PARENTAGE WITHOUT GENDER

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I. INTRODUCTION

There is no question that the Supreme Court's June 2015 ruling in *Obergefell v. Hodges*,[1] in which it declared a constitutional right to marry a person of the same sex, changed the landscape of marriage law dramatically. The patchwork of laws either embracing or prohibiting such marriages had become increasingly hard to reconcile as couples moved or traveled from one state to the next and faced uncertainty about their marital status.[2]

With a single wave of its constitutional wand, the Supreme Court ended those conflicts. In two simple sentences, the Court ended a decades-long controversy over the right of same-sex couples to marry.

> The Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex. . . . [T]he Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.[3]

The simplicity of these statements belies the complexity of the national landscape at that time. States were stridently split between allowing same-sex couples to marry and prohibiting both the celebration and recognition of marriages by same-sex couples.[4]

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

2 There is extensive literature on this point. By way of example, see Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215 (2005); ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 17 (2006); Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J.C.R. & C.L. 1 (2005); Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433 (2005).

3 *Obergefell*, 135 S. Ct. at 2607–608. The Court inched towards this ruling in 2013, with its ruling in Windsor v. United States, 133 S. Ct. 2675 (2013), in which it invalidated the federal Defense of Marriage Act ("DOMA") on equal protection grounds.

4 *See* Danielle Kurtzleben, *Map: Here's How Same-Sex Marriage Laws Will Now Change Nationwide*, NPR (June 26, 2015), http://www.npr.org/sections/itsallpolitics/2015/06/26/417715124/map-heres-how-same-sex-marriage-laws-will-now-change-nationwide.

Now, same-sex married couples can marry anywhere—and, importantly, divorce anywhere.[5] And wherever they go, they are just as married as any other married couple. But what about the status of children of same-sex couples? The growing number of children being raised by same-sex couples and their relegation "through no fault of their own to a more difficult and uncertain family life" played a key role in Justice Kennedy's reasoning in the majority opinion in *Obergefell*.[6] But the ability of any particular child's parents to marry is only the most obvious way in which *Obergefell* affects children. It also has potentially far reaching implications for parentage law—the statutes and doctrines that tell us who a child's legal parents are. *Obergefell* resolved some thorny parentage law issues, but left others unresolved and made still others more confused. This uneven impact reveals an underlying incoherence of parentage law that goes far beyond the questions raised by married, same-sex couples with children.

Dramatic changes in the family form over the last several decades have put increasing pressure on the parent-child relationship. This elevation of the parent-child relationship in law and policy means that parents have both greater rights and more onerous obligations than in a system that spreads responsibility for children more broadly. The question of what constitutes a legal parent-child relationship under American law has become increasingly important because of its primacy in the determination of rights and obligations, but also increasingly complex because of reproductive technology and changing patterns of childbearing. The complexity and lack of cohesion that characterizes modern parentage law is a reflection of the past. Or, perhaps more accurately, it reflects the law's attempt to preserve the legal traditions of the past despite oceanic changes in society and in family form. Courts and legislatures have tried to reason by analogy when developing parentage rules for modern families. But the vast differences between the traditional family—a heterosexual, married couple who conceived children only through sex—and the myriad types of new American families strain the analogy. Can parentage rules that turned exclu-

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[5] Marriage does not require residency, but divorce does. This difference has meant that many same-sex couples that left home to marry or enter civil unions were then unable to dissolve those relationships anywhere. *See, e.g., In re* Marriage of J.B. and H.B., 326 S.W.3d 654 (Tex. App. 2010) (refusing to grant divorce to gay couple that married in Massachusetts before moving to Texas).

[6] *Obergefell*, 135 S. Ct. at 2600. The Court cited and relied on research from the Williams Institute, an LGBT policy group at UCLA. *Id*.

sively on marriage or biological ties find use in situations involving neither?

This essay will explore the origins of parentage law, the questions raised by modern families, and the impact of the *Obergefell* ruling. When we remove gender from questions of parentage, what remains?

II. The Origins of Parentage Law

Joan and Peter Stanley raised three children together and cohabited on and off for almost two decades, but they never married.[7] When Joan died in the late 1960s, the children were made wards of the state and placed with a court-appointed guardian.[8] Peter, though he was the biological and social/psychological father of the children, and supported them throughout their lives, was given no rights as a legal parent under Illinois law.[9] In fact, the law did not include him in the definition of parent at all:

> 'Parents' means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent. It does not include a parent whose rights in respect of the minor have been terminated in any manner provided by law.[10]

Because Peter was not considered a "parent," his children's fate upon the death of their mother—and only legal parent—was governed by another provision, which rendered them "dependent" on the state because they were "without a parent, guardian, or legal custodian."[11] He could have petitioned to be their custodian or guardian but, even if appointed, he would not have been considered their "parent," with all the rights and obligations that come with that status.

The Illinois law that denied legal parent status to Peter Stanley was not unique. Quite the contrary. It was typical in an era when parentage and legitimacy were inextricably linked. For legitimate

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7 *In re* Stanley, 256 N.E.2d 814, 814 (Ill. 1970).

8 *Id*.

9 *Id*.

10 Ill. Rev. Stat. ch. 37, para. 701–14 (1967) (current version at 705 Ill. Comp. Stat. Ann. 405/1–3 (West 2015) (removing the word legitimate)). The provisions applicable to this case are cited and discussed in the opinion of the Illinois Supreme Court. *See Stanley*, 256 N.E.2d at 815.

11 Ill. Rev. Stat. ch. 37, para. 702–05 (1967) (current version at 705 Ill. Comp. Stat. Ann. 405/2–4 (West 2015)).

children, the mother's husband was presumed, often conclusively, to be the legal father.[12] Marital status of the mother thus determined paternal parentage of the child.[13]

For illegitimate children, marital status often determined (or precluded) parentage as well. Although American law never took as harsh an approach to the status of illegitimate children as English law, most state laws differentiated between legitimate and illegitimate children when defining the parent-child relationship.[14] Into the nineteenth century, a child born out of wedlock was *filius nullius*—the child of nobody.[15] But this rule was often overlooked to allow ties between illegitimate children and their mothers and her kin. The formal rule gave way by the end of the nineteenth century to a less harsh rule that rendered them, by law, children of their mothers, but not their fathers.[16] Like the 1967 version of the Illinois Juvenile Court Act, most state statutes in the late nineteenth and early twentieth centuries defined "parent" to include both mother and father in the case of legitimate children, but only the mother in the case of illegitimate children. And for "legitimate" children who were actually fathered by someone other than the mother's husband, their biological fathers did not have legal parent status either.

Parentage and legitimacy were tied for obvious reasons. For the most part, children of married parents were, in fact, biologically tied both to the mother and her husband. Although conclusive presumptions always invite error, most husbands were the biological fathers of their wives' children. So this presumption dictated the right conclusion in the vast majority of cases.[17] And when another man was the father, there was a sordid, and maybe illegal,

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12 *See* LESLIE HARRIS ET AL., FAMILY LAW 887 (4th ed. 2010) (stating that in England, a husband was conclusively presumed to be the father of his wife's children, unless he had been out of the kingdom for more than nine months).

13 *See* Michael H. v. Gerald D., 491 U.S. 110, 120 (1989) (describing and upholding conclusive marital presumption of paternity).

14 *See* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994).

15 *See id.* at 24.

16 On this history, see John Witte, Jr., *Ishmael's Bane: The Sin and Crime of Illegitimacy Reconsidered*, 5 PUNISHMENT & SOC'Y: THE INT'L J. PENOLOGY 327, 329–30 (2003).

17 *See* Chris W. Altenbernd, *Quasi-Marital Children: The Common Law's Failure in Privette and Daniel Calls for Statutory Reform*, 26 FLA. ST. U. L. REV. 219, 227–28 (1999) (citing a 1940s study that found ten percent of children born to married women were conceived in adultery).

tale that was best left unrevealed.[18] The father was not likely to provide support, and allowing him to be identified would simply stigmatize mother and child, as well as the mother's cuckolded husband.[19] Moreover, given the limitations of scientific knowledge, the real father could never be known for sure, and the cost of asking an unanswerable question might be the stability of the intact family unit.[20]

Although they had little if any access to parental rights, fathers of out-of-wedlock children were sometimes responsible for support of their children. Laws specifically obligating unwed fathers to support their illegitimate children were among the first to formalize the obligation of both parents to support their children (now reflected, among other places, in strict gender-neutral and marriage-neutral child support laws). As states began to formalize the obligation of parents to support their children, many specifically obligated fathers to support illegitimate children. By the 1930s, every state had both a civil and criminal law requiring support for children.[21] Although these laws varied from state to state, a number of them expressly required fathers to support their out-of-wedlock children.[22] Unwed mothers or local prosecutors could institute "bastardy" proceedings to prove paternity and obtain child support.[23]

This bifurcation of rights and obligations for unwed fathers was the subject of several challenges in the 1970s. In *Stanley v. Illinois*, the case challenging Illinois's refusal to recognize Peter Stanley as the legal father of his biological children, the U.S. Supreme Court concluded that the law excluding unwed fathers from the definition of "parent" violated the Due Process Clause of the Fourteenth Amendment.[24] The Court relied first on the well-established principle that the right to "conceive and to raise one's chil-

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18 On the law's confinement of legitimate sex to marriage, see, in general, JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA (2011).

19 *Id.*

20 Courts sometimes ignored even incontrovertible scientific evidence when applying the marital presumption. *See, e.g.*, Prochnow v. Prochnow, 80 N.W.2d 278, 281 (Wis. 1957) (upholding the trial court's ruling that the husband was the father despite blood-type evidence that excluded him as a possible father).

21 CHESTER G. VERNIER, AMERICAN FAMILY LAWS, VOLUME IV: A COMPARATIVE STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES, ALASKA, THE DISTRICT OF COLUMBIA, AND HAWAII (TO JAN. 1, 1935) at 5 (1936).

22 *See id.*

23 *See id.*

24 Stanley v. Illinois, 405 U.S. 645, 648 (1972).

dren" is "essential."[25] Constitutional protection for parental rights had been established in a trilogy of cases in the early twentieth century, establishing a protective sphere for parental decision-making.[26] In a modern case, *Troxel v. Granville*, the Supreme Court reminded states of this protection by invalidating a third-party visitation statute that did not give enough weight to the preferences of a fit parent.[27] *Troxel* operates as a counterweight to efforts to recognize non-biological parents, as the recognition of an additional parent necessarily dilutes the existing parent's rights.

With respect to unwed fathers, the Court concluded in *Stanley* that the categorical rule of non-recognition actually undermined the state's identified interests.[28] It aimed to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" and to "strengthen the minor's family ties whenever possible."[29] Yet, children were callously removed from custodial, biological fathers based solely on marital status. As the Court observed in *Stanley*, "the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family."[30] Thus, even if the state was right that "most unmarried fathers are unsuitable and neglectful parents," some of them are "wholly suited to have custody of their children."[31] Peter Stanley, in the Court's view, was entitled to an opportunity to make his case as a father deserving of custody.[32] As states had tried to do in other contexts, Illinois was relying on an irrebuttable presumption, which was "cheaper and easier than individualized determination," but which came at the expense of individuals' due process rights.[33] But the Court rejected this approach, concluding that it "needlessly

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25 *Id.* at 651 (*quoting* Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

26 *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating state law banning instruction in any foreign language before ninth grade); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (invalidating an Oregon law requiring children between ages eight and sixteen to attend public school); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding conviction of child's aunt for allowing her niece to sell religious pamphlets on the street in violation of state labor law).

27 Troxel v. Granville, 530 U.S. 57 (2000) (invalidating Washington state law that allowed "any person" at "any time" to petition for visitation with a child and permitted courts to grant such requests based solely on the best interests of the child).

28 *See Stanley*, 405 U.S. 645.

29 *Id.*

30 *Id.* at 652–53.

31 *Id.* at 654.

32 *Id.*

33 *Id.* at 656–57.

risks running roughshod over the important interests of both parent and child."[34] The Court thus struck down the categorical denial to unwed fathers of legal parent status.[35]

Stanley effected the first big deviation from the traditional rules of parentage by allowing for the possibility that a biological father could have parental rights without being married to the child's mother. This proposition was important then, as rates of non-marital cohabitation and non-marital child bearing were beginning to be palpable. And it became more important as those rates began to rise dramatically. Only 1.8% of children born in 1915 were likely illegitimate, and only 3% in 1940.[36] And, in most of the cases, the births (and the real fathers) were concealed from the public. By the 1980s, however, cohabitation and unmarried coparenting were definitely out of the closet: in 1985, 22% of all children were born to unmarried mothers; in 1997, 32%; and by 2008, 40.3%.[37] The rate for children of African-American mothers, in 2015, was over 70%.[38]

A series of cases after *Stanley* considered the contours of parental rights for unwed fathers, especially for those who had not lived with their children or otherwise acted like a parent. Recognizing their differing roles in reproduction and the special difficulty of identifying a child's biological father, the Court declined to mandate identical treatment of unwed mothers and unwed fathers. A woman who gives birth is presumed to be the legal mother, unless the birth is subject to an enforceable surrogacy contract. But for men, the genetic tie only gives rise to the opportunity to be a parent—an opportunity that can be grasped or forfeited by the man's conduct during the woman's pregnancy or towards the child after birth.[39] If he fails to grasp that opportunity, the Constitution will

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34 *Stanley*, 405 U.S. 645.

35 *Id.*

36 *Id.*

37 *See* Brady E. Hamilton et al., *Births: Preliminary Data for 2014*, 64 NAT'L VITAL STAT. REP. 6, 13 tbl. 6 (June 17, 2015).

38 *Id.* at 13, tbl. 6.

39 *See* Lehr v. Robertson, 463 U.S. 248 (1983) (upholding New York's putative father registry as sufficient protection for the parental rights of unwed fathers); *see also* Quilloin v. Walcott, 434 U.S. 246 (1978) (upholding provision of Georgia code that denied an unwed father the right to veto a proposed adoption because father had failed to legitimate child through available statutory procedure); Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating New York law that gave unmarried mothers but not unmarried fathers the right to veto an adoption); *see also* Michael H. v. Gerald D., 491 U.S. 110 (1989) (finding that that California's refusal to permit putative fathers to contest the paternity of children born during their mother's marriage to another did not violate the Due Process Clause of the Fourteenth Amendment).

not "automatically compel a state to listen to his opinion of where the child's best interests lie."[40] This standard can produce harsh results for men who hesitate to assert their parental rights, and even, sometimes, for those who are thwarted in their efforts to establish a relationship.[41] But as the family continued to morph—Justice O'Connor aptly wrote in *Troxel* that the "demographic changes of the past century make it difficult to speak of an average American family"[42]—parentage law faced new and, frankly, greater challenges, which are addressed in the next section.

III. Parentage Law in the Age of the New American Family

Stanley spurred the first big change to the traditional rules of parentage, necessitated by the Supreme Court's mandate that states could not categorically deny the rights of unwed fathers. *Stanley* and its progeny required a wholesale restructuring of state parentage law to account for the constitutional parental rights—as limited as they might be in any given case—of unwed fathers. In response, states enacted new statutory schemes designed to ferret out fathers and draw lines between those who had earned parental rights and those who had not.[43]

It was thus against this backdrop that the Uniform Parentage Act ("UPA") was adopted in 1973. Many states had parentage laws that were rendered unconstitutional by one or more of the Court's opinions on illegitimacy or unwed fathers' rights. As importantly, those opinions both reflected and reinforced an emerging tolerance for new family forms. But with new families came new questions about the legal ties between adults and children.

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40 *Lehr*, 463 U.S. at 262.

41 *In re* Adoption of B.Y., 356 P.3d 1215 (Utah 2015) (upholding adoption over objection of biological father who had relied on mother's assurances that she would not place the child for adoption if he did not initiate a paternity proceeding); *see also* Joanna L. Grossman, *He Who Hesitated Lost: Unwed Father in Utah Forfeits Parental Rights*, Justia's Verdict (Sept. 2, 2015), https://verdict.justia.com/2015/09/02/he-who-hesitated-lost-unwed-father-in-utah-forfeits-parental-rights.

42 *Troxel*, 530 U.S. 57, 63.

43 On the challenges in defining the rights of unwed fathers, *see generally* David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 Ariz. L. Rev. 753 (1999); Laura Oren, *Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 Fam. L.Q. 153 (2006); *see also* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 Calif. L. Rev. 1277 (2015).

The focus of the 1973 UPA was to provide states with a coherent set of rules governing parentage in a wider variety of situations than covered by traditional statutes, which by and large treated parentage and legitimacy as the same question. While mothers were entitled to legal parent status solely as a function of giving birth, legal fatherhood was determined by reference to a "network of presumptions which cover cases in which proof of external circumstances (in the simplest case, marriage between the mother and a man) indicate a particular man to be the probable father."[44] Section 4 of the UPA provided that a man is presumed to be the natural father of a child if he is married to the child's mother, has acknowledged paternity (which has not been disputed by the mother), or he has received a minor child "into his home and openly holds out the child as his natural child."[45]

The UPA's relatively simple conception of legal fatherhood actually involves two key moves away from the traditional model: a weakening of the marital presumption such that a husband might not always be deemed the legal father of his wife's children and the creation of the possibility that an unwed biological father might have rights and responsibilities. Eighteen states adopted the 1973 UPA in full or in substantial part.[46] A handful of other states adopted parentage statutes of their own that were similar in at least some respects. But almost as quickly as this round of parentage laws was adopted, they became outdated. The prevalence, use, and nature of assisted reproduction changed dramatically in the decade following the adoption of the original UPA. We saw greater use of assisted reproduction in general, but also greater use of donated sperm by single women, lesbian couples, and unmarried heterosexual partners with male factor infertility. With those changes came more difficult questions about where to draw the line between "donor" and "potential father." And, eventually, questions arose about whether the rules regarding paternity might also be applied to female partners. The adoption of parentage statutes—abrogating what had largely been a common-law system of rules—finalized a shift away from reliance on marital status as a proxy for biological fatherhood and towards recognition, and protection, of both burgeoning and full-fledged father-child relationships.

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44 Prefatory Note, U.P.A. (1973).

45 U.P.A. § 4 (1973).

46 A small number of states adopted the 1973 UPA, but omitted the word "married" in the sperm donor provision, generally without explanation. *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-106(2) (West 2014); OHIO REV. CODE ANN. § 3111.95(B) (West 2015); WYO. STAT. ANN. § 14–2-103 (repealed 2003 and replaced with §§ 14-2-902 & 903).

Since the 1970s, the family has moved several more steps away from the traditional model—and into an almost dizzying array of scenarios in which today's children might be born, involving unwed parents, reproductive technology, same-sex couples, egg and sperm donors, surrogate carriers, or some combination of these. The UPA was revised in 2000, and amended again in 2002, largely to deal with increasingly complicated uses of reproductive technology. For example, the new version provides for the possibility that an unmarried male partner could be deemed the legal father of a child conceived by his partner with donor sperm.[47] This set of moves away from the marital family, however, have proved harder to sort out because there has been no recognition of federal constitutional rights for other would-be parents, no consensus about the wisdom of denying or recognizing parentage in particular situations, and no theoretical basis for either choice. There is a virtual consensus that biology and adoption are not the only bases of parentage, but no consensus on which other factors suffice, or what to do when there is tension between different factors. Parentage by intent, by agreement, and by function have all been recognized by *some* states in *some* contexts, but there is no unified theory to guide those choices or to be able to predict them.

Consider the following example: The Kansas Supreme Court recently held that a lesbian co-parent must be treated as a legal parent of her partner's child because the two women entered into an enforceable agreement to share parental rights.[48] But in a well-known case working its way through the lower courts in Kansas, the "Craigslist sperm donor" has been deemed a legal father of children conceived with his donated sperm despite an agreement between the donor, the biological mother, and her lesbian partner that the two women would share parental rights and obligations and that the donor would have neither.[49] The agreement should be valid for purposes of recognizing the lesbian co-parent's rights, given the applicable precedent, but that would leave the child with three legal parents. Yet, Kansas, like most states, has stuck to the "rule of two," which limits each child to two legal parents.[50] It thus becomes hard to reconcile these two cases.

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47 U.P.A. § 703 (2000, amended 2002).

48 *See* Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013).

49 *See* Steve Fry, *Marotta is a Father, Not Merely a Sperm Donor*, CJONLINE.COM (Jan. 22, 2014), http://cjonline.com/news/2014-01-22/court-marotta-father-not-merely-sperm-donor.

50 Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11 (2008). In 2014, California adopted the first statute to allow for more than two parents in certain cases. *See* CAL. FAM. CODE §7612(c) (2014); *see also* Joanna L. Grossman, *California Allows Children to*

It is in the cases involving at most one biological parent that the parentage questions get interesting. When, and under what circumstances, do adults without a biological tie to children nonetheless have a claim to legal parentage? This question can be asked in many settings, but the focus in this essay, and particularly the next section, is the application of parentage rules to same-sex married couples.

IV. Parentage for Same-Sex Married Couples

As discussed in the Introduction, the *Obergefell* ruling resulted in clear, bright-line rules regarding marriage for same-sex couples: (1) same-sex couples can marry in any American state;[51] (2) same-sex couples who do marry will be recognized as married both horizontally—by other states—and vertically—by the federal government; and (3) same-sex married couples can divorce or seek annulments on the same terms as any other married couple.[52]

Less clear are the consequences for parentage law. How does the right to marry affect the creation of parent-child relationships in families anchored by a same-sex couple? Married heterosexual couples also become parents in other ways—through adoption, surrogacy, and gamete donation. The rules in those situations are explained below, as I discuss the impact of *Obergefell* in each situation.

Same-sex couples, obviously, cannot produce a child that is genetically related to both of them—nor only to them. Thus, questions of parentage are, right off the bat, more complicated for these families. But does the ability to marry (and be treated as married nationwide) resolve some of those complications? There is no uniform answer to that question; it varies by method of conception and a variety of other factors.

Have More Than Two Legal Parents, Justia's Verdict (Oct. 15, 2013), https://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents.

51 Efforts by states or state officials to block the issuance of marriage licenses will not succeed, but they persist as a predictable form of backlash to a controversial ruling on a social issue. *See, e.g.*, John Mura & Richard Perez-Pena, *Marriage Licenses Issued in Kentucky County, but Debates Continue*, N.Y. Times, Sept. 4, 2015, at A12 (reporting on clerk who was jailed for refusing to issue marriage licenses to same-sex couples).

52 *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Joanna L. Grossman, *From Zero to Fifty in Eleven Years: The Supreme Court Declares the Right of Same-Sex Couples to Marry in Obergefell v. Hodges*, Justia's Verdict (June 26, 2015), https://verdict.justia.com/2015/06/26/from-zero-to-fifty-in-eleven-years.

A. *Adoption*

Adoption can raise many legal issues, but this essay will focus just on the two situations most likely to affect a same-sex couple. First, when two people wish to jointly adopt a child that is not the biological child of either, many states require them to be married.[53] With nationwide access to marriage, same-sex couples can now satisfy that prerequisite in every state. Only Mississippi has a separate law barring two people of the same sex from jointly adopting a child,[54] though that law is currently being challenged.[55]

Second, when a person seeks to adopt the biological child of a romantic partner, different rules apply.[56] Many states provide by statute for adoption by a stepparent (as long as the child's other legal parent is out of the picture—never recognized, rights terminated, or dead).[57] Without adoption, stepparents have neither rights nor obligations toward their stepchildren, particularly after the marriage that created the relationship dissolves.[58] Stepparent adoption provisions allow the parent's spouse to adopt without severing the parent's rights (most adoptions substitute one parent-child relationship for another)[59] and, typically, bypass some of the steps in the adoption approval process, such as home visits.[60] In theory at least, the parent who married the would-be adoptive parent has undertaken the state's usual screening role. With equal access to marriage, same-sex *spouses* should be able to adopt in all fifty states.

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53 *See, e.g.*, UTAH CODE ANN. § 78B-6-117(3) (2008); Cynthia R. Mabry, *Joint and Shared Parenting: Valuing All Families and All Children in the Adoption Process with an Expanded Notion of Family*, 17 AM. U. J. GENDER SOC. POL'Y & L. 659, 661 (2009).

54 MISS. CODE ANN. § 93-17-3(5) (2010).

55 *See* Tamar Lewin, *Mississippi Ban on Adoptions by Same-Sex Couples is Challenged*, N.Y. TIMES, Aug. 12, 2015, at A9 (discussing a couple's challenge of the Mississippi law). The Movement Advancement Project provides helpful tracking on these issues here. *Foster and Adoption Laws*, MAP: MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws (2015).

56 WILLIAM P. STATSKY, FAMILY LAW 560 (2013).

57 *See, e.g.*, N.C. GEN. STAT. ANN. § 48–4–103 (1996) (authorizing stepparent adoption).

58 *See, e.g.*, A.S. v. I.S., 2015 WL 9485233 (Pa. Dec. 29, 2015) (considering legal rules governing stepparent-stepchild relationships).

59 *See generally* Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 TENN. L. REV. 1019, 1025–026 (1999); Thomas A. Jacobs, *§ 4:5 Stepparent*, 1 CHILD. & L.: RTS & OBLIGATIONS § 4:5 (2015).

60 *See, e.g.*, ALA. CODE § 26-10A-11 (2015) ("When the person sought to be adopted is an adult, only the sworn, written consent of the adult person shall be required and no order or reference or any home studies need be issued."); *see also* Jacobs, *supra* note 59.

When same-sex couples choose not to marry, however, the ability to adopt a partner's child will vary by state.[61] In some states, an unmarried partner, gay or straight, is never allowed to adopt the partner's child.[62] In others, courts have allowed same-sex partners to adopt via a so-called "second-parent adoption," in which the biological parent and partner jointly petition to adopt (even though the biological parent is already legally attached to the child).[63]

The first second-parent adoption was granted during an era in which lesbian couples just began to openly have and raise children. These "planned lesbian families," as they were then called, coincided with the popularizing of artificial insemination, and a "self-insemination" movement, in the 1980s.[64] Today, the number of gay and lesbian couples openly raising children has dramatically increased. Nearly 600,000 American households are anchored by a same-sex couple, and nearly a quarter of them are raising children. As many as nine million children in the U.S. have at least one gay parent.[65] But long before we reached numbers at those levels, the lesbian-couple families began to seek ways to cement ties between the non-biological mother and the children.

In 1993, Vermont and Massachusetts became the first states to approve adoptions that resulted in recognition of a child with two legal mothers. In *Adoption of Tammy*, two successful doctors decided to have and raise a child together.[66] The child was conceived by one of the women, using donor sperm. After the child's birth, the biological mother and her lesbian partner jointly petitioned to adopt the child. The applicable adoption statute did not expressly prohibit an unmarried couple from jointly adopting a child, nor did

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61 *See, e.g.*, UTAH CODE ANN. § 78B-6–117(3) (West 2015).

62 *Id.*

63 Mark A. Momijan, *Cause of Action for Second-Parent Adoption*, 25 CAUSES OF ACTION 2D 1, §1 (Nov. 2015).

64 Nancy Polikoff, Brief Amicus Curiae, R.–Y v. Robin Y., New York County Family Court Docket No. P3884/91, *reprinted in* 22 N.Y.U. REV. L. & SOC. CHANGE 213, 219–20 n. 2 (1996–97) (citing documentation of early lesbian planned families); *see also* Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 (1976); Benna F. Armano, *Lesbian Mother: Her Right to Child Custody*, 4 GOLDEN GATE U. L. REV. 1 (1973).

65 *See* Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 164–65 (2001); *see also* Gary J. Gates et al*., Adoption and Foster Care by Gay and Lesbian Parents in the United States*, URBAN INSTITUTE (2007), http://www.urban.org/research/publication/adoption-and-foster-care-lesbian-and-gay-parents-united-states/view/full_report .

66 619 N.E.2d 315 (Mass. 1993); *see also* Doris Sue Wong, *Lesbian Couple Allowed to Adopt*, BOSTON GLOBE, Sept. 11, 1993.

it expressly prohibit adoption by two people of the same sex.[67] But certainly the legislature did not contemplate what these two women were proposing. And the statute did say that adoption has the effect of terminating legal ties between a child and his or her natural parents. But as to this provision, the court held that it did not apply to stepparent or second-parent adoptions, where one of the natural parents is a party to the adoption petition. Moreover, on a record replete with witnesses—psychologists, teachers, a priest, and a nun—who testified to the existence of a stable and functional parent-child relationship between the child and both women, the court held that the adoption, though unorthodox, would be in the best interests of the child. The highest court in Vermont reached the same conclusion in a similar case the same year.[68] In the years that followed, several states adopted statutes explicitly authorizing second-parent adoptions for same-sex partners of a parent, and appellate courts in many other states upheld such adoptions without express statutory authorization.[69] Second-parent adoption became, in relatively short order, the ideal mechanism for securing rights between a lesbian co-parent and her partner's child. Legally speaking, adoption is superior to the alternatives because it is embodied in a judgment, which is entitled to the most exacting form of full faith and credit and thus valid in other states.[70]

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67 MASS. GEN. LAWS ANN. ch. 210, § 1 (West 2008). The statute provides that a "person of full age may petition the probate court . . . to adopt as his child another person younger than himself, unless such other person is his wife or husband, or brother, sister, uncle or aunt, of the whole or half blood."

68 *See* Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993) (holding that adoption does not require termination of the natural mother's parental rights when the adoption is between the natural mother and her partner and is in the best interests of the children).

69 *See* CAL. FAM. CODE § 9000(f) (West 2004); COLO. REV. STAT. §§ 9-5-203(1), 19–5–208(5), 19-5-210(1.5), 19-5-211(1.5) (2007); CONN. GEN. STAT. ANN. § 45a-724(3) (West 2004); VT. STAT. ANN. tit. 15A, § 1-102(b) (West 2004). On second-parent adoptions generally, see Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures, and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933 (2000).

70 V.L. v. E.L. 84 U.S.L.W. 3491 (2016) (per curiam) (requiring Alabama courts to give full faith and credit to second-parent adoption granted to lesbian couple in Georgia). *See* Embry v. Ryan, 11 So. 3d 408, 409–10 (Fla. Dist. Ct. App. 2009); *see also* Finstuen v. Crutcher, 496 F.3d 1139, 1151 (10th Cir. 2007) (invalidating state constitutional amendment that bars recognition of final adoption orders from other states by same-sex couples because it violates the Full Faith and Credit Clause); Russell v. Bridgens, 647 N.W.2d 56, 58–60 (Neb. 2002) (noting that courts must give full faith and credit to a Pennsylvania same-sex co-parent adoption unless the challenging party can prove the court lacked subject matter jurisdiction); Starr v. Erez, No. COA99-1534 (N.C. Ct. App., Nov. 27, 2000). A New York court allowed a same-sex couple to jointly adopt the biological child of one of the partners, even though the co-parent already had enforceable parental rights because the couple had legally married in the Netherlands. *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 692–93 (Sur. Ct. 2009). The court held that "the best interests of

Legislative and judicial approval of second-parent adoptions involved two deviations from the traditional model of parentage: (1) that a child could have two legal mothers, rather than a mother and a father; and (2) that an unmarried partner could adopt her partner's child—without severing the ties between the biological mother and child and without being married to the mother. The first change is the more significant, one that paved the way for recognition of parent-child relationships in a variety of new contexts. Yet it seemed to trouble courts very little. The impulse that two parents are better than one seemed to drive decision-making more than concern about exclusivity or the necessity of the traditional mother/father model. The second change—to allow, in effect, a stepparent adoption for an unmarried partner—was an equitable workaround in a world without marriage for same-sex couples. The idea of a second parent who was not married to the first parent was no longer novel—we have unwed fathers like Peter Stanley to thank for that development. But adoption law remains wedded to the past and the notion that only the stability of marriage would justify allowing two adults to jointly parent a child. Courts and legislatures recognized, however, that same-sex couples, without a right to marry, did not have access to stepparent adoption and thus created exceptions to the usual rules.[71] Second-parent adoption was used as an equitable remedy for the law's denial of equality for those couples.[72] The question after *Obergefell* is whether those states will continue to allow *unmarried* same-sex couples to use second-parent adoption to shore up the relationship between the second parent and the child, or whether those couples will, like heterosexual couples, be required to marry to avail themselves of the adoption privilege.

B. *Lesbian Co-Parents*

It may seem as though we have just finished with the issue of lesbian co-parents, but adoption is only one of the possible mecha-

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this child require a judgment that will ensure recognition of both Ingrid and Mona as his legal parents throughout the entire United States." *Id.* An Alabama court recently refused to give full faith and credit to a second-parent adoption granted in Georgia. The Supreme Court, which has not yet ruled on the adoptive mother's petition for certiorari, stayed the ruling pending that decision. *See* Smith v. E.L., 2015 WL 7258695 (Dec. 14, 2015).

71 *See* Erin J. Law, *Taking a Critical Look at Second Parent Adoption*, 8 L. & SEXUALITY 699, 701, 707 (1998).

72 *Id.*

nisms for recognizing a legal tie between a biological mother's partner and the mother's child.[73] Many states, even a majority, do not have any precedent for lesbian second-parent adoptions, nor any clear statutory authority. In North Carolina, the state's highest court invalidated such an adoption decree in a high-profile case involving a state legislator, because of the lack of statutory authority, even though thousands of similar adoptions had been granted by trial courts in the state.[74] Some other states have also ruled expressly against second-parent adoptions by same-sex couples.[75]

There have been a huge number of cases in the last two decades involving lesbian co-parents who jointly participated in the decision to have a child, but later parted ways.[76] If a second-parent adoption has taken place, there likely is no parentage dispute that ends up in the courts. Yet there are dozens and dozens of cases in which the rights of the non-biological co-parent are litigated. Whether and under what circumstances she has rights or obligations with respect to her partner's child varies tremendously by jurisdiction, as well as by the particular nature of the relationship.[77] The range of approaches invites consideration of the many possible bases for parentage other than the genetic tie—intent, contract, and function.

In some jurisdictions, the lesbian co-parent can be recognized as a *de facto* parent by virtue of the functional parent-child relationship actively fostered by the biological mother and carried out

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73 *See generally* 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 (2009).

74 Boseman v. Jarrell, 704 S.E.2d 494 (N.C. Ct. App. 2010).

75 *See, e.g., In re* Adoption of Luke, 640 N.W.2d 374, 376–77 (Neb. 2002) (concluding that Nebraska's adoption statutes prohibit two unmarried persons from adopting a minor child together); *In re* Adoption of Adoption of Doe, 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998) (construing the Ohio adoption statute to permit adoption by an unmarried adult only if the biological parents' legal rights are terminated; In Interest of Angel Lace M., 516 N.W.2d 678, 685–86 (Wis. 1994) (prohibiting adoption by a mother and her female cohabitant because the proposed adoption failed to satisfy elements of the adoption statute).

76 Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010); *In re* Mullen, 953 N.E.2d 302 (Ohio 2011).

77 *Compare* Black v. Simms, 12 So. 3d 1140, 1143 (La. Ct. App. 2009) (rejecting de facto parentage in light of "the paramount right of a parent in the care, custody, and control of his or [sic] child" that can be abrogated only "in rare circumstances") *and* Janice M. v. Margaret K., 948 A.2d 73, 84–93 (Md. 2008) (finding no justification for elevating de facto parent above other third parties seeking to obtain custody or visitation over the natural parent's objection), *with* Smith v. Guest, 16 A.3d 920, 925, 930–32 (Del. 2011) (upholding de facto parentage statute against constitutional challenge and awarding joint custody to adoptive mother and lesbian de facto parent), *and In re* Parentage of L.B., 122 P.3d 161, 176–77 (Wash. 2005) (recognizing de facto parent status in legal parity with an otherwise legal parent).

by the co-parent.[78] This status seldom results in rights precisely equal to the biological parent's, but it can be the basis for awarding visitation rights.[79] The Wisconsin Supreme Court was the first to recognize *de facto* parentage in a lesbian co-parent. In *In re Custody of H.S.H.-K*, the Court relied on this concept to grant visitation to the co-parent over the objection of the child's biological mother.[80] The two women were intimately involved and, together, planned to start a family. From the outset, both women functioned equally as parents to the child, sharing every burden and participating in every happy moment. But when the women broke off their adult relationship four years after the child was born, the biological mother sought to sever ties completely. As in many states, Wisconsin courts had the authority to adjudicate custody in the wake of the dissolution of marriage and to place a child with a non-parent in the event both parents were unfit or unable to care for the child. But there was no express authorization for what the co-parent sought—an adjudication of a quasi-parental status that would allow the mother's wishes to be overridden in favor of a non-parent. The Court drew on equitable principles to craft a right for the co-parent based on her functional parent-child relationship. It acknowledged the constitutional parental rights of the biological mother, but held that she had, in effect, agreed to their dilution by fostering a parental-type relationship between her partner and her child. The parent-like relationship is established through four elements: (1) consent by the biological parent to foster the formation of the parent-child relationship; (2) living in the same household with the child; (3) assuming the obligations of parenthood, including support and childrearing; and (4) sufficient duration to establish "with the child a bonded, dependent relationship parental in nature."[81] This four-part test has become the standard definition of de facto parentage; it has been adopted by courts in some jurisdictions[82] and by legislatures in others.[83]

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78 Emily C. Patt, *Second Parent Adoption: When Crossing the Marital Barrier Is in a Child's Best Interests*, 3 BERKELEY WOMEN'S L.J. 96, 107 (1987).

79 Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents By Estoppel and De Facto Parents Under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285, 292 (2001).

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

81 *Id.*

82 *See, e.g., In re* E.L.M.C., 100 P.3d 546, 559–60 (Colo. App. 2004); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000).

83 *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-101 (2011) (considering marriage between persons of the same gender to be void but recognizing children of these marriages as legitimate); *see also* Smith v. Guest, 16 A.3d 920, 925, 930–32 (Del. 2011) (upholding de facto parentage statute

This doctrine, however, has been rejected by courts in many states, including in the controversial New York case, *Debra H. v. Janice R.*[84] The court in that case cited the lack of certainty about parental status as the chief reason for rejecting de facto parentage—the judges during oral argument said it was better to have a clear answer on parental status than to have the right answer.[85] Other courts have voiced concern over the biological mother's constitutionally protected parental rights[86] or the usurpation of legislative authority to create, or choose not to create, a quasi-parental status.[87]

In other jurisdictions, agreement has played a greater role than functional parenting in determining lesbian co-parent rights. In several states, courts have enforced co-parenting agreements, or at least expressed a willingness to do so in the right case. The Supreme Court of Ohio, for example, held in *In re Mullen* that while a parent cannot be ordered to share custody or control with a third party, a parent "may voluntarily share with a nonparent the care,

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against constitutional challenge and awarding joint custody to adoptive mother and lesbian de facto parent). In a recent case, the Wyoming Supreme Court declined to adopt the de facto parentage doctrine, agreeing with the Delaware court that the legislature should decide whether to codify the status. *See* L.P. v. L.F. 338 P.3d 908 (Wyo. 2014). Effective July 1, 2016, the Maine legislature enacted a de facto parent law. *See* MAINE REV. STAT. § 1891 (2016).

84 930 N.E.2d 184 (N.Y. 2010); *see also* Guardianship of Z.C.W. and K.G.W., 84 Cal. Rptr. 2d 48, 49–50 (Cal. Ct. App. 1999); Smith v. Gordon, 968 A.2d 1, 2–3 (Del. 2009), *superseded by statute* DEL. CODE ANN. tit. 13, § 8-101; Wakeman v. Dixon, 921 So. 2d 669, 673 (Fla. Dist. Ct. App. 2006); *In re* C.B.L., 723 N.E.2d 316, 320–21 (Ill. App. Ct. 1999); B.F. v. T.D., 194 S.W.3d 310, 312 (Ky. 2006); Janice M. v. Margaret K., 948 A.2d 73, 84–93 (Md. 2008). White v. White, 293 S.W.3d 1, 9, 11 (Mo. Ct. App. 2009); Debra H. v. Janice R., 930 N.E.2d 184, 186 (N.Y. 2010); *In re* Thompson, 11 S.W.3d 913, 923 (Tenn. Ct. App. 2000); Jones v. Barlow, 154 P.3d 808, 809–10 (Utah 2007); Stadter v. Siperko, 661 S.E.2d 494, 499–501 (Va. Ct. App. 2008); Titchenal v. Dexter, 693 A.2d 682, 683–85 (Vt. 1997).

85 *Debra H.*, 930 N.E.2d at 190–92; *Jones*, 154 P.3d at 816 (declining to adopt de facto parentage doctrine because it "fails to provide an identifiable jurisdictional test that may be easily and uniformly applied in all cases").

86 *See, e.g.*, Black v. Simms, 12 So. 3d 1140, 1143 (La. Ct. App. 2009) (rejecting de facto parentage in light of "the paramount right of a parent in the care, custody, and control of his or [sic] child" that can be abrogated only "in rare circumstances"); *Janice M.*, 948 A.2d at 680–95 (finding no justification for elevating de facto parent above other third parties seeking to obtain custody or visitation over the natural parent's objection); *In re Thompson*, 11 S.W.3d at 918–19; *Jones*, 154 P.3d at 819 (refusing to recognize de facto parentage because doing so "would abrogate a portion of [the biological mother's] parental rights"); *Titchenal*, 693 A.2d at 687 (noting the "potential dangers of forcing parents to defend third-party visitation claims").

87 *See, e.g.*, *Z.C.W.*, 84 Cal. Rptr. 2d 48 at 50–51; *Jones*, 154 P.3d at 810 ("We decline to extend the common law doctrine of in loco parentis to create standing where it does not arise by statute."); *Titchenal*, 693 A.2d at 689 ("Given the complex social and practical ramifications of expanding the classes of persons entitled to assert parental rights by seeking custody or visitation, the Legislature is better equipped to deal with the problem.").

custody, and control of his or her child through a valid shared-parenting agreement."[88] Other states, including North Carolina and Kansas, have issued similar rulings.[89]

Parentage by function or by private agreement can preserve an informal parent-child relationship, but only if the law allows it and the facts supporting the claim can be proven.[90] These are the least certain of potential ties between parent and child and the least likely to be recognized across state lines. But they remain relevant for lesbian couples who choose not to marry—or for those whose children were conceived and born before marriage became legal in their home states. A Maryland court just ruled that a lesbian co-parent dispute was unaffected by *Obergefell* because the child was born before the ruling.[91] Whether or not the two women had the option to marry did not change their status—they were an unmarried couple who jointly participated in the birth and rearing of a child and were subject to the rules governing all such couples.[92] The lesbian co-parent in this case, *Conover v. Conover*,[93] did not succeed in being recognized as a second parent to her partner's biological child.[94] She was deemed a legal stranger whose access to the child could be unilaterally severed by the child's biological mother.[95]

One question after *Obergefell* is whether de facto parentage might lose its traction given the ability of same-sex couples to marry and create formal parent-child ties. A Missouri appellate court recently observed that "the justification for rejecting an equitable parentage argument is stronger today" than in 2009 when it

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88 *In re* Mullen, 953 N.E.2d 302, 305 (Ohio 2011).

89 Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013) (holding that a lesbian co-parent was entitled to full legal parent status on the basis of a co-parenting agreement signed by her and her partner that she and her partner had signed in conjunction with the birth of their daughters); Joanna L. Grossman, *Parenthood by Contract: The Kansas Supreme Court Enforces a Lesbian Co-Parenting Agreement*, JUSTIA'S VERDICT (April 16, 2013) https://verdict.justia.com/2013/04/16/parenthood-by-contract.

90 In *Mullen*, for example, the court found insufficient evidence that the two women had entered into the agreement alleged by the plaintiff-coparent; *see also* Christina Spiezia, *In the Courts: State Views on the Psychological-Parent and De Facto-Parent Doctrines*, 33 CHILD. LEGAL RTS. J. 402, 405–07 (2013); 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, 678–79 (2012).

91 Conover v. Conover, 120 A.3d 874 (Md. Ct. Spec. App. 2015), *cert. granted*, 128 A.3d 51 (Md. 2015).

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.* at 886.

first rejected the doctrine.[96] Indeed, the court noted, "[w]e anticipate that in the wake of *Obergefell*, situations like this one, in which important issues involving children must be decided outside the established legal framework applicable to married couples, will occur less frequently."[97] The New York Court of Appeals, in *Debra H.*, rejected the de facto parentage doctrine, but granted parental rights to the lesbian co-parent. While pregnant, Janice R. had entered into a civil union with Debra H., which, the court concluded, gave rise to parental rights under Vermont's marital presumption.[98] Putting aside the very real possibility that the New York court misunderstood Vermont law on this point, we see in the court's ruling a clear preference for tethering parentage to marital status rather than allowing it to be proven on more amorphous and fact-specific grounds. It is not a stretch to predict that other courts will exhibit that same preference now that marriage is available to same-sex couples in every state.[99]

C. *The Marital Presumption*

Perhaps the purest test of what parentage law looks like when gender is removed from the equation is the treatment of the marital presumption. Just over a decade ago, there was no conceivable way for a lesbian co-parent to gain parentage through marital status because there was no marriage or marriage-like alternative for same-sex couples. But beginning in 2000, with civil unions in Vermont,[100] and continued in 2004, with the nation's first same-sex marriages in Massachusetts,[101] the possibility of marriage-based parentage for same-sex couples emerged. Courtesy of the Supreme Court's ruling in *Obergefell*, same-sex couples now have the opportunity to marry in any state.[102]

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96 McGaw v. McGaw, 468 S.W.3d 435, 442 (Mo. Ct. App. 2015).

97 *Id.* at 438.

98 Debra H. v. Janice R., 930 N.E.2d 184, 197 (N.Y. 2010).

99 *See generally* 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 (2012); Grossman, *supra* note 90.

100 *See* Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that it was a violation of the state constitution to withhold the benefits of marriage from same-sex couples and giving the legislature 180 days to conform the law to the constitutional standard); An Act to Create Civil Unions, VT. STAT. ANN. tit. 15, §§ 1201–205 (2000) (partially repealed 2009).

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

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

Recall from Section I the traditional marital presumption. Once conclusive, but now typically rebuttable, husbands are presumed to have fathered children born to their wives during the marriage and, therefore, to be their legal parents. Is a woman's wife also presumed to be the legal parent of any children born to the woman during the marriage?[103]

In the states that adopted same-sex marriage or civil union by statute prior to the mandate in *Obergefell*, the legislatures made clear that all the benefits and obligations of marriage are available to same-sex couples who choose that formal status. One of the derivatives of marriage that is both right and obligation is a marital presumption of paternity—husbands are presumed to be the fathers of their wives' offspring. Courts understood the command for parity to mean that this presumption should be applied to lesbian couples as well—a female spouse must be presumed to be the legal parent of her spouse's biological children.[104] In some jurisdictions, the legislature adopted specific language to support the gender-neutral application of the marital presumption, even before they offered full marriage equality rights.[105] In D.C., for example, there is a specific statute that outlines how the marital presumption of maternity should work. Birth during marriage or domestic partnership creates a presumption of legal motherhood for the co-parent, which can be rebutted with "clear and convincing evidence that the presumed parent did not hold herself out as a parent of the

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103 For obvious reasons, the traditional marital presumption applied only to husbands. In an odd recent case, a woman claimed to be the legal mother of a child sired by her husband and given birth to by his mistress. *See* In the Interest of S.N.V., 284 P.3d 147 (Colo. App. 2011). But this was certainly not a typical case—nor one likely to result in a finding of parentage in the woman who did not give birth to the child.

104 *See, e.g.*, Hunter v. Rose, 975 N.E.2d 857 (Mass. 2012) (holding that child born during registered domestic partnership was presumed the child of both parties); Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951 (Vt. 2006); *see also* Wendy G-M. v. Erin G-M., 985 N.Y.S.2d 845 (N.Y. 2014) (holding that lesbian spouse is an equal legal parent of a child conceived with artificial insemination and born during the marriage); Barse v. Pasternak, 2015 WL 600973 (Conn. Super. Ct. 2015) (holding that child born during civil union that was subsequently converted into a marriage was legal child of mother's female spouse). For more sustained analysis of this question, see Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006).

105 Vermont's original civil union law provided that the "rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage." VT. STAT. ANN. tit. 15 § 1204(f) (2000) (2010) (partially repealed in 2009); *see also* CAL. FAM. CODE § 297.5 (d) (West 2007) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."). Under current California law, all parentage rules are gender-neutral and applied with equal force to all spouses. *See* CAL. FAM. CODE § 7611 (West 2013).

child."[106] In states that came to same-sex marriage solely by virtue of a judicial mandate (*Obergefell*, if not one prior to that), we can assume that the rights and obligations should be equal for same and opposite-sex couples, but there is no statutory language to prove it.

The application of the marital presumption of paternity to a female spouse raises two interesting questions. First, which marital presumption applies? The general presumption of husband-paternity or the special rule governing conception with assisted reproduction? If the former, then what is the nature of the protection? Most marital presumptions are rebuttable today, some upon proof of no genetic tie between husband and child, some only if a court decree establishes paternity in another man. The genetic tie between child and lesbian co-parent will virtually never exist (outside the rare care of one spouse providing the egg for gestation by the other), thus some of these presumptions are of uncertain force. A trial court in Connecticut recently held that the marital presumption applies with equal force to children born to married same-sex couples, and, although the presumption can usually be rebutted by evidence of no genetic tie, the court held that equitable principles could be invoked to prevent the biological mother from seeking to rebut the presumption.[107] The presumptions that may be rebutted based on another man's paternity might be more protective since many of the pregnancies will be achieved with donor sperm under conditions that result in non-paternity for the donor.

Second, what is the theoretical or policy basis for extending the marital presumption of paternity to a female spouse? As discussed earlier, the marital presumption was largely, but not exclusively, driven by a guess about biological fatherhood. And it swept in cases without a biological tie because it was better to brush evidence of extramarital sex under the rug in an age when both illegitimacy and divorce were stigmatized. And even the post-1973 statutes that extended the marital presumption to cases of artificial insemination with sperm from a donor were designed to create the appearance of biological fatherhood. None of these rationales support extension of the presumption to lesbian co-parents. That is not to say that female spouses should not be treated as legal parents of their partners' children, only that the traditional rationales often do not apply.

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106 D.C. CODE § 16-909(a)(1) (2012).

107 *Barse*, 2015 WL 600973.

In the context of two women who together plan for the conception and birth of a child, what is marriage a proxy for? It is certainly not a proxy for biology—our best guess about the identity of the child's other genetic parent—as it was for married fathers. So what does marriage stand for here? It seems, for some courts, to stand as a proxy for consent of the definite legal parent—the biological mother—to share parental rights. In defending its requirement of a formal legal tie as a prerequisite for parentage, the *Debra H.* court observed: "And both civil union and adoption require the biological or adoptive parent's legal consent, as opposed to the indeterminate implied consent featured in the various tests proposed to establish de facto or functional parentage." But consent to what? Is the decision to enter a marriage or civil union evidence of consent to share parentage of children conceived via artificial insemination or, at a minimum, with genetic material from a third party? The "implied consent" of de facto parentage may, indeed, be "indeterminate"; but it also speaks directly to the relevant question: did the biological mother intend to share her otherwise absolute parental rights with another adult?

It might also be a proxy for the stability of a family unit—and the assumption of a social parent-child relationship between the second adult in the household and the child. In *Michael H. v. Gerald D.*, the Supreme Court upheld California's marital presumption, which allowed the husband's paternity to be rebutted only by the spouses, and not by the child's biological father seeking to rebut the presumption in favor of his own rights.[108] The Court deferred to California's protection of the "marital family" that was admittedly not based on a genetic tie between husband and child. This same reasoning might protect a lesbian co-parent against claims by a third party, perhaps the man who provided the sperm, but it may not protect her in a dispute with the child's biological parent.

There are clearly valid reasons to apply the marital presumption to female spouses. First, constitutional principles may require that female spouses be treated as legal parents if the law treats husbands as legal parents in cases of artificial insemination with donor sperm. The Iowa Supreme Court ruled that the Department of Public Health was constitutionally required to list a mother's spouse on a child's birth certificate regardless of the spouse's gen-

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

der.[109] Iowa became a same-sex marriage state by judicial ruling and thus has no statute prescribing the rules of parentage or other incidents of marriage. The court held, however, that because the state code applies the marital presumption to husbands in cases of artificial insemination with donor sperm, it could not refuse to do so for a female spouse without running afoul of equal protection principles. In either case, the spouse's tie to the child was the same—marriage to the child's mother. And after *Obergefell*, constitutional principles may require that the marital presumption be applied to same-sex spouses even if there is no statute on artificial insemination if the presumption is simply an incident of marriage.

Second, the biological mother's consent to marry is sometimes treated as consent to share parental rights of any children born during the union. Recall the ruling in *Debra H.*, in which the New York Court of Appeals held that marriage to a child's mother is the only way other than adoption through which a lesbian co-parent can gain parental status.[110] The court based its ruling squarely on the notion of consent. While Janice M., the biological mother, had the power to exclude other adults from her child's life, she gave up that power by entering into a civil union with Debra H. while pregnant and inviting her to assume a parental role.

Third, the extension of the marital presumption to female co-parents may be justified by the benefit to children of identifying a second legal parent. For children conceived with sperm from a donor who is likely subject to a statutory rule of non-paternity, the female co-parent is the only possible second parent. The D.C. provision mentioned above is designed to award legal parentage to co-parents who are both committed to the biological parent through marriage or domestic partnership and have functioned as a parent. It screens in "real" parents and screens out the rest.

At a minimum, *Obergefell* will provoke questions about the applicability of the marital presumption to female spouses, and, as discussed above, courts are likely to reflexively apply it with equal force. This is probably the right result, but what the changed landscape ought to provoke is a more thoughtful inquiry into the nature of the marital presumption itself as a basis for parentage. The in-

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[109] Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013) (invalidating state parentage statute, which precluded the listing of two mothers on birth certificate, as unconstitutional on state equal protection grounds). On this case, see Joanna L. Grossman, *Birthright: The Iowa Supreme Court Allows a Lesbian Co-Parent to be Listed on an Infant's Birth Certificate*, JUSTIA'S VERDICT (May 28, 2013), http://verdict.justia.com/2013/05/28/birthright-the-iowa-supreme-court-allows-a-lesbian-co-parent-to-be-listed-on-an-infants-birth-certificate.

[110] *Debra H.*, 930 N.E.2d 184, 195–96 (N.Y. 2010).

teresting question is not which spouses benefit from, or are subject to, the presumption, but why?

C. *Surrogacy*

An increasingly popular type of family creation, surrogacy involves an agreement that one woman will conceive and carry a child for someone else to raise.[111] In its traditional form, a woman conceived a child using her own egg and sperm from the husband of an infertile woman. The surrogate could be inseminated by a doctor or at home, and the arrangement was conducted pursuant to a contract providing that the surrogate was to relinquish all rights to the child at birth in favor of the intended parents—the biological father and his wife.[112] The legal questions about surrogacy arise out of contracts that purport to assign parentage to someone other than the person designated by the traditional rules. Can parentage be relinquished—and assumed—prior to the birth of a child? After birth, the substitution of one set of legal parents for another would be governed by adoption law, with rules about the revocability of consent, screening of the adoptive parent, and so on. But surrogacy arrangements rely on the enforceability of the agreement, without which the child would never have been brought into the world, and the inability of the carrier to change her mind. The well-known *Baby M.* case brought the emerging issue of surrogacy into the public consciousness.[113] There, a traditional surrogate, who had been paid $10,000 to conceive and gestate a child for another couple, refused to honor the agreement. The case unfolded dramatically across several states and culminated in a ruling from the New Jersey Supreme Court that the agreement was void as against public policy.[114] With the contract deemed unenforceable, the traditional rules of parentage came into play. The child's legal parents were her biological mother (the surrogate) and biological father (the sperm donor and intended father).

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111 Amy Garrity, *A Comparative Analysis of Surrogacy Law in the United States and Great Britain—A Proposed Model Statute for Louisiana*, 60 LA. L. REV. 809, 809 (2000).

112 *See* Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of the Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21 (2005).

113 For a history of this case and its role in the surrogacy debate, see Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109 (2009); *see also* Carol Sanger, *Developing Markets in Baby-Making*: *In the Matter of Baby M.*, 30 HARV. J.L. & GENDER 67 (2007).

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

The *Baby M.* ruling had national reverberations, provoking a public debate, as well as a wide range of legislative responses. Today, almost thirty years later, surrogacy remains controversial for both same-sex and different-sex families, and states remain split over its legality.[115] There are still many states, including New York, that prohibit paid surrogacy, and others that have no clear rule.[116] Most modern surrogacy arrangements involve gestational surrogacy, in which the carrier provides only the womb, not the egg.[117] The egg and sperm will come either from the intended parents, from donors, or a combination of the two.[118] This type of surrogacy abates one strand of objection, about the difficulty a biological mother might have parting with her newborn, but leaves others in play.[119]

An increasing number of states, however, regulate surrogacy by statute.[120] In those states, gestational surrogacy is permitted, but only within certain parameters.[121] This shift reflects a growing awareness of the need for surrogacy: it provides a way for infertile

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115 *Compare In re* the Paternity of F.T.R, 833 N.W.2d 634 (Wis. 2013) (holding the surrogacy agreement entered by the parties as valid and enforceable contract), *and In re* Baby, 447 S.W.3d 807 (Tenn. 2014) (holding traditional surrogacy agreements as enforceable under strict guidelines), *with Baby M.*, 537 A.2d at 1227 (finding that surrogacy agreements were unenforceable and a violation of NJ public policy), *and* R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998) (holding that surrogacy agreement between the surrogate mother and father was unenforceable). The Uniform Status of Children of Assisted Conception Act, promulgated in 1988, offered alternative provisions on surrogacy: one banning such arrangements, one allowing them. USCACA secs. 5, 10, 9C U.L.A. 363 (2001). The Uniform Parentage Act, which supersedes the USCACA, rejects this approach, opting instead for an approach that allows, but regulates surrogacy. *See* U.P.A § 801 & cmt. (2002).

116 *See* N.Y. DOM. REL. § 123 (McKinney 1993) (prohibiting compensated surrogacy); *see also* Scott, *supra* note 113; Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES, July 6, 2014 at A1. Many bills have been introduced into the New York legislature to repeal the surrogacy ban, the latest in 2015. *See* 2015 N.Y. S.B. 2675, 2015 Leg., 238th Sess. (N.Y. 2015). Paid surrogacy is also banned by statute in Indiana, Louisiana, Maryland, Michigan, Nebraska, New Mexico, Oregon, and the District of Columbia. *See* Center for Bioethics and Culture, *State-by-State Surrogacy Summary*, CBC (Aug. 2012), http://www.cbc-network.org/wp-content/uploads/2012/08/State-by-State_Surrogacy_Sum_CBC.pdf.

117 Christen Blackburn, *Family Law—Who is a Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, 39 U. MEM. L. REV. 349, 352 (2009).

118 *Id.*

119 Although gestational surrogacy has generally met with more acceptance than traditional surrogacy, a New Jersey court held in 2009 that *Baby M.* applied with equal force to gestational surrogacy arrangements, thus preventing their enforcement. *See* A.G.R. v. D.R.H., Docket No. FD-09-001838-07, (N.J. Super. Ct. Dec. 23, 2009) 2009 N.J. Super. Unpub. LEXIS 3250.

120 The Illinois Gestational Surrogacy Act is a model for these types of statutes. *See* 750 Ill. Comp. Stat. Ann. 47/5 (2005) [hereinafter "Ill. Comp. Stat."); *see also* Garrity, supra note 111, at 812–13.

121 Ill. Comp. State, *supra* note 120; Garrity, *supra* note 111, at 812-13.

or gay male couples to have children with genetic ties to at least one parent.[122] Perhaps it also reflects an awareness of law's limits. Laws banning surrogacy seem only to push parties to enter into arrangements somewhere else, rather than deterring them from using surrogacy as a means to parenthood. Noel Keane, the intermediary who brought together Mary Beth Whitehead and the Sterns, had the same number of surrogacy clients a year after paid surrogacy was banned in New Jersey, almost all of whom lived in New Jersey.[123] The demand for surrogacy is there; along with growing sympathy for those who see it as their only path to parenthood.[124]

In several of the states regulating surrogacy by statute, only a married couple can enter into an agreement with a gestational carrier to produce a child.[125] In those states, none of which voluntarily permitted same-sex couples to marry prior to *Obergefell*,[126] same-sex couples could not jointly enter into a surrogacy arrangement and the ability of the partner without a biological tie to become a legal parent would turn on the state's recognition of second-parent adoption for same-sex couples (discussed above). These obstacles were most important for gay male couples, who account for an increasing proportion of surrogacy arrangements and who have limited options for biological parenthood. After *Obergefell*, however, different-sex and same-sex couples stand on equal footing—if they want to become parents via surrogacy in some states, they must

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122 On surrogacy and gay male couples, see Arlene Istar Lev, *Gay Dads: Choosing Surrogacy*, 7 LESBIAN & GAY PSYCHOL. REV. 72 (2006); *see also* Darren Rosenblum, et al., *Pregnant Man? A Conversation*, 22 YALE J.L. & FEMINISM 207 (2010) (sharing his own story of becoming a parent, with his male partner, via surrogacy); DAN SAVAGE, THE KID: WHAT HAPPENED AFTER MY BOYFRIEND AND I DECIDED TO GO GET PREGNANT (1999) (recounting the complications of parenthood via surrogacy for the author and his male partner).

123 Robert Hanley, *Jersey Panel Backs Limits on Unpaid Surrogacy Pacts*, N.Y. TIMES, Mar. 12, 1989, at page 38.

124 Precise numbers are hard to find, given the lack of government regulation of surrogacy. But the American Society for Reproductive Medicine estimated that there were as many as 600 births a year to gestational surrogates between 2003 and 2007. *See* Sara Rimer, *No Stork Involved, but Mom and Dad Had Help*, N.Y. TIMES, July 11, 2009, at A1.

125 *See* FLA. STAT. ANN. §§ 742.11–16 (West 2015); TENN. CODE ANN. § 36-1-102 (West 2015); TEX. FAM. CODE ANN. § 160.754 (West 2015); UTAH CODE ANN. §§ 78b-15-801–09 (West 2015); VA. CODE ANN. § 20–158 (West 2015); *see also* Tiffany L. Palmer, *The Winding Road to the Two-Dad Family: Issues Arising in Interstate Surrogacy for Gay Couples*, 8 RUTGERS J.L. & PUB. POL'Y. 895, 905 (2011). Nevada had a marriage requirement for intended parents, *see* NEV. REV. STAT. ANN. § 126.045, but repealed it in 2013.

126 Prior to *Obergefell*, several of these states were subject to federal court orders invalidating their state bans on constitutional grounds. *See, e.g.,* Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014) (invalidating Utah's ban on marriage by same-sex couples on constitutional grounds); Latta v. Otter, 771 F.3d 456 (9th Cir. 2014) (invalidating same-sex marriage bans in Idaho and Nevada).

marry first, but at least they *can* marry. For some couples, then, the move to marriage equality might drastically change their individual parenting options. But because surrogacy was controversial long before it was openly used by same-sex couples—and continues to be separate and apart from any anti-gay-parenting sentiment—*Obergefell* is not likely to have a broader impact on surrogacy law.

D. *Gamete Donation*

The parentage rules when conception involves at least one gamete donor are varied and complex, but revolve around how to distinguish a donor from a parent. The use of donor sperm in conception did not become a routine practice until the 1950s, and the use of donor eggs not for several more decades. By the time the Uniform Parentage Act was first adopted in 1973, artificial insemination was enough in use—primarily by married women with infertile husbands—that the Act included a parentage provision. Contemplating only artificial insemination by married women, section 5(b) provided that "the donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."[127] This was paired with a provision, section 5(a), that provided that the husband of a married woman was considered the natural father of any child she conceived with donor sperm as long as he consented in writing to the insemination. Together, these provisions operated to substitute the husband for the donor as the legal father of a donor-conceived child, and intent for biology.[128] This provision was thought necessary in part because a few courts, in the absence of statutory guidance, had held that insemination with donor sperm was adultery and resulting children were illegitimate.[129] Moreover, as the traditional marital presumption weakened—becoming rebuttable rather than conclusive in most jurisdictions—it became less clear that a woman's husband would be legally tied to her children if he were not also the biological father.

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127 U.P.A. § 5(b) (1973).

128 *Id.* at § 5(a).

129 *See, e.g.*, Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Ill. Super. Ct., Dec. 13, 1954); *appeal dismissed on procedural grounds*, 139 N.E.2d 844 (1956).

In 2000, a new version of the UPA was promulgated. Section 702 of the new act provided that a "donor is not a parent of a child conceived by means of assisted reproduction."[130] It dropped the requirement that sperm be provided to a licensed physician, thus extending the non-paternity rule to a greater number of conceptions. Sections 703 & 704 provided, as did the original UPA, that a husband who consents to use of donor sperm by his wife is the father of any resulting child.[131] An amendment in 2002 added the possibility that an unmarried male partner could be deemed the legal father of a child conceived by his female partner with donor sperm. Section 703, which previously spoke only of husbands, now provides that "[a] man who provides sperm for, or consents to, assisted reproduction by a woman as provided in section 704 with the intent to be the parent of her child, is a parent of the resulting child."[132]

In this iteration, the UPA shifted the line between donors and potential fathers again, but not in a linear direction. It began to focus on pre-conception intent as the touchstone for distinguishing between the two groups rather than biology, the formality of the medical process, or marital status. Across the nation, states still vary significantly in their treatment of parentage in the context of sperm donation. Three-quarters of the states have a statute that applies a rule of non-paternity in at least some situations. Some are still based on the original 1973 UPA, some have been amended to reflect the 2000 or 2002 changes, and some are sui generis. Several statutes, for example, provide that a man who donates sperm to an unmarried woman is not a father unless he and the woman agreed otherwise in writing before the birth.[133]

In which situations is *Obergefell* likely to make a difference in parentage determinations involving gamete donors? Its chief effect will be the ability of a same-sex spouse to take advantage of the rules regarding artificial insemination within marriage. When a married woman conceives a child using donor sperm, her husband, in most states, is deemed the legal father as long as he consented to the insemination or in vitro fertilization.[134] This rule both cements

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130 U.P.A. § 702 (2000).

131 *Id.* at §§ 703, 704.

132 U.P.A. § 703 (2000, amended 2002).

133 KAN. STAT. ANN. § 23–2208 (West 2015) ("The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman."); CAL. FAM. CODE § 7613 (West 2015).

134 People v. Sorenson, 437 P.2d 495 (Cal. 1968); U.P.A. § 5(a) (1973).

the tie between husband and child and provides a protective shield against claims by donors. After *Obergefell*, lesbian married couples should be able to take advantage of the same rule of legal parentage, provided the spouse consents to conception, as discussed above. Given that such a statute reflects the state's determination that biology is not a necessary prerequisite to parentage, the state would have no constitutional basis for withholding the benefit of the presumption based solely on the gender of the spouse.

What about in states without a specific rule regarding assisted reproduction? A female spouse might be able to avail herself of the marital presumption, also explained above, which deems a married woman's spouse the legal parent of any child to which she gives birth.[135] This conclusion assumes that courts will apply the marital presumption with equal force to same-sex couples, an assumption that will be proven or disproven over time. But where it does apply, lesbian married couples will have substantially greater protection against parental rights claims by a known donor, particularly as long as states restrict a child to two legal parents.

When an unmarried woman conceives a child using donor sperm, the child may have no legal father (if the donor is subject to a rule of non-paternity). Practically speaking, anonymous donors could not have rights or obligations because their identity is unknown. Known donors could, conceivably, but a majority of states apply the rule of non-parentage to all donors, regardless of any current or past connection to the mother.[136] *Obergefell* has no obvious impact on these rules, but, rather, draws attention to the fact that parentage rules involving gamete donors have already moved away from a model that revolves around marriage. The social changes that brought about this shift continue unabated; there is thus no reason to expect any reversion to the traditional rules simply because marriage is now available to same-sex couples.

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135 Elizabeth Brenner, *Marriage for All: The Legal Impact of* Obergefell v. Hodges *in Texas*, 78 TEX. B. J. 622, 622 (2015); *see also In re* Adoption of a Minor, 29 N.E.3d 830 (Mass. 2015).

136 *See, e.g.,* Jhordan C. v. Mary K., 179 Cal. App. 3d 386 (Cal. Ct. App. 1986) (noting that the non-paternity rule applies to known donors, even those who had a prior sexual relationship with the mother); *In re* R.C., 775 P.2d 27, 35 (Colo. 1989) ("an unmarried woman does not lose the protection of the artificial insemination statute merely because she knows the donor"); Lamaritata v. Lucas, 823 So.2d 316 (Fla. Dist. Ct. App. 2002) (applying non-paternity rule to known donor and refusing to enforce post-birth stipulations and agreements purporting to give him visitation rights); *see also* Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L.Q. 93 (2015).

V. Conclusion

Children have always taken center stage in the debates over same-sex marriage. Potential harm to children was the centerpiece of the argument by opponents; the desire for legitimacy and a stable upbringing was at the heart of the argument by proponents. And, in the end, the Supreme Court decided that the interests of children militated in favor of same-sex marriage rather than against it. But the question taken up in this essay is different: in what way does the changed world of marriage change the world of parentage? Or, to ask the same thing a slightly different way, is it harder or easier now to create, avoid, or gain legal recognition for the ties that bind parents to children? As the essay has shown, there are discrete cases—surrogacy, for example—where the impact of *Obergefell* is clear. Some couples that were unable to enter enforceable surrogacy arrangements will now be able to pursue surrogacy as a path to parenthood. But in others, the impact of *Obergefell* is less clear and, indeed, reveals the underlying incoherence of parentage law for all families. Open questions about the applicability of the marital presumption to same-sex spouses loom large in this category. But the questions do not arise from any particular complication of same-sex marriage, but rather from our collective failure to provide modern rationales for old rules or to scrutinize the analogies we draw. *Obergefell*'s most important contribution to parentage law may be simply to provoke the scrutiny we should already have given it.