

# BUFFALO LAW REVIEW

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VOLUME 64

MAY 2016

NUMBER 3

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## Parental Parity: Intentional Parenthood's Promise

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### INTRODUCTION

Twenty-first century parentage requires a new approach to establishment of the legal parent-child relationship. The heteronormative idealization of a married mother and father for each child (to whom the child is biologically related) does not represent the reality of a growing number of American families. Parentage establishment has historically relied on status: birth mother, genetic parent, or the marital presumption (“status-based parentage”). Status-based parentage, in turn, is based on the nuclear ideal of one married mother and father for each child. As such, it is ill equipped to determine parentage for nontraditional families—those that do not model the nuclear family of a married mother and father and/or those that are formed through Assisted Reproductive Technologies (“ART”). Moreover, status-based parentage perpetuates the dual system of family law—one system for the poor and one for the wealthy—and unfairly imposes traditional, middle-class norms and morals.

For more than a decade, my scholarship has challenged the applicability of status-based parentage in the non-

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nuclear family context and has, instead, advocated for broader use of both the intentional and functional parenthood doctrines. Intentional parenthood (choosing and (often) planning to be a parent) has an advantage over functional parenthood (undertaking traditional parental duties), in that the intentional parenthood doctrine permits at-birth parentage determinations, whereas functional parenthood requires an analysis at some point after a child's birth.<sup>1</sup> Reflecting on my previous work and the works of others, this Article suggests elimination of status-based parentage at birth. Instead, legislatures should consider intentional parenthood as the default, at-birth parentage establishment model. I have written this Article to outline why status-based parentage is outmoded in the twenty-first century and why an intentional parentage model is preferable. In future work, I will continue to develop arguments in favor of intentional parenthood and the specifics for implementation. Intentional parenthood is a superior parentage establishment doctrine because it accurately identifies the adults who wish to voluntarily assume parental responsibilities and obligations for a child.<sup>2</sup> Unlike status-based parentage, which is both over and under-inclusive in its application, intentional parenthood appropriately captures the range of potential parents for each child.

Most importantly, intentional parenthood's promise is greater parental parity: the doctrine's neutrality prevents

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1. Both intentional and functional parenthood will continue to play an ever-increasing and important role in parentage establishment in the twenty-first century. For purposes of this Article, I am focusing on at-birth parentage determinations and thus place greater emphasis on intentional parenthood.

2. It might be that neither genetic parent wishes to parent the child, in which case the genetic parents can confirm this through a relinquishment of parental rights, and the child can be placed for adoption. It is possible that a greater number of children will be available for adoption at birth, although I do not think that is a likely outcome. There is a greater likelihood that there may be disagreement among adults about which has/have the requisite intent to parent and whether more than one parent can successfully co-parent with another. If the intentional parenthood model is adopted, a process for resolving potential disputes will need to be included. Although "status" has been suggested for use in that process, a real concern is reliance on status as a tie-breaker would negate the utility of the intentional parentage model.

inherent discrimination based on income, class, gender, sexual orientation, or marital status. Class differences, increased non-nuclear families, and lessening of social stigma for children born out of wedlock have greatly contributed to the emergence of two family law regimes: a newer “choice-based” regime that relies on private ordering to determine parentage and the more traditional “status-based” regime that assigns parental status based on biology or the marital presumption. Intentional parenthood can overcome those differences.

In her 1990 seminal work, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, Professor Marjorie Shultz argued for a new “meta-rule” that makes intent determinative of parenthood when couples use ART to have children.<sup>3</sup> Intentional parenthood, as Shultz describes, encompasses voluntary, purposeful, and meaningful choice.<sup>4</sup> Although Shultz observed that intent could play a meaningful role in all parentage establishments, she limited her focus to parentage establishment within the ART context.<sup>5</sup> Arguably, the voluntariness and choice expressed by an individual or couple in the ART context may differ considerably from natural conception. Many births are not planned, and, given restricted access to abortion, it is impossible to suggest that every woman who carries a baby to term is an “intended mother” as contemplated in the ART context. Broadening the applicability of intentional parenthood, though, will reduce current class and income disparities in parentage establishment and can empower lower income women in other ways, such as by eliminating required co-parenthood.

The past two decades have witnessed some judicial acceptance of intentional parenthood and significant

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3. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323.

4. *See id.* at 307-08.

5. *Id.* at 323-24 (“While I am favorably disposed toward more general adoption of intent as a determinant of legal parenthood, I restrict this current proposal to instances where children are brought into being through ‘artificial or assisted reproduction.’”).

advocacy for the doctrine by scholars.<sup>6</sup> Intentional parenthood represents significant procreative freedom and choice: intentional parenthood defines who will and will not have parental rights and responsibilities, regardless of traditional status-based parentage, such as genetic connection or marriage. Because of its association with ART, intentional parenthood has largely been available to people of greater means and, in turn, that availability perpetuates class and income disparities in parentage establishment.

Intentional parenthood, for instance, has not played a role in parentage determinations for poorer people. For those who are part of the welfare system, for example, the State by and large dictates parentage establishment and parentage responsibilities.<sup>7</sup> Although single women of means have been able to establish themselves as the sole legal parent of a child born from the sperm of a known donor, a single mother who receives government provided Temporary Assistance to Needy Families is required by law to assist the state in establishing paternity for her child or she is at risk of losing her benefits.<sup>8</sup> This status-based system is unfair to poor, nonmarital mothers who are not permitted to exercise the same procreative autonomy as wealthier, nonmarital mothers. Moreover, it is unfair to men who engage in traditional (coital) reproduction with no intent to parent a child but who, under federal and state law, will be

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6. See generally Mary Patricia Byrn & Erica Holzer, *Codifying the Intent Test*, 41 WM. MITCHELL L. REV. 130 (2015); Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2005); Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210 (2012); Shultz, *supra* note 3; Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597 (2002).

7. Melanie B. Jacobs, *Intentional Parenthood's Influence: Rethinking Procreative Autonomy and Federal Paternity Establishment Policy*, 20 AM. U. J. GENDER SOC. POL'Y & L. 489, 497 (2012) [hereinafter Jacobs, *Intentional Parenthood's Influence*].

8. See Federal Parent Locator Service, 42 U.S.C. § 653 (2012) (requiring that mothers who receive public assistance cooperate with the state agency charged with establishing paternity and child support or risk losing a portion of their benefits); Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 824-26 (2006) [hereinafter Jacobs, *My Two Dads*].

established as a legal father against their will and be ordered to pay child support.<sup>9</sup>

Intentional parenthood as the default framework to establish all at-birth parent-child relationships has several advantages. Use of intentional parenthood at birth would: (1) reduce the growing class and wealth disparities within parentage establishment; (2) reduce many gender and sexual orientation inequities that still persist in parentage establishment; (3) allow for more than two parents, as appropriate; and (4) prohibit claims to “disestablish” parentage. It is possible that some parents who would have parental rights through status-based parentage may no longer have parental rights under intentional parenthood. The greater accuracy and neutrality of intentional parenthood make the doctrine superior to status-based parentage and should be adopted for all parent-child relationships. A potential difficulty is determining who may establish parental rights if more than two or three adults claim intentional parent status: if the parties agree, the framework provides rights for them all; if they do not agree, intentional parentage statutes will need to provide a mechanism for prioritizing who may establish parental rights. What follows in the remainder of this Article is an argument against the continued use of status-based parentage and a recommendation in favor of using intentional parenthood, as well as identifying the next steps necessary to implement this model.<sup>10</sup>

#### I. THE ARRAY (DISARRAY?) OF PARENTAGE DOCTRINES

Parentage law has become unwieldy in recent decades, and there is no one clear explanation of when a parent-child

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9. See generally Jacobs, *Intentional Parenthood's Influence*, *supra* note 7.

10. The primary purpose of this Article is to argue against continued use of status-based parentage and to suggest adoption of an intentional parentage model going forward. Future work will develop the specific steps necessary for implementation.

relationship will be recognized.<sup>11</sup> Rather, “it all depends.”<sup>12</sup> “It all depends” can largely be explained by whether a status-based or choice-based framework applies. Even within the status-based framework, context and circumstances often result in differential application of that parentage doctrine, lending further disarray.<sup>13</sup>

In most instances, legal parentage is determined through an individual’s *status*: as genetic parent, birth mother, or mother’s husband. More recently, though, some legal parentage has been established using intentional and functional parenthood doctrines.<sup>14</sup> These doctrines place greater emphasis on the potential parent’s actions in either bringing forth the conception and birth of the child (intentional parenthood) and/or the role the potential parent has assumed in raising the child (functional parenthood). A status-based parentage regime, by contrast, simplifies who can and cannot qualify as a parent and thus has the benefit of ease of application.

Unfortunately, status-based parentage determinations can be construed as both overly broad and too narrow. For instance, status-based parentage may involuntarily create legal parenthood for some nonmarital fathers through federal paternity policies and yet exclude a non-genetic gay

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11. See JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 286 (2011).

12. *Id.* at 304.

Who is a parent? The answer has gotten cloudier over the years. Science has added new ways to make babies. And society has changed the way it defines parents and children. Biological and social parenthood compete for legal recognition. What results is both controversy and confusion . . . . So if we ask, “who is a parent?” the answer is, “it all depends.”

13. Heather Kolinsky, *The Intended Parent: The Power and Problems Inherent in Designating and Determining Intent in the Context of Parental Rights*, 119 PENN ST. L. REV. 801, 805-06 (2015) (“Trying to encapsulate the complexities of legal recognition of parentage is not a simple process. Rather, it often resembles a mad game . . . where one person’s claim to parentage often trumps another’s, only to be reordered based upon changing status and relationships in and among adults . . .”).

14. Adoption is another means by which to establish parenthood, but I am focusing on non-adoptive parentage establishment.

or lesbian “parent” who wants and intends to parent a child. Moreover, the current status-based default model exacerbates wealth disparities and perpetuates discrimination against non-nuclear families.

Status-based parentage highlights the socio-economic differences in parentage establishment and also relies heavily on the traditional nuclear family paradigm of one mother and one father. The establishment of a legal parent-child relationship has traditionally included elements of class and middle-class privilege and norms. As Professor Leslie Harris has written:

The disparate treatment of rights and duties in families based on the marital status of the parents is very old in Anglo-American culture and expressed a fundamental class divide. Marital parents were respectable, and parentage rules upheld their choices about family formation . . . . On the other hand, childbearing outside marriage traditionally was disreputable . . . .<sup>15</sup>

The marital presumption—that the husband of a child’s mother is the child’s legal father—was a significant bulwark of English and American common law. Although the majority of U.S. states now consider the marital presumption rebuttable, a minority still reveres the presumption’s emphasis on the marital nuclear family.<sup>16</sup> The marital presumption privileged marital families and helped reify the importance of the American nuclear family: one mother and one father for each child.

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15. Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1297; see also June Carbone, *Out of the Channel and Into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859, 861 (2011) (“In an era in which marriage determined family regularity, the law recognized two family types: a privileged marital family of husband and wife and the children born into the union, and a much smaller group of single parent families produced by death, divorce, or ‘illegitimate’ births.”) (citing Jacobus tenBroek, *California’s Dual System of Family Law*, 16 STAN. L. REV. 257 (1964)).

16. Melanie B. Jacobs, *Overcoming the Marital Presumption*, 50 FAM. CT. REV. 289, 290 (2012).

By contrast, children born to women out of wedlock were *filius nullius* and had only one legal parent, their mother.<sup>17</sup> In the late 1960s and early 1970s, the United States Supreme Court delivered a series of opinions that demanded greater parity for marital and nonmarital children.<sup>18</sup> In 1973, in response to those decisions, the Uniform Parentage Act (“UPA”) was promulgated to ensure greater equality between marital and nonmarital children and, specifically, to ensure that nonmarital children had an established parent-child relationship with their father.<sup>19</sup> Relying on a series of presumptions, including genetic connection and/or holding oneself out as the child’s father, a man could be legally declared a child’s father and, as a result, be required to pay child support until the child was emancipated.<sup>20</sup>

The effect of the UPA was largely to mimic the nuclear family by ensuring one mother and one father—with attendant responsibilities and rights—for each child. In 2000 and 2002, the UPA underwent significant revision, largely to assist in parentage determinations for children born through ART, and incorporates intentional parenthood in its more recent iteration.<sup>21</sup> For instance, the UPA severs genetic from legal parentage when gamete donors are used and

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17. See Jacobs, *My Two Dads*, *supra* note 8, at 822 (discussing the history of paternity establishment).

18. See *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (holding that nonmarital children have the same constitutional entitlement to support as marital children); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 164 (1972) (holding it violated the Equal Protection Clause to deny to two children born out of wedlock the same right to sue under a worker’s compensation law as four marital children); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding that it violated the Equal Protection Clause not to permit five children born out of wedlock to seek damages as a result of the wrongful death of their mother).

19. UNIF. PARENTAGE ACT at Prefatory Note (amended 2002), 9B U.L.A. 296 (Supp. 2006).

20. See UNIF. PARENTAGE ACT § 201 (b)(1) (amended 2002), 9B U.L.A. 309 (Supp. 2015) which provides multiple bases on which to establish legal fatherhood, such as adjudication of fatherhood pursuant to judicial proceedings and reliance on presumptions of paternity, such as residing with the child and holding oneself out as the father, despite a lack of biological connection.

21. See *infra* notes 53-57 and accompanying text.

furthermore provides that in a gestational surrogacy, the birth mother is not a legal parent.<sup>22</sup>

The UPA, though, also incorporates class and socio-economic bias, by relying on intentional parenthood for people who can afford to conceive using ART yet still relying on genetic parenthood for “traditional” reproduction. The class bias would not be as pronounced but for the fact that the UPA is directly linked to the Family Support Act of 1988, which requires that states, on behalf of single mothers who receive public assistance, file paternity complaints against the men who allegedly fathered the child, regardless of whether the father has any interest—or any intent—to parent.<sup>23</sup>

Status-based parentage determinations make parentage establishment more complicated for families that use ART and for lesbian and gay parents. For instance, if genetic connection determines parentage, then a sperm donor should be a legal father. As noted above, the current UPA provides that a donor is not a legal father; intentional parenthood is an appropriate means by which to establish parentage for the non-genetic parent. Intentional parentage is also important for same-sex couples in which only one member of the couple may have a genetic connection to the child but the other partner intends to co-parent. In recent years, intentional parenthood and functional parenthood determinations have increased. Both doctrines, but especially the intent doctrine, rely on choice, purpose, voluntariness, and private ordering. The increased use of these alternate parentage determination doctrines illuminates the growing inequities in parentage law by fostering choice and private ordering for certain communities but proscribing choice and private ordering for other communities.

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22. The UPA provides that “[a] donor is not a parent of a child conceived by means of assisted reproduction.” UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355 (2000). Article 8 governs gestational surrogacy. *See infra* note 57.

23. *See Jacobs, My Two Dads, supra* note 8, at 824.

A. *Status-based Parentage—Maternity*

Determining a child's maternity has long been straightforward, genetically and legally: a child's birth mother is her legal mother and all states and the UPA include a provision that so provides.<sup>24</sup> The UPA further provides that provisions that apply to determining paternity also apply to determining maternity, which means that genetic connection is another basis of maternity establishment.<sup>25</sup> As the California Supreme Court noted in *Johnson v. Calvert*,<sup>26</sup> technology has now made it possible for two women to each qualify as a legal mother under the UPA: a gestational, birth mother and a genetic mother may both fit the criteria for maternity under the UPA. Maternity, however, is still largely defined through status-based determinations; as discussed below, some courts, as in *Johnson*, have used the intent framework to resolve status-based conflicts.

The law has long presumed that the genetic and birth mother was an intended parent: she receives all the rights and responsibilities of parentage unless she relinquishes those rights.<sup>27</sup> Intent for the mother who has a child through intercourse may often differ from the intent of a mother who used ART to have a child. The ART mother had a pre-birth intention; "but-for" her planning, a child would not be born. A non-ART mother may have become pregnant as a result of rape, deficient birth control, or lack of access to birth control. How can we ascribe "intent" to such different scenarios? I realize that I am oversimplifying the difficult decisions some women make; if a woman chooses to parent rather than relinquish her parental rights and place the child for

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24. *E.g.*, UNIF. PARENTAGE ACT § 201 (a)(1) (amended 2002), 9B U.L.A. 24 (Supp. 2015).

25. See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 351 (2002).

26. 851 P.2d 776, 782 (Cal. 1993). In *Johnson*, the California Supreme Court used intent as the tie-breaker in choosing whether the child's gestational or genetic mother should be the legal mother. *Id.*

27. Kolinsky, *supra* note 13, at 808.

adoption, I am ascribing intent to her for an at-birth parentage determination.

Inherent, then, within traditional maternity is intentional parenthood: the intentional act to parent or not parent. Determining maternity through intent, then, would not likely cause any change in how often maternity is established. Intent would merely serve as a more explicit means by which to establish maternity, rather than the fact of birth or genetic connection. In this way, traditional status-based maternity would instead be established through intent: a woman who achieves pregnancy through intercourse would be a legal mother so long as she does not relinquish her parental rights. A gestational surrogate would not be a legal mother but the intended mother would be. There should be negligible difference—if at all—in maternity establishment under an intentional parenthood framework.

#### B. *Status-based Parentage—Paternity by Biology*

Determining paternity has been less clear. Historically, a child born out of wedlock had only one parent, the child's legal mother: the biological father had no responsibility for the child and no recognized parental status.<sup>28</sup> As the state sought to ensure two parents for each child, determining paternity was largely a criminal matter in the first half of the twentieth century.<sup>29</sup> Then, in the latter half of the twentieth century, determining paternity became a largely civil matter, particularly with the promulgation of the UPA.<sup>30</sup>

As noted earlier, the promulgation of the UPA became closely linked with federal paternity establishment policies largely as a response to women receiving welfare.<sup>31</sup> In 1975,

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28. For an overview of paternity law, see Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 6-7 (2004); Jacobs, *My Two Dads*, *supra* note 8, at 816.

29. *Id.*

30. *Id.*

31. For a discussion of the relationship between paternity law and federal policies concerning child support enforcement, see Jacobs, *My Two Dads*, *supra* note 8, at 822-26.

Congress enacted the federal Office of Child Support Enforcement and the relationship between paternity establishment and welfare became stronger.<sup>32</sup> In 1988, the Family Support Act established performance goals for all states regarding paternity establishment and linked those goals to federal funding.<sup>33</sup> The relationship between paternity establishment and welfare became even tighter after welfare reform in 1996. Biologically based paternity establishment is inextricably linked to government efforts to reduce welfare and promote child support enforcement. As other scholars have noted, the efficacy of these policies is doubtful, but their influence is significant.<sup>34</sup>

The heightened reliance on biology to assign parental status for men is not always fair, in that some men do not intend to parent, and some women may not choose for a biological father to co-parent.<sup>35</sup> Although protecting children and ensuring their well-being is an important public policy goal, legislatures and courts alike recognize that some women will choose to be single parents. In fact, despite their reticence about a child having only one parent, courts have upheld the constitutionality of statutes that permit a woman to be the sole legal parent of her child even if she uses a known sperm donor.<sup>36</sup> As I have argued in previous writings,

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32. *Id.* at 824.

33. *Id.*

34. See, e.g., Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 476-77; Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1030-31 (2007); Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 99-100.

35. And, as I have observed in previous writings, biological fatherhood coupled with intent may not result in legal fatherhood if the child's mother is married. See Jacobs, *My Two Dads*, *supra* note 8, at 810.

36. See *In re K.M.H.*, 169 P.3d 1025, 1038-41 (Kan. 2007) (upholding a Kansas statute that bars a sperm donor from parental status in the absence of a preconception written agreement and further determining that a known sperm donor was unable to establish paternity because he had not executed such an agreement); *Ferguson v. McKiernan*, 940 A.2d 1236, 1244-48 (Pa. 2007) (holding that a woman who used sperm from a known donor with the understanding that the donor would have no parental rights could not sue to establish the donor's

the current status-based regime raises an important fairness question by imposing fatherhood (and the two-parent paradigm) in some cases and yet permitting single motherhood in others.<sup>37</sup>

Status-based paternity also illustrates how parentage law attempts to foster proper social norms. An unmarried father who does not establish his fatherhood is often referred to as a “deadbeat dad” and the implication that he has shirked his responsibilities is clear. By imposing fatherhood on nonmarital fathers, the law seeks to “punish” bad behavior and force men to assume parental responsibility.<sup>38</sup> Yet, these policies have largely backfired and the “assumption of the risk” approach to paternity often, in fact, is harmful to children. Relying on voluntariness—rather than status—will provide greater procreative autonomy to fathers and mothers without harming children.

### C. *Status-based Parentage—Paternity through the Marital Presumption*

The marital presumption presumes that a child’s legal father is the husband of the child’s mother.<sup>39</sup> All U.S. jurisdictions maintain the marital presumption, to varying degrees. In a few jurisdictions, the presumption has more “bite” and it is nearly impossible for a child’s alleged biological father to challenge the presumption while in other jurisdictions, biological fathers have greater access to

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paternity five years after giving birth to twins). The court in *Ferguson* emphasized the right of a woman to be able to use sperm from a known donor to establish single motherhood as she could use the sperm of an anonymous donor. 940 A.2d at 1244-48.

37. See Jacobs, *Intentional Parenthood’s Influence*, *supra* note 7, at 500-01; Jacobs, *My Two Dads*, *supra* note 8, at 812-13; see also Lisa Lucile Owens, *Coerced Parenthood as Family Policy*, 5 ALA. C.R. & C.L. L. REV. 1, 10-11 (2014).

38. Owens, *supra* note 37, at 9-10 (discussing that current parentage policy “reflects the assumptions regarding coerced fatherhood. It assumes that men should and must be compelled to stand up to their parental ‘obligations’ that have resulted with or without their intention or consent”).

39. Melanie B. Jacobs, *When Daddy Doesn’t Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 206 (2004).

standing.<sup>40</sup> The marital presumption serves a useful purpose: like other status-based parentage determinations, it has ease of application.<sup>41</sup> And, in the majority of instances, a mother's husband is, indeed, the child's biological father. Also, the presumption exists to foster family harmony and unity. But, as judges have articulated, if, in fact, a biological father seeks to rebut the marital presumption, then marital unity and family harmony have already been significantly disrupted.<sup>42</sup>

The marital presumption is important because it privileges two parent, two gender families.<sup>43</sup> The Supreme Court upheld the importance of the marital presumption as recently as 1989 in the well-known case of *Michael H. v. Gerald D.*<sup>44</sup> In the case, a biological father, with whom the mother had resided after she left the marital home, tried to establish visitation with his biological daughter.<sup>45</sup> Writing for a plurality of the Court, Justice Scalia rejected the biological father's claim and affirmed the importance of the marital presumption to American family law. Relying mostly on glorifications of the American nuclear family, Justice Scalia made clear his disdain for the biological interloper who disrupted the family.<sup>46</sup> In dissent, Justice Brennan was sharply critical of the plurality's rhapsodizing of the nuclear

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40. Jacobs, *supra* note 16, at 289-90.

41. *Id.* at 290 (observing that the marital presumption fosters efficiency as well as nuclear family integrity).

42. As noted by a Michigan Supreme Court justice in a case involving whether a biological father who had an affair with the child's mother and voluntarily held himself out as the child's father had standing to challenge the marital presumption, "[i]t is surely a bit late to talk of preserving the 'sanctity' of the marital family by the time a situation like the one alleged in this case has arisen." *Girard v. Wagenmaker*, 470 N.W.2d 372, 389 (Mich. 1991) (Cavanagh, J., dissenting).

43. For a more comprehensive review of the marital presumption, see generally Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547 (2000).

44. 491 U.S.110, 122 (1989).

45. *See id.* at 111-12.

46. Justice Scalia wrote that the liberty interest that exists due to biological fatherhood plus an established parental relationship rest upon "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family." *Id.* at 123.

family and wrote that, “[t]he plurality’s exclusive rather than inclusive definition of ‘unitary family’ is out of step” and “out of tune.”<sup>47</sup>

The marital presumption is not the bulwark it once was, though. Following the decision in *Michael H.*, the presumption is rebuttable in the majority of U.S. jurisdictions. As with status-based biological paternity, the marital presumption includes a morality component: a biological father interloper has a lesser moral claim to parentage than a married husband who asserts his parental rights, despite not having a biological connection with the child. The law rewards good behavior (marriage) and punishes bad behavior (non-marital sex and child-rearing). Intentional parenthood is morality-neutral and will eliminate parentage distinctions based on “good” or “bad” behavior. And, if both the marital and biological father wish to assert parental rights, it is possible under an intentional parentage framework.

#### D. *Intent-based Parentage*

Procreative autonomy includes the use of ART; individuals should have the right to use various ART procedures without government interference.<sup>48</sup> A doctrine built on the right to be free from coerced sterilization,<sup>49</sup> to have unfettered access to contraception,<sup>50</sup> and a right to legal abortion,<sup>51</sup> is flexible enough to embrace the further right to

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47. *Id.* at 145 (Brennan, J., dissenting).

48. See Melanie B. Jacobs, *Procreation Through ART: Why the Adoption Process Should Not Apply*, 35 CAP. U. L. REV. 399 (2006).

49. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that mandatory sterilization of one convicted of stealing chickens and armed robbery was unconstitutional because it violated equal protection).

50. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

51. See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that a ban on abortion unconstitutionally infringed on a woman’s right of privacy).

choose how to form your family. Choice and intent have similar meanings; most significantly, both imply purpose.

“At the most general level, procreative liberty is the freedom either to have children or to avoid having them.”<sup>52</sup> Inherent within a definition of procreative liberty that embraces the freedom to have children or not is the concept of intent: does a person intend to have a child or intend not to have a child? Arguably, individuals who choose to have children using ART enjoy greater procreational liberty than individuals who have children as a result of sexual intercourse: they have the ability to choose their genetic and legal roles, whereas individuals who engage in coital reproduction are not able to exercise the same degree of choice. The use of ART heightens the tension between allowing some individuals to renounce legal parentage, even though they are genetic parents, and requiring other individuals to be legal parents, regardless of their intent or choice to be a parent (or to engage in typical parental behaviors).

#### 1. Affirmative Intent—Intent to be a Parent

Although there is no “one size fits all” methodology by which parentage is established when ART is used, intent has garnered judicial support and is heavily incorporated in the UPA and the American Law Institute Principles of Dissolution. For instance, the UPA in its section governing gestational surrogacy specifically refers to “intended parents”<sup>53</sup> and, furthermore, the UPA has a section pertaining to gamete donors in which it affirms that a gamete donor, “is not a parent of a child conceived by means of assisted reproduction.”<sup>54</sup> Similarly, the ALI in its definition of a parent by estoppel focuses on the agreement of the

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52. JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 22 (1994).

53. UNIF. PARENTAGE ACT § 801 (amended 2002), 9B U.L.A. 87-88 (Supp. 2015).

54. UNIF. PARENTAGE ACT § 702 (amended 2002), 9B U.L.A. 355 (2001).

parties to co-parent a child,<sup>55</sup> incorporating the purposeful choice articulated by Professor Shultz.

The first judicial instance of using intentional parenthood is in *Johnson v. Calvert*, wherein the court was required to determine which mother—the gestational and birth mother or the genetic mother—was the child’s legal mother.<sup>56</sup> Relying heavily on Shultz’s intentional parenthood article, the court used intent as a “tie-breaker” and concluded that because the genetic mother intended, along with her husband (the sperm donor), to parent the child, she should be declared the legal mother.<sup>57</sup>

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55. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (AM. LAW. INST. 2002). A legal parent is an individual who is defined as a parent under other state law. *Id.* § 2.03 (1)(a).

A parent by estoppel is an individual who, though not a legal parent, (i) is obligated to pay for child support under Chapter 3; or (ii) lived with the child for at least two years and (A) over that period had a reasonable good-faith belief that he was the child’s biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and (B) . . . thereafter . . . continued to make reasonable, good-faith efforts to accept responsibilities as the child’s father, [even if that belief no longer existed;] or (iii) lived with the child since the child’s birth, holding out and accepting full and permanent responsibilities as [a] parent, as part of a prior co-parenting agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition . . . as a parent is in the child’s best interests; or (iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child’s parent (or, if there are two legal parents, both parents), when the court finds that recognition . . . as a parent is in the child’s best interests.

*Id.* § 2.03(1)(b).

56. *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

57. *Johnson*, 851 P.2d at 782-83 (“Professor Shultz observes that recent developments in the field of reproductive technology ‘dramatically extend affirmative intentionality. . . . Steps can be taken to bring into being a child who would not otherwise have existed’ . . . . ‘Within the context of artificial reproductive techniques,’ Professor Shultz argues, ‘intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.’”) (citations omitted).

Intentional parenthood was more explicitly embraced and applied by a California appellate court in *Buzzanca v. Buzzanca*.<sup>58</sup> In a case that involved a married couple, egg donor, sperm donor, and gestational surrogate, the court held that the two spouses were the child's legal parents because they intended to be.<sup>59</sup> Essentially, "but for" the intentions of the married couple, the child would not exist; that is, because individuals intended to create a child, through use of other people's gametes, IVF, and/or surrogacy, those individuals should be recognized as the resulting child's legal parents.<sup>60</sup> The *Buzzanca* court found that intentional parents who rely on ART to have a child should have their procreative choices protected like other parents.<sup>61</sup>

The UPA emphasizes intent rather than biology in numerous provisions in Articles 7 and 8,<sup>62</sup> both of which address parentage when ART is used.<sup>63</sup> For example, section 706 specifically addresses how parentage will be determined in the event of the parties' divorce or one party's withdrawal of consent. Subsection (a) provides that unless a former spouse specifically consented that if ART occurs after divorce s/he will be the parent, the default position is that the former

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58. *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

59. *Id.*

60. *Id.* at 280, 288.

61. *Id.* at 280.

62. Articles 7 and 8 specifically apply to ART. The prefatory note to Article 7 explains, in part:

During the last thirty years, medical science has developed a wide array of assisted reproductive technology . . . which have enabled childless individuals and couples to become parents. Thousands of children are born in the United States each year as the result of ART. . . . [I]t is necessary for the new Act to clarify definitively the parentage of a child born under these circumstances.

UNIF. PARENTAGE ACT art. 7 cmt. (amended 2002), 9B U.L.A. 78 (Supp. 2015). Article 8 specifically addresses the issue of gestational agreements, permitting the use of gestational agreements and providing a framework for enforcing the agreements. UNIF. PARENTAGE ACT art. 8 (amended 2002), 9B U.L.A. 86-95 (Supp. 2015).

63. See UNIF. PARENTAGE ACT § 706 cmt. (amended 2002), 9B U.L.A. 84 (Supp. 2015) (declaring that "intention, rather than biology, is the controlling factor" regarding liability in parentage following divorce or withdrawal of consent).

spouse is not the parent of the resulting child.<sup>64</sup> The comment further explains,

a child born through assisted reproduction accomplished after consent has been voided by divorce or withdrawn in a record will have a legal mother under § 201 (a)(1). However, the child will have a genetic father, but not a legal father. In this instance, intention, rather than biology, is the controlling factor.<sup>65</sup>

I remind the reader this is quite different from the law's approach to determining a father for a child born out of wedlock to a mother receiving governmental assistance. Intent also governs parentage determinations when a child is born as a result of a gestational surrogacy. Article 8 of the UPA permits a court to validate and approve a gestational surrogacy agreement and confirm parentage in the intended parents.<sup>66</sup>

## 2. Negative Intent—Intent Not to be a Parent

Intent plays a significant role in the right not to parent as well. Certainly, the Supreme Court's protection of the right to use contraception represents intent not to become a

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64. UNIF. PARENTAGE ACT § 706(a) (amended 2002), 9B U.L.A. 83 (Supp. 2015) (“If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child.”).

65. UNIF. PARENTAGE ACT § 706 cmt. (amended 2002), 9B U.L.A. 83-84 (Supp. 2015).

66. UPA § 801 authorizes gestational agreements for married or unmarried couples. The provision provides, in part:

(a) A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that:

. . . .

(2) the prospective gestational mother . . . and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and

(3) the intended parents become the parents of the child.

UNIF. PARENTAGE ACT § 801(a) (amended 2002), 9B U.L.A. 87-88 (Supp. 2015).

parent.<sup>67</sup> Similarly, a right of abortion represents the right not to parent. In the ART context, there are many examples of intent not to procreate, most explicitly seen in the frozen embryo dispute cases. For example, most courts deciding the issue of whether a woman may implant frozen embryos without the consent of her husband or ex-husband have held that embryos cannot be implanted without the consent of both partners, in large part because no court wants to impose unwanted parenthood.<sup>68</sup> As the Massachusetts Supreme Judicial Court held in *A.Z. v. B.Z.*:

We derive from existing State laws and judicial precedent a public policy in this Commonwealth that individuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a mechanism for forcing such relationships when they are not desired. This policy is grounded in the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship.<sup>69</sup>

The foregoing discussion highlights that people who use ART to have a child or children have greater procreative freedom and choice. As discussed below, the inaccessibility of ART for most people, along with the link between biological paternity and child support, creates a significant schism in how parentage is established. Intentional parenthood would create parity among all parents, regardless of the use of ART or traditional reproduction and regardless of income.

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67. *Eisenstadt v. Baird*, 405 U.S. 438, 452-53 (1972) (“To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state.”) (quoting *Baird v. Eisenstadt*, 429 F.2d 1398, 1402 (1st Cir. 1970)).

68. *See, e.g., Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (finding that an ex-husband’s right not to procreate outweighed the ex-wife’s interest in donating embryos for implantation by another couple).

69. *A.Z. v. B.Z.*, 725 N.E.2d 1051,1059 (Mass. 2000).

## II. RICH PARENT, POOR PARENT

The increased use of intentional parenthood—and corresponding private ordering—for some families but not others, perpetuates the dual system of family law. As early as the 1960s, Jacobus tenBroek identified a dual system of family law: “[o]ne is for underprivileged and deprived families; the other for the more comfortable and fortunate.”<sup>70</sup> More recently, Professor Jill Hasday has observed that welfare laws structure “familial rights and responsibilities in poor families in many ways that are directly contrary to the law’s regulation of wealthier households.”<sup>71</sup> That greater wealth provides greater procreative freedom is not new: access to private doctors gave women of means access both to contraception and to abortion before abortion was legalized in 1973.<sup>72</sup> The past few decades, however, have seen a growing schism between the “haves” and “have-nots.”<sup>73</sup>

“[The] divisions between the family law of rich and poor, private and public, voluntary and involuntary family associations have been the subject of extensive commentary.”<sup>74</sup> I do not seek to reproduce that commentary here, but refer to it to highlight the disparity between those

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70. Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status Part I*, 16 STAN. L. REV. 257, 257-58 (1964).

71. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 832 (2004).

72. See Mark A. Graber, *The Ghost of Abortion Past: Pre-Roe Abortion Law in Action*, 1 VA. J. SOC. POL’Y & L. 309, 311-12 (1994).

73. According to the Centers for Disease Control, over 1.5% of all infants born in the United States each year are conceived using ART. Saswati Sunderam et al., *Assisted Reproductive Technology Surveillance—United States*, 2011, CDC (Nov. 21, 2014), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6310a1.htm>. While not all ARTs are expensive—at home, assisted insemination with the sperm of a known donor may not cost anything, for example—many reproductive technologies cost thousands to tens of thousands of dollars. The cost of IVF in the United States, for example, is particularly expensive. Costs vary worldwide, from approximately \$2000 in Russia to more than \$12,000 per cycle in the United States. JUDITH DAAR, *REPRODUCTIVE TECHNOLOGIES AND THE LAW* 175 (2d ed.) (discussing fertility tourism and the high cost of IVF in the United States).

74. June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1188 n.16 (providing citations to nearly a dozen articles exploring the inequities in family law).

individuals who have more freedom to exercise legal choices about parentage than those individuals for whom parentage establishment is linked to receipt of public benefits and, further, for whom parentage may create unwanted legal relationships.<sup>75</sup>

Paternity law is seemingly class-neutral: the purpose of paternity statutes is to determine a legal father for a child born out of wedlock. Paternity policy, though, is largely fueled by its link to the welfare system, and determining a legal father has become much more about establishing a child support order than a meaningful parental relationship. As noted above, status-based parentage contains both forced “opt-in” elements and forced “opt-out” (by not meeting the status criteria). While it is likely that both mothers and fathers will “opt-in” to the paternity system to identify and establish a child’s legal father, a single mother who receives public assistance is required to opt-in to the system.<sup>76</sup> A woman who receives public assistance and has a child out of wedlock must identify for the state’s IV-D agency the father of her child and assist in establishing his paternity.<sup>77</sup> Failure to assist may result in the termination of benefits.<sup>78</sup>

More than half of children born to women under thirty are born out of wedlock. “Once largely limited to poor women and minorities, motherhood without marriage has settled deeply into middle America.”<sup>79</sup> Moreover, within the group of

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75. *Id.* at 1188-89.

76. Although the legislation concerning paternity establishment and corresponding child support orders includes good cause exceptions which would permit a woman to “opt-out” of the required paternity process, most states use narrow definitions of good cause. Daniel L. Hatcher, *Don’t Forget Dad: Addressing Women’s Poverty by Rethinking Forced and Outdated Child Support Policies*, 20 AM. U. J. GENDER SOC. POL’Y & L. 775, 783 (2012).

77. *Id.* at 780.

78. As Professor Hatcher explains, single mothers are not only required to assist in identifying the absent parent but must also assign back any resulting child support to the government so that the state can recoup some of the benefits it pays out. *Id.*

79. Jason DeParle & Sabrina Tavernise, *For Women Under 30, Most Births Occur Outside Marriage*, N.Y. TIMES (Feb. 17, 2012), <http://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-marriage.html>. The one group of mothers resisting this trend is college graduates, most of who

single mothers, significant class disparities have emerged. The emergence of Single Mothers by Choice (“SMC”) further illustrates the growing economic inequality among women in the United States. SMCs are generally educated, middle class, and financially secure women who choose to become pregnant and parent as single mothers. Thus, a Single Mother of Choice is someone who intends and plans prior to conception to be a single parent,<sup>80</sup> in contrast with divorced or widowed mothers who parent alone, as well as single mothers who bear children out of wedlock as a result of an unintended pregnancy or within a relationship not leading to marriage. In some states, SMCs have been able to protect their legal, single-mother status, and courts have shied away from establishing a father-child relationship against the mother’s will.<sup>81</sup>

The disparity in treatment of SMCs and low income mothers who must participate in paternity proceedings highlights how greater financial security results in greater procreative and parental autonomy.<sup>82</sup> As Professor Daniel Hatcher highlighted in a recent article, “[c]hoices available to middle class and wealthy women are stolen from poor mothers, and dignity stripped from fathers. The long

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marry before having children. *Id.* Professors June Carbone and Naomi Cahn have written about the new class divide in which the financial and social “rewards” of marriage are reserved for people with the most education. Carbone & Cahn, *supra* note 74, at 1186. Essentially, we have an elite group for whom college, marriage, and co-parenthood is the norm and the middle and lower classes for whom marriage is becoming less attainable. *Id.*; see also Jason DeParle, *Two Classes, Divided by “I Do,”* N.Y. TIMES, July 14, 2012, at A1. The Sunday, front-cover article was subtitled, *Marriage for Richer; Single Motherhood, for Poorer* and discusses recent research highlighting the growing income gap in the United States which has also created a gap in family formation. Older, better educated Americans marry later, stay married, and have children within marriage. Single women with less income and education find themselves in much less stable relationships.

80. SMC is someone who intends and plans, from the outset, to be a single mother (contrasted with single mothers generally). See generally SUSAN B. BOYD ET AL., AUTONOMOUS MOTHERHOOD? A SOCIO-LEGAL STUDY OF CHOICE AND CONSTRAINT 172 (2015).

81. See, e.g., *In re K.M.H.*, 169 P.3d 1025 (Kan. 2007) (discussed in footnote 36); *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007) (same).

82. See *supra* note 65 and accompanying text.

outdated notions of bastardy acts, when single mothers were criminalized and forced into court to protect society from the burden of their illegitimate children, still exist.”<sup>83</sup> Intentional parenthood—choosing to remain a single mother or choosing an informal relationship with the child’s father rather than pursuing a paternity order—is not available to poor, single mothers.

The practice of forced paternity has had deleterious effects on many of the children that the practice was supposed to benefit. Theoretically, it sounds ideal to ensure that every child has two legal parents available for emotional and financial support. In fact, federal policies that have encouraged voluntary paternity establishment have been very successful, and many children have benefitted from two parents who voluntarily undertook the obligations of parenting together.<sup>84</sup> Requiring paternity establishment for all children, however, has not served to alleviate poverty nor has it served to improve the qualitative relationship between a child and her “forced” father; rather, some children are worse off economically and socially because of current federal paternity establishment policies.<sup>85</sup> As Professor Hatcher writes, these policies characterize nonmarital fathers “as an enemy to be pursued”<sup>86</sup> and “forces poor mothers and fathers into hostile positions.”<sup>87</sup>

Intentional parentage will eliminate status-based parentage and, further, will reduce the income, wealth, and class disparities that inhere in status-based parentage. Certainly, many birth mothers and biological fathers will be

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83. Hatcher, *supra* note 76, at 776 (footnote omitted).

84. Voluntary Acknowledgements of Parentage (“VAP”) allow the child’s mother and father to establish the legal father’s paternity at the hospital, birth center, or courthouse without litigation. See Harris, *supra* note 15, at 1305.

85. Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAMILY L.Q. 157, 159 (2011) (reviewing the Fragile Families and Child Wellbeing Study to conclude that “child support enforcement practices are actually harmful to many poor, nonmarital children and their custodial mothers, in some cases reducing economic support from the fathers and disrupting the fathers’ relationships with the children”).

86. Hatcher, *supra* note 76, at 776.

87. *Id.* at 779.

legal parents under this approach, but their affirmative action of ratifying intent to parent, rather than their status, will create their legal responsibility. Perhaps most significantly, this model is more accepting of single parenthood and will not distinguish between wealthier and poorer single women, nor will different rules apply based on whether a mother received governmental financial assistance. Applying intentional parenthood to all parentage determinations removes class and income distinctions in parentage establishment and gives all women equal access to procreative autonomy, not merely those who can afford it.<sup>88</sup>

Recognizing the right of single parenthood for lower income women has garnered some previous scholarly support. Professor Karen Czapanskiy has previously proposed that only a birth mother would be assigned as a legal parent at birth, and then she could designate a co-parent.<sup>89</sup> Professor Czapanskiy's proposal differs from mine, in that she relies on status-based parentage to establish maternity as well as to establish a co-parent over the mother's objection.<sup>90</sup> Still, Professor Czapanskiy also advocates for greater intentionality by lower income women in establishing paternity for their children.<sup>91</sup> Acknowledging that her proposal may be considered radical, she responded, "[i]t is radical because it empowers single mothers."<sup>92</sup> Professor Gary Spitko has also argued constitutional protection for a father-child relationship should depend, in

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88. Karen Syma Czapanskiy, *To Protect and Defend: Assigning Parental Rights When Parents are Living in Poverty*, 14 WM. & MARY BILL RTS. J. 943, 959 (2006) (emphasizing that women with sufficient resources may establish their single motherhood without state intervention imposing a co-parent father whereas if "the woman is on welfare, the state can force her to sue her sexual partner for paternity and child support").

89. *Id.* at 943.

90. *Id.* at 946 ("Under the proposal, certain people wanting to fill the role of parental partner may petition to be designated over the mother's objection. The category includes only the mother's marital or civil union partner, the child's biological father, and people who provided the mother with substantial material and nonmaterial support during the mother's pregnancy and after the birth of the child.").

91. *See generally id.*

92. *Id.* at 966.

part, upon the consent of the mother to the creation of an additional parent-child relationship.<sup>93</sup>

Intentional parenthood will not overcome income inequality, and there are those who argue that increasing single parenthood creates worse outcomes for children. I agree that we need to do more to improve outcomes for children, to ensure better educational and vocational opportunities. The current system, though, in which we impose a particular parentage framework in the mere hope that modeling a nuclear family will yield the same results, is not working and is not helping children. We can (and should) devote greater resources to early childhood education, to paid parental leave, and quality day care—all of which would improve outcomes for children at all income levels and especially improve outcomes for low income children. Those efforts would reap far greater rewards than establishing a two parent family in name only.

While opponents may argue that it is wrong to deprive a child of financial support from two parents, an intentional parenthood approach will likely not worsen the current status quo and, in fact, may improve the outcomes for some children. First, many men who are required to pay child support as a result of a state initiated paternity and support proceeding cannot afford to pay, nor pay enough, support to remove children from public assistance.<sup>94</sup> Second, a woman

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93. E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 101, 105 (2006).

94. Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 619 (2012) (footnotes omitted):

Today, noncustodial parents who live in poverty owe the vast majority of child support owed in the United States. These parents lack the means to pay their child support debt, yet they experience the full panoply of enforcement measures, including civil incarceration for nonpayment of support. Ironically, low-income noncustodial parents who lack the ability to pay their child support debts are more likely to face incarceration than are the more culpable noncustodial parents who have the means to pay child support but refuse to pay. This is because other routine and less severe enforcement measures, such as wage garnishment, are effective in securing support from those with the means to pay.

who later meets a man who wishes to support her and her child will have a harder time establishing a legal tie for the other man if paternity has been established based on biological fatherhood. Third, and most significant, as Professor Karen Czapanskiy has observed, “few mothers would act irrationally when it comes to the emotional and financial interests of their infants. Therefore, few would decline to designate [a] parental partner.”<sup>95</sup>

### III. ADDITIONAL BENEFITS OF INTENTIONAL PARENTHOOD

Intentional parenthood has benefits beyond fostering income and class equality in parentage establishment such as promoting elimination of gender and sexual orientation discrimination in parentage establishment. Additionally, intentional parenthood permits more than two parents and discourages parentage disestablishment.

#### A. *Intentional Parenthood Creates Parental Parity for Lesbian and Gay Parents*

Status-based parentage precludes parenthood establishment for a nonbiological co-parent. Because status-based parentage relies on birth or genetic connection, usually only one member of a gay or lesbian couple can establish his or her parenthood. I have previously argued in favor of using intentional parenthood to recognize nonbiological lesbian (and gay) co-parents. A default intentional parenthood framework would create greater stability for a child and her

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95. Czapanskiy, *supra* note 88, at 950. In fact, according to the federal Office of Child Support Enforcement, for the fiscal year 2010, 1.7 million paternities were established of which 1.1 million were acknowledged in the hospital or through another paternity acknowledgement. *FY2010 Annual Report to Congress*, OFF. CHILD SUPPORT ENFORCEMENT (June 28, 2013), <http://www.acf.hhs.gov/programs/css/resource/fy2010-annual-report>. So, roughly 65% of paternities are established voluntarily. As discussed in the previous Part, men who sign VAPs are more likely to pay support and to play a role in their child’s life. VAPs create greater parity among all parents and allow poor parents to document their choice and intent to parent.

parents. As such, intentional parenthood removes sexual orientation discrimination from parentage establishment.

Intentional parenthood would allow easier parentage determination for same-sex couples, both in and out of marriage. The Supreme Court's 2015 marriage equality decision now permits marriage between members of the same sex in all U.S. jurisdictions.<sup>96</sup> The impact of same-sex marriage in parentage establishment is not fully clear. While some courts interpret the marital presumption to apply to same-sex partners,<sup>97</sup> other courts have held that because the presumption assumes biological parentage, it cannot apply to same-sex couples.<sup>98</sup> Furthermore, many lesbian and gay couples, like straight couples, may choose not to marry, and many statutes defining parental rights with the use of assisted reproductive technologies apply only to married couples.<sup>99</sup> So, intentional parenthood would greatly simplify parentage determinations for many gay and lesbian parents and provide protection for them and their child(ren).

#### B. *Intentional Parenthood Allows More Than Two Parents*

Intentional parenthood permits recognition of more than two parents at birth. The doctrine will better reflect the reality of some American families and provide security and stability for the child and adults alike by clarifying at birth the adults with parental rights and responsibilities. In

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96. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015).

97. *Wendy G-M. v. Erin G-M.*, 985 N.Y.S.2d 845, 861 (Sup. Ct. 2014) (holding that the marital presumption applies to the nonbiological lesbian co-parent).

98. See Arthur S. Leonard, *Even with Marriage Equality, Parental Status Conflicts Persist*, GAY CITY NEWS (May 28, 2015), <http://gaycitynews.nyc/even-marriage-equality-parental-status-conflicts-persist>. In the article, Professor Arthur Leonard reviews trial court decisions from several states which differ in their approach to the application of the marital presumption for same-sex partners.

99. See Application for Direct Appellate Review of Plaintiff-Appellant Partanen, *Partanen v. Gallagher*, No. DAR App. Ct. No. 2015-P-1510 (Mass. Nov. 24, 2015). In this case pending before the Massachusetts Supreme Judicial Court, a nonbiological, unmarried lesbian partner is challenging a trial court order dismissing her parentage claim. *Id.* The trial court determined she did not have standing under Massachusetts' assisted reproduction statutes, which only provide protection to married couples. *Id.*

certain situations, recognizing the legal rights of more than two parents may benefit a child.<sup>100</sup> For example, it may benefit a child to have three legally recognized parents when a lesbian couple wants a known sperm donor to play a parental role in their child's life or a family in which a marital father and biological father both want to support (financially and emotionally) a child.

Several jurisdictions have recognized legal rights for more than two parents. Most notably, in 2013, the California legislature enacted legislation that allows a child to have more than two legal parents if it would serve the best interests of the child.<sup>101</sup> California Family Code Section 7612(c) provides, “[i]n an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child.”<sup>102</sup>

California is not the first state to permit recognition of more than two parents. Since 1989, Louisiana has permitted dual paternity and has amended its statute to allow a biological father to sue for paternal rights within a year of a child's birth, even if the child has a presumed marital

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100. See Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309 (2007) (arguing in favor of permitting more than two parents when in a child's best interests); see also Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11 (2008).

101. Joanna L. Grossman, *California Allows Children to Have More Than Two Legal Parents*, JUSTIA: VERDICT (Oct. 15, 2013), <https://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents>.

102. CAL. FAM. CODE § 7612(c) (West Supp. 2016). The rest of the section provides:

In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.

*Id.*

father.<sup>103</sup> Other states have similarly recognized more than two parents for a child. In *Jacob v. Shultz-Jacob*, a Pennsylvania court held that a biological lesbian mother, her partner, and the children's known sperm donor all had parental rights and obligations for the children.<sup>104</sup>

In February 2013, a Florida judge ruled that a child's birth certificate could list two mothers and a father.<sup>105</sup> And, in 2007, the Ontario Court of Appeals similarly ruled that a child could have three legal parents. In *A.(A.) v. B.(B.)*, the court recognized the parental rights of the child's biological mother and father and the biological mother's lesbian partner.<sup>106</sup> While I am not suggesting that all children should have more than two parents, courts and legislatures have taken note of the fact that it may be in a child's best interests to recognize more than two parents. Intentional parenthood is the most straightforward means by which to do so.<sup>107</sup>

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103. See Jacobs, *My Two Dads*, *supra* note 8, at 853-54 (reviewing the Louisiana statute and cases).

104. 923 A.2d 473, 482 (Pa. Super. Ct. 2007). In overturning the trial court's holding that the biological father had no support obligation, the appellate court wrote:

In the trial court's view the interjection of a third person in the traditional support scenario would create an untenable situation, never having been anticipated by Pennsylvania law. We are not convinced that the calculus of support arrangements cannot be reformulated, for instance, applying to the guidelines amount set for Appellant fractional shares to incorporate the contribution of another obligee.

*Id.*

105. Martha Neil, *3-Parent Birth Certificate is Ok'd by Judge*, ABA J. (Feb. 8, 2013, 3:33 PM), [http://www.abajournal.com/news/article/judge\\_oks\\_3-parent\\_birth\\_certificate\\_says](http://www.abajournal.com/news/article/judge_oks_3-parent_birth_certificate_says). A female couple, lawfully married in Connecticut but living in Florida, used the sperm of a known donor. *Id.* The parties orally agreed that all would maintain a parental relationship and the judge agreed. *Id.*

106. *A. (A.) v. B. (B.)* (2007) 83 O.R. 3d 561, 574 (Can. Ont. C.A.) (agreeing with the parties that adoption by the nonbiological lesbian mother would be to the detriment of the child who would thus lose a legal tie to his biological father, the court used its equitable, *parens patrie* authority to legitimate the rights of all three parents and foster the child's best interests).

107. I have previously written that recognition of more than two parents does not necessitate that each parent have the same degree of responsibility for the child, and it is possible to prioritize parents to make multiple parentage manageable. Intentional parenthood would permit the "disaggregation" of parental responsibilities for which I previously argued. Jacobs, *supra* note 100, at

C. *Intentional Parenthood Will Prevent Paternity Disestablishment*

Intentional parenthood has another advantage: it militates against paternity disestablishment. Technology has not only made it easier to disaggregate legal and genetic parentage, it has made it much easier to determine genetic parentage for any child. While biology plays a starring role in establishing support orders from “deadbeat dads” biology is also playing a role in the “duped dads” movement.<sup>108</sup> Pharmacies now sell DNA testing home-kits, and news articles have chronicled the emotional devastation some men suffer upon learning they are not a child’s biological father. In response, some state legislatures have enacted legislation that permits a man who is an established legal father of a child to disestablish his paternity if he submits proof that he is not the child’s genetic father,<sup>109</sup> and some states have also allowed paternity disestablishment by judicial opinion.<sup>110</sup> Although the courts focus on the questionable ethics of the mother—who did not reveal that another man was the genetic father—those courts rarely question the ethics of a man who has long functioned as a father to a child but now wants no more contact with the child who considers him

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339; see also Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 427 (2013) (“Functional and formal parenthood are distinct statuses that need to be clearly distinguished and supported for the benefits they each provide as well as the different limitations involved in each method of obtaining parenting rights.”).

108. I have put both phrases in quotations because I dislike both terms. As discussed earlier, many men who do not pay child support or pay inadequate child support do not have the resources with which to pay. Furthermore, as I have discussed in previous writings, men who form a social bond with a child over five, ten, or fifteen years should not be considered “duped” for they have enjoyed the benefits of fatherhood.

109. See Jacobs, *supra* note 39, at 227-33 (reviewing several state statutes that permit paternity disestablishment).

110. See *id.* at 222-27 (reviewing state opinions permitting paternity disestablishment).

“daddy.”<sup>111</sup> As I have previously argued, biology should not trump relationships.<sup>112</sup>

Applying intentional parenthood more broadly will help reduce the growing “disestablishment” movement. By relying on a person’s affirmative consent, intent will govern parentage—not genetics or the marital presumption—and someone who voluntarily undertakes the responsibilities of parenthood will not be able to change his mind later on.<sup>113</sup> Impressing upon parents the gravity of establishing intentional parenthood may deter some individuals from signing and accepting responsibilities at the time of a child’s birth; but the intentional parenthood framework should result in overall better outcomes for children because of the voluntariness of the undertaking.

#### CONCLUSION

The intentional parenthood approach prioritizes voluntariness and choice in parentage establishment. If broadly adopted, intentional parenthood can eliminate income, class, marital, gender, and sexual orientation inequities in parentage establishment. Furthermore, intentional parenthood simplifies parentage establishment for gay and lesbian parents; makes it easier to establish more than two parents; and would greatly diminish claims to disestablish parentage. To accomplish implementation of the intentional parenthood model, I propose that in addition to a birth certificate—which provides indicia of parentage but is not the legal basis of parentage—all parents must sign an intentional acknowledgment of parenthood that establishes the maternity and/or paternity of the child. An intentional parenthood approach will not require one mother and one father, nor will it require two parents. Rather, under this approach, a child will have a minimum of one parent and may possibly have two, three, or more parents.

Future work will develop a particular implementation strategy. If states abandon status-based parentage in favor

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111. *See id.*

112. *See id.* at 233-34; *see also* Jacobs, *My Two Dads*, *supra* note 8, at 837-43.

113. This will require that the signing of a document of intentional parenthood may not be rescinded except in cases of fraud or duress.

of intentional parenthood, several technical and important points need consideration: (1) the document or means to establish intentional parenthood; (2) the timeframe by which intentional parenthood must be established; (3) rules regarding possible rescission of intentional parenthood; and (4) parenthood establishment at a time much later than that prescribed for establishing intentional parenthood.

I anticipate using a document similar to the Voluntary Acknowledgement of Parentage used widely in hospitals to establish paternity for nonmarital children. A VAP or something similar could be offered to all parents to establish intentional parenthood at birth. Like birth certificates, VAPs are offered in birth records offices and birthing facilities. Most are signed soon after a child's birth. Rather than reserving this process for unmarried couples only, I suggest that a document to establish intentional parenthood be offered to all parents.<sup>114</sup>

If intentional parenthood is not established within a particular period (e.g., six or twelve months), then a showing in addition to intent should be required before allowing someone to assume the obligations and benefits of parentage. So, while intentional parenthood provides the fairest default mechanism by which to establish parenthood at the time of a child's birth, the additional layer of functional parenthood should be used after a period of time, to ensure that the second (or third) caregiver has demonstrated both the requisite intent and undertaken parental obligations to earn the legal parent title. Moreover, by adding a requirement of functional parenthood analysis to later parentage determinations, we can prevent too many individuals from asserting a parentage claim.<sup>115</sup>

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114. In the case of gestational surrogacy, I propose that the intended parents establish parentage at birth but also still recommend the use of a pre-birth agreement to clarify the parties' expectations so that the gestational surrogate could be precluded from signing a parentage form. *See Purvis, supra* note 6, at 244.

115. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (AM. LAW INST. 2002) (defining parents by estoppel and de facto parents who may demonstrate through their actions that they have undertaken the responsibilities of parentage and should be recognized as a parent).

Intentional parenthood will enable all parents to exercise greater choice and autonomy regarding birthing and raising children. Intentional parenthood will also provide a clear, consistent means by which to establish parentage for all children while reducing inequities of class, income, gender, marital status, and sexual orientation. As such, intentional parenthood's true promise can be realized: parental parity.