supreme Court to accord parental rights.[293] Moreover, as Murray has shown, similar tendencies emerge in the nonmarital-birth cases, where the Court validated the claims of children raised in the context of marriage-like, biological families.[294]

In the cases on unmarried fathers and nonmarital children, the adult, horizontal relationship — and its proximity to the marital model — supplied a way for the Court to identify parent-child relationships worthy of protection. When viewed in conjunction with earlier LGBT efforts, it becomes clear that even the expansion of rights to unmarried parents and the erosion of distinctions based on marital status have been, across time and contexts, shaped by notions of the marital family and a focus on intimate adult relationships.[295]

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[290] *See* Grossman, *supra* note 60, at 673 (contrasting "the entanglement of legitimacy and parentage for children of lesbian co-parents" with the "law of unwed fatherhood," which "reflect[s] sound reasoning about the best way to serve the needs of children and the adults who raise them"); Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 555 (2015) ("The language put forward by advocates, and ultimately adopted by the Court in *Windsor*, regarding non-marital families is deeply in tension with efforts made a generation ago to lessen the importance — both symbolic and substantive — of whether a child was born to a legal marriage.").

[291] Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 650 (1993) (footnote omitted).

[292] *See* Murray, *supra* note 280, at 399–412; *accord* Appleton, *supra* note 44, at 359; Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 273 (2003).

[293] Murray, *supra* note 280, at 402; *see also* Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1253 (2010).

[294] *See* Murray, *supra* note 280, at 397; *cf.* Mayeri, *supra* note 35.

[295] *Cf.* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1338–39 (2005) (discussing the importance of a "committed relationship" between adults to the concept of parenthood by estoppel). For critiques of this trend as assimilationist in earlier lesbian co-parent cases, see Ruthann Robson, *Making Mothers: Lesbian Legal Theory & the Judicial Construction of Lesbian Mothers*, 22 WOMEN'S RTS. L. REP. 15, 32–

Part II's case study brings into view *why* the marriage-like adult relationship has mattered in these contexts: it indicated intentional and functional parent-child relationships. In earlier LGBT work, the adult relationship was deployed in service of parenthood concepts that could accommodate same-sex parents and legally recognize the relationships they either were forming or had formed with their children. Indeed, LGBT advocates even reframed the cases on unmarried fathers, which otherwise presented an obstacle to the recognition of *nonbiological*, unmarried parents, to focus on conduct over biology as the key to parentage.

In this sense, both assimilationist and anti-assimilationist impulses motivated work on behalf of unmarried same-sex parents. Advocates stressed unmarried same-sex parents' reflection of marital norms as a way to broaden the application of emerging forms of nonbiological marital parenting. Assimilation to *some* norms — particularly those emphasizing coupled commitment and interdependence — provided a vehicle for challenging *others* — namely biological, dual-gender parenting, both inside and outside of marriage. In this way, claims premised on sameness stressed comparisons that actually marginalized traditional markers of parentage.[296]

By disturbing a central historical premise of the critique of marriage equality, the case study also challenges some of its normative dimensions. Drawing a stark distinction between marriage and nonmarriage as both a historical and theoretical matter, scholarly critics at times both overestimate the progressive dimensions of nonmarital family recognition and neglect progressive family law possibilities offered by marriage equality.[297] They assume that the contemporary rhetoric of marital family formation buttresses a traditional family form.

While these scholars raise significant and plausible concerns, the case study points toward an alternative reading that suggests how marriage equality may continue, rather than cut against, developments in the family. In marriage-equality litigation, same-sex couples with children were the paradigmatic plaintiffs, cast as model partners and parents.[298] Even unmarried, their lives mapped onto the idealized fea-

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33 (2000); and Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 35 (1999).

296 The model of parenthood this Article uncovers is expansive along some dimensions, but it nonetheless derives parentage in large part from intimate coupled adult relationships. For a broader paradigm shift focused on vertical, rather than horizontal, relationships, see generally MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

297 *See, e.g.*, Franke, *supra* note 277, at 1197.

298 *See* Murray, *supra* note 280, at 423 ("[T]hese same-sex couples are not only 'perfect plaintiffs,' they are also perfect parents." (footnote omitted)).

tures of marital families.[299] Yet these same-sex couples' families were premised on a model of parenthood that called into question traditional norms rooted in biological procreation and dual-gender parenting. By claiming similarity to different-sex married couples in marriage-equality efforts, LGBT advocates drew comparisons that contributed to reshaped notions of marriage and parenting. As an examination of marriage-equality jurisprudence reveals, same-sex couples' adherence to some norms enables the destabilization of others, ultimately in service of a more expansive vision of parenthood.

B. Through Marriage Equality

By explicating the stakes in same-sex marriage jurisprudence, we can observe the continuity between the model of parenthood elaborated in the earlier nonmarital work documented in Part II and the more recent reasoning about marriage equality. More specifically, we can see how marriage equality was partly enabled by — and in turn enables — intentional and functional concepts of parenthood forged in earlier *nonmarital* advocacy. As courts focused on same-sex couples with children to justify marriage equality, they appealed to — and validated — features that historically defined marginal — even stigmatized — family formation, and minimized traditional conceptions of parenting.

Over the many years of litigation leading up to *Obergefell*, child-centered arguments constituted the central justification for those defending same-sex marriage bans.[300] For opponents of same-sex marriage, marriage embodies "optimal childrearing," which occurs when a married mother and father raise their biological children.[301] Procreative sex and dual-gender childrearing are seen as essential components of marital parenting and points of distinction with same-sex couples.

LGBT advocates responded with child-centered arguments of their own.[302] Same-sex couples, they argued, are similarly situated to

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[299] *See* Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 59 (2012).

[300] *See generally* BALL, *supra* note 25, at 37–81.

[301] *See, e.g.*, Amici Curiae Brief of Robert P. George, Sherif Girgis, & Ryan T. Anderson in Support of Hollingsworth & Bipartisan Legal Advisory Group Addressing the Merits & Supporting Reversal at 20, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), and United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307). For a historical critique of arguments privileging biological parenting, see Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467 (2013).

[302] *See, e.g.*, First Amended Complaint for Declaratory & Injunctive Relief at 4, Baskin v. Bogan, 12 F. Supp. 3d 1144 (S.D. Ind. 2014) (No. 1:14-cv-00355) ("[T]he State denies the child Plaintiffs and other children of same-sex couples equal access to dignity, legitimacy, protections, benefits, support, and security conferred on children of married parents under state and federal law."); *see also* BALL, *supra* note 25, at 111–28.

different-sex couples specifically with regard to parenting.[303] The commonality emerges not from biology or gender, but from functional and intentional relationships. Just like different-sex couples, same-sex couples have and raise children together.[304]

In considering same-sex couples' claims, courts faced a choice between competing models of parenthood — one prioritizing biological, dual-gender childrearing, and the other focusing on chosen, functional families. In accepting same-sex couples' claims, courts validated the latter model, and thereby centered a model of parenthood that includes same-sex-couple-headed families. Crucially, to the extent marriage is related to parenting, it is seen as premised not on procreation, biology, gender, or sexual orientation, but rather on the very model of parenthood elaborated by advocates to achieve parental recognition *outside of marriage*.[305]

Indeed, in making claims to marriage equality, LGBT advocates devoted significant attention to showing how same-sex couples constructed nonmarital families that resembled and functioned like the families formed by married different-sex couples.[306] The marital-status distinction between these families thus appeared arbitrary. Accordingly, the model of marital parenthood centered in marriage-equality decisions both accommodates same-sex parenting and appears largely indistinct from nonmarital (coupled) parenthood.

Given the focus on California in Part II, that state's shift to same-sex marriage provides a useful illustration. In 2008, years after the California Supreme Court validated same-sex parenting outside marriage, it struck down the state's statutory ban on same-sex marriage.[307] In doing so, the court minimized the once-salient difference between same-sex and different-sex couples — that "only a man and a woman can produce children biologically with one another."[308] Instead, the court focused on the similarity between same-sex and different-sex couples as parents: "[A] stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex

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[303] *See, e.g.*, Complaint for Declaratory & Injunctive Relief at 42, Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014) (No. 1:13-cv-1861).

[304] *See, e.g.*, Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 29, *Baskin*, 12 F. Supp. 3d 1144 (No. 1:14-cv-00355).

[305] *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 935 (N.D. Cal. 2010) ("[A]dopted children or children conceived using sperm or egg donors are just as likely to be well-adjusted as children raised by their biological parents.").

[306] *See* NeJaime, *supra* note 26, at 241.

[307] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). The decision was overturned by voters' passage of Proposition 8.

[308] *Id.* at 430.

couples . . . ."[309] The court stressed the commonality between families headed by same-sex and different-sex couples and oriented these families toward marriage in the same way.

If same-sex couples are deemed similarly situated to different-sex couples for purposes of marital parenthood, the specific basis of similarity becomes important to understanding the meaning of marital parenthood generally. Crucially, they are similarly situated along axes that have historically defined *nontraditional* modes of family formation. Again, developments from California illustrate. In its 2010 decision striking down Proposition 8 (California's constitutional ban on same-sex marriage), the federal district court reasoned: "California law permits and encourages gays and lesbians to become parents through adoption . . . or assistive reproductive technology."[310] Affirming the district court on narrower grounds, the Ninth Circuit explained that, "in California, the parentage statutes place a premium on the 'social relationship,' not the 'biological relationship,' between a parent and a child."[311] With same-sex marriage, the functional and intentional principles of parenthood centered by nontraditional families become the governing principles for an understanding of parenting that includes both same-sex and different-sex couples.

This dynamic is not limited to cases from California. It emerges even more clearly in the most recent same-sex marriage decisions leading up to the Supreme Court's 2015 decision in *Obergefell v. Hodges*. In accepting same-sex couples' claims to marriage, federal appellate courts rejected biological and gendered limitations on the model of parenting served by marriage. Dismissing the argument that the purpose of marriage "is to encourage child-rearing environments where parents care for their biological children in tandem," the Seventh Circuit asked: "Why the qualifier 'biological'?"[312] Writing for the court, Judge Posner explained that "family is about raising children and not just about producing them."[313] Accordingly, the government could not contend that marriage "is inapplicable to a couple's adopted as distinct from biological children."[314] The court elevated functional parenting over procreative sex, gender, and biology.

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309 *Id.* at 433.

310 *Perry*, 704 F. Supp. 2d at 968.

311 Perry v. Brown, 671 F.3d 1052, 1087 (9th Cir. 2012), *vacated*, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). Because the Supreme Court ultimately ruled that the proponents of Proposition 8 lacked standing to appeal the district court's decision, the district court decision became the definitive ruling in the case. *Perry*, 133 S. Ct. at 2668.

312 Baskin v. Bogan, 766 F.3d 648, 663 (7th Cir. 2014).

313 *Id.*

314 *Id.*; *see also* Latta v. Otter, 771 F.3d 456, 468 (9th Cir. 2014) (rejecting the argument "that a child reared by its biological parents *is* socially preferred and officially encouraged").

Courts also resisted differentiating between intentional parenting — framed by opponents of same-sex marriage as specific to same-sex couples — and "natural" parenting[315] — framed as a distinctive feature of both heterosexuality and marriage.[316] Defenders of Virginia's marriage ban, for instance, argued that, because same-sex couples "bring children into their relationship[s] only through intentional choice and pre-planned action," they do not need marriage in the way different-sex couples do.[317] This "responsible procreation" argument about the instrumental nature of marriage located same-sex couples' family formation outside of marriage's core purpose, with marriage channeling heterosexual sex and accidental procreation into stable family units.[318] In this way, child-centered arguments against same-sex marriage integrated recognition of intentional parenthood — that is, accepted state-recognized same-sex parenting — but distinguished that model of parenthood from marriage.[319] By rejecting this argument, courts signaled acceptance of intentional parenting as a component of marital parenting.[320] They resisted distinctions between biological procreation and assisted reproduction — and thus between paradigmatic different-sex and same-sex family formation.

Finally, in *Obergefell*, the Court grounded same-sex couples' right to marry partly in same-sex parenting. In explaining why the fundamental right to marry "appl[ies] with equal force to same-sex cou-

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[315] *See, e.g.*, Janna Darnelle, *Breaking the Silence: Redefining Marriage Hurts Women Like Me — and Our Children*, PUB. DISCOURSE (Sept. 22, 2014), http://www.thepublicdiscourse.com/2014/09/13692 [http://perma.cc/DCF4-F636] ("There is not one gay family that exists in this world that was created naturally."); John Finnis, *The Profound Injustice of Judge Posner on Marriage*, PUB. DISCOURSE (Oct. 9, 2014), http://www.thepublicdiscourse.com/2014/10/13896 [http://perma.cc/W9ZB-BRMZ] ("For Posner, . . . 'parents' just means the people who are raising the child. So both (1) optimality in child-raising and its necessary condition, (2) biological parenthood, have dropped out, along with (3) sexual intercourse, the only possible cause of (2).").

[316] *See* Bostic v. Schaefer, 760 F.3d 352, 382 (4th Cir. 2014). On these concepts, see Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law's Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 456 (2007).

[317] *Bostic*, 760 F.3d at 382 (alteration in original) (quoting Appellant McQuigg's Opening Brief at 43, *Bostic*, 760 F.3d 352 (Nos. 14-1167, 14-1169, 14-1173), 2014 WL 1262842); *see also Latta*, 771 F.3d at 471 (describing the argument by those defending Idaho's marriage ban that "marriage's stabilizing and unifying force is unnecessary for same-sex couples, because they always choose to conceive or adopt a child").

[318] *See generally* Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83 (2013); Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403 (2009).

[319] *Cf.* Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 83–84, 83 n.422 (2013) (showing shifts in argumentation in same-sex marriage opposition).

[320] *See Latta*, 771 F.3d at 472 ("[I]f Idaho and Nevada want to increase the percentage of children being raised by their two *biological* parents, they might do better to ban assisted reproduction using donor sperm or eggs, gestational surrogacy, and adoption, by both opposite-sex and same-sex couples, as well as by single people. Neither state does.").

ples,"[321] the Court declared that a "basis for protecting the right to marry is that it safeguards children and families."[322] Same-sex couples, the Court continued, "provide loving and nurturing homes to their children, whether biological or adopted."[323] Not only were "hundreds of thousands of children . . . being raised by [same-sex] couples," but many states had themselves facilitated same-sex couples' formation of adoptive parent-child relationships outside of marriage.[324] This, for the Court, "provide[d] powerful confirmation from the law itself that gays and lesbians can create loving, supportive families."[325]

For purposes of a model of marriage that takes childrearing as "a central premise,"[326] the Court conceptualized same-sex and different-sex couples as similarly situated. Accordingly, the Court affirmed a model of marital parenthood that hinged on neither biology nor gender. Indeed, Chief Justice Roberts's dissent highlighted the model rejected by the majority. Because "[p]rocreation occurs through sexual relations between a man and a woman," the Chief Justice claimed, the state has an interest in channeling different-sex relationships into marriage "for the good of children and society."[327] But, as he observed, the Court set aside this "traditional, biologically rooted" understanding of marriage.[328] Instead, the Court connected the childrearing dimensions of marriage to same-sex couples' *non*traditional, *non*biological parent-child bonds.

Ultimately, marriage equality routes intentional and functional concepts of parenthood — concepts leveraged in earlier efforts to recognize unmarried same-sex parents — into an LGBT-inclusive model of marriage, pushing intentional and functional parenthood from the margins to the mainstream. With marriage equality now a nationwide reality, the next two Parts analyze its capacity to support the growth of intentional and functional parenthood both inside and outside marriage, for both same-sex and different-sex couples.

IV. MARITAL PARENTHOOD AFTER MARRIAGE EQUALITY

Intentional- and functional-parenthood concepts have significant roots in marriage, yet were framed as exceptions to the traditional operation of marital parentage. As Part II has demonstrated, partly be-

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[321] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

[322] *Id.* at 2600.

[323] *Id.*

[324] *Id.* On the impact of LGBT adoption on marriage-equality decisions, see Godsoe, *supra* note 122, at 369–71.

[325] *Obergefell*, 135 S. Ct. at 2600.

[326] *Id.*

[327] *Id.* at 2613 (Roberts, C.J., dissenting).

[328] *Id.* at 2614.

cause of LGBT work, these concepts received extensive elaboration outside of marriage, where biological ties had been central. Now, with same-sex couples included in marriage, intentional- and functional-parenthood principles will begin to shape marital parenthood generally. Through an examination of the marital presumption,[329] this Part shows how concepts that had long served as mere exceptions to the general rule now furnish the logic on which to understand marital parenthood.

Traditionally, a child born to a married woman was deemed a child of the marriage, and therefore her husband was presumed to be the child's biological, and thus legal, parent.[330] For married lesbian couples, the nonbiological parent now relies on the marital presumption to assert parental status based on her marriage to the biological parent.

Family law scholars who have expressed skepticism of parenting-based arguments for marriage equality also have criticized the focus on marriage-based claims to parentage. Polikoff warns that the tendency to "view[] parentage through a marriage equality lens"[331] "revives the discredited distinction between 'legitimate' and 'illegitimate' children" — producing what she terms "the new 'illegitimacy.'"[332] Going further, Professor Joanna Grossman questions the basis on which a marital presumption of parentage, premised on an assumed biological connection, would apply to same-sex couples; instead, she urges a stronger de facto parentage doctrine in order to separate the question of marriage from parentage and shift the locus of inquiry away from adult relationships and toward parent-child relationships.[333]

This critique overlooks commonalities between claims based on the marital presumption and earlier claims to parentage, like those documented in Part II. The marital parentage claims rely on the explicit, official marital relationship, rather than the "not as yet legally formalized,"[334] marriage-like relationship. The same logic that, in large part, was used to support the recognition of same-sex parents in nonmarital families becomes a way to understand the key provision attaching parental rights inside the marital family. As Professor Susan Appleton suggests, for married same-sex couples, the presumption rests on the

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[329] This is often referred to as the presumption of legitimacy. *See generally, e.g.*, Appleton, *supra* note 25.

[330] *See, e.g.*, CAL. FAM. CODE §§ 7540, 7611(a) (West 2014).

[331] Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 737 (2012).

[332] *Id.* at 722.

[333] *See generally* Grossman, *supra* note 60 ("The partner's functional role in parent-like activities over a period of time . . . would seem a much better indicator of consent to share the role of parent than whether the couple said vows to each other at some point." *Id.* at 719–20.).

[334] West v. Superior Court, 69 Cal. Rptr. 2d 160, 162 (Ct. App. 1997).

partners' agreement regarding their parental roles vis-à-vis the child.[335]

While the marital presumption always had the capacity to embody functional parenthood,[336] it often did so by masking, rather than owning, biological reality.[337] Even when the mother's husband was not the biological father, the law could act on the fiction that he was.[338] But with same-sex couples, where there can be no mistake about biological fact, the marital presumption is detached from notions of biology on a wholesale basis.[339] With same-sex marriage, the presumption makes sense only because it provides an indication of intent and "holding out" — the very concepts elaborated on behalf of unmarried same-sex parents in earlier advocacy.

Application of the marital presumption to same-sex couples is clear in some states, including California.[340] But other states have resisted.[341] Because the presumption contemplates biological parenthood or

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[335] *See* Appleton, *supra* note 25, at 285–86 ("[T]he presumption today reflects the belief that someone legally connected to the woman bearing the child likely planned for the child, demonstrated a willingness to assume responsibility, or provided support (emotional and/or economic) during the pregnancy . . . ." (footnote omitted)).

[336] *See* Michael H. v. Gerald D., 491 U.S. 110 (1989); *see also* Carbone, *supra* note 295, at 1305 ("The marital presumption has long balanced a presumption of biology with the need to secure functional family relationships.").

[337] *See* Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-less When Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811, 818 (2004).

[338] Research shows that for men with "high paternity confidence," which in the relevant studies includes exclusively or primarily men in married couples, biological nonpaternity rates are between 1.7% and 3.3%. *See* Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity? Evidence from Worldwide Nonpaternity Rates*, 47 CURRENT ANTHROPOLOGY 513, 516 (2006).

[339] *See* Appleton, *supra* note 25, at 230 ("As applied to same-sex couples, of course, the presumption and its variants always diverge from genetic parentage and always produce what might be considered fictional or socially constructed results.").

[340] In fact, California's legislature has made section 7611's marital presumption explicitly gender neutral. CAL. FAM. CODE § 7611 (West 2013) ("A person is presumed to be the natural parent of a child if . . . [t]he presumed parent and the child's natural mother are or have been married to each other and the child is born during the marriage . . . ."). The conclusive marital presumption, though, has remained gender specific. *Id.* § 7540 ("[T]he child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.").

[341] Telephone Interview with Cathy Sakimura, Deputy Dir. & Family Law Dir., NCLR (Aug. 15, 2014) (on file with the Harvard Law School Library) (reporting cases in Maryland and New York). Some of the cases that arose before *Obergefell* settled without appeal. *Id.* Others produced troubling doctrinal pronouncements, though in factually complex and distinguishable circumstances. *See* Q.M. v. B.C., 995 N.Y.S.2d 470, 474 (Fam. Ct. 2014) ("[W]hile [the marriage-equality law] requires same-sex married couples to be treated the same as all other married couples, it does not preclude differentiation based on essential biology."); Jann P. v. Jamie P., N.Y.L.J. 1202664390754, at *3–4 (Fam. Ct. June 30, 2014) ("[B]ecause there is no dispute in this case that the petitioner is not a biological parent of the child, the presumption of legitimacy has no application." (citation omitted)).

can be rebutted by biological evidence under certain circumstances,[342] some government actors deem it inapplicable to a same-sex spouse who is clearly not the biological parent. They reject the presumption even when no party is contesting its application — for instance, when the couple used an anonymous sperm donor and both women agree on the nonbiological mother's parental status.[343] Today, then, the marital presumption has become a site of conflict over the extent to which marriage equality advances an intentional and functional model of parenthood.

In the wake of *Obergefell*, disputes over the marital presumption have proliferated. Many of these disputes involve birth certificates, which constitute evidence of parentage.[344] In Arkansas, same-sex couples filed suit to challenge the state's "refusal to apply the presumption of parenthood to the spouse of the birth mother" and thus its refusal to list both spouses on the birth certificates of children conceived through donor insemination.[345] Similar challenges have emerged in Florida.[346] A Florida statute provides that, "[i]f the mother is married at the time of birth, the name of the husband shall be entered on the birth certifi-

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[342] The most common situations involve an alleged biological father asserting paternity, a husband or ex-husband denying paternity, or a mother denying the paternity of her husband or ex-husband. But states differ dramatically on who can challenge the marital presumption and under what circumstances. For a more extensive discussion of these situations and the divergent approaches states have taken, see Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 571–85 (2000).

[343] *See infra* notes 345–346.

[344] Many states include a marital presumption in both their parentage statutes and their vital-records and birth-registration regulations, while some states include a marital presumption only in their parentage statutes. *Compare* GA. CODE ANN. § 19-7-20 (2015) (parentage), *and* GA. CODE ANN. § 31-10-9 (2012) (birth registration), *with* IND. CODE § 31-14-7-1(1)(a) (1998) (parentage). Even if states allow the nonbiological mother to be listed on the birth certificate, this does not resolve questions regarding the conditions under which her parentage can later be challenged.

[345] Complaint for Declaratory & Injunctive Relief at 9, Pavan v. Smith, No. 60CV-15-3153 (Ark. Cir. Ct. July 13, 2015). The couples claimed that the state's refusal to apply the marital presumption "solely on the basis of their status as a same-sex married couple . . . [was] in clear violation of their right to Equal Protection under the federal and state constitutions." *Id.* The circuit court ordered the state to issue birth certificates identifying both spouses as parents. The order applied both to the plaintiff same-sex couples and to other similarly situated same-sex couples in Arkansas. *See* Pavan v. Smith, No. 60CV-15-3153, at 10 (Ark. Cir. Ct. Dec. 1, 2015) (memorandum opinion). Before this Article went to publication, the Arkansas Supreme Court stayed the circuit court's order pending appeal, but noted that the plaintiff couples had received the birth certificates they sought. *See* Smith v. Pavan, No. CV-15-988, at 1–3 (Ark. Dec. 10, 2015) (petition for emergency stay granted in part and denied in part; motion for expansion of page limit granted) (per curiam).

[346] *See* Complaint & Jury Demand for Declaratory & Injunctive Relief, Chin v. Armstrong, No. 4:15-cv-00399 (N.D. Fla. Aug. 13, 2015); Verified Petition for Dissolution of Marriage with Minor Children, *In re* Marriage of Karen Lynskey-Lake & Deborah Lynskey-Lake, No. FMCE1100065 (Fla. Cir. Ct. Sept. 4, 2015).

cate as the father of the child,"[347] but the state has refused to apply this statutory provision to married lesbian couples.

Some states maintain marital presumptions that explicitly use the terms "natural" or "biological"[348] but rarely inquire into biological connections in different-sex couples. In Indiana, same-sex couples have challenged the state's refusal to apply such a presumption to the nonbiological mother in a same-sex couple.[349] Even though the relevant statute provides that "[a] man is presumed to be a child's *biological* father if . . . the man and the child's biological mother are or have been married to each other,"[350] the plaintiffs contend that "a man is granted the presumption of parenthood by virtue of the fact that he is married to the biological mother of the child, regardless of whether the husband is biologically related to the child."[351] Indeed, the complaint cites donor insemination as an example of this nonbiological application.[352]

As these disputes reveal, the conceptual underpinnings of donor-insemination regulation, which premises marital parentage on intent and conduct, may become generalizable through marriage equality. Previously, donor insemination constituted an exception to the normal operation of presumptions. Many states, including California, maintain a separate provision setting out intent-based rules for married couples using donor insemination.[353] The assumption, of course, is

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347 FLA. STAT. § 382.013(2)(a) (2015).

348 *See, e.g.*, COLO. REV. STAT. § 19-4-105(1)(a) (2015); MICH. COMP. LAWS § 700.2114(1)(a) (2013); MO. REV. STAT. § 210.822.1(1) (2000); MONT. CODE ANN. § 40-6-105(1)(a) (2015); NEV. REV. STAT. § 126.051(1)(a) (2013); OHIO REV. CODE ANN. § 3111.03(A)(1) (LexisNexis 2015); WIS. STAT. § 891.41(1) (2014).

349 *See* Second Amended Complaint for Declaratory & Injunctive Relief at 4–5, Henderson v. Adams, No. 1:15-CV-220 (S.D. Ind. June 4, 2015).

350 IND. CODE § 31-14-7-1 (1998) (emphasis added).

351 Second Amended Complaint for Declaratory & Injunctive Relief, *supra* note 349, at 5.

352 *See id.* In Wisconsin, a married same-sex couple who had a child through anonymous donor insemination sought a determination of parentage by urging a gender-neutral application of both the marital presumption, which refers to "the natural father," WIS. STAT. § 891.41, and the AID statute, which refers to "the husband of the mother," *id.* § 891.40. *See In re* P.L.L.-R, No. 2015AP219, 2015 WL 6701332, ¶ 4 (Wis. Ct. App. Nov. 4, 2015). The couple's petition was denied on procedural grounds. *See id.* ¶ 14 ("Because the attorney general was never served and afforded an opportunity to be heard, the circuit court was without competency to hear the matter and appropriately dismissed it."). Meanwhile, in a case wherein plaintiffs sought birth certificates listing both women in a same-sex marriage as parents, a federal district court in Wisconsin denied class certification to "lesbian married couples and any children of the couples," reasoning that subclasses of couples exist because only some couples conceived through AID and only some of the couples who conceived through AID complied with the relevant statute. Torres v. Rhoades, No. 15-cv-288, 2015 BL 419460, at *1–3 (W.D. Wis. Dec. 21, 2015).

353 In some states, the application of these statutes to married same-sex couples having children through AID is clear. *See, e.g.*, Della Corte v. Ramirez, 961 N.E.2d 601, 603 (Mass. App. Ct. 2012). California's legislature even amended its statute to adopt gender-neutral language. CAL. FAM. CODE § 7613(a) (West 2013) ("If, under the supervision of a licensed physician and surgeon

that donor insemination makes the biological reality explicit in ways that complicate application of the marital presumption and point toward a competing claim by the sperm donor. For those states that nonetheless route donor insemination through the general marital presumption, the biological reality for most different-sex couples can remain hidden.[354] With same-sex marriage, however, the logic of alternative insemination informs the logic of the marital presumption more generally, such that the presumption effectively becomes a de facto donor-insemination statute.

In states that remain hostile to LGBT equality, resistance to application of the marital presumption to same-sex couples surely represents further enactment of anti-LGBT sentiment.[355] Yet the refusal to

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and with the consent of her spouse, a woman conceives through assisted reproduction with semen donated by a man not her husband, the spouse is treated in law as if he or she were the natural parent of a child thereby conceived.").

But in other states this issue has provoked litigation, and same-sex couples have relied on *Obergefell* to argue for equal treatment. *See, e.g.*, Declaration of Christa A. Gonser at 2, Marie v. Mosier, No. 14-cv-2518 (D. Kan. Oct. 5, 2015) ("By refusing to treat my same-sex marriage the same as an opposite-sex marriage with respect to children conceived by my spouse through artificial insemination, [Kansas] has refused to recognize my marriage on equal terms with opposite-sex marriages as required by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)."). In this vein, a federal district court ordered Utah to issue a birth certificate with both women's names on it, ruling that in light of *Obergefell* the state had to apply the AID statute equally to same-sex and different-sex married couples. *See* Roe v. Patton, No. 2:15-cv-00253, 2015 WL 4476734, at *3 (D. Utah July 22, 2015) (holding that based on *Obergefell* the state cannot "extend the benefits of the assisted-reproduction statutes to male spouses in opposite-sex couples but not for female spouses in same-sex couples").

While denying the relevance of *Obergefell*, Kansas officials have agreed to issue birth certificates that list both same-sex parents. *See* Defendants' Objection & Response to Plaintiffs' Additional Submissions at 3–4, Marie v. Mosier, No. 14-cv-2518 (D. Kan. Oct. 12, 2015). That concession came after a state court ordered the state to apply its Assisted Conception statutes to same-sex couples, such that when a lesbian couple has a child through donor insemination both women are listed on the birth certificate. *See In re* Parentage of L.D.S., No. 2015-DM-000892, at 3–4 (Kan. Dist. Ct. Sept. 16, 2015) (emergency order determining parentage).

354 Many states do not have statutes specifically regulating donor insemination. *See* Christina M. Eastman, Comment, *Statutory Regulation of Legal Parentage in Cases of Artificial Insemination by Donor: A New Frontier of Gender Discrimination*, 41 MCGEORGE L. REV. 371, 383 (2010). In those states, the ordinary marital presumption is the exclusive method by which the husband who is not biologically related to the child is presumed a legal parent. Even in states with AID statutes, if married couples fail to comply — for instance, they might fail to use the assistance of a licensed physician and might engage in at-home insemination — the marital presumption would still provide a presumption of parentage to the husband.

355 The Iowa Family Policy Center (now called The Family Leader), which opposes same-sex marriage, argued in Iowa that applying the presumption to same-sex couples "would bring about a sea-change in legal parentage," Final Brief of the Iowa Family Policy Center as Amicus Curiae in Support of Appellant at 12, Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013) (No. 12-0243), by rejecting rules "mean[t] to connect children to their biological parents," *id.* at 11. On the organization and its opposition to same-sex marriage, see Shane Vander Hart, *Iowa Family Policy Center ACTION Is Now the Family Leader with Bob Vander Plaats as President/CEO*, DES MOINES REG. (Nov. 21, 2010, 4:41 PM), http://blogs.desmoinesregister.com/dmr/index.php/2010/11/21/iowa-family-policy-center-action-is-now-the-family-leader-with-bob-vander-plaats-as

apply the marital presumption to same-sex couples can be understood not merely as continuing resistance to LGBT equality, but also as an attempt to recenter biology as a dominant marker of parentage and to maintain the primacy of gendered notions of parenting.[356]

Government resistance to the marital presumption's application to lesbian couples runs counter both to the significant developments in the law of parenthood documented in Part II and to the principles animating marriage equality elaborated in Part III. Application of the marital presumption to nonbiological mothers in same-sex marriages would ratify developments in parentage law, which witnessed the extensive recognition of married, nonbiological parents. It would also give meaning to marriage equality, which validated same-sex couples' intentional and functional parent-child relationships. Indeed, same-sex couples have looked to *Obergefell*, the Court's marriage-equality decision, to bolster their claims to the marital presumption. For example, same-sex couples in Florida, represented by NCLR, have argued that because *Obergefell* compels the state to "provide married same-sex couples with the full 'constellation of benefits' associated with marriage 'on the same terms and conditions as opposite-sex couples,'" both women must be listed on the child's birth certificate.[357]

An important pre-*Obergefell* case, which provides guidance on the application of the marital presumption to nonbiological mothers in same-sex marriages, makes clear the impact of marriage equality on the logic of parentage. *Gartner v. Iowa Department of Public Health*[358] arose after the Iowa Supreme Court required the state to allow same-sex couples to marry.[359] Iowa officials subsequently used the marital presumption as the basis for refusing to list the nonbiological mother, who was married to the biological mother, on the birth certificate of the child the couple had through anonymous donor insemina-

-presidentceo/article [http://perma.cc/3VS9-6WVU]; and *Issues We Are Focused On*, FAM. LEADER, http://www.thefamilyleader.com/issues-we-focus-on [http://perma.cc/9234-8434] ("We believe marriage is a permanent, lifelong commitment between a man and a woman.").

356 Motherhood continues to represent the primary parent-child relationship, and fatherhood is conceptualized as derivative of the mother's relationship. *See* Dolgin, *supra* note 291, at 644. Given this gendered nature of the presumption, the inclusion of same-sex couples might exert further pressure on the operation of the presumption. The policies animating the presumption when applied to same-sex couples — such as the desire to identify the parents who intended to have and support the child — apply to both women and men. *See* Appleton, *supra* note 25, at 260. Accordingly, in a marriage-equality regime, one could imagine a gender-neutral marital presumption. For objections to de-gendering motherhood, see FINEMAN, *supra* note 296.

357 Complaint & Jury Demand for Declaratory & Injunctive Relief at 9, Chin v. Armstrong, No. 4:15-cv-00399 (N.D. Fla. Aug. 13, 2015) (first quoting *Obergefell*, 135 S. Ct. at 2601; then quoting *id.* at 2605); *see also* Plaintiffs' Motion for Summary Judgment & Incorporated Memorandum of Law at 7–20, *Chin*, No. 4:15-cv-00399 (N.D. Fla. Dec. 9, 2015).

358 830 N.W.2d 335 (Iowa 2013).

359 *See id.* at 341.

tion.[360] The birth-certificate regulations included a marital presumption of parentage, providing: "If the mother was married at the time of conception, birth, or at any time during the period between conception and birth, the name of the husband shall be entered on the certificate as the father of the child . . . ."[361] The State defended its treatment of married same-sex couples by arguing that the "system for registration of births in Iowa . . . recognizes the biological and 'gendered' roles of 'mother' and 'father,' grounded in the biological fact that a child has one biological mother and one biological father . . . ."[362] Even as same-sex marriage took hold, biology and gender continued to structure the state's vision of parenthood.

In ordering equal application of the marital presumption to lesbian couples, the Iowa Supreme Court extended the logic by which it justified marriage equality years earlier to the question of parentage.[363] Focusing on intent and function over biology and gender, the court explained that, "with respect to the government's purpose of identifying a child as part of their family . . . , married lesbian couples are similarly situated to spouses and parents in an opposite-sex marriage."[364] Donor insemination provided the lens through which to specifically understand same-sex and different-sex couples as similarly situated for purposes of the marital presumption. Iowa does not separately provide for donor insemination, and thus a husband who consents to his wife's insemination with donor sperm is the presumed father by virtue of the marital presumption. Yet the State treated "married lesbian couples who conceive through artificial insemination using an anonymous sperm donor differently than married opposite-sex couples who conceive a child in the same manner."[365]

Donor insemination made clear that the birth certificate, and the marital presumption on which it relied, had come to reflect intentional and functional notions of parenthood. With a married different-sex couple using donor insemination, the State "is not aware the couple conceived the child by an anonymous sperm donor" and the "birth certificate reflects the male spouse as the father."[366] The same-sex couple, by contrast, makes the biological reality knowable and public, and thus explicitly disturbs the biological assumptions of the presumption.

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[360] *See id.* at 341–42.

[361] IOWA CODE § 144.13(2) (2007), *invalidated by Gartner*, 830 N.W.2d 335. Again, a birth certificate is merely evidence of parentage. For the marital presumption in Iowa's parentage statutes, see *id.* § 252A.3.

[362] *Gartner*, 830 N.W.2d at 342 (second omission in original) (quoting Appellant's Final Brief & Request for Oral Argument at 35, *Gartner*, 830 N.W.2d 335 (June 25, 2012) (No. 12-0243)).

[363] *See id.* at 351–53 (relying on Varnum v. Brien, 763 N.W.2d 862, 878–906 (Iowa 2009)).

[364] *Id.* at 351.

[365] *Id.* at 352.

[366] *Id.*

The differential treatment of different-sex and same-sex couples, the court concluded, was based not on the government's legitimate goals but instead on "stereotype or prejudice."[367] In other words, the State's judgment reflected continued resistance to family forms that unambiguously depart from traditional patterns rooted in biology and gender — patterns clearly disrupted by same-sex parenting.[368]

Applying the marital presumption to same-sex couples is important not only from a sexual-orientation-equality perspective, but also from a more general family law perspective. The push and pull between biology and function continues to play out in disputes involving different-sex parents.[369] In fact, in some states, biology has gained prominence in the context of married different-sex couples in which the husband seeks to disestablish paternity.[370] Even when a man has served as a father for a substantial period of time, some courts have allowed the introduction of genetic evidence to terminate his parental obligations.[371] These types of disputes arise at divorce, when, at a particularly unsettling time for children, courts may terminate an established parent-child relationship.[372]

Paternity disestablishment is troubling from the perspective of a model of parenthood that values functional relationships and children's best interests,[373] and it should be seen as connected to conflicts over the application of the marital presumption to same-sex couples. If the marital presumption applies to lesbian mothers in a way that is

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[367] *Id.* at 353.

[368] *Cf.* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 889 (2014) (identifying an antistereotyping principle in constitutional sexual-orientation law).

[369] *See* JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS 106 (2014) (noting family law's disagreement "on the starting point — biology (and thus sex) or function (and thus assumption of a parental role)"); *see also* June Carbone & Naomi Cahn, *The Past, Present and Future of the Marital Presumption*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 387 (Bill Atkin ed., 2013 ed.) (discussing different approaches by states in conflicts between husbands and biological fathers); James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 872 (2003) ("[S]ome paternity presumptions appear to serve not so much as predictors of who will be a good father for a child, but rather simply as indications of who is the biological father.").

[370] *See* Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 194–95 (2004); *see also* June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1050–66 (2003); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 137–38 (2006).

[371] *See, e.g.*, Gantt v. Gantt, 716 So. 2d 846, 846 (Fla. Dist. Ct. App. 1998); NPA v. WBA, 380 S.E.2d 178, 180 (Va. Ct. App. 1989); *see also* Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 324–25 (2004).

[372] *See* Glennon, *supra* note 342, at 559, 596.

[373] *See* Bartholet, *supra* note 371, at 324 ("Once a child-parent relationship has been created, we should not let it be destroyed simply because there is no DNA match.").

relatively insulated from rebuttal by genetic evidence, then it may similarly apply to husbands who have been serving as (nonbiological) fathers. Of course, competing claims by biological fathers present an additional consideration. Still, it is important to see that part of what is at stake in paternity disestablishment is a model of parenthood that values parent-child relationships regardless of biology.[374] Family law developments over the past several decades, culminating in many ways in the Court's recognition of marriage equality in *Obergefell*, point toward results in both the same-sex and different-sex contexts that value functional and intentional parenthood over biological and genetic connections.

V. NONMARITAL PARENTHOOD AFTER MARRIAGE EQUALITY

Marriage equality validates a model of parenthood that, while having significant roots in marital family formation, was elaborated by LGBT advocates to reach nonmarital families. Yet there is certainly cause for concern that, going forward, marriage equality will lead courts and legislatures to limit nonmarital paths to legal parentage for nonbiological parents.[375] Even aside from issues explicitly involving same-sex couples, many states continue to discriminate in parentage based on marital status.[376] In some ways, *Obergefell*, which describes marriage as "a keystone of our social order,"[377] exacerbates these concerns.[378] The Court envisions nonmarital life, including nonmarital

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[374] *See* Kording, *supra* note 337, at 840 (explaining how "biology trump laws," or paternity disestablishment provisions, "classify all but intact marriages as unprotected families, subject to paternity challenges based on nature over nurture" such that a man "can challenge [his paternity under] the marital presumption at the time of divorce or within a certain time period, usually two to four years after the child's birth").

[375] *See* Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 495–96 (2014).

[376] *See* Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 46 (2008); Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1179 (2010); Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187, 230 (2013). For illustrative statutes, see ARK. CODE ANN. § 9-10-201 (2015) (donor-insemination statute applicable to married couples); IDAHO CODE § 39-5405(3) (2015) (same); and UTAH CODE ANN. § 78B-6-117(3) (West 2012) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.").

[377] Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015).

[378] *See* Melissa Murray, Obergefell v. Hodges *and the New Marriage Inequality*, 104 CALIF. L. REV. (forthcoming 2016) (manuscript at 3) ("*Obergefell* builds the case for equal access to marriage on the premise that marriage is the most profound, dignified, and fundamental institution into which individuals may enter. Alternatives to marriage . . . are by comparison, undignified, less profound, and less valuable."). For other scholarly commentary offering a critique of *Obergefell*'s privileging of marriage, see Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other:* Obergefell *and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 124 (2015); and Clare Huntington, Obergefell*'s Conservativism: Reifying Familial Fronts*, 84 FORDHAM L. REV.

childrearing, as inferior. Citing *United States v. Windsor*,[379] the Court's 2013 decision striking down section 3 of the Defense of Marriage Act, the *Obergefell* Court reasoned: "Without the recognition, stability, and predictability marriage offers, [same-sex couples'] children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life."[380]

Despite the Court's rhetorical insistence on the priority of marriage in *Windsor* and *Obergefell*, this Part suggests an overlooked alternative path that could emerge with marriage equality. By affirming the equal worth of same-sex couples' family formation and by mainstreaming same-sex parenting, marriage equality can function as an important precedent for the growth of intentional and functional parenthood for all families, not only inside but also outside marriage. Perhaps paradoxically, then, marriage equality may further blur, rather than just redraw, the line between marital and nonmarital parental recognition.

A. Same-Sex Family Formation and Nonmarital Parenthood

It is important to contextualize same-sex marriage within broader legal and demographic developments decentering marriage. Marriage equality is intervening on a national scale at a time when marriage no longer organizes family life for a growing segment of the American population.[381] Marriage itself has become a marker of privilege.[382] Those who marry (and stay married) are more likely to be white, relatively educated, and relatively high-income.[383] Early data suggest that at least some of these demographic patterns may also exist among

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23, 28 (2015). For a perspective that criticizes *Obergefell*'s privileging of marriage and yet sees potential in the decision for the constitutional rights of nonmarital families, see Courtney G. Joslin, The Gay Rights Canon and Non-Marriage (Oct. 9, 2015) (unpublished manuscript) (on file with the Harvard Law School Library); and compare with Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 31–32 (2015) ("*Neither* limiting marriage to opposite-sex couples *nor* excluding the unmarried from the circle of those whose autonomy the law respects is consistent with the commitment to equal dignity that lies at the heart of *Obergefell*.").

379 133 S. Ct. 2675 (2013).

380 *Obergefell*, 135 S. Ct. at 2600 (citing *Windsor*, 133 S. Ct. at 2694–95). *Windsor* has also been criticized for its privileging of marriage. *See, e.g.*, Widiss, *supra* note 290, at 549, 552.

381 *See* Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married: As Values, Economics and Gender Patterns Change*, PEW RES. CTR. (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married [http://perma.cc/JMC3-HWV5]; *see also* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 168 (2015) ("[M]arriage [is] no longer at the center of family life for increasingly large swaths of the American public.").

382 *See* Linda C. McClain, *The Other Marriage Equality Problem*, 93 B.U. L. REV. 921, 924 (2013) (describing "the class-based marriage divide" as "the 'other marriage equality problem'").

383 *See* CARBONE & CAHN, *supra* note 369, at 3–5.

same-sex couples.[384] At this point, there are not significant racial differences between married and unmarried same-sex couples,[385] though racial minorities in same-sex couples are more likely than their white counterparts to be raising children.[386] But there are significant economic disparities: married same-sex couples, including those with children, have higher median household incomes than their unmarried counterparts.[387]

Family law and sexuality scholars have pointed out how child-centered arguments for marriage equality accept, rather than challenge, the connection between marital family formation and parental rights in ways that cut against broader family law interventions benefitting all families.[388] This is a significant concern. Indeed, in the states in which same-sex couples are most likely to be raising children, family law regimes are the least pluralistic.[389] While marriage will offer a route to parentage for some same-sex parents, if couples do not marry, the nonbiological parent may remain a legal outsider. (And since many of these couples are raising children from previous different-sex relationships,[390] marriage itself may offer little relief to the

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[384] *See* GARY J. GATES, WILLIAMS INST., DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES (2015), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf [http://perma.cc/PAN5-U7D7].

[385] *See id.* at 4–5.

[386] *See* ANGELIKI KASTANIS & BIANCA D.M. WILSON, WILLIAMS INST., RACE/ETHNICITY, GENDER AND SOCIOECONOMIC WELLBEING OF INDIVIDUALS IN SAME-SEX COUPLES 2 (2014), https://escholarship.org/uc/item/71j7n35t [http://perma.cc/URW5-6ZAU].

[387] *See* GATES, *supra* note 384, at 4–5, 7. The disparity between same-sex married and unmarried couples, however, is less than that between different-sex married and unmarried couples. *See id.* at 5, 7.

[388] *See* POLIKOFF, *supra* note 75, at 100–09; Franke, *supra* note 277, at 1196–97.

[389] Because same-sex couples are most commonly raising children from previous different-sex relationships, states with less welcoming environments for LGBT people tend to be those with the highest rates of same-sex parenting. Dr. Gary Gates has found that Arkansas, Kansas, Mississippi, North Dakota, Oklahoma, South Dakota, and Wyoming are among the states with the highest rates of childrearing among same-sex couples. *See* GARY J. GATES, WILLIAMS INST., LGBT PARENTING IN THE UNITED STATES 4 (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf [http://perma.cc/2HSP-HYSN]. These states have had relatively harsh laws governing same-sex family formation. For example, Mississippi, which at this point has the highest proportion of same-sex couples raising children, maintains a ban, currently being challenged, on adoption by same-sex couples. *See* Complaint for Declaratory & Injunctive Relief, Campaign for S. Equal. v. Miss. Dep't of Human Servs., No. 3:15-cv-578 (S.D. Miss. Aug. 12, 2015) (challenging MISS. CODE ANN. § 93-17-3(5) (2007)).

[390] While parenting of children from previous different-sex relationships historically has been the most common form of same-sex parenting, the rise of intentional families continues to shift these demographics. *See* Mignon R. Moore & Michael Stambolis-Ruhstorfer, *LGBT Sexuality and Families at the Start of the Twenty-First Century*, 39 ANN. REV. SOC. 491, 495 (2013); Gary J. Gates, *Adoption Equality Is Not a Sure Thing*, CONTEXTS (July 7, 2015), http://contexts.org/blog/adoption-equality-is-not-a-sure-thing [http://perma.cc/7PZU-3876] [hereinafter Gates, *Adoption Equality*]. In fact, the percentage of same-sex couples raising children has declined in recent

nonbiological parent, given that the noncustodial parent could withhold consent to the stepparent adoption.)

Even in states that have offered nonmarital, nonbiological routes to parenthood, the rights of nonbiological parents in same-sex relationships may come to depend on marriage.[391] Courts that may otherwise have used equitable theories to recognize such parents may find that for nonbiological parents who had the opportunity to legally marry a child's biological parent, their choice not to do so undermines their claim to parental rights. Indications of how formal statuses might erode other parentage doctrines had emerged even before *Obergefell*.[392] And since *Obergefell*, some courts have situated marriage as the newly available solution to same-sex couples' parentage problems while denying parental rights to unmarried, nonbiological mothers.[393]

As these cases illustrate and as scholars have persuasively argued, access to marriage may limit other paths to parental recognition and may reduce incentives to achieve laws that recognize unmarried, nonbiological parents.[394] Clearly, marriage equality will not provide a comprehensive solution to family law problems for same-sex couples[395] — just as second-parent adoption before it did not solve same-sex couples' parentage problems. And marriage equality may lead to setbacks in parentage law in some jurisdictions. California — the focal

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years. *See* GARY J. GATES, WILLIAMS INST., SAME-SEX AND DIFFERENT-SEX COUPLES IN THE AMERICAN COMMUNITY SURVEY: 2005–2011, at 5 (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf [http://perma.cc/8ZL3-XK9X]. And this decline is due in part to the fact that lesbian and gay individuals are coming out earlier and thus are less likely to have had different-sex relationships that produced children. *See* Gates, *Adoption Equality*, *supra*.

391 *See* Joslin, *supra* note 375, at 495–96; Polikoff, *supra* note 331, at 728–29.

392 *See, e.g.*, A.H. v. M.P., 857 N.E.2d 1061, 1065, 1074 n.17 (Mass. 2006) (stating that failure to legally adopt a child may be relevant to whether a party is considered a parent based on equitable principles). A recent case from Oregon provides further illustration. The Oregon Court of Appeals had held that the donor-insemination statute, recognizing the woman's husband as the father, unconstitutionally discriminated based on sexual orientation and therefore must apply to unmarried lesbian couples. Shineovich & Kemp, 214 P.3d 29 (Or. Ct. App. 2009). But more recently the court of appeals held that the statute "applies to unmarried same-sex couples who have a child through artificial insemination [only] if the partner of the biological parent consented to the insemination *and* the couple would have chosen to marry had that choice been available to them." *In re* Madrone, 350 P.3d 495, 496 (Or. Ct. App. 2015).

393 *See, e.g.*, Conover v. Conover, 120 A.3d 874, 883 (Md. Ct. Spec. App. 2015) ("The couple could have married before Jaxon was born, but did not.").

394 *See, e.g.*, Joslin, *supra* note 375; Polikoff, *supra* note 331. Here, functional and intentional parenthood, to the extent they are distinct, may cut in different directions, given that decisions limiting parental recognition under equitable theories have arisen in the context of functional parenting claims, regardless of the method of reproduction. *See, e.g.*, LP v. LF, 338 P.3d 908 (Wyo. 2014) (denying claim to de facto parentage in different-sex context).

395 Still, some courts frame marriage equality in this way. *See, e.g.*, DeBoer v. Snyder, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014).

point of Part II — features some expansive laws, but impediments to more robust parental recognition exist in many other states.

Yet while the focus on marriage might suggest a renewed effort to redraw parentage through marriage, there are other indications that marriage equality has the capacity to contribute to more pluralistic family law and to accelerate the slippage between marital and nonmarital parentage, both in California and in other, less progressive jurisdictions. Ultimately, at this moment when the meaning and implications of marriage equality are contingent and contested, there is potential for same-sex marriage to yield more robust recognition for *some* unmarried parents.

In the way that marriage equality has been articulated — in California, in other states, and in the Court's decisions — it signals sexual-orientation equality specifically on family-based terms. Accordingly, it presents a challenge to family law regulations that continue to draw distinctions between families formed by different-sex and same-sex couples. Marriage equality's impact on this front will likely expand over time. Now that same-sex marriage has intervened on a national scale, the family-based LGBT equality that had been occurring on a piecemeal basis with significant geographical variation can become a more robust and generally applicable norm.

Family-based LGBT equality may be particularly significant to the status of assisted reproduction, which is central to same-sex family formation. Marriage equality may further normalize various forms of ART for all families. Surrogacy, for instance, continues to be heavily restricted as a legal matter.[396] But as states embrace same-sex family formation, they may increasingly accommodate the mechanisms commonly used by same-sex couples to have children.[397]

Consider developments in New York after the state enacted marriage equality. An openly gay state senator, who had a child with his husband through surrogacy in California, introduced a bill to lift the state's commercial-surrogacy ban.[398] The bill, which was supported

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[396] Some jurisdictions continue to prohibit commercial surrogacy. *See, e.g.*, D.C. CODE § 16-402 (2013); MICH. COMP. LAWS § 722.855 (2013); N.Y. DOM. REL. LAW § 122 (McKinney 2010).

[397] *See* NeJaime, *supra* note 23. *But cf.* Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1169 (2014) ("[E]ven a full-fledged constitutional right to gay marriage would not importantly affect the case for surrogacy . . . ."). On the relationship between nonenforcement of surrogacy agreements and the marginalization of same-sex family formation, see Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 197 (2013).

[398] *See* Glenn Blain, *EXCLUSIVE: Gay Rights Advocates Fight to Lift Ban on Paying Surrogate Moms*, N.Y. DAILY NEWS (Jan. 15, 2014, 6:33 PM), http://www.nydailynews.com/news/politics/push-nys-ban-paying-surrogate-moms-article-1.1581165; Anemona Hartocollis, *And Surrogacy Makes 3: In New York, a Push for Compensated Surrogacy*, N.Y. TIMES (Feb. 19, 2014), http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html.

by New York's leading LGBT legislative-advocacy organization,[399] would have allowed compensated gestational surrogacy and would have furnished mechanisms by which "intended parents" could secure parentage judgments.[400] "Intended parents" would have included spouses, unmarried "intimate partners," and single individuals.[401] While male same-sex couples would have gained an important route to parenthood with the bill, single parents and different-sex couples also engage in assisted reproduction, including surrogacy, and would have benefited from wider availability and recognition.[402] The bill did not pass, but efforts to reform New York's surrogacy laws are gaining momentum.[403]

Growing acceptance of ART may in turn yield greater recognition of nonbiological parents. The New York surrogacy bill would have provided routes to parentage not only for intended parents using ART, but also for functional parents generally. Seeking to expand New York's relatively restrictive functional-parenthood doctrine,[404] the bill sought to offer parentage judgments to those who "formed a parent-child bond" and "performed parental functions for the child to a significant degree."[405] Recalling the logic of earlier nonmarital parenting cases, the provision would have applied only to those who had been an "intimate partner" of the child's parent.[406] While nonbiological parenting is more common among same-sex couples, it arises in a variety of families. The benefits of an expanded functional-parenthood doctrine

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399 At the end of 2015, however, the Empire State Pride Agenda announced plans "to conclude major operations." *Empire State Pride Agenda Announces Plans to Conclude Major Operations in 2016*, EMPIRE STATE PRIDE AGENDA (Dec. 12, 2015), http://www.prideagenda.org/news/2015-12-12-empire-state-pride-agenda-announces-plans-conclude-major-operations-2016 [http://perma.cc/9EAK-VBBQ].

400 S.B. 04617, 2013–2014 Reg. Sess. §§ 581-201–206 (N.Y. 2013).

401 *See id.* § 581-404.

402 Greater acceptance of ART and mechanisms to determine parentage arising out of ART may produce more pluralistic family law. *See* Matsumura, *supra* note 397, at 203–04.

403 In fact, Governor Andrew Cuomo has asked the Task Force on Life and the Law to explore lifting the ban. *See* Carl Campanile, *Cuomo Might Lift Surrogate-Mom Ban, a Priority for Gay-Rights Advocates*, N.Y. POST (Oct. 19, 2015, 12:13 PM), http://nypost.com/2015/10/19/cuomo-might-lift-ban-on-commercial-surrogates-a-priority-for-gay-rights-advocates [http://perma.cc/7NYT-TLV3].

404 *See* Debra H. v. Janice R., 930 N.E.2d 184, 192 (N.Y. 2010) (adhering to a "bright-line rule" for parentage rather than adopting a "complicated and nonobjective test for determining so-called functional or de facto parentage"); Alison D. v. Virginia M., 572 N.E.2d 27, 28–29 (N.Y. 1991) (denying the applicability of "parent" within the meaning of New York law to a woman who was not the biological mother but had been a functional parent of the child while in a relationship with the biological mother).

405 S.B. 04617 at §§ 581-601(B)(3)–(B)(4).

406 *Id.* § 581-601(C). Though, in the adoption context, the New York courts have not limited "intimate partners" to those in cohabiting or sexual relationships. *See In re* Adoption of G., 978 N.Y.S.2d 622, 629 (Sur. Ct. 2013).

would accrue to parents and children in families headed by both same-sex and different-sex couples.

Of course, there will be continued resistance to both ART and nonbiological parentage.[407] In fact, the regulation of ART has become an increasingly high-profile topic of family law debate,[408] and much of the discussion focuses on the significance of genetic bonds. Marriage equality bears on this debate. It casts serious doubt not only on specific efforts to limit opportunities for same-sex couples to form families, but also on broader attempts to marginalize intentional and functional parenthood and redraw parental status through biology and gender — for all parents.

In the specific domain of same-sex parenting, marriage equality may push state family law regimes that increasingly have accommodated ART toward gender and sexual-orientation neutrality in ways that extend intentional and functional parentage outside marriage. Even as many states have resisted recognition of same-sex parents, they have gradually come to grips with unmarried heterosexual parents. The 1970s saw states alter family law principles to recognize unmarried, biological fathers and their children. While many statutes continue to discriminate against unmarried individuals in the regulation of ART and parentage,[409] states are increasingly recognizing the parental status of unmarried different-sex couples using ART to have children. Now, marriage equality can become a precedent on which to

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[407] David Blankenhorn's Institute for American Values, for example, is working to restrict ART. In doing so, the Institute's researchers prioritize biological and gendered notions of parenting. *See* ELIZABETH MARQUARDT, ONE PARENT OR FIVE: A GLOBAL LOOK AT TODAY'S NEW INTENTIONAL FAMILIES 25 (2011); ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, MY DADDY'S NAME IS DONOR (2010). Anti-ART efforts have continued — and seemingly intensified — in *Obergefell*'s wake. *See, e.g.*, Melissa Moschella, *To Whom Do Children Belong? How Same-Sex Marriage Threatens Parental Rights*, PUB. DISCOURSE (Oct. 5, 2015), http://www.thepublicdiscourse.com/2015/10/15407 [http://perma.cc/AE3N-325H]; Christopher White, *Surrogacy and Same-Sex Marriage: A Tale of Two Countries*, PUB. DISCOURSE (July 21, 2015), http://www.thepublicdiscourse.com/2015/07/15362 [http://perma.cc/97Q6-QLXT].

[408] *Compare* NAOMI CAHN, THE NEW KINSHIP (2013) (arguing for a new legal framework for ART that is grounded in family law and focuses on relationships and the child's best interests), Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367 (2012), *and* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000) (arguing that sexual and technological conception should be governed by the same legal regime), *with* Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, 49 U.C. DAVIS L. REV. 183 (2015) (contending that reproductive regulation that is justified by the "incest taboo" is problematic both normatively and constitutionally), I. Glenn Cohen, *Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431 (2012) (critiquing Professor Naomi Cahn's support for mandatory sperm-donor registries), *and* Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003) (arguing for a relatively unregulated parenthood market in the context of alternative insemination).

[409] *See* Joslin, *supra* note 375, at 509.

achieve sexual-orientation equality with regard to the recognition of unmarried, intentional parents.

Consider *D.M.T. v. T.M.H.*,[410] decided by the Florida Supreme Court after the U.S. Supreme Court's decision in *Windsor*. The Florida state government historically had defended a legal regime hostile to LGBT parents.[411] It enforced a ban on lesbian and gay adoption, enacted during Anita Bryant's 1977 "Save Our Children" campaign, until a 2010 state appellate decision struck it down.[412] Yet Florida increasingly had recognized unmarried, intentional *different-sex* parents using reproductive technology. Its family code provides that egg and sperm donors relinquish their claims to parental rights, except in circumstances where they are part of a "commissioning couple";[413] the law defines "commissioning couple" as "the intended mother and father."[414]

In 2013, the Florida Supreme Court considered whether unmarried "commissioning couples" could be limited to different-sex couples.[415] The court evaluated a "co-maternity" situation and needed to decide whether the genetic mother, who had been in a relationship with the birth mother, would be deemed a mere donor whose rights were relinquished. The case, essentially Florida's version of *K.M. v. E.G.*, was decided not on the basis of state parentage law but instead on constitutional grounds.[416] The court invoked *Windsor*, noting that while that decision involved a separate issue (recognition of same-sex couples' marriages), it nonetheless recognized the constitutional interests of same-sex couples in ways that shaped the considerations in the instant case.[417] This move is especially noteworthy given that *Windsor*, like *Obergefell*, employed rhetoric that privileged marriage and marginalized nonmarital families.[418] Despite its focus on the marital family —

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410 129 So. 3d 320 (Fla. 2013).

411 *See* Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 806–07 (11th Cir. 2004).

412 *See* Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010). The legislature did not formally repeal the ban until 2015. H.B. 7013, 117th Leg., Reg. Sess. (Fla. 2015).

413 FLA. STAT. § 742.14 (2015).

414 *Id.* § 742.13(2).

415 *D.M.T.*, 129 So. 3d. 320. NCLR, Lambda Legal, and the ACLU participated as amici curiae. *See Amicus Curiae* Brief of American Academy of Assisted Reproductive Technology Attorneys in Support of Respondent, *D.M.T.*, 129 So. 3d 320 (No. SC12-261) [hereinafter AAARTA Brief] (filed by NCLR); Brief of *Amici Curiae* American Civil Liberties Union Foundation, American Civil Liberties Union of Florida, & Lambda Legal in Support of Appellee, *D.M.T.*, 129 So. 3d. 320 (No. SC12-261).

416 *D.M.T.*, 129 So. 3d at 328.

417 *See id.* at 337.

418 Indeed, the *Windsor* Court reasoned that the denial of federal marital recognition to same-sex couples "humiliates tens of thousands of children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their

and married parents specifically — *Windsor*, to the Florida Supreme Court, signified sexual-orientation equality in family law more broadly.

Ultimately, the court found that "the State does not have a legitimate interest in precluding same-sex couples from being given the same opportunity as heterosexual couples to demonstrate [parental] *intent*."[419] Nonetheless, because the case featured "co-maternity," the specific holding related to the mother's biological status. Indeed, the court stressed that, like an unmarried, biological father seeking parental rights, the genetic mother grasped the opportunity afforded by her biological connection, and thus demonstrated the requisite parental conduct to qualify for parental status.[420] Moreover, the court emphasized that membership in the commissioning couple did not independently give rise to a claim to parentage.[421]

Still, the logic, as NCLR urged in the case,[422] should ultimately apply to nonbiological mothers in same-sex couples using ART. Even as the court stressed the mother's genetic connection to the child, it consistently appealed to notions of intent and emphasized the importance of legally recognizing the child's two parents.[423] Moreover, the court quoted NCLR's amicus curiae brief in explaining that ART "'help[s] intended parents who are otherwise unable to have children of their own create a family,' and [is] used by 'opposite-sex married couples . . . , same-sex couples, unmarried heterosexual couples, and single individuals who seek the opportunity to become parents.'"[424] Indeed, the court explained that even as "the 'law is being tested as . . . new techniques [of assisted reproduction] become more commonplace and accepted,' . . . courts must ensure that the constitutional rights of those individuals who *intended* to be parents to the child are protected."[425]

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own family and its concord with other families in their community and in their daily lives." United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).

419 *D.M.T.*, 129 So. 3d at 343 (emphasis added).

420 *Id.* at 337–39.

421 *See id.* at 342 ("[S]ections 742.13 and 742.14 do not create a statutory basis for an individual who would not otherwise have parental rights to claim those rights."). The court explained that the statute at issue allows a member of the commissioning couple "to preserve his or her interest in the child conceived through assisted reproductive technology" but that "that individual becomes a parent only if he or she has some legal basis to be recognized as a parent." *Id.* In doing so, the court referred to both biological and nonbiological routes to legal parentage. *See id.* (citing FLA. STAT. § 742.11 (2015) (Florida's AID statute)).

422 *See* AAARTA Brief, *supra* note 415, at 20.

423 *D.M.T.*, 129 So. 3d at 344.

424 *Id.* at 340 n.7 (third alteration in original) (quoting AAARTA Brief, *supra* note 415, at 3).

425 *Id.* (first and second alterations in original) (emphasis added) (citation omitted) (quoting *In re* Roberto d.B., 923 A.2d 115, 117 (Md. 2007)). At least one Florida court, however, has distinguished *D.M.T.* in denying parental rights to a nonbiological mother whose same-sex partner had children through donor insemination. *See* Russell v. Pasik, No. 2D14-5540, 2015 WL 5947198, at *3 (Fla. Dist. Ct. App. Oct. 14, 2015) ("When, as in the present case, there is not a biological con-

Given that Florida had come to grips with unmarried different-sex couples' use of reproductive technology, it could not, within a family law regime disciplined by a sexual-orientation-equality principle, withhold intent-based routes to parentage from unmarried same-sex couples. Just as *Buzzanca* followed from *Johnson* in California, future decisions may further untether the intent-based principle in *D.M.T.* from biology.[426] In a family law system in which intent and function govern over biology and gender, same-sex and different-sex couples are similarly situated, both inside and outside marriage. And in a world in which marriage equality is accepted — the post-*Obergefell* world — sexual-orientation nondiscrimination becomes a more universal norm.

Just as the Florida Supreme Court found support in *Windsor*, future courts may appeal to the broader principles of liberty and equality announced in *Obergefell*. That is, even as *Obergefell* privileged marriage, its reasoning may support broader LGBT rights in the family law context. An opinion from a Missouri case involving an unmarried, nonbiological lesbian mother suggests one potential path: "While *Obergefell* addresses the right to marry, it also pronounced that 'choices concerning contraception, family relationships, procreation, and childrearing' are protected by the Constitution."[427] Accordingly, the opinion reasoned: "[I]n light of the decision in *Obergefell*, . . . it is unclear which statutory schemes can be deemed adequate . . . as they relate to parentage . . . of children born to same-sex couples, whether *married or not*."[428] Indeed, in observing that "[i]t is the children of same-sex couples who will be most severely affected by being limited in their opportunity to maintain bonds with a party who is not a biological parent but who has . . . 'functionally behaved as the children's second parent,'"[429] the opinion evinced an appreciation for how resistance to nonbiological parentage in both marital and nonmarital families reflects and produces LGBT inequality.[430] Importantly, it

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nection between petitioner and child and it is a nonparent that is seeking to establish legal rights to a child, there is no clear constitutional interest in being a parent.").

426 *But see Russell*, 2015 WL 5947198, at *2–4.

427 McGaw v. McGaw, 468 S.W.3d 435, 454 (Mo. Ct. App. 2015) (Clayton, J., concurring in part and dissenting in part) (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015)). The Missouri Court of Appeals rejected equitable claims to parenthood but affirmed the nonbiological mother's right to assert claims to custody and visitation in an independent statutory action. *Id.* at 448–49 (majority opinion).

428 *Id.* at 453 (Clayton, J., concurring in part and dissenting in part) (emphasis added).

429 *Id.* at 452.

430 Similarly, in a pre-*Obergefell* decision from New York holding that the family court had jurisdiction over a biological mother's petition for child support from the nonbiological mother, a concurring opinion explained that "it seems intuitive[] that all people, male and female, gay and straight, should be treated the same way. Yet it is an inescapable fact that gay and straight couples face different situations . . . as a matter of biology." H.M. v. E.T., 930 N.E.2d 206, 211 (N.Y. 2010) (Smith, J., concurring).

suggested that, as a constitutional matter, *Obergefell* calls such inequality into question.

B. Blurring Marriage and Nonmarriage

The developments in Florida are consistent with the broader trajectory within which marriage equality fits — a trajectory in which recognition of same-sex parents followed from, and in turn furthered, the erosion of parental distinctions based on biology, gender, and marital status. As Part II's case study demonstrates, recognition of nonbiological (presumptively heterosexual) parents inside marriage justified the recognition of parents, including same-sex parents, outside marriage. Eventually, same-sex couples gained access to marriage based on the principles that supported the recognition of their nonmarital parent-child relationships. Now, with marriage equality, principles of intentional and functional parenthood may expand in ways that span marital and nonmarital families, for both same-sex and different-sex couples.

Consideration of opposition to earlier advances in LGBT family law underscores this reading. In California, social-conservative advocates fought not only same-sex marriage, but also developments that muddied distinctions between marriage and nonmarriage, including second-parent adoption, recognition of nonbiological co-parenting, and domestic partnership.[431] At stake was the primacy of marriage and its relationship to childrearing. These social-conservative activists saw what many scholars miss today: the entrance of same-sex couples into marriage followed partly from the decreasing salience of marriage, rather than its continued centrality.

The same logic that supported recognition of parentage inside marriage applied to the recognition of parentage outside marriage, such that the line between marriage and nonmarriage for purposes of parentage had been drained of some significance. Same-sex couples' marriage claims extended that logic to remove the formal marital-status distinction. In fact, when LGBT advocates litigated marriage claims in California, they appealed to marriage's unique status partly because the rights bestowed by marriage had been achieved through

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In contrast, in affirming the denial of parental rights to a nonbiological mother in a same-sex relationship, a Maryland court failed to grapple with the incidence of nonbiological parentage in same-sex couples, simply reasoning that "there is no gender discrimination or sexual orientation discrimination because all non-biological, non-adoptive parents face the same hurdle, no matter what sex or sexual orientation they are." Conover v. Conover, 120 A.3d 874, 883 (Md. Ct. Spec. App. 2015). A concurring opinion, though, pointed out that "the definitions of parenthood tied to marriage, biology or formal adoption don't map neatly onto same-sex relationships." *Id.* at 887 (Nazarian, J., concurring).

431 *See supra* sections II.B–C, pp. 1212–30.

nonmarital mechanisms.[432] If unmarried same-sex couples enjoyed rights traditionally routed through marriage, including parentage, then their claims to marriage had to emphasize expressive, more than tangible, harm.

On this account, marriage reiterates more generally applicable intentional- and functional-parenthood principles. It thereby constitutes part of a broader — though incomplete — family law regime that centers on chosen, functional families and recognizes parent-child relationships in ways not limited by biology, gender, sexual orientation, or marital status.

Contextualizing the current moment within a longer trajectory reinforces this understanding. In the 2000s, the California Supreme Court consistently saw the recognition of same-sex couples' parental rights as supporting, rather than rendering unnecessary or unwise, the expansion of parental rights through other means.[433] While the legislature had extended stepparent adoption to same-sex couples through the domestic partnership regime, the court did not view that development as a reason to restrict second-parent adoption.[434] Instead, domestic partnership advanced sexual-orientation-equality principles that also animated second-parent adoption.[435] More importantly, second-parent adoption served a broader array of functional parent-child relationships that the state sought to protect.[436]

Again in 2005, when the California Supreme Court handled three groundbreaking same-sex parenting cases, it did so after the legislature passed a new domestic partnership law, which provided that the rights of registered domestic partners with regard to the children of either of them would be the same as the rights of spouses.[437] The court expressly considered whether same-sex couples' parental rights should be routed exclusively through the new law.[438] LGBT advocates, as they had with second-parent adoption, distinguished domestic partnership and stressed the interests of children in families, formed by both same-sex and different-sex couples, lacking formal state-law status.[439] Per-

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[432] *See* Douglas NeJaime, *Framing (In)Equality for Same-Sex Couples*, 60 UCLA L. REV. DISCOURSE 184, 196–99 (2013).

[433] *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 666 (Cal. 2005).

[434] *See, e.g.*, Sharon S. v. Superior Court, 73 P.3d 554, 565 (Cal. 2003).

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

[436] *See supra* section II.B, pp. 1212–22.

[437] CAL. FAM. CODE § 297.5(d) (West 2004). For a family law perspective on the domestic partnership law, see generally 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 (2004).

[438] *See* Kristine H. v. Lisa R., No. S126945, 2004 Cal. LEXIS 9106 (Sept. 22, 2004).

[439] *See* Opening Brief of Real Party in Interest Emily B. at 24–25, *Elisa B.*, 117 P.3d 660 (No. S125912) ("[E]ven after [the new domestic partnership law] goes into effect, children will continue

suaded, the court viewed the domestic partnership law as justifying, rather than limiting, the extension of parental rights to a larger population of parents.[440] The interests advanced by the formal regime — sexual-orientation equality and protection of children's best interests — pushed toward more, not less, recognition of parent-child relationships. Existing routes to parentage justified additional routes to parentage.[441]

Most importantly, same-sex marriage has not redrawn the scope of parental rights in California. Since same-sex couples gained access to marriage, second-parent adoption, parental presumptions outside marriage, and the domestic partnership regime have remained. Indeed, the California courts have continued to apply the "holding out" presumption, against the objections of social-conservative advocates, to unmarried and unregistered nonbiological lesbian co-parents.[442] And the state legislature revised the family code to make both the marital presumption and the "holding out" presumption in section 7611 explicitly gender neutral.[443]

In fact, the legislature has continued to expand intentional- and functional-parenthood principles to both married and unmarried parents. In 2015, it passed a bill, which the governor signed and which NCLR had co-sponsored,[444] revising section 7613 to remedy some of the inequities that the earlier lesbian parenting cases — those cases that came before marriage equality — had exposed.[445] Section 7613 now applies to unmarried same-sex and different-sex couples, thereby recognizing nonbiological intended parents regardless of marital status. If, "with the [written] consent of another intended parent," a woman conceives with donor sperm or egg, "that intended parent is treated in law as if he or she were the natural parent of a child thereby conceived."[446] Of course, in earlier litigation, including in *Elisa B.*, LGBT advocates had pressed an interpretation of the donor-insemination statute that would apply to unmarried couples. But it was not until after marriage equality that the legislature made section 7613 marital-status neutral. The legislature also addressed the problem presented

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to be born to same-sex couples who do not register as domestic partners as well as to heterosexual couples who do not marry.").

440 *See Elisa B.*, 117 P.3d at 666 ("We perceive no reason why both parents of a child cannot be women. That result now is possible under the current version of the domestic partnership statutes.").

441 *See supra* section II.C, pp. 1222–30.

442 *See, e.g.,* Charisma R. v. Kristina S., 96 Cal. Rptr. 3d 26, 41 (Ct. App. 2009).

443 *See* S.B. 1306, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

444 *See* Summary & History, Legislation: California Assembly Bill 960, NAT'L CTR. FOR LESBIAN RIGHTS, http://www.nclrights.org/cases-and-policy/policy-and-legislation/legislation-california-assembly-bill-960 [http://perma.cc/35JG-4KYB].

445 *See* Assemb. B. 960, 2015–2016 Leg., Reg. Sess. (Cal. 2015).

446 *Id.* sec. 1, § 7613(a).

by the requirement of physician assistance. Now, involvement of a doctor or sperm bank is not necessary to preclude a donor's claim to parentage.[447] Finally, the new law provides guidance on egg donation. It includes provisions that ratify the *K.M.* decision by treating a woman who donates ova for use in assisted reproduction by her "spouse or *nonmarital partner*" as a legal parent.[448] As this important legislation demonstrates, a regime that includes same-sex couples having children both inside and outside marriage mainstreams assisted reproduction and nonbiological parentage in ways that support the expanded recognition of intentional and functional parenthood in both marital and nonmarital families.

Of course, family law varies by state, and California has a particularly robust parentage regime. Nonetheless, at this moment when the meanings and implications of marriage equality are contested and contingent, developments from California suggest how recognition of same-sex couples' parental rights through marriage can run with, rather than against, recognition of nonmarital parental rights based on intent and function.[449] In an indication of national shifts in this direction after *Obergefell*, the Uniform Law Commission has begun the process of drafting a revised UPA to address parentage issues related to same-sex couples. Professor Courtney Joslin, who was a seminal figure in the earlier parenting advocacy on behalf of unmarried parents and is a prominent scholar on nonmarital parentage, has been designated the official reporter.[450] Again, my point is not to suggest that marriage equality does not, in significant ways, accept the line between marriage and nonmarriage.[451] Indeed, critical rights and benefits continue to be

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[447] *See id.* sec. 1, § 7613(b)(2) ("If the semen is not provided to a licensed physician and surgeon or a licensed sperm bank . . . , the donor of semen for use in assisted reproduction by a woman other than the donor's spouse is treated in law as if he were not the natural parent of a child thereby conceived if either of the following are met: (A) The donor and the woman agreed in a writing signed prior to conception that the donor would not be a parent. (B) A court finds by clear and convincing evidence that the child was conceived through assisted reproduction and that, prior to the conception of the child, the woman and the donor had an oral agreement that the donor would not be a parent.").

[448] *Id.* sec. 1, § 7613(c) (emphasis added).

[449] Oregon lawmakers are considering legislation to make the state's parentage laws gender neutral. Importantly, the draft legislation would not only make the donor-insemination statute apply to same-sex spouses, but would also expand its application to unmarried couples. *See* H.B. 3231, 2015 Leg., Reg. Sess. § 3(1) (Or. 2015), https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB3231 [http://perma.cc/FGZ6-FPYL] ("A person who consents in writing to the artificial insemination of a woman, with the intent to be the parent of the woman's child, is conclusively established as a parent of the child.").

[450] *See* Email from Courtney Joslin, Professor of Law, U.C. Davis Sch. of Law, to author (Dec. 2, 2015, 3:37 PM) (on file with the Harvard Law School Library).

[451] *See* Douglas NeJaime, *Marriage and Non-Marriage After* Windsor, *in* CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 417, 428–33 (Steven Saltzman & Cheryl I. Harris eds., 2013).

routed through marriage.[452] Rather, it is to say that along other dimensions — here, parenthood — marriage equality has the potential to facilitate continued erosion of that line for all families.

As we have seen in California, same-sex couples' inclusion in marriage has driven and justified the expansion of parental recognition based on intent and function, and, in doing so, has further decentered a model of parenthood bounded by biology, gender, sexual orientation, and marital status. Importantly, parentage principles that accommodate same-sex parenting even challenge limitations on the number of legal parents a child can have. For example, in response to a dispute involving a married same-sex couple, California enacted a multiple-parent law, thus moving parentage beyond the dyadic unit.[453] *In re M.C.*[454] featured three individuals with claims to parental status: a biological mother, her same-sex spouse, and the biological father with whom the biological mother had a sexual relationship.[455] After the appellate court in 2011 found that the child could have only two legal parents under the UPA,[456] the legislature responded with a multiple-parent bill, co-sponsored by NCLR.[457] Now, a court can find more than two legal parents if not doing so would be detrimental to the child.[458] The court would then allocate custody and visitation based on the child's best interests.[459]

Often — and more commonly than the situation above — same-sex couples with children envision continuing parental roles for individuals who, though outside the primary coupled relationship, have biological connections to those children — likely through sperm or ova dona-

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[452] *See* Murray, *supra* note 280, at 433; Polikoff, *supra* note 284, at 585.

[453] S.B. 274, 2013–2014 Leg., Reg. Sess. (Cal. 2013).

[454] 123 Cal. Rptr. 3d 856 (Ct. App. 2011).

[455] *Id.* at 861.

[456] *Id.* at 876–77.

[457] The first attempt, SB 1476, was vetoed by Governor Edmund "Jerry" Brown, Jr. Jim Sanders, *Jerry Brown Vetoes Bill Allowing More Than Two Parents*, SACRAMENTO BEE: CAPITOL ALERT (Sept. 30, 2012, 1:22 PM), http://blogs.sacbee.com/capitolalertlatest/2012/09/jerry-brown-vetoes-bill-allowing-more-than-two-parents.html [http://perma.cc/52MH-KJ39]. A year later, Brown signed a revised version. Christopher Cadelago, *Jerry Brown Signs California Bill Allowing More Than Two Parents*, SACRAMENTO BEE: CAPITOL ALERT (Oct. 4, 2013, 5:47 PM), http://blogs.sacbee.com/capitolalertlatest/2013/10/jerry-brown-signs-bill-allowing-more-than-two-parents-in-calif.html [http://perma.cc/EYA2-PNRX]. On NCLR's support, see Michelle Garcia, *Calif.: Brown Vetoes Multiparent Protection Law*, THE ADVOC. (Oct. 1, 2012, 3:41 PM), http://www.advocate.com/politics/2012/10/01/california-governor-brown-vetoes-multiparent-protection-law [http://perma.cc/FJ4X-YJ95].

[458] CAL. FAM. CODE § 7612(c) (West 2013).

[459] CAL. FAM. CODE § 3040(d) (West 2004). The multiparent concept extends principles of functional parenthood. *See* Bartlett, *supra* note 12, at 944 (explaining that "nonexclusive parenthood permits recognition of de facto parenting relationships"); *see also* Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 713 (2008) (arguing that "recognizing functional, non-exclusive parenthood undermines all of the core qualities associated with biological parenthood").

tion or through surrogacy.[460] In this way, same-sex couples may intentionally create family arrangements in which the child has more than two individuals performing parental roles.[461]

By pushing these arrangements *from within marital families*, same-sex couples may destabilize powerful norms dictating exclusive, married parenthood, for both same-sex and different-sex couples.[462] For instance, while in an earlier era the nonbiological mother in a same-sex relationship could be deemed a legal stranger even as the sperm donor became a legal father,[463] with same-sex marriage the nonbiological mother would enjoy a presumption of parentage (subject to the challenges explained *supra* Part IV). Accordingly, in cases where the parties have deliberately created a parental role for the biological father, his legal status could supplement, rather than supersede, that of the nonbiological mother. While courts operating under a two-parent limitation may simply exclude the biological father (which of course may be the best result regardless of any limitation), California courts can now recognize three parent-child relationships in appropriate situations.[464] By destabilizing norms around biological, gendered parenting, married same-sex couples may pressure the common assumption that a child has only two parents[465] and, at the same time, may validate parents who are not in coupled relationships.

Of course, the multiple-parenthood concept does not depend on marriage. In some states that prohibited same-sex marriage, courts nonetheless recognized multiple parents in limited situations.[466] And families formed by same-sex and different-sex couples, both in and out of marriage, may feature multiple parents. Indeed, while same-sex marriage produced the scenario that led to California's multiple-parent law, the law's recognition is not limited to situations arising out of

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460 BALL, *supra* note 68, at 129–34; *see also* MAMO, *supra* note 68, at 90–92; JUDITH STACEY, UNHITCHED: LOVE, MARRIAGE, AND FAMILY VALUES FROM WEST HOLLYWOOD TO WESTERN CHINA 74–79 (2011).

461 Professor William Eskridge labels such arrangements "polyparenting." Eskridge, *supra* note 6, at 1975. On the complexities posed by the potential legal recognition of families in which more than two adults fill familial, including parental, functions, see Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 371–73 (2015).

462 *See* Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage*, 64 EMORY L.J. 2047, 2084–86 (2015) (linking same-sex marriage and parenting to recognition of multiple parentage).

463 *See, e.g.*, Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994); Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 394 (1986).

464 CAL. FAM. CODE § 7612(c) (West 2013).

465 *See* Paula L. Ettelbrick, Speech, *Our Common Humanity: Vermont's Leading Role in Forging a New Basis for Family Recognition*, 2 GEO. J. GENDER & L. 135, 142 (2000).

466 *See, e.g.*, Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007) (recognizing that three individuals — a biological mother, a nonbiological mother, and an involved sperm donor — may have parental rights and obligations).

marriage or same-sex family formation. The parents, for example, may be three unmarried, heterosexual individuals.[467]

This is part of the point. By challenging norms once considered core to marriage and parenthood and instead reinforcing a model of parenthood that derives parentage from intent and function, families formed by same-sex couples continue to destabilize norms that constrict familial possibilities *for all families*, both in and out of marriage. Ultimately, the blurring of norms governing marital and nonmarital families, which of course relates to broader legal and demographic trends,[468] may continue through — and grow out of — marriage equality.

CONCLUSION

The Supreme Court's decision in *Obergefell* resolved the question of whether same-sex couples have access to marriage. But it opened up new questions about what such access means for a body of family law that regulates same-sex and different-sex couples, biological and nonbiological parents, and marital and nonmarital families. Rather than accept wholesale assessments that view same-sex couples' inclusion in marriage as rendering them "like straights,"[469] the account presented here focuses on the particular grounds that justify such inclusion. By carefully attending to the dimensions along which same-sex couples are conceived as similarly situated to their different-sex counterparts, this Article shows how an appeal to some marital norms has allowed same-sex couples to unsettle and reshape others.[470]

In early LGBT parenting litigation on behalf of unmarried parents, advocates drew on their constituents' marriage-like relationships, but they did so to elaborate a new model of intentional and functional parenthood. Recent claims to marriage equality implicated these same

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[467] Troublingly, anecdotal evidence in California suggests that the law has been invoked in the context of nonmarital families involving different-sex relationships, where the state looks for two potential fathers — a functional father and a biological father — as sources of child support. Interview with Cathy Sakimura, *supra* note 341; Interview with Diane Goodman, Dir., Law & Mediation Office of Diane M. Goodman, APC, in Encino, Cal. (July 10, 2014) (on file with the Harvard Law School Library). It becomes clear, once again, that government actors can deploy expansive parentage laws to privatize support.

[468] *See* Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 858–59 (2004).

[469] *See* Spade, *supra* note 280, at 84; *see also* Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1374 (2005).

[470] This account resonates with Professor Martha Minow's influential treatment of difference and the law. As Minow finds: "Strategies for remaking difference include challenging and transforming the unstated norm used for comparisons, taking the perspective of the traditionally excluded or marginal group, disentangling equality from its attachment to a norm that has the effect of unthinking exclusion, and treating everyone as though he or she were different." MARTHA MINOW, MAKING ALL THE DIFFERENCE 16 (1990).

principles. Same-sex couples who sought access to marriage sidelined biological and gendered notions of parentage and instead centered intent and function. This perspective brings into view marriage equality's power to facilitate, rather than undermine, the growth of transformative parentage concepts across family law. In fact, by validating the model of parenthood central to same-sex family formation, marriage equality can provide a precedent on which to justify the expansion of that model not only inside but also outside marriage, for both same-sex and different-sex relationships.