Presuming Parentage Without the Intent to Parent (and Vice Versa)

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As a result of the women's rights movements of the twentieth century, the law shifted the origin of family creation from the married man to the person who gave birth, resulting in the presumption of maternity as the law has now. This Note explores how the presumption of maternity fails to provide legal recognition to nontraditional families—including families who use Assisted Reproductive Technology, same-sex parents, and unmarried parents—and how it furthers gender and sex-based norms within a family, parenting, and marriage. In response, the Note identifies the underlying justification to the modern presumption of parentage: the belief that a person intends to be a legal parent through the act of giving birth to the child or by marriage to the child's birth parent. By looking at how intent to parent is already a part of our legal and social understanding of parentage, the Note argues that the law should shift away from the presumption of maternity in favor of an intent-based parentage system when assigning legal parents at the time of a child's birth. As part of shifting to an intent-based system, the legal system will better reflect our social notions of the family and each person's chosen role within the family.

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INTRODUCTION

The legal construct of motherhood was once a progressive idea that signified the legal and social standing of women within the family and beyond. Rather than continuing to recognize a woman's autonomy and power in family creation, the classification has been used to reshape the presumptions of legal parenthood around a birth/biological connection, leaving the intent to parent and other social relationships as secondary factors. The focus on the biological origins of family

formation has enabled the law to uphold the ideals of a traditional family while imposing real barriers to legal family recognition for many parents. Further, the distinct maternal presumption of parentage and the classification of motherhood allow for the state to impose gendered expectations into family structures and provide a basis for arguing there is a distinction between sexes.

With our current understanding of parenthood[1] involving same-sex couples, single parents, parents who give birth and do not conform to traditional gendered roles, and parents who utilize Assisted Reproductive Technology (ART), the presumption and requirements of motherhood are inconsistent with our belief of what a family is. Rather than utilizing the presumption of maternity and the mother as the starting point of family creation, the law should look to the intended parents of the child when presuming parentage at time of a child's birth or in infancy.[2] Looking to the intended parents removes the faulty understanding that a person who gives birth is inherently connected through biology and social/emotional relationships with the child. Further, identifying the intended parents as the presumed parents, rather than the person who gave birth and then determining a second parent through marriage or biological relation, helps to counter the belief that a mother figure is necessary for a child. As a result, this reduces the ability of the state to impose beliefs about sex-based differences, gendered expectations in parenting, and spousal roles. Lastly, a presumption based on the intended parents strengthens the social value of a family by promoting choice to parent and equal legal recognitions for two-parent families.

I. PRESUMPTION OF MATERNITY AND THE CREATION OF LEGAL MOTHERHOOD

The presumption of parentage can generally be understood as who the state automatically assigns as a legal parent to a child without the parent having to undergo additional state scrutiny such as through an adoption or legal order. As the Court stated in *Caban v. Mohammed*, "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[3] However, the requirements for a parent to receive legal recognition as a presumed parent vary based on the parent's sex, relationship to the child through pregnancy, and marriage to the child's other parent. The Court has viewed maternity as an obvious, typical, and undisputable fact that is established by giving birth to the child.[4] On the other hand, the legal system has used a range of factors for

1. In this Note, I use the term "parent" to refer to a child's legal and/or intended parent, regardless of the parent's gender or biological connection to the child. The terms "mother" and "father" are used throughout the Note when necessary to distinguish the laws' treatment between the traditional mother and father. For a further analysis, *see infra* note 30, discussing the distinction between motherhood, fatherhood, and parenthood.

2. A focus on intended parents does not mean that a biological, genetic, social, or marital connection to a child does not matter. Instead, those are all factors that can be considered in the case of questions regarding parentage. *See infra* Part IV.

3. 441 U.S. 380, 397 (1979).

4. *Id.* ("The mother carries and bears the child, and in this sense her parental relationship is

determining paternity including marriage, biological relationship to the children, and involvement in the children's lives,[5] each of these factors being interpreted and weighed differently depending on the time and circumstances of the case.[6]

Despite its flaws, the presumption of parentage currently serves two important roles: providing legal recognition and creating social understanding of who qualifies as a family. First, the presumption of parentage establishes an individual as a legal parent, thus qualifying the parent and child as a family that receives "protection for certain formal family relationships" under U.S. constitutional law and state laws.[7] The recognition as a legal parent ensures that the individual will be able to make decisions regarding the child's education, medical decisions, and day-to-day care.[8] Further, as a child is typically limited to two legal parents,[9] the presumption that the individual is one of the child's parents must be refuted before another individual tries to take the place as one of the parents.[10] Similarly, the presumption prevents a parent from having to go through the often long, confusing, expensive, and intrusive process of adoption to receive rights.[11] Second, the presumption creates a social norm that a particular family is worthy of recognition. When the government requires certain families to undergo additional state scrutiny to receive legal recognition, the state creates an understanding that those types of families should only be recognized after proving they meet a set of arbitrary requirements that the presumed family is not subjected to.[12]

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clear."); Nguyen v. INS, 533 U.S. 53, 64 (2001) (explaining "the proof of motherhood that is inherent in birth itself" and that the "mother is always present at birth"); Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2223–28 (2020) (describing the ways courts have found maternity to be obvious despite a range of disputes regarding maternity).

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

6. Nguyen v. I.N.S., 533 U.S. at 63 ("The Constitution, moreover, does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method.").

7. Lehr v. Robertson, 463 U.S. 248, 257 (1983).

8. *See, e.g.*, Myers v. Nebraska, 262 U.S. 390 (1923) (recognizing a fundamental right to parent one's own child); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (allowing parents to choose to send their children to private religious schools over public school); Wisconsin v. Yoder, 406 U.S. 205 (1972) (finding compulsory education laws violated a parent's right to raise their child); Troxel v. Granville, 530 U.S. 57 (2000) (determining that courts could not force a parent to permit visitation between their child and the child's grandparents).

9. Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families, Real and Imagined*, 90 FORDHAM L. REV. 2561 (2022) (describing the treatment of multiparent families in today's legal realm).

10. *See infra* Section II.B.

11. *See, e.g.*, U.S. Dep't of Health & Hum. Servs., Admin. Child. & Fam., Child's Bureau, Home Study Requirements for Prospective Parents in Domestic Adoptions (2020), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/homestudyreqs_adoption.pdf?VersionId=SrRitjRX5GENfoR8fPs5g4uK hgJbY_G3 [https://perma.cc/52C T-YTZJ] (outlining the general adoption process); Melissa B. Jacoby, *The Debt Financing of Parenthood*, 72 Law & Contemp. Probs. 147 (2009) (explaining the financing options that have developed to cover high prices of adoptions).

12. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1222 (2016) [hereinafter NeJaime, *Marriage Equality and the New Parenthood*] ("Same-sex parents, quite reasonably, resented having to adopt their own children."); LEGAL RECOGNITION FOR LGBT FAMILIES, NAT'L CTR. FOR LESBIAN RTS. 1–2 (2019) ("Regardless of whether you are married or in a civil

Beyond being the easiest option for parents to receive legal recognition, the presumption of parentage is one of the easiest ways for the state to assign parental rights and obligations to parents. The state's involvement in creating legally recognized families shows why efficiently creating families becomes an interest to the state. The family, like a state, is a way that we are able to protect our interest as individuals by ensuring support and resources.[13] In addition, the state has an interest in ensuring that necessary acts such as reproduction and raising children are done in an efficient way; however, the state avoids interfering in the private family sphere to do this.[14] To respect family privacy and increase efficiency, the state instead relies on the presumption of parentage. As the Court wrote in *Stanley v. Illinois*, "presumption is always cheaper and easier than individualized determination."[15] The presumption of parentage allows the state to quickly, easily, and cheaply assign the rights and responsibilities of parenthood without individual and personal inspection of the family. As such, the presumption expedites government processes while also upholding the ideal of family privacy.

For a presumption of parentage to fulfill state interest in being efficient, it is helpful to not only have a starting point for the presumption but also have a singular starting point. In the vast majority of cases, this starting point of the presumption of parentage is also the origin to the legal creation of a family. While pregnancy and childbirth have always had a foundational role in reproduction, it was not until recently that childbirth was sufficient to start a legally recognized family.[16] As such, mothers had an important and necessary role in family creation, but they were not the aspect that family formation started with. During the last half a century, the women's rights movements created legal and social changes for women including in the family and family creation.[17] As a result, the start of parentage presumptions has shifted to the mother and has placed a seemingly higher value on the biological relationship between a child and the parent who gave birth by creating and using the maternal presumption of parentage. Below I track the shift from the married man as the origin of the legally recognized family to the current starting point of giving birth.

A. The Married Man as Center of Family Creation

For the majority of U.S. history, the husband was the center of legally recognized family creation. Within a marriage, coverture established a single legal entity, controlled by the husband.[18] Not only was a married woman restricted in

union or comprehensive domestic partnership, NCLR always encourages non-biological and non-adoptive.").

13. Stu Marvel, The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage, 64 EMORY L.J. 2047, 2065–66 (2015).

14. *Id.* at 1266.

15. Stanley v. Illinois, 405 U.S. 645, 656–57 (1972).

16. *See infra* Section I.B.

17. *See infra* Sections I.A & I.B.

18. Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 461–65 (2020) [hereinafter Siegel, *The Nineteenth Amendment and the Democratization of the Family*] (explaining how coverture restricted a married woman from exercising control over her own

owning property or entering into contract but she was typically limited from asserting control over her own body.[19] As such, the husband was given the power to decide for a married couple if and when they would have a family.[20] In addition, illegitimacy laws intended to deter women from having children outside of marriage by classifying children born outside of marriage as "illegitimate." Illegitimate children and their birth parent(s) were barred from receiving legal recognition as a family—which prevented illegitimate children from receiving certain benefits from the government and their parents—thus creating and furthering social stigma around nonmarital families.[21] Despite the lack of legal recognition, the mothers of illegitimate children often took on the responsibilities of caretaking and had *de facto* custody.[22] The treatment of illegitimate children and their mothers shows that the government's recognition of families neither stemmed from a biological connection to the children or even the caretaking and emotional connection that a woman had with her children. The classification of illegitimate children reinforced the notion that a family can, and *should*, only be created as part of a marriage between a man and a woman.[23]

While a mother had important social and caretaking duties in a legally recognized family, there was essentially no legal recognition of parenthood for women. Illegitimacy and decision-making illustrate how parentage at this time was not a recognition of two married parents and their rights and obligations, rather, it was a recognition of the husband's role and duty to his wife and kids.[24] Despite the law in the U.S. quickly developing into the "best interest of the child" standard, there were often undertones from European and Roman common law that prioritized the man as the absolute power holder in the family.[25] While these

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economics, sexual, and reproductive decisions).

19. *Id.* at 461–65; Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1379–80, 1411, 1426 (2000) (describing the marital rape exception and the subsequent inability for married women to have control in when they had sex or reproduced).

20. Siegel, The Nineteenth Amendment and the Democratization of the Family, supra note 18, at 462–64.

21. Solangel Maldonado, Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children, 63 FLA. L. REV. 345, 350–51 (2011).

22. Martha Albertson Fineman, *The Neutered Mother*, *in* The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies 67, 79–80 (1995).

23. Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1284–85 (2015) [hereinafter Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*] (explaining how illegitimacy laws punished children for their parents' actions of furthering the "pressing social issue" of nonmarital family creation).

24. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, *supra* note 18, at 452 ("A male head of household was enfranchised to represent his wife, children, and other members of the household.").

25. Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 264 (2009) ("Under the common law, 'fathers had an absolute right to ownership and control over children' . . . mothers were owed 'reverence and respect, but they were granted 'no powers.'")(citing to MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 76 (1995); also quoting 1 William Blackstone, *Commentaries* *452–53).

common law principles were occasionally cited in U.S. courts,[26] they can be seen better through the distribution of power in other areas of marriage and family.

Following the understanding that a husband is responsible for creating and financially supporting his family, the common law marital presumption assigns the husband as the legal father of a child his wife gives birth to.[27] While the marital presumption of paternity typically identified the biological father as the legal father with certain parental rights and obligations, the marital presumption served purposes outside of identifying biological parents or assigning rights.

Historically, a presumption of paternity could only be refuted by the presumed parents who had to show that the husband did not have access to his wife during the period she would have become pregnant—an incredibly difficult requirement, especially considering limitations imposed by the rules of evidence.[28] If the presumption was successfully refuted, the child was then treated as an illegitimate child and no longer could receive many recognitions or benefits.[29] From this, it can be seen that the presumption of paternity was not used to determine true biological connection—if this was the case, there should have been additional or easier avenues for refuting paternity such as allowing third parties to challenge the presumption—rather, it was used to uphold adultery and fornication laws and maintain the requirements for a husband to care for his wife and any kids born during the marriage. Similarly, by placing the burden to refute the presumption on the parents (although refuting the presumption was really an ability only the husband held), the presumption protected the husband's privacy and reputation in instances his wife got pregnant by another man, either from the wife cheating or from the husband's inability to conceive a child. The marital presumption furthered the social meaning of marriage and parenthood. While there have been changes to the marital presumption over time, the core rationale stays the same today; the husband is presumed to be the other legal parent to any child his wife has unless that presumption is successfully challenged.

B. Women as Independent Legal Actors and Independent Parents

Alongside the fight for economic and social equality, the feminist movements of the 1960s and 1970s began to change the legal relationships between marriage, family, reproduction, gender, and individual rights.[30] The progress made in these

26. Commonwealth v. Briggs, 33 Mass. (16 Pick.) 203, 205 (Mass. 1834).

27. Theresa Glennon, Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity, 71 W. VA. L. REV. 547, 562 (2000).

28. *Id.* at 563.

29. *Id.*

30. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a right to privacy for married couples to use contraceptives); Eisenstadt v. Baird, 405 U.S. 438 (1972) (expanding the protections of *Griswold* to allow nonmarried individuals access contraceptives); Reed v. Reed, 404 U.S. 71 (1971) (finding that discrimination against women is unconstitutional under the Fourteenth amendment); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (finding Title VII protects women from being discriminated against in the hiring process due to having children).

areas increased the ability of women to hold jobs, make their own reproductive decisions, and appear as equals in a marriage.[31] In addition, the Supreme Court took major steps in restricting the classification of illegitimate children,[32] therefore allowing children who were born out of wedlock to have many of the same rights and benefits as children born to married parents.[33] The combination of these changes allowed for a family to be legally, socially, and economically formed without a recognized or involved father.[34] While the illegitimacy cases of this time period allowed for single women to receive legal recognition as parents and soon after allowed single men the ability to parent,[35] the decisions did not provide an avenue of legal recognition for two unmarried parents who were not in a marriage-like arrangement.[36] While once a woman could not create a family without being married to a man, opportunities began to emerge for a single woman to parent a family on her own.

These legal changes forced states to reevaluate how they presumed parentage. Most notably, parenthood could no longer be tied to marriage to a man, nor could the legal power of the family be vested only in the husband.[37] As a result, parenthood became a status both married parents held.[38] Additionally, legal parenthood of a child could be extended to an unmarried person and some unmarried couples. Viewing historical parentage as a recognition of the marriage and a husband's role and duties highlights the major shift of the time; it was not just progress in allowing women to be recognized as parents outside of a marriage, it was a shift to view women as parents on the same level as her husband. This created the understanding of two independent legal parents.[39] With the opportunity for two biological parents to assert parentage over their child[40] and the state's interest in

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31. *See Griswold*, 381 U.S. 479; *Eisenstadt*, 405 U.S. 438; *Reed*, 404 U.S. 71; *Phillips*, 400 U.S. 542.

32. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968) (finding a state law that prohibited children of unmarried mothers from acquiring property of their deceased mother was unconstitutional, and the state could not justify the discrimination based on deterring the immoral behavior of having a child out of wedlock); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (finding it violated the equal protection clause to deny an unmarried mother from collecting insurance after the wrongful death of her son).

33. Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, *supra* note 23, at 1340–51 (describing the involvement of feminists in the work against illegitimacy classifications and punishments for illegitimate children and the subsequent limitations of continued advocacy for nonmarital rights).

34. These changes removed the functional prohibitions on independent women and single mothers. They did not predict the obstacles to, or stigma associated with, single parenting.

35. Stanley v. Illinois, 405 U.S. 645 (1972). *See generally* Melissa Murray, *What's So New About the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387 (2012).

36. *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983); Michael H. v. Gerald D., 491 U.S. 110 (1989).

37. *See Levy*, 391 U.S. 68; *Glona*, 391 U.S. 73.

38. *See* June Carbone & Naomi Cahn, *Jane the Virgin and Other Stories of Unintentional Parenthood*, 7 U.C. IRVINE L. REV. 511, 543 (2017) ("Married parents effectively consent to the inclusion of the other parent as an equal partner in childrearing, and the judicial insistence on promoting the continued involvement of both parents following a breakup can be seen as an implementation of the mutual assumption of responsibility for children within marriage.").

39. *See supra* sources cited notes 32–38.

40. Particularly, unmarried parents.

avoiding parentage disputes interfering with parental rights in married couples,[41] it was necessary for the state to pinpoint one place to determine parentage from rather than from both biological parents.

To respond to the changes of this time, states began to form the maternal presumption of parentage. Unlike the marital presumption of paternity that was centered around social understandings of marriage and family (with a biological relationship typically also occurring but not necessarily),[42] the presumption of maternity was rooted in the biological connection tied to giving birth.[43] By giving birth, it is assumed that a person not only has a biological connection—either from being the genetic mother or from carrying and delivering a child who was conceived with genetic material from an egg donor—but also has a social connection that is formed during the pregnancy and birth.[44] Additionally, the choice to become and remain pregnant was used to strengthen the argument that a person who gives birth has a social connection, *that they choose*, with the child.[45] On the other hand, the choice to become a parent was not presumed for a parent who did not give birth; rather, some form of additional proof such as marriage or surrogacy agreements were required.[46] The maternal presumption creates a classification of motherhood that is distinct from traditional fatherhood/parenthood[47] by arguing the person who

41. *See* Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1493–1502 (2018) (discussing the government's interests in the illegitimacy and fatherhood cases).

42. *See supra* Section I.A.

43. *See* Nguyen v. INS, 533 U.S. 53 (2001) (establishing that a child who is born outside of the United States can gain citizenship based on their mother's U.S. citizenship but requiring additional proof of a social connection to establish citizenship when using their father's US. citizenship).

44. See *id.*

45. Carbone & Cahn, *supra* note 38, at 522 ("Intentional parenthood with self-conscious choices about getting pregnant, carrying the pregnancy to term, choosing a partner, and supporting that partner's involvement in the child's life came to characterize both the formal law and the informal norms of the group.").

46. *See, e.g.*, *id.* at 520–21 (discussing ways parents have attempted to receive legal recognition in non-traditional ways by demonstrating their intent to parent).

47. While the distinction is historically classified as a motherhood vs. fatherhood issue, in this Note I refer to the distinction as a motherhood vs. parenthood distinction for multiple reasons. First, as addressed in more detail below, there has been a change in legal understanding so that the "father" role is simply a second part of parenthood. A second woman may be presumed to be the second parent of a child if she is married to the parent who gave birth. However, by receiving parentage through the marital assumption, she is placed into the "second parent" spot rather than as *the* mother. A second parent may also be socially recognized as a mother or parent (rather than as a gender-based mother/father) despite providing the sperm that created the child. Similarly, the classification of motherhood based on giving birth also captures people who would not identify as a mother. Second, there are some parents who we would typically classify as "mothers" but are not ordinarily presumed to be a mother under the maternal presumption and typically would be required to take additional steps to be recognized as a legal mother. For example, a parent who uses their egg, and therefore is genetically related to the child, but also used a surrogate, may not be presumed to be the parent in all states and would be required to take additional steps to show legal motherhood. Third, using the classification of "parent" rather than "father" highlights that since the non-mother parent is not necessarily the father, we have the social ability to assign parental roles without a gender attachment. *See* Jessica Clarke, *Pregnant People?*, 119 COLUM. L. REV. F. 173 (2019) (describing families in which the classification of motherhood over- and under classifies parents).

was pregnant and gave birth already has a social and biological connection with the child and, therefore, is the best person to assume as the origin of family creation.

C. Maternity as the Origin of the Family

As women were beginning to gain recognition as equal and independent parents, the focus on family creation moved away from the married husband. For many parents during this time, family creation was still occurring through marriage,[48] which limited the urgency in addressing how to easily assume legal parentage. However, the legal and social changes of the 1960s and 1970s gave women significantly more autonomy over their reproductive choices both in and out of marriage,[49] but the law had not adapted to easily determine who to assign parental rights and obligations to outside of traditional marriage-based family creation.

In light of the dialogue around women's roles in and importance to family relations and parenting, the demand for legal parental recognition for women followed from decades of women taking on parenting work without any rights or recognition.[50] At the same time, nonmarital sex was becoming more common, and the rates of nonmarital births were also rising.[51] An unmarried woman has the same biological relationship and emotional connection with her child before the elimination of illegitimacy laws and after; however, she is now also given legal recognition of the parent-child relationship because she, as an independent person, chose to have a child.[52] Giving birth is viewed as showing intent to parent on top

48. In the early 1960s, around ten percent of births were premarital. While the number has steadily increased, the percentage of premarital births had only raised to eighteen percent of all births in the U.S. between 1970 and 1974. Amara Bachu, *Trends in Premarital Childbearing 1930 to 1994*, U.S. CENSUS BUREAU (1999), https://www2.census.gov/l ibrary/publications/1999/demographics/p23-197.pdf [https://perma.cc/L4ZY-GBZX].

49. For example, *Griswold v. Connecticut*, 381 U.S. 479 (1965), allowed for use of contraceptives for married couples, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), expanded access to contraceptives to single women, and *Roe v. Wade*, 410 U.S. 113 (1973), found abortion was a fundamental right. While married women still faced legal sexual violence within marriage, the dialogue from the feminist movements was able to create social change to partially compensate for the legal shortcomings. Hasday, *supra* note 19, at 1379–80, 1411, 1481 ("[S]oon after the woman's rights movement initiated its public battle against marital rape, sustained accounts of the harm that marital rape inflicted on wives began to appear in the mainstream prescriptive literature on marriage, reproduction, and health. This literature, however, did not support legal change. Instead, it urged husbands to practice voluntary restraint, on the ground that the concession would benefit them at least as much as their wives.").

50. See Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 HARV. L. REV. 947 (2002); Siegel, The Nineteenth Amendment and the Democratization of the Family, supra note 18.

51. Higdon, *supra* note 41, at 1487 (noting the challenges to traditional parentage laws as nonmarital families have become more common).

52. The presumption of maternity rests greatly on the belief that a person chose to become and stay pregnant. While there were increasing protections for contraceptives and abortion during this time frame, reproductive healthcare has never been widely accessible in the United States, foreclosing the option to choose pregnancy and childbirth for many. However, with increasing restrictions to reproductive healthcare and the rollback of federal protections, there is even less of an ability to choose pregnancy now. *See infra* discussion in Section IV.C.1.

of the biological and social connection alleged to be formed through pregnancy and childbirth.[53] This distinct aspect of pregnancy and childbirth is used to create the maternal presumption of parentage. The choice, knowledge, and relationship don't extend to the unmarried biological father. As such, it was in the interest of men to distinguish their biological role in pregnancy and childbirth from that of a biological mother.

The legal distinction between motherhood and fatherhood in terms of biological relationships through pregnancy was incorporated into mainstream legal understandings in a series of immigration cases. Most notably, in *Nguyen v. INS*, the Court found the relationship that is formed by giving birth to a child provided a level of certainty in parenthood that was not inherently present in the relationships a child has with another parent.[54] This level of certainty in parenthood was enough to treat a biological mother differently than another parent.[55] While a biological mother could be presumed to be the parent because of the act of giving birth, other parents must take additional steps to prove their connection with their child.[56] Since then, the court has eliminated some of the requirements for a non-birthing parent to show a connection to the child for immigration purposes; however, the understanding of an inherent connection and "certainty" of parenthood still remains for a parent who gives birth.[57]

D. Mother vs. Father vs. Parent

One reason the Court in *Obergefell* focused on federal recognition of same-sex parents was out of the interest of children raised by same-sex parents.[58] The Court noted the importance of legal recognition for married parents and the valuable social implications that legal recognition of parenthood can bring.[59] While not explicitly stated in the decision, *Obergefell* set the legal understanding that a child was not restricted to one male parent and/or one female parent, but rather, a child was restricted to two parents regardless of their sex.[60] Following from the logic in *Obergefell* that it is in the best interest of a child to have parents who are legally married and both recognized as legal parents,[61] the Court in *Pavan* expanded the marital presumption of paternity to same-sex couples, at least for recognition on birth certificates.[62] In *Pavan*, the Court struck down an Arkansas policy of prohibiting same-sex couples from being recognized on the birth certificate of a child their spouse gave birth to.[63] The Court rejected Arkansas's argument that the

53. *See* Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).
54. Nguyen v. INS, 533 U.S. 53 (2001).
55. *Id.*
56. *Id.*
57. Sessions v. Morales-Santana, 582 U.S. 47 (2017).
58. Obergefell v. Hodges, 576 U.S. 644, 667–69 (2015).
59. *Id.* at 668.
60. *Id.*
61. Id.
62. Pavan v. Smith, 582 U.S. 563 (2017).
63. *Id.*

parents on a birth certificate must record the biological parents because Arkansas not only permitted but required the biological mother's husband to be listed on the birth certificate, regardless of if he was the biological father of the child.[64] As such, the Court reasoned that marriage provided the marital benefit of presumption of parentage to the spouse of a biological mother, deciding that a state must extend the same benefits and recognitions of marriage to couples regardless of their sex.[65]

Pavan greatly increased access for two married women to both be presumed to be the parent, however, it was still necessary for one of the parents to give birth to the child to be presumed parents.[66] This left the idea of "motherhood" intact as the starting point of a family—only once the mother is identified does the other parent become presumed to be a parent. In a marriage between two women, this results in only one parent being the presumed mother and the other parent taking on a secondary "parent" spot, which has traditionally been recognized as the father.[67] Despite the stride in legal recognition of a second mother as a presumed parent through marriage, by classifying two moms differently the law creates an understanding that the two parents are not both mothers in the same way.[68] While making this distinction, the law fails to look at the actual social and emotional relationship that the two parents have with the child. Additionally, the law in most states continues to assign transgender and nonbinary people who give birth as the mother, regardless of the actual parenting dynamics or societal views of the parents.[69] This demonstrates that *Obergefell* and *Pavan* successfully shifted the

64. *Id.* at 566.

65. *Id.* at 567.

66. *Id.*

67. Not all states have been as willing to accept this. For example, a trial judge in Oklahoma recently revoked the presumption of parentage from a mother who was married to the child's birth mother at the time of the child's birth. DIST. CT., SEVENTH JUD. DIST., STATE OF OKLA., LETTER RULING (2023); *In the District Court In and for Oklahoma County, Oklahoma*, OKLA. STATE COURTS NETWORK, https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=FD-2021-3681&cmid=4032274 [https://perma.cc/3AGT-3F8N] (last modified Nov. 13, 2023). Initially, the judge had ruled the second (nonbirth) mom should be removed from the birth certificate; however, she was reinstated as a parent on the birth certificate due to the requirements of *Pavan*. Both women were listed as parents on the child's birth certificate, with the biological mom taking the "mom" spot and the other mom being listed as the other parent. According to the judge, Oklahoma's parentage laws were enacted prior to *Obergefell* or *Pavan*. As such, the judge argued the statutes were written in a way that required a presumed parent to be biologically male. The judge noted that the Oklahoma statute provided legal avenues the second mother could have taken, including adoption and formal paternity disputes, to secure legal parentage. In addition to denying the marital presumption of parentage, the judge ruled the sperm donor to be one of the child's legal parents. The nonbirth mom has motioned for a new hearing, arguing that the judge incorrectly applied the decisions from *Obergefell* and *Pavan* and ignored precedent in interpreting Oklahoma's parentage statutes in a gender-neutral way. The next hearing in the matter is set for May 5, 2023.

68. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (finding there can only be one legal mother). *But see infra* Section III.A (describing limited instances where two people can split the biological connection to a child).

69. *See e.g.*, ARIZ. REV. STAT. § 36-334(A) (2023) ("A person completing a birth certificate shall state the name of the woman who gave birth to the child on the birth certificate as the child's mother unless otherwise provided by law or court order."); ARK. CODE. ANN. § 20-18-401(e) (2023) ("[T]he

"father" role to a "parent" role that a person of any gender or sex could fulfill, but the "mother" position remained a distinct classification that was tied to beliefs about gendered care, nurturing, and choice.

Intended parents, regardless of sex or gender, who use a surrogate are often forced to jump through legal requirements to prove they are the intended parent.[70] In some states, an intended parent can have the maternal presumption applied to their spouse if there is a surrogacy agreement and the intended parents use their egg to conceive their child, however, this extension of the maternal presumption is not consistent across states.[71] While some states recognize a parental relationship from use of an intended parent's egg during surrogacy, the same understanding of a biological connection is rarely extended to a parent whose sperm was used to conceive a child.[72] While the difference in treatment is typically based on the act of pregnancy, in cases like these where neither parent is pregnant or gives birth to the child, the state chooses to treat the parents differently based on biological sex despite similar levels of involvement in the creation of a child.[73] This difference in

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mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate."); OR. REV. STAT. § 432.088(8) (2023) ("For purposes of making a report of live birth and live birth registration, the woman who gives live birth is the birth mother."). *But see* CAL. HEALTH & SAFETY CODE § 102425.1 (Deering 2023) (allowing for parents to designate their parent-child relationship as "mother," "father," or "parent" on their child's birth certificate); *Illinois Updating Birth Certificates for Transgender Dads*, AP NEWS (Jan. 11, 2020, 9:04 AM), https://apnews.com/article/1a829a412760fdc4b83ec1666d16d79c [https://perma.cc/Q47N-R8N8] (describing how Illinois agreed to update its system to prevent parents who gave birth from automatically being described as "mother" on their child's birth certificates). Additionally, states may not require a parent who gave birth to be labeled as "mother," however, the state's system or procedures may not be set up to allow for the parent who gave birth to describe their parent-child relationship in any other way. *See Illinois Must Issue an Accurate Birth Certificate to Child of Trans Parents*, LAMBDA LEGAL (Dec. 17, 2019), https://legacy.lambdalegal.org/blog/20191217_ll-asks-illinois-to-issue-correct-birth-certificate [https://perma.cc/4QJB-MALB] (explaining efforts taken to prevent a transmasculine parent who gave birth from automatically being listed as "mother" on the child's birth certificate).

70. *See, e.g.*, Maria Cramer, *Couple Forced to Adopt Their Own Children After a Surrogate Pregnancy*, N.Y. TIMES (Jan. 31, 2021), https://www.nytimes.com/2021/01/31/us/michigan-surrogacy-law.html [https://perma.cc/4KKE-7M58]; *How Adoption After Birth in Surrogacy Works*, AM. SURROGACY (OCT. 16, 2020), https://www.americansurrogacy.com/blog/how-adoption-after-birth-in-surrogacy-works/#:~:text=Generally%2C%20the%20surrogate%20must%20execute,is%20filed%20by%20the%20attorney [https://perma.cc/R5LH-HRDL].

71. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2298–306, 2376–81 (2017) [hereinafter, NeJaime, *The Nature of Parenthood*]; *see also* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261 (2020) [hereinafter NeJaime, *The Constitution of Parenthood*].

72. Cahill, *supra* note 4, at 2272 ("Intended parents who fare less well in these genetic maternity—required surrogacy states include single men, same-sex male couples, and nonbiological intended mothers—none of whom can claim a genetic (or a gestational) connection to the child who results from third-party surrogacy.").

73. While egg collection requires significantly more time, money, and physical intrusion compared to sperm collection, the different procedures for collecting reproductive material do not inherently show a stronger or weaker intent to parent. For example, while an intended parent who has undergone the egg retrieval process has taken many steps on their journey to become a parent, however, a person may have gone through the same process to donate their eggs without having any intent to parent children born from their genetic material. Additionally, there is not one specific act necessary to

treatment creates a notion that the state views the actions of a mother as more important or more trustworthy in determining the intentions to start a family.

E. Different Rights and Requirements

Maintaining the mother as the starting point for family creation upholds the additional legal steps that many parents must take to become legally recognized as parents. These additional steps impact virtually all nontraditional families.[74] For example, opposite-sex couples who use a surrogate typically must show that there is a biological connection to at least one of the intended parents or provide extensive documentation proving the child has always been recognized as their own.[75] Single cisgender men and men who are married to another man have virtually no way of accessing the presumption of parenthood due to the inability to give birth. Instead, the law must actively assign parentage through adoption or enforcement of a surrogacy contract.[76] Unmarried coparents are often required to have the nonbirth parent go through processes of adoption, but each state has its own requirements for second-parent adoption that may limit legal recognition of parent-child relationships without a biological connection to the child or a marital relation to the child's birth parent.[77] Further, a parent who is presumed to be a parent may still have to undertake steps to receive legal recognition as a parent in other states.[78]

Additionally, the distinction between birth mother and other legal parent(s) impacts when a particular parent can give up their parental rights. Typically, a pregnant person is unable to give up parental rights until after the child is born; in some states, this extends to surrogates and allows them to terminate a surrogacy contract and assert parentage in certain cases.[79] In the case of egg or sperm

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demonstrate the intent to parent. There are many ways that an intended parent may be involved in having a child—including being pregnant, using their reproductive material to conceive, choosing a donor for reproductive material, attending appointments alongside their coparent or surrogate, filling legal documents, preparing the home for a child, and many other ways—and, therefore, the overall picture of preparing for a child can tell us more than the specific act of collecting reproductive material.

74. NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 12.

75. NeJaime, *The Nature of Parenthood*, *supra* note 71, at 2309.

76. NeJaime, *The Constitution of Parenthood*, *supra* note 71 (addressing how courts tend to presume parentage through giving birth or marriage to the parent who gave birth).

77. Sabra L. Katz-Wise, *Co-Parent Adoption: A Critical Protection for LGBTQ+ Families*, HARV. HEALTH BLOG (Feb. 25, 2020), https://www.health.harvard.edu/blog/co-parent-adoption-a-critical-protection-for-lgbtq-families-2020022518931 [https://perma.cc/Y3DY-FEGF]; *see also Parental Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws/second_parent_adoption_laws [https://perma.cc/43 VZ-742U] (last visited Mar. 14, 2024) (providing a list of states which permit second parent adoptions).

78. *See infra* Section I.D.

79. THOMAS A. JACOBS, CHILDREN & THE LAW: RIGHTS AND OBLIGATIONS § 3.11 (2023) ("Most states preclude relinquishment for a period of time, typically 24 four to 72 hours, following the child's birth."). Additionally, many states that permit surrogacy allow for surrogates to terminate the surrogacy contract within a few days after the child is born, thus allowing the surrogate to assert parentage after the child is born. *See* FLA. STAT. ANN. § 63.213 (providing a "right of recission" for surrogates after the birth of a child that is genetically related to the surrogate); D.C. CODE § 16-411(4) (2017) (allowing a surrogate to assert parentage during a limited time frame after the child's birth).

donation, on the other hand, the donor is never given legal rights in the first place.[80] Additionally, a biological parent who is not pregnant is able to give up parental rights to the child before the child is born.[81] The distinction in when parental rights can be given up furthers the notion that pregnancy and childbirth create an inherent connection between the parent and child despite evidence that this is not always the case.

II. DETERMINING THE (OPTIONAL) SECOND PARENT

As addressed above, the presumption of maternity is used as the start of determining who, if anyone, is a second presumed parent. However, developments in Assisted Reproductive Technology (ART) and increases in nonmarital relationships can complicate the process. The first issue can arise when it is not quite clear who the presumed mother should be.[82] Once the mother is determined, the next task becomes determining who should be the second parent, if any.

As the presumption of parentage is intended to be an easy and nonintrusive way for the state to assign parental rights and responsibilities, states have created a hierarchy to identify a potential second parent.[83] However, this sometimes works contrary to our social understandings of family.[84] Additionally, there are times in which multiple people are identified as a potential second parent.[85] Below, I describe the ways in which the maternal presumption as a starting point for determining parentage fails to live up to the states' goals of being efficient and respecting privacy, while also working contrary to common social understanding and promoting ideas about family that are harmful to women and queer families.

A. Determining the Legal Mother

The presumption of maternity is thought to be the most accurate way to determine which individual has the strongest biological and social connection to the child.[86] Based on the belief that giving birth necessarily involves both a biological connection to and an established social connection with the child, the Court has

80. *See e.g.*, UNIF. PARENTAGE ACT § 702 (UNIF. L. COMM'N 2017) (stating a genetic egg/sperm donor is not a legal parent).

81. Typically, voluntary denials of paternity/parentage are restricted only to the presumed or biological parent who is not pregnant. *See, e.g.*, DENIAL OF PATERNITY, WASH. STATE DEP'T. HEALTH (Who Can Sign a Denial of Paternity? "The spouse or ex-spouse who is currently married or was married to the mother/birth parent at any time during the pregnancy and will not be the parent listed on the child's birth certificate. A person who is genetically related to the child and is revoking their right to be a parent listed on the child's birth certificate. The second parent currently listed on the child's birth certificate. An Acknowledgment of Parentage form must be submitted to replace the second parent being removed."), https://doh.wa.gov/sites/default/files/legacy/Documents/Pubs/422-158-DenialOfParentage.pdf [https://p erma.cc/T49F-PQQA].

82. *See supra* Section II.A.

83. *See generally* Unif. Parentage Act (Unif. L. Comm'n 2017).

84. *See infra* Section II.B. discussing examples of when the presumption of parentage can fail to give legal recognition to a parent we socially see as a parent.

85. *See, e.g.*, NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 12, at 1264.

86. *See supra* Section I.C.

emphasized a person who gave birth to a child has a unique relationship through the legal construct of maternity.[87] However, not all mothers give birth to their legal child,[88] nor do all mothers share a genetic connection to the child they give birth to.[89]

The first aspect of the presumption relies on the biological connection a pregnant person has to a child. If biology is limited to a genetic relationship between parent and child, a person may lack a biological connection when using an egg donor but is pregnant with a child they intend to parent. To get around this, the biological connection has been interpreted to include the connection developed through pregnancy.[90] However, the genetic and pregnancy/birth aspects of biological connection can be split among two people so that one person has a biological connection to the child through the use of their egg and genetics while another person has a biological connection to the child through pregnancy and childbirth.[91] When two people both have a biological connection to the child, the law tends to presume that the person who gave birth is the genetic and intended parent based on the ideas of a normative family.

In the case that two people split the biological connections, one having a genetic relationship to the child and the other having a connection through pregnancy and birth, and the two people are intending to parent together, the state (in theory) can assign both people as legal mothers.[92] In scenarios like this, each parent has a biological connection to the child, and the only other person who could assert a biological connection is the sperm donor, if any.[93] Each potential mother here has a social connection through actively choosing to go through the egg collection process or embryo implantation and pregnancy. When two intended mothers both share a biological connection to the child, and the presumed mothers are married to each other, it is easiest for courts to allow both presumed parents to take on the role together.[94] Without being married, the potential parents have the additional task of not only showing that they intended to both parent the child but also that they both intended to parent the child together.

If the two potential parents in the situation above either cannot show they intended to parent the child together, or if there is a dispute about who the intended mother actually is,[95] the parental relationship moves beyond something a

87. Nguyen v. INS, 533 U.S. 53 (2001).

88. Such as in cases of surrogacy or adoption.

89. Including when using an egg donor or when carrying a child as a surrogate.

90. NeJaime, *The Nature of Parenthood*, *supra* note 71 at 2290–30.

91. *See* Cahill, *supra* note 4, at 2276–82.

92. *See, e.g.*, K.M. v. E.G., 117 P.3d 637 (Cal. 2005) (assigning parentage to two women who each had a biological connection through genetics or pregnancy).

93. While there is the possibility that the "sperm donor" is not a "donor" in the traditional sense, by using egg collection and implantation, there necessarily is medical guidance and requirements. As such, it may prove challenging to find any medical provider that would agree to these types of reproductive procedures without a clear understanding of who the intended parents will be. Almost always, the egg and/or sperm donor would also be required to agree to a set of terms regarding parental rights.

94. NeJaime, *The Nature of Parenthood*, *supra* note 71 at 2306–07.

95. Generally, egg donation and surrogacy can create the potential for disputes related to the

presumption of parentage can handle. While this is necessary to protect the interest of people who use or participate in egg donation or surrogacy,[96] it highlights the limitations of presumptions of maternity. Additionally, it shows that for people who use egg donation or surrogacy, documentation of agreements and intentions can be the evidence that determines parental rights.[97] The same precautions extend to unmarried people who intend to parent together—especially in the case where one or both potential mothers are or become married to someone else—it can be crucial to have evidence showing the presumed parent's denial of parentage and the intended parent's intent to parent.[98] Situations like these reiterate how a two-parent restriction can cause roadblocks and hurdles in instances where there otherwise wouldn't be disputes over parentage.

Can a child be born without a mother? Our social understanding of families and parenting allows for a child to be parented without a mom when a child is born through surrogacy to a single dad or two men/nonwomen as well as when a transgender man or nonbinary person carried the child through pregnancy.[99] However, the law, in general, is not yet set up to handle a child born without a mother. For instance, the 2017 Uniform Parentage Act (UPA) "include[s] broadening the presumption, acknowledgment, genetic testing, and assisted reproduction articles to make them gender-neutral"[100] yet continues to use phrases such as "genetic mother,"[101] "mother,"[102] and "gestational mother."[103] While the law can avoid giving a woman or mother parental rights and responsibilities, the language of the law is not set up to do so without additional determinations or legal applications.[104]

B. Second Parent Presumption

Once the mother is presumed, the law then looks to the spouse of the mother to presume a potential second parent. Due to limitations that restrict marriage to a relationship between only two people, there should be only one potential parent for

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intended mother.

96. By requiring a showing of intent, donors of reproductive material and surrogates, groups that traditionally do not intend to parent, cannot be required to support a child should the intended parents back out.

97. Carbone & Cahn, *supra* note 38, at 520–21.

98. Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 347–55 (2016) (discussing challenges to nongenetic parents in custody disputes).

99. *See* Darren Rosenblum, Noa Ben-Asher, Mary Anne Case, Elizabeth Emens, Berta E. Hernandez-Truyol, Vivian M. Gutierrez, Lisa C. Ikemoto, Angela Onwuachi-Willig, Jacob Willig-Onwuachi, Kimberly Mutcherson, Peter Siegelman & Beth Jones, *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 207 (2010) (discussing stories of men becoming parents in multiple ways).

100. UNIF. PARENTAGE ACT, Prefatory Note, at 2 (UNIF. L. COMM'N 2017), https://www.uniformlaws.org/viewdocument/final-act-96?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f&tab=librarydocuments [https://perma.cc/ZAR8-W6TM].

101. Unif. Parentage Act § 102(3) (Unif. L. Comm'n 2017).

102. *Id.* at art. 3; 42 U.S.C. § 666(a)(5)(C)(i).

103. Unif. Parentage Act § 804(a)(7), Comment (Unif. L. Comm'n 2017).

104. NeJaime, *The Nature of Parenthood*, *supra* note 71, at 2266.

the law to presume through the marital presumption.[105] The common law marital presumption of paternity, as well as the UPA, then extends parentage to the spouse regardless of biological relationship.[106] As the Court found in *Michael H.*, the marital relationship can be prioritized by a state over nonmarital relationships, even over the biological relationship of a father.[107] Rather than focusing on the interest of a biological parent to have a legal relationship with his child, the Court focused on the interest of the state in maintaining the marital family. The emphasis on marriage in family structures imposes obstacles for a spouse to deny parental responsibility for a child their spouse gives birth to.[108]

In many cases, the birth parent's spouse has a genetic relationship with the child. Additionally, most states do not provide a third party with standing to challenge a presumed genetic relationship marital presumption, especially as disproving the relationship likely will not have any effects on the parentage established through the marital presumption.[109] The child's birth parent and/or the presumed second parent are typically the only parties who can refute a genetic relationship, but refuting a genetic connection is typically used to deny parental responsibilities in these cases rather than seeking legal recognition as a parent.[110] The UPA provides limited circumstances for a third party to bring a challenge to the genetic relationship of a presumed parent, and simply showing a genetic connection does not guarantee the genetic parent will receive legal rights.[111]

ART and two-mom families have required the law to recognize that the marital presumption does not depend on a genetic relationship to both parents.[112] As long as one spouse is the presumed mother based on the maternal presumption, the marital presumption of parentage gives parental recognition to the second parent even in cases where there is no genetic relationship between the second parent and child.[113] However, a married parent who lacks a genetic relationship with the child may still seek formal adoption of the child to ensure that the parent-child

105. Malinda L. Seymore, *Inconceivable Families*, 100 N.C. L. Rev. 1745, 1788–90 (2022) (describing how California allows more than two legal parents but how the statute was written to restrict the legal recognition of multiparent families).

106. UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM'N 2017) (enacted as law in California, Oregon, Colorado, Maine, Vermont, Connecticut, and Massachusetts).

107. Michael H. v. Gerald D., 491 U.S. 110 (1989).

108. Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, *supra* note 23.

109. Unif. Parentage Act, art. 6 (Unif. L. Comm'n 2017).

110. However, a presumed parent may refute a genetic relationship to a child in order to deny parental rights/obligations so that an unmarried parent may go through the judicial process to seek rights.

111. Under the Uniform Parentage Act, a third party has two years after the child is born to assert that they have a genetic relationship to the child and challenge a presumption of parentage. UNIF. PARENTAGE ACT § 608(b) (UNIF. L. COMM'N 2017). After two years, a genetic parent may refute another person's parentage only if the presumed parent lacks a genetic connection, never lived with the child, and never held themselves out to be the child's parents, or if there is more than one presumed parent. *Id.*

112. UNIF. PARENTAGE ACT, art. 7 (UNIF. L. COMM'N 2017); Pavan v. Smith, 582 U.S. 563 (2017).

113. NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 12, at 1264; *see also* Joslin & NeJaime, *supra* note 9; NeJaime, *The Constitution of Parenthood*, *supra* note 71, at 378.

relationship is respected in every state.[114]

As NeJaime discussed, ART and same-sex parenting can often create scenarios where a family wants more than two parents to be involved in the child's life; however, the law typically restricts a child to two parents.[115] If the birthparent is married, the law presumes the spouse to be the parent, and any disputes brought by a third party to the marriage must be determined by the legal system, typically favoring the marital parents.[116]

C. Becoming a Second Parent Without the Presumption

The presumption of parentage allows parents to avoid the intrusive, costly, and confusing judicial system to establish legal parentage, however, other parents are forced to establish a legal connection through the judicial system. One way for a parent to assert parentage at the time of birth of the child or shortly after is by signing a voluntary acknowledgment of parentage (VAP).[117] VAPs allow unmarried people to assert a genetic connection to the child and eventually assume the role of a legal parent without marriage to the child's other parent.[118] While VAPs are based on the assumption of a genetic relationship, it is not required to prove this connection before the parents use a VAP to assign parentage.[119]

VAPs are a form of intent-based parentage that have been used to strengthen the legal meaning of family without marriage, however, they are limited by multiple factors. First, a VAP does not always create legal parentage at the time of signing.[120] Before the VAP takes effect as legal parentage, some states allow the opportunity for other people to rebut the connection and parentage asserted by a VAP.[121] Second, a VAP cannot be signed if there are already two presumed parents, requiring that one of the presumed parents goes through a judicial determination to remove the presumption first.[122] Similarly, the two-parent limit prevents the use of

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114. Feinberg, *supra* note 98, at 337.

115. NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 12, at 1264; *see also* Joslin & NeJaime, *supra* note 9; NeJaime, *The Constitution of Parenthood*, *supra* note 71, at 378.

116. *See, e.g.*, Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, *supra* note 23; UNIF. PARENTAGE ACT §§ 608 (UNIF. L. COMM'N 2017).

117. Formerly, VAPs were limited to voluntary acknowledgment of paternity; however, the 2017 UPA shifted to "parentage" following the logic in *Pavan v. Smith*, and *McLaughlin v. Jones*, 401 P.3d 492 (Ariz. 2017), which expanded the marital presumption to women who are married to a person who gave birth to the child. These cases recognized that a parent (1) does not need to have a biological connection to their child and (2) a person, regardless of their physical sex, can share a genetic connection to a child they were not pregnant with. Despite the UPA's change, many states' statutes still restrict VAPs to biological males.

118. Unif. Parentage Act §§ 301–313 (Unif. L. Comm'n 2017).

119. *See, e.g.*, *id.*, art. 3.

120. While California is one of the few states that transforms VAPSs into legal parentage as soon as filed with the state, VAPs signed by parents who are under 18 years old do not go into effect for 60 days after signing or until the parent turns 18. CAL. FAM. CODE § 7573I (West 2024); CAL. FAM. CODE § 7580 (West 2024).

121. 42 U.S.C. § 666(a)(5)(G).

122. 42 U.S.C. § 666(a)(5)(C)(ii).

a VAP for acknowledging more than two parents.[123] Third, some sates restrict the use of VAPs to biological males by requiring a VAP to reflect an asserted biological connection.[124] However, VAPs are also one of the least intrusive or demanding ways to receive a judicial finding of parentage.

Other methods of establishing parentage tend to require more active involvement by the government and judicial system. For example, when disputes over parentage arise from the maternal presumption, the UPA instructs the courts to intervene and settle the dispute using the best interest of the child standard.[125] This allows the government to look at a range of personal and family information and ultimately intervene in decision-making authority to determine who receives parental rights, often using subjective and normative criteria to make the determination. Similarly, adoption is available to unmarried parents, but parents must comply with state laws regarding the number of parents and the type of adoption allowed. This may first require a determination that a presumed parent is not a legal parent in order to comply with two-parent laws. Additionally, states do not have to allow for second-parent adoption for unmarried parents.[126]

III. CREATING AND UPHOLDING GENDER AND SEX-BASED DIFFERENCES

By relying on the presumption of maternity to extend legal parent-child relationships to parents, the law creates a notion that distinguishes types of parents and idealizes the mother. In doing so, the law creates beliefs about real differences between the sexes, imposes gendered norms into family dynamics, and furthers the beliefs of spousal roles. The legal presumption of parenthood asserts a normative idea of what the correct family looks like and how each parent and spouse should behave. The presumption of parentage is a way for the law to intervene in private family relationships and assign certain family roles.

A. Gendered Expectations in the Family

By structuring a family around the mother and a potential second parent, the law prescribes parental expectations based on gender stereotypes. The presumption of maternity is focused on the idea that giving birth inherently creates the most

123. Unif. Parentage Act § 302(a)(2) (Unif. L. Comm'n 2017).

124. LEGAL RECOGNITION FOR LGBT FAMILIES, *supra* note 12, at 6 ("Most states only allow men who believe they are genetic fathers of their children to sign VAPs, but a small but growing number of states now explicitly allow parents of any gender and non-genetic parents to sign VAPs.").

125. Unif. Parentage Act § 613 (Unif. L. Comm'n 2017).

126. Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEMINISM 100, 112 (2018) ("[S]econd parent adoption is not available in all jurisdictions."). *See, e.g.*, *In re* Adoption of I.M., 48 Kan. App. 2d 343 (Kan. 2012) (requiring a mother to give up parental rights before a stepfather could adopt the child despite agreement to coparent); Boseman v. Jarrell, 704 S.E.2d 494 (N.C. 2010) (determining an adoption decree was invalid because, despite a correct finding on best interest of the child standards, the unmarried stepparent could not adopt without forcing the biological mom to terminate parental rights).

definitive and strong relationship a parent can have with a child.[127] While this may be true for some people, there are many others who give birth without an emotional or genetic connection to a child they carried as a surrogate, others who terminate parental rights so the child can be adopted, and others who raise their genetic child but lack an immediate parent-child connection. The justification of emotional and social connection is an overly broad belief; however, the weight it has been given in the legal context has allowed it to support a social belief that giving birth creates the relationships.

The belief of an inherent connection is then used to support the notion that a mother is best suited to care for a child she gave birth to. Additionally, by requiring a second parent to prove their intention to parent, a belief is created that a parent who does not give birth does not have an inherent connection to the child, rather, they must go out of their way to show they will develop a connection with their child.[128] These beliefs regarding differences between parents impose typical gendered parenting and family roles onto a family.

These gendered norms can be imposed even in families outside of a two opposite-sex, cisgendered parent family. In these cases, imposing traditional gendered parenting norms not only causes harms based on hierarchal gender structures but also causes harms related to promoting a specific "ideal" family. As seen in custody cases involving a transgender parent, courts have used parents' trans identities or gender nonconformance against them under the best interest of the child standard.[129] The legal classification, and necessity, of motherhood violates family privacy and allows the state to expand its control over family functioning.

B. Spousal and Parenting Roles

Built around the historic role of marriage and illegitimacy, the marital presumption was initially formed as a way to ensure that a woman would have a husband to support her while she is pregnant and raising her husband's children.[130] While the law has moved beyond illegitimacy and coverture, the marital presumption still assumes a spouse is consenting to the responsibilities of parenthood if their spouse becomes pregnant and gives birth to a child. The marital presumption places financial, emotional, and caretaking roles on a spouse simply because their counterpart is pregnant, not because of an active decision between the spouses. Prescribing the roles of responsibility onto a married couple, the law reached into the typically private sphere of the family[131] to insert beliefs about how spouses

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127. *See supra* Section I.C.

128. *See* Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983); Michael H. v. Gerald D., 491 U.S. 110 (1989).

129. Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593, 1631–32 (2019) (discussing the findings of a study that revealed reasons courts denied trans parent's custody rights include factors such as exposing the child to ridicule related to their trans parent, a perceived instability in the parent's gender, and fears of "contagion" related to the parent's trans identity or gender nonconformance).

130. *See supra* Section I.A.

131. *See supra* Part III.

should care for and support each other. While married couples are free to resist this, the law imposes the beliefs on the individual family and on societal beliefs broadly.

Additionally, the marital presumption supports the notion that it is in the child's best interest to assign two legal parents who are married.[132] The desire to assign two married parents is without any regard to any connection, biological relationship, or intent to parent. A married person may seek ways to avoid parental reasonability, such as a denial of parentage or a court order determining the individual does not have parental responsibilities, however, these methods not only require a person to take affirmative steps to avoid parental responsibilities they never consented to but they also often require intervention by the judicial system.[133]

By structuring a family around the mother and a potential second parent, the law prescribes parental expectations based on gender stereotypes. Through the presumption of maternity, the spouse who gave birth is identified as the mother of the child. By singling out the act of pregnancy and childbirth as a unique and inherent connection, there is pressure placed on the birth mother to already have a certain bond with the child. On the other hand, the marital presumption is given because of the marriage to the birth parent, a relationship placed above other relationships with the child and intentions to parent. As such, the role of the second parent is often seen as deserving of less recognition and value. These distinctions in how parent-child relationships are viewed change the ways that people believe they should parent, enforcing traditionally sex-based parent roles.

C. Sex-Based Differences Outside of Family Law

Notably, the presumption of maternity and the belief of an inherent mother-child relationship are used to assert a legal difference between the sexes as support for sex-based classifications. This distinction between the sexes has an impact beyond family creation and parenting roles; the ways that pregnancy and parenting are gendered are used to create social norms, private policies and rules, and governmental laws and policies.[134] Pregnancy has been used to justify differences in treatment for men and women in employment, abortion, and criminal law.[135] As a result, the legal classification of motherhood has a negative effect outside of family functioning and has been used to support distinct classifications for men and women.

IV. MOVING FROM MOTHERHOOD TO INTENDED PARENTS

The current presumptions of parenthood, focused on the biological mother,

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132. The relationship between maintaining *both* the marital presumption and the maternal presumption of parenthood work together to enforce normative ideas about women who give birth and the supremacy of a family with married parents.

133. Carbone & Cahn, *supra* note 38, at 513–14.

134. *See* David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309 (2019); Cahill, *supra* note 4.

135. *See* sources cited *supra* note 134.

enforce and reward the normative ideal family.[136] For married couples who have a spouse carry and give birth to the child, or a single mother who gives birth, the law respects the privacy of the family and establishes the legality of the family without any extra steps. However, these rights are not extended to a married couple who does not give birth, an unmarried couple, a single parent who does not give birth, or family structures that wish to legally recognize more than two parents. For families that fall into the second category, there are additional legal barriers to overcome, which involve letting the state intrude into private details of the family. Even for those in the group that is benefiting from these presumptions in terms of family creation, the existence of the presumptions creates gender and sex stereotypes that harm many of the people they benefit. In response to these issues, intent-based parentage should be used to identify the legal parents of a child at the time of a child's birth or in early infancy. This change is necessary for overcoming the uneven legal starting point many "non-traditional" families face, especially in light of the difficulties a nonbirth parent has in asserting a social connection to a child at the time of the child's birth or in early infancy.

A. Presumption of Maternity is Overbroad

The supposed benefit of presumed maternity is that the presumption is believed to always identify an "actual" parent.[137] However, as discussed above, the act of giving birth neither guarantees a genetic biological connection nor the intention to parent the child.[138] Additionally, using pregnancy and childbirth to pick the first parent can raise situations where there are two individuals who share a biological connection with the child.[139] These limitations demonstrate that identifying parents based off pregnancy and childbirth is no more accurate for identifying the parents of a child in any given instance. While the maternal presumption may overall be the easiest or most accurate option for the state, the individuals whom it works for should find problems with it as well.

By claiming that childbirth demonstrates a biological and genetic connection to the child, the state is prioritizing biological relationships in a way not previously done. While it is true that many people who give birth intend to parent the child and share a genetic relationship with the child, looking for this relationship places it at a unique place of importance where the law values it higher than other forms of connection and intent. The value the law places on this connection then seeps into the understanding the common person has about parental connections. Despite a long history of nongenetic parenting through marriage and adoption,[140] the law

136. *See* NeJaime, *The Nature of Parenthood*, *supra* note 71, at 2267.

137. *See supra* Part I (discussing how courts have found maternity to be an "easy" connection to identify between parent and child).

138. *See supra* Section II.A.

139. For example, a person who used an egg donor can have claims of parentage from both genetic parents. *See supra* Section II.A.

140. Steven Mintz, *Children Families and the State: Family Law in Historical Perspective*, 69

places nongenetic relationships at a lower value, causing a belief that these relationships lack legal meaning outside of marriage or legal intervention. On top of the harms to nongenetic parents, this idolization of a genetic relationship tells people that the person who gave birth should be a superior parent, creating expectations that result in more work for parents who give birth.

Additionally, pregnancy and childbirth have been used by courts to show that the pregnant person chose to create a child and is therefore responsible for the child.[141] Similar to the above discussion, many people who give birth did actively choose to get and remain pregnant. However, others choose to endure pregnancy for the sake of creating a child for other people as a surrogate, never intending to have any rights or responsibilities over the child. Additionally, others may not have known they were pregnant or may not have wanted to remain pregnant but were unable to prevent or terminate pregnancy.[142] Similarly, the value of pregnancy in choosing to have a child undervalues the choice that the intended parent(s) had in becoming pregnant and undergoing the process to become pregnant, either through sexual reproduction or ART.[143]

The emphasis on social connection created through pregnancy and childbirth is another overly broad generalization that results in harmful understandings of parental value. For many parents who are the "ideal mother," having both given birth and sharing a genetic connection, they report a lack of automatic connection with their child the first time holding them and sometimes for weeks after.[144] This creates a sense of shame and inadequacy in the parents who do not have this connection, a phenomenon that occurs in nearly a fourth of parents and forty percent of first-time parents.[145] Further, the emphasis overlooks the ability of some people to undergo pregnancy and childbirth as a surrogate or with the intention to place the child for adoption and avoid creating any emotional connection. Yet, when people claim they do not have a connection to the child they are pregnant with, a sense of inadequacy or judgement is often placed on the person, ultimately deterring many from speaking openly about their experience or choice to be a surrogate or to place a child for adoption, which can increase stigma for individuals who are involved in either of these options.

The claim that childbirth and pregnancy can definitively identify a parent is

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DENV. U. L. REV. 635, 635–38, 644–45 (1992) (explaining the emergence of modern adoption in the United States during the mid-nineteenth century).

141. Nguyen v. INS, 533 U.S. 53, 64 (2001).

142. Carbone & Cahn, *supra* note 38, at 522 ("Intentional parenthood with self-conscious choices about getting pregnant, carrying the pregnancy to term, choosing a partner, and supporting that partner's involvement in the child's life came to characterize both the formal law and the informal norms of the group.").

143. *Id.*

144. K.M. Robson & R. Kumar, *Delayed Onset of Maternal Affection After Childbirth*, BRITISH J. PSYCHIATRY 347 (1980) (demonstrating the longstanding understating that many parents do not have an inherent emotional connection with their child after birth).

145. *Id.* at 349 (finding up to forty percent of first-time parents and twenty-five percent of parents who already had a child lacked an emotional connection).

not always the case, but even when it is successful, the beliefs used to determine parentage have harmful effects on the parental, spousal, and societal roles that are imposed on parents. Additionally, the focus on maternity fails to provide the same level of privacy and lack of government intrusion on many families who do not conceive through sexual reproduction, families with unmarried parents, and families with same-sex parents, further stigmatizing these families. As such, other methods for determining and assigning parentage should be used.

B. Looking to Intended Parents

Intent-based parenthood generally looks for who has been intending to parent the child from before conception, throughout a pregnancy, and in the time frame shortly after the child's birth.[146] The UPA and many state statutes have long placed the intent to parent at the center of determining parentage, with the most recent UPA further accommodating nontraditional families by increasing the role of intent for determining parentage.[147] Multiple states have adopted the most recent UPA, which takes the strongest stance towards intent-based parentages,[148] and many others have adopted a previous version of the UPA, which includes some forms of intent-based parentage outside of marriage and the belief that becoming pregnant demonstrates intent.[149] Even without acknowledging or legislating an intent-based parenting system, the principles of intent-based parenting have long been present in the U.S. family law system. The ideas of intent-based parentage are nothing new and have already been used as the basis of legal parentage.

The biggest shift necessary to have a true intent-based parentage system comes from recognizing that no one act or involvement in the creation of a child inherently classifies a person as a parent. Instead, the state is required to look at the circumstances surrounding the child's birth, prenatal development, and conception to locate who has held the understanding that the child is their legal responsibility. In many cases, the person who gave birth holds themselves out to be the parent, which can be seen by how they acted during pregnancy and steps they took before becoming pregnant. Similarly, the spouse of a person who gave birth often is referred to and refers to themselves as another parent, which can be supported by the involvement they had in preparing to raise the child and in taking care of their

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146. *See* UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990).

147. *See* Unif. Parentage Act, Preface (Unif. L. Comm'n 2017).

148. California, Colorado, Connecticut, Maine, Massachusetts, Oregon, and Vermont, and have all enacted the 2017 version of the UPA. 2017 *Parentage Act Enactment History*, UNIF. L. COMM'N (Nov. 17, 2023), https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f [https://perma.cc/RJ37-M5R2]. The 2017 version includes understandings of same-sex parents, surrogacy, and *de facto* parents. *Id.*

149. Alabama, Delaware, Illinois, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming have enacted the 2002 version (or similar) of the UPA. *Id.* Many other states have enacted even older versions such as the original 1973 UPA or modified versions. *Id.*

spouse during pregnancy.[150] Additionally, written agreements and understandings can be used to show the intention to parent when the parents may be unmarried, using an egg or sperm donor, or using a surrogate.

C. Intent-Based Parentage as a Reflection of Common Understanding of Parenting

Over the last century, our understanding of what parenting looks like and who is a parent has changed drastically. Not only is becoming a parent seen more as a choice but the structures of families are more diverse. Families are no longer viewed as inherently sharing a genetic connection or birth connection as egg and/or sperm donation has increased, and surrogacy and adoption have lost much of the secrecy. Federal recognition of same-sex marriage has continued to challenge the understanding of the martial presumption and a genetic connection.[151] With increase in divorces,[152] more parents are sharing custody of children in separate households,[153] often adding stepparents to the parenting dynamic as well.[154] Similarly, single parenting, regardless of the sex of the parent, has gained respect as a way to raise children.[155]

Despite these changes, presumptions of parentage that rely on the maternal presumption fail to place many forms of parent-child relationships on the same level of legal recognition, despite our acceptance and understanding of the familial relationships. Intent-based parentage supports these parent-child relationships by providing validation to families beyond the married opposite-sex couple. Further, intent-based parentage is already reflected in many of our current parentage laws as described below.

1. Parenthood as a Choice

In both the maternal and the marital presumptions of parentage, there is the idea that the parent made the choice to become a parent and undertake the responsibilities of parenthood. As addressed above, marriage was historically a responsibility that a husband undertook for care, responsibility, and decision-making for his wife.[156] This included the choice to start a family and the responsibility to care for any child, essentially regardless of biological connection,

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150. Fontana & Schoenbaum, *supra* note 134 (describing ways that a parent who is not pregnant can be involved with the pregnancy and preparing for the child).

151. Carbone & Cahn, *supra* note 38, at 532–33; Higdon, *supra* note 41, at 1489–50.

152. VALERIE SCHWEIZER, DIVORCE: MORE THAN A CENTURY OF CHANGE, 1900-2018 (2020), https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/schweizer-divorce-century-change-1900-2018-fp-20-22.pdf [https://perma.cc/NED4-ATU4].

153. Daniel R. Meyer, Marcia J. Carlson & Md Moshi Ul Alam, *Increases in Shared Custody After Divorce in the United States*, 36 DEMOGRAPHIC RSCH. 1137 (2022).

154. *A Portrait of Stepfamilies*, PEW RSCH. CTR. (Jan. 13, 2011), https://www.pewresearch.org/social-trends/2011/01/1 3/a-portrait-of-stepfamilies/ [https://perma.cc/B23D-ZA7K].

155. Paul Hemez and Chanell Washington, Percentage and Number of Children Living With Two Parents Has Dropped Since 1968, U.S. CENSUS BUREAU (Apr. 12, 2021), https://www.census.gov/library/stories/2021/04/number-of-children-living-only-with-their-mothers-has-doubled-in-past-50-years.html [https://perma.cc/5QY5-6JGU].

156. *See supra* Section I.A.

that his wife gives birth to.[157] As the dynamic of marriage and family creation has changed, the marital presumption has failed to keep up with the understanding of choice in presuming parentage.

Similarly, the maternal presumption took shape during a time when women were seeing an expansion in personal, political, and social rights.[158] While constitutional protections for the right to contraception and abortion were expanding at the same time as protections for illegitimate children, access to birth control, abortion, and reproductive health have never been universally available in the United States.[159] Regardless of the lack of true choice in pregnancy, the presumption of maternity is based heavily on the assumption of choice to become and stay pregnant. This right to choose plays an important part in assigning the birth parent as a legal parent by extending the choice to become and stay pregnant to the choice to parent. After *Dobbs*,[160] there no longer is a federal right to choose to end a pregnancy and access to birth control continues to be restricted by religious freedom arguments such as those in *Burwell v. Hobby Lobby Stores*.[161] Without adequate protections for methods to prevent pregnancy and without the choice to end pregnancy, there is no extension to argue a person necessarily chose to undertake parental responsibilities because of choices to become and stay pregnant. As such, assigning a birth parent as a legal parent now rests simply on the act of birth without any regard to individual choice.

By shifting to an intended parent standard, the legal system will better respect an individual's choice to parent or not. Importantly, this also means that a traditionally presumed parent—a person who gives birth or a person who is married to someone who gives birth—is not assigned parental obligations simply by giving birth or being married to someone who did. The act of marriage and birth/pregnancy can still be used as one possible way to demonstrate an intention to parent, but they will not necessarily trigger a legal obligation to parent. This focus on choice to parent better aligns with our historical understanding of presumptions of parentage while accommodating modern family structures.

2. Genetic and Birth Connections

With parentage laws still prioritizing some form of "biological" connection, the understanding of biology under the law has adapted to include families formed by various types of ART, matching the social beliefs of parenthood.[162] Unlike the traditional belief that a mother is biologically connected to her child through *both* a genetic relationship *and* pregnancy/childbirth, the modern understanding of biological connection between a parent and child can be met by either a genetic

157. *See supra* Section I.A.
158. *See supra* Section I.B.
159. *See supra* Section I.B.
160. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
161. 573 U.S. 692 (2014).
162. Feinberg, *supra* note 98, at 350.

relationship *or* pregnancy/childbirth.[163]

In addition, surrogacy and adoption have long been recognized as ways to form a parental and/or maternal connection with a child without a connection through pregnancy and birth.[164] In surrogacy, the intentions and actions of the parents prior to the child's birth, in conjunction with a surrogacy agreement demonstrating the pregnant person's intention not to parent, are used to showcase the intended parent's role in creating and caring for the child despite the lack of pregnancy/birth connection.[165] Similarly, adoption identifies the adoptive parent's ability to parent the child and the adoptive parent's intention to undertake the responsibilities of parenthood, both without a biological connection to the child. Additionally, recent changes in the law have been made to reflect the historic understanding that *de facto parents* often can and should have legal recognition of a parent-child relationship due to the connection and nature of the relationship—despite a lack of genetic or birth connection to the child.[166] These avenues to parenthood demonstrate that the focus on biological, genetic, or pregnancy/birth connections fail to accurately reflect what we view as deserving of recognition as a family. Instead, the desire of a person to parent and their involvement in preparing to parent are better ways to understand our beliefs about parenthood.

3. Divorce and Shared Custody

As divorce rates have increased and divorce laws have abandoned a presumption of assigning custody to the mother, more children are being raised in separate households by two independent parents.[167] Over time, practices of custody have shifted from the dad being awarded sole custody of the children due to his legal decision-making power for a family, then to sole custody for the mom because of the thought that a mom provides the best care of a child, and ultimately to shared custody between parents.[168] What this shows is that our common understanding supports the notion that not only is it okay for a child to have parents who do not live together but it can be beneficial for a child to maintain a relationship with both parents even in separate households.

Giving parental rights to two unmarried people is often assumed to be a result of only a divorce or the termination of marriage-like relationships. However, the two-parent ideal that often underscores custody decisions in divorce cases can apply outside of divorce proceedings as well.[169] While custody disputes in a divorce

163. Unif. Parentage Act § 612 (Unif. L. Comm'n 2017).

164. Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 84, 86-87 (2013) (explaining how Congress, over the last century, has extended benefits to children based on their need based on the parents that provide support, not based on a biological connection to the parent).

165. Higdon, *supra* note 41, at 1510–11.

166. Unif. Parentage Act § 609 (Unif. L. Comm'n 2017).

167. *See supra* sources cited notes 152–55.

168. *See supra* Part I.

169. Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2381 (2016) [hereinafter Mayeri, *Foundling Father*] (explaining how the

proceeding often involve established parent-child relationships, divorces and custody disputes also occur when the parents have infants. Even in cases with infants, where the parent-child relationship may not be as established, courts still often award custody to both parents because of the belief that it is good for the child to have a relationship with two parents who are fit to parent and interested in doing so.[170] What this demonstrates is that intention to parent outside of a marriage or outside of a unified household should not preclude parents from receiving legal recognition. Outside of traditional marital family structures, children can benefit from having relationships with more than one parent, and it can be positive for legal authority to be shared between parents of a child.

4. Sex and Gender of Parents

The historic belief that a child needed two opposite-sex parents has been nearly abandoned by the law over the last century.[171] As addressed above, the law previously followed the notion that a child must have two married, opposite-sex parents.[172] However, the changes to illegitimacy laws altered the understanding that a child was required to have two parents, allowing for single mothers and eventually single fathers to be recognized as legal parents.[173] The shift in allowing single parents not only signals an intention for the law to reflect the freedom to have children as a liberty independent from marriage but the change also reflects the belief that a child can be parented without two different-sex parents.

In *Obergefell*, the Court stated that recognizing same-sex marriage was important to children of same-sex parents because it provided "recognition and legal structure to their parents' relationship."[174] "As all parties [in the case] agree[d], many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted," and therefore, should be given the same recognition and rights as other families—an important aspect of preventing unnecessary stigma for the families and children.[175] By finding that same-sex parents deserved legal recognition, the Court acknowledged that same-sex parents should be recognized despite (1) both parents being the same sex and (2) the child inherently lacking a genetic connection to at least one parent.[176] While it had been established decades

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"Court embraced nonmarital fathers' rights, [because] it was largely on terms that resonated with the divorced fathers' rights movement.").

170. Julie E. Artis & Andrew V. Krebs, *Family Law and Social Change: Judicial Views of Joint Custody, 1998–2011*, 40 LAW & SOC. INQUIRY 723, 734 (finding that by 2011, eighty percent of judges preferred joint custody for children under four years old).

171. *See supra* Part I.

172. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (finding that a marital relationship could be protected over a genetic relationship and determining a child did not have a right to two dads).

173. *See supra* Sections I.C.–I.E.

174. Obergefell v. Hodges, 576 U.S. 644, 668 (2015).

175. *Id.* at 667–69.

176. *Id.*

before that a child did not need two opposite-sex parents,[177] *Obergefell* extended the law's understanding to require states to recognize that a child can have two parents of the same sex.

Before *Obergefell*, recognition of same-sex parents strengthened the understanding of parenting outside of marriage and without a biological connection. For example, "advocates for LGBT parents made creative use of the unwed fathers cases as they sought to detach parentage from biology, gender, and marriage," instead asserting "parental status based upon functional and intent-based criteria rather than formal categories such as marital status and biology."[178] While same-sex marriage has allowed more weight to be put onto the marital relationship for asserting parental rights, it continues to be important to acknowledge the role of intention in family creation and the functional roles of parents in their children's lives. Intention and function underlie why the marital presumption extends past the role of biology and genetics.

D. Settling Disputes in Intent-Based Parentage

A concern of intent-based parentage is that the "wrong" parents will be identified or that there will not be a good way to narrow parentage to two parents. While intent-based parentage may pick different parents than our current focus on presumptions of maternity, neither option is guaranteed to pick the "correct" parent. However, intent-based parentage allows for easier consideration of a broad range of factors that do not limit a parent-child relationship to birth, genetic connection, or marriage. By removing the inherent weight of certain factors, the individual circumstances can be considered with the appropriate weight. In these cases, each factor can be looked at to see how long the potential parent has intended to parent, when the potential parent became aware of the pregnancy or process of creating a child, the level of involvement in preparing for the child before birth, and the outside social beliefs of who is the parent.

Additionally, disputes over parentage can occur beyond the initial presumption of parentage.[179] Intended parentage is meant to assign initial legal parent standing to a child at or around the time of birth, not to determine who is or is not a legal parent later on in the child's life.[180] An individual who became a legal parent through intended parentage may still have their rights restricted or removed if deemed necessary by the courts; however, expanding presumptions of legal

177. In reference to legal parent-child relationships only being established when a child was born to a mother and her husband. *See supra* Section I.A.

178. Mayeri, *Foundling Father*, *supra* note 169, at 2389–90. (2016).

179. Such as parents disputing over the genetic relationship of a fetus, surrogates attempting to deny parentage before the child is born, and donors of genetic material entering into contracts related to parental rights before donating.

180. Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 222 (2012) ("Only one theory—intent—allows a truly forward-looking perspective. The other alternatives, the marital presumption, biological connection, and functionalist theories, make a backward-looking assessment of parenthood . . . .").

parentage provides additional parents protection in the form of standing in child custody and visitation cases. Similarly, additional parents may be determined through the child's life through adoption or other parental determinations. While the intention of an individual to be a parent is important at any time of a child's life, functional-based parenting determinations should be used later on in a child's life as they determine the intentions to parent, and they better encompass the relationships a child already has.[181]

To settle disputes regarding intended parents, factors like marriage and biology can be considered in addition to other social and personal actions. For example, a person who was pregnant and quietly prepared for a child by acquiring baby clothes, bottles, and a crib is likely to have a much stronger claim to parentage than a person who lacks a genetic or social connection to the child but has loudly and publicly held themselves out to be the intended parent. Similarly, when two parents both have a genetic connection to the child, our current understanding that both parents who are aware of this connection have a right to parentage is likely to stand, placing this genetic connection (and knowledge of it) over other social factors like marriage.

When more than two parents assert parentage, current practices already tend to look towards intentions to parent. In these cases, the law looks to identify the range of factors that demonstrate parentage, sees what factors are strongest in supporting a claim of parentage, and identifies any factors that would negate parentage. However, by shifting away from a maternal presumption as a starting point, the factors in determination are able to be seen with more clarity. Without a maternal presumption, factors that point to parentage are not given more weight simply because of a particular biological relationship or social connection to the presumed mother.

Like in our current system, there are times when there are two parents recognized by the law, but one or both parents object to the other having parental rights. When this occurs, an intent-based parentage system can respond nearly identical to the current system. One parent can refute the factors that determined parentage, such as showing the other parent does not actually have a biological connection as they claimed or that the parent was not actually involved with the child before birth. If the claim to parentage can be refuted, then the law can remove parental recognition. If the claim to parentage is not refuted by arguing against the factors that supported the finding, then the parent arguing against it is able to pursue the same options as currently exist to revoke parental rights of the other parent. This can follow current state laws about protecting children from unsafe conditions a parent may create and/or utilizing the best interest of the child standard.

E. Voluntary Acknowledgment of Intended Parentage

One potential action a state could take is to allow the intended parents to assert

181. *See* Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319 (2023) (describing functional parent doctrines and their use in maintaining parent-child relationships).

their intention to be the legal parents of the child by signing a VAP-like form. Like a VAP,[182] the intended parent form could be available before the birth of a child and for a certain time frame after the child's birth. Additionally, the intended parent form could allow for both intended parents, or multiple intended parents in states that do not restrict the number of parents a child can have, to sign the intended parent form to assert that they intend to parent together. By allowing them to acknowledge their intent to share parental rights and responsibilities for the child, the state is able to easily resolve arguments asserting one parent was not an intended parent. In cases where more individuals assert themselves as an intended parent than the law allows or in scenarios where one individual argues that another person is not actually an intended parent, the judicial system is able to intervene as addressed above by looking at a range of factors.

Acknowledgments of intended parentage should create legal parentage at time of signing. Unlike a VAP which, in theory, is based on a genetic connection to a child that can be rebutted if there lacks a genetic relationship,[183] acknowledgments of intended parentage should only be prevented from transforming into legal parentage if it is determined that the individual is not an intended parent or through current judicial methods of determining a parent is not fit. As such, an acknowledgment of intended parentage should transform into legal parentage at time of the child's birth or at time of signing if the parent signs after the child is born. By allowing legal parentage as soon as the form is signed and the child is born, the state can mitigate the potential inconvenience to the state of parents later denying their intention to parent. Additionally, by allowing legal parentage at time of signing, there is no disadvantage for those who choose to sign an acknowledgment of intended parentage compared to those who do not sign one (if the state chooses to allow). Similarly, automatic legal parentage reaffirms the idea that the intended parents are in fact the legal parents.

In addition, states could extend acknowledgments of intended parentage to include a denial of intended parentage for nonparents who are involved in the pregnancy. This could create a unified method for surrogates and sperm/egg donors to easily make a legal assertion denying any rights or responsibilities for a genetic child. Similarly, it could allow for a surrogate to ensure the child they are carrying is the legal responsibility of the intended parents. In addition, a denial of intention to parent can allow a person to deny legal responsibility for a child of their spouse, cohabitant, or friend, if the state allows. While the state should allow individuals to file a denial of intention to parent, it is in the state's interest to also allow for groups of people to jointly file intentions to parent and denial. For example, this could enable a sperm donor to deny any legal rights and responsibilities while identifying the intended parent(s) and for the intended parent(s) to assert their intention to parent while confirming the intention of the

182. *See supra* Section II.C.
183. *See supra* Section II.C.; NeJaime, *The Nature of Parenthood*, *supra* note 71, at 2344.

sperm donor to avoid any rights and responsibilities. By offering parties the opportunity to jointly identify intended parents, the state is able to encourage communication by the parties to clarify the exact agreed arrangement.

Abandoning the presumption of maternity in favor of intent-based parentage does not solve every issue, however, the focus on intent allows for the factors that determine parentage to be seen without influence by arbitrary and overly broad ideas about motherhood. This is likely to identify the parent(s) of a child without extra hurdles for single fathers, unmarried couples, and people who use surrogacy. Additionally, by removing the assumptions regarding motherhood, pregnancy, and childbirth, the risk of creating and imposing gendered norms and caretaking roles is limited, letting individual parents decide how they (and their coparent) will split parenting responsibilities.

V. PUSHBACKS, LIMITATIONS, AND RESPONSES

Despite the benefits for children and parents, any change in the law is likely to receive criticism and hesitation from some. Below I address the likely arguments against a shift away from the maternal presumption and to a true intent-based parenting system.

A. Minimizes Mothers and Women

A likely concern with eliminating the presumption of maternity as the foundation of family creation is that it will reduce the value and importance women have in the family, which can devalue the work women put into creating and raising a family. While it is a valid goal of encouraging respect for women in the creation and raising of a family, shifting away from the maternal presumption is unlikely to do this. As NeJamie points out, despite eliminating the gender hierarchy that resulted from the legal classification of legitimate children, new legal classifications have emerged to maintain a gender hierarchy in marriage and family, this time, by using the maternal presumptions of parenthood to argue for sex-based differences, then using the marital presumption to idolize the married, two-parent family with at least one mother.[184] First off, the maternal presumption does not currently

184. *See* NeJaime, *The Nature of Parenthood*, *supra* note 71, at 2267 ("Yet even as the Court renounced 'illegitimacy' and dismantled legally enforced gender hierarchy within marriage, it produced a new form of gender differentiation in parenthood—which is justified by resort to reproductive biology. At the moment of birth, the nonmarital child—unlike the marital child—had one legal parent: the mother . . . situating women, but not men, as naturally responsible for nonmarital children."). In addition to the harms that parental presumptions create from arguing on the basis of sex-based differences that NeJaime addresses, marital presumptions create similar harms in the continuance of idolizing the married two-parent family. This perpetrates stereotypes of the ideal family that continues the superiority of a marital family like Mayeri discusses. Additionally, the continued existence of the parental presumption (including both the marital presumption and the maternal presumption) has become harder to justify based on modern ideas of family formation; however, like NeJaime addresses, modern justification of parental presumptions tends to use an argument that there are actual/biological differences between the sexes which furthers the use of unjustified classifications based on sex (in a

respect the role and standing of all women or mothers. As addressed above, for most two-mom families, only one mom can be the "presumed legal mom" while the other is stuck as the second parent.[185] Second, a mother who did not give birth to a child is presumed to have less of a connection than a mother who did give birth because she did not have the opportunity to bond socially and biologically through pregnancy.[186] Third, a woman who did not choose to become pregnant, did not want to stay pregnant, or is intending to have the child placed for adoption or given to parents using surrogacy is commonly required to refute the idea that a pregnant person has chosen to have the child and take responsibility for it.[187] Fourth, transgender men, nonbinary people, and other nonwomen who are pregnant are treated the same by the maternal presumption despite often not fulfilling an ideal of what motherhood is, therefore weakening the concept of motherhood.[188] The maternal presumption prevents many women from being perceived and treated by the law the same as a person who fulfills the presumption. Further, the maternal presumption conflates the social aspects of motherhood with biological aspects of pregnancy and childbirth.[189] By moving away from the presumption of maternity, all mothers will have the same ability to assert themselves as the mom of their child and choose to fulfill traditional roles of a mom. This provides more meaning to motherhood as it becomes a choice that a person makes. Additionally, by removing the hierarchy of parent-child connection created through the maternal presumption, women who are unable or choose not to become a mom through pregnancy and childbirth are not discounted on their standing as a woman because the notion that pregnancy and childbirth are what distinguished men and women is weakened.

Eliminating the legal classification of motherhood is necessary because even if the other issues are solved, the legal belief of motherhood through the presumption of maternity would still be a restricting factor on family formation. The entire notion of motherhood as part of the presumption of maternity rests on ideas that being pregnant and giving birth creates a connection between the parent and child and demonstrates a desire to parent.[190] These beliefs do not isolate themselves as just part of the law, rather, they shape our understanding of our own relationships and roles. Placing motherhood as a unique aspect that occurs in a parent who gave birth results in women and mothers being placed into typically gendered caregiving and parenting roles, thus limiting the ability of women and mothers to have freedom and autonomy to parent. In addition, assuming that there is a special relationship created through pregnancy and childbirth strengthens the argument that a family needs a mother as only a mother can provide certain things.

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broad legal sense) and imposes stereotypes into a family related to gendered parenting roles.

185. *See supra* Section II.B.

186. *See supra* Section II.B and Part III.

187. *See supra* Section IV.C.1.

188. *See supra* notes 67 & 69.

189. *See supra* Section III.A.

190. *See supra* Sections I.B and I.C.

This discredits families that do not have a mom and continues to place the mother into specific caretaking and family roles. The idea of motherhood as a product of pregnancy and childbirth is harmful to women who want recognition for their role and work as mothers. As such, it is in the best interest of mothers and women to move past the maternal presumption as the starting point of family formation.

B. Concrete Legal Recognitions

An area of concern, especially for nontraditional families, is that intent-based parentage does not inherently provide any concrete recognition of legal parentage.[191] Under the current system, a birth certificate lists the child's birth parent and can list a second parent.[192] If the second parent is not listed, they can use evidence of marriage to the child's birth parent to argue the marital presumption applies to them, and unmarried second parents can provide evidence of a VAP or a court order that declares them as a legal parent.[193] However, "proof" of parentage under the current presumption is essentially nonexistent without some form of court recognition. While birth certificates can be used to provide proof of parentage, a birth certificate is not used to establish parentage and may later be amended if a court makes an adjudication of parentage or if a child is adopted.[194]

Most vulnerable under the current system, a second parent who is not married to the child's birth parent may not receive recognition as a legal parent even if they are listed on the birth certificate as a parent.[195] The state laws may require a VAP, second-parent adoption, or marriage to the birth parent in order to extend parentage, all of which require the consent of the birth parent.[196] If the second parent is not listed on the birth certificate, they may be able to argue for parental recognition. However, the rights will depend much on the willingness of the birth parent to allow for the second parent to form and maintain a relationship with the child. On the other hand, a spouse of a birth parent must take affirmative steps to deny parental responsibilities.[197] Additionally, if the second parent does not share a genetic connection with the child, there may be even more additional hurdles. For example, a state does not have to allow for second-parent adoptions by a parent not married to the child's legal parent[198] nor are states currently required to permit for

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191. Having an easy way to assert legal recognition can be important, especially for nontraditional families.

192. *See also* Pavan v. Smith, 582 U.S. 563 (2017).

193. *See supra* Section II.C.

194. *See, e.g.*, CAL. DEP'T OF CHILD SUPPORT SERVS., CHANGING A CHILD'S BIRTH CERTIFICATE, CA.GOV, ("Therefore, a birth certificate DOES NOT establish legal parentage when parents are unmarried."), https://childsupport.ca.gov/changi ng-a-childs-birth-certificate/ [https://perm a.cc/4QGL-32CS] (last visited Mar. 14, 2024).

195. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 102425(4)(C) (Deering 2023) (requiring a VAP or judicial finding of parentage for an unmarried second parent to be recognized as a legal parent).

196. *Id.*

197. UNIF. PARENTAGE ACT § 303 (UNIF. L. COMM'N 2017) ("A presumed parent or alleged genetic parent may sign a denial of parentage in a record.").

198. *See* NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 12; *supra* text

VAPs to be signed by a nonbiological parent.[199]

With the increase in use of egg/sperm donation and the continued use of surrogacy, the legal meaning of giving birth will continue to be disputed regarding parental rights. Additionally, the growing number of parents who choose to parent outside of marriage highlights the limitations posed by the current system, especially for those who do not want parental obligations for their spouse's child.[200] These changes will continue to reduce the proof a birth certificate or genetic relationship to the birth parent can show.

While the current system fails to provide concrete evidence of a legal parent-child relationship for parents who receive parental rights through the maternal or martial presumption, it is important that states avoid this issue when implementing an intent-based system. As addressed above, a state should consider ways to allow intended parents to assert their intention to parent as well as to allow nonparents a way to assert their intention not to have any parental rights or responsibilities. To offer the most protection, the federal government should require a state to classify an acknowledgment of intended parentage as a legal finding that other states must respect under the Full Faith and Credit Clause similar to how a VAP does.[201]

C. Coercion to Parent or Avoid Parenting

A potential fear of intent-based parentage is that individuals will be forced into parenting or into giving up their child. While intent-based parentage could create more opportunities for other individuals to try and assert parentage over a child,[202] it does not mean that an assertion of parentage will result in parental rights being given. As addressed above, no one factor is determinative of parentage and the other parent, or a third party, is able to refute parentage if the factors used to assign it were wrong or misleading.[203]

In cases of human trafficking, the effects of intent-based parentage are likely to be a large concern, however, the current system of parentage fails to protect against this as well. Under the current system, a person married to the parent who gives birth is automatically given parental rights unless refuted by a biological parent. The essentially automatic assignment of parental rights to a spouse allows

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accompanying note 74.

199. Feinberg, *supra* note 126.

200. Carbone & Cahn, *supra* note 38, at 522.

201. 42 U.S.C. § 666(a)(5)(c)(iv) ("Such procedures must require the State to develop and use an affidavit for the voluntary acknowledgment of paternity which includes the minimum requirements of the affidavit specified by the Secretary under section 652(a)(7) of this title for the voluntary acknowledgment of paternity, and to give full faith and credit to such an affidavit signed in any other State according to its procedures.").

202. Under the current presumptions of parentage there are clear "guidelines" on determining a child's parent(s). These guidelines describe who can challenge parentage of a presumed parent and give priority to parents with certain relationships and traits. *See supra* Section I.C, Section I.D, and Part II discussing current presumptions of parentage.

203. *See supra* Part IV.

trafficking to occur through marriage to the person giving birth. Additionally, the current system puts significant weight into surrogacy agreements and biological connection to the child, both allowing trafficking to easily occur. While intent-based parentage does not eliminate these issues entirely, it does allow for courts to investigate and consider other aspects of parentage beyond following a list of social and biological factors based on their apparent importance. Additionally, intent-based parentage does not eliminate the ability for people to pursue legal action revoking parentage or criminal action against an abusive parent.

Similarly, the impacts of intent-based parentage are also likely to be a concern for people who can more easily deny the intent to parent out of fear of safety or well-being of them or their child in cases of domestic violence. Intent-based parentage provides an advantage as it does not automatically use factors like marriage or biological relationship to assign parental rights. This can allow a person to avoid an abusive spouse or biological parent from automatically receiving parental rights. As mentioned above, intent-based parentage does not guarantee that abusive parents will not receive rights, and legal procedures to revoke parental rights or access to the child can still be pursued. Additionally, if a pregnant person does fear for their or their child's safety, intent-based parentage can provide them an easier way to avoid parental rights and responsibilities being automatically assigned.[204] While not a perfect way to solve issues of domestic violence or human trafficking, intent-based parentage does not make the issues worse and, in some circumstances, can help improve the options for people in these situations.

D. Government Interests

As discussed above, the state creates families to provide methods of support for individuals and uses the current structure of maternal presumptions to most efficiently determine family standing.[205] Abandoning the presumption of maternity and motherhood as the starting place of family creation and assignment of parenting duties seems as if it would create more questions of who qualifies as a parent and who does not. The current presumption of maternity assists the government in ensuring caretaking responsibilities of a child are assigned by implying the parent who gave birth is inherently good at the tasks and choosing to do them.[206] Eliminating this presumption, however, will not make us worse off for caretaking and parenting. By letting parents choose who will do what task, it allows parents to build on their strengths and interest in parental duties while also better allowing parents to choose what makes them happy. Having this choice is likely to improve

204. Although formal legal processes will still have an important role for placing a child for adoption, the shift to intent can allow for a pregnant person to have the knowledge and reassurance that a child they give birth to is not automatically their legal child. Similarly, an intent-based system can allow a person to deny parentage before the child is born, allowing them to reduce the chance of being pressured into keeping their child by an abusive spouse or biological parent.

205. *See supra* Part I.

206. *See supra* Part III.

the care of children while also helping parents be happy in their roles as parents. Additionally, by restricting ways the government can impose gendered roles into a family, there will be less pressure to maintain and create gender-based parental roles. This can then influence broad societal beliefs about parenting and gender, which can influence policies on parental leave, medical benefits for reproduction and childcare, and hiring decisions based on gendered parenting roles.

Moving away from the maternal assumption to determine parents may be a slower and less methodological process for the state to undertake. Despite this, intent-based parentage can still increase the effectiveness of the government's goal of creating networks of care and support within a family. By locating and assigning parental duties to the people who intended to care ensures that the individuals who are tasked with parenting have an interest in doing so. Additionally, locating the intended parents at the birth of the child prevents some disputes over parentage from occurring later.[207] This is typically viewed as best for the child as it creates stability and certainty.[208] While intended parentage can expand the family beyond a close, marriage-held family, current trends already were moving away from this[209] and therefore should not be seen as hindering the governments interest in managing distinct and easily defined families. In addition, while intent-based parentage may appear to intrude on the privacy of the family more, it increases privacy regarding how someone got pregnant, the genetic relationship of the parents and child, and the marital relationship of the parents, overall promoting the idea of privacy because the family is not inherently based on certain connections. By using intent-based parentage, the government is able to fulfill their interest in creating families that support and care for one another.

E. Restrictions from Two-Parent Limits

While some states do allow for second parent, typically a stepparent, to receive some form of legal recognition over a child who already has two legally recognized parents, it is rare that this exists.[210] As the debate over motherhood in ART shows, both a biological and a social connection can be seen as valuable in establishing the initial parent-child relationship.[211] However, when the person who gives birth does

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207. Focusing on intended parents at the time of a child's birth could limit some disputes that occur due to marital and biological relationships. As mentioned before, moving to intended parents will not prevent future parentage and custody disputes from arising.

208. *See, e.g.*, MORGAN LEWIS AND BOCKIUS LLP, BEST INTERESTS OF THE CHILD – CONTINUITY & STABILITY OF CHILD FACTOR (2017) (listing state statutes that address continuity and stability for determining the best interest of the child), https://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-Q6-Best-Interests-Continuity-Stability-of-Child.pdf [https://perma.cc/S5R6-HTW9].

209. *See supra* text accompanying notes 151–59.

210. Nejaime, *Marriage Equality and The New Parenthood*, *supra* note 12, at 1196 (citing Margaret M. Mahoney, STEPFAMILIES AND THE LAW (1984)); NeJaime, *The Constitution of Parenthood*, *supra* note 71, at 378 (2020).

211. Purvis, *supra* note 180, at 224–25, 227–30.

not fulfill both of these requirements, we are reluctant to split the parental recognition between the person who gave birth to the child and the person who is the genetic mother of the child (unless those two are married).[212] As NeJaime pointed out, modern family creation can result in situations where there are more than two people who should be recognized as a legal parent based on traditional presumptions of parentage, but the two-parent limit restricts recognition for all parents.[213] The reluctancy of states to recognize more than two parents has created an incentive for parents using ART to get married before creating a family in order to strengthen the presumption of two potential parents over others.

F. Inequalities in Parentage Beyond Birth and Infancy

Like the marital presumption of parentage, intended parentage is meant to assign legal rights and responsibilities at birth or shortly after. As such, intended parent laws cannot provide protection for a person who develops a parent-child relationship later in a child's life, such as a stepparent, or for individuals who fulfill the functional role of a parent for a child who already has the maximum number of parents.[214] While these parent-child relationships should be valued and protected like those developed from an initial intention to parent a child, determining how the law should accommodate the parents and children in these situations is beyond what intended parentage laws can handle.

Similarly, the inequalities in the judicial child welfare systems impact the rights of parents and the ability for families to maintain relationships. Despite the legal systems using stereotypes about what constitutes a good family to make these determinations,[215] it is unlikely that any one change in existing law can help combat this. However, working to normalize nontraditional family structures assists in mitigating some notions of what the ideal or good family is.

G. Social Restrictions Limiting Parenting and Family Formation

Shifting away from the presumption of maternity as a starting point for family helps to enable who can receive parental rights and recognitions and can enable parents to avoid some of the gendered restrictions that can be imposed on parenthood. However, outside of parental recognition, there are many considerations that can influence or limit a person when deciding to have a family. These considerations may include deciding not to have a child due to racism, poverty, stigma around disabilities, or negative perception of a particular family structure. As a result, these factors may impact a person's decision on how to assert

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212. *See supra* Section II.B.

213. NeJaime, *The Constitution of Parenthood*, *supra* note 71, at 340–43; NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 12, at 1191 (2016); *see also* Joslin & NeJaime, *supra* note 9 (describing the treatment of multiparent families in today's legal realm).

214. *See* Purvis, *supra* note 180, at 222 (describing intended parentage as "forward looking" opposed to established methods that are better suited for looking "backwards").

215. *See, e.g.*, *id.* at 216–17.

their intent to parent or their initial choice to pursue having children. To best allow people to freely choose to have a family and to parent in a way that they are most comfortable with, it is necessary to also address the limitations imposed by factors outside of traditional family formation.

CONCLUSION

The maternal presumption of parentage creates a legal understanding of what constitutes motherhood, requiring motherhood to have a form of biological connection between the parent and child. The law then uses the biological connection to argue that a mother has an inherent social connection to the child and has shown an intent to take on parental rights and responsibilities. Once a presumed mother is decided, the state can then assign a second parent based on potential parents' relationships with both the child and the mother. The methods of placing family creation with a presumed mother create problems not only by creating and imposing gender and sex-based roles in a family but also by limiting the concept of who is able to be recognized as family. These challenges have been heightened by parents who use ART, unmarried parents, same-sex parents, and transgender and nonbinary parents who give birth, all of which demonstrate the arbitrary nature of the maternal presumption and beginning family formation with the mother.

In response to these concerns, the law should shift away from the maternal presumption and mother as the basis of family creation. Instead, intent-based parentage should be used to determine parental rights and responsibilities. The move away from the maternal presumption and mother is necessary to prevent the law from creating and imposing gendered norms in the family and mitigate the potential to argue that pregnancy and childbirth provide the grounds for differences between sexes. Using intent-based parentage as the replacement avoids these concerns while also better accommodating family structures outside of the traditional married, opposite-sex couple who creates a family through sexual reproduction. While intent-based parenting is a step in the right direction, the law should then look to modify restrictions on the number of parents as well as work to limit social factors that prevent a person from choosing to have children.