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From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood

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FROM PRESUMED FATHERS TO LESBIAN MOTHERS: SEX DISCRIMINATION AND THE LEGAL CONSTRUCTION OF PARENTHOOD

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In 1997, the California courts denied parental status to two women who had lived with and helped raise their partners' children for a number of years.[1] In contrast, in 1998, the Supreme Court of California awarded parental status to the husband of a woman who had become pregnant while separated from him and living with a lover.[2] In all three cases the individuals seeking parental status were non-biological parents.

The California courts, following the lead of the federal courts, strongly support the position that the differential treatment of men and women, based solely or primarily on gendered constructions of

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1. *In re* Guardianship of Z.C.W., 84 Cal. Rptr. 2d 48 (Cal. Ct. App. 1999); West v. Superior Court, 69 Cal. Rptr. 2d 160 (Cal. Ct. App. 1997).
2. Dawn D. v. Superior Court, 952 P.2d 1139 (Cal. 1998).

masculinity and femininity, is legally impermissible.[3] An exception does exist, however, (in both State and Federal law) in the area of human reproduction. When considering laws and policies in this area, the courts do occasionally support procedures that appear facially discriminatory so long as they are used to redress disadvantages that may arise as the result of the physical changes that occur during and immediately following pregnancy.[4] Laws that require employers to provide maternity leave, to rehire employees following such leave, and to provide private areas for breast feeding or milk extraction are examples.[5] So, despite a general rule of equal treatment, the courts do recognize that, during and immediately following reproduction, men and women are biologically different from one another, and the law is generally allowed to recognize and reflect those differences.[6]

But what is the difference between men and women who are involved in acts of social reproduction?[7] Do the California courts treat non-biological, i.e. "social" mothers differently than non-biological, i.e. "social" fathers? If so, should this treatment be legally permissible?[8] As the cases above suggest, the courts frequently grant legal parent status to

3. Most cases involve discrimination in the workforce, falling under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000), or discrimination in education, falling under Title IX of the Education Amendments of 1972, 20 U.S.C §§ 1681–1688 (2000).

4. For current discussions regarding the courts' treatment of pregnancy as a "special case" with regard to application of the principal of equality between the sexes, see Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, *in* FOUNDATIONS: FEMINIST LEGAL THEORY 180 (D. Kelly Weisberg ed., 1993); Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, *in* FOUNDATIONS: FEMINIST LEGAL THEORY 156 (D. Kelly Weisberg ed., 1993); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, *in* FOUNDATIONS: FEMINIST LEGAL THEORY 128 (D. Kelly Weisberg ed., 1993).

5. Many of these laws (e.g., a limited period of employment leave following the birth or adoption of a child) are being rewritten in a gender-neutral fashion allowing both men and women to take advantage of them. Some, however, like providing women private facilities for breast-feeding, are likely to remain sex-based.

6. Throughout this analysis I use the term "sex" (as in "sex differences") as a biological referent. The biological fact that women gestate fetuses and men produce sperm is a sex difference. I use the term "gender" (as in "gender discrimination") as a social referent. The social assignment of parental roles to men and women (breadwinner versus caretaker, or disciplinarian versus nurturer, for example) are gender differences.

7. Here, I am using the term social reproduction, in contrast to biological reproduction. I mean to emphasize the parenting of children to whom one is not biologically related.

8. After all, the physical manifestations of pregnancy, the current legal justification for disparate treatment, does not exist here as neither group of parents experiences them.

non-biological fathers while refusing similar status to non-biological mothers.[9] Is this practice logically and inevitably grounded in the biological differences inherent in male and female reproduction, as the courts frequently claim, or is it merely a complex case of sex-based discrimination?

In today's world, the courts encounter a dizzying array of new reproductive possibilities and family constellations—often, the result of advances in reproductive technology, combined with changes in social understandings of what constitutes a family—that create previously unimagined paths to parenthood.[10] These fast-moving developments challenge the courts to think in new ways about what constitutes a parent and/or a family and make the following analysis particularly important to debates addressing issues of equality and differences in reproduction.

To anticipate the forthcoming analysis, I find that the California courts, bound as they are to traditional constructions of reproduction and family, continue to construe all fathers (both biological and social) as fundamentally different from all mothers (whether biological or social). A long tradition of employing a presumption of biological consanguinity (albeit very loosely construed) in parental status cases has tied the courts to particular constructions of parent and family that are unnecessarily restricted by sex (parenting pairs, for example, remain restricted to one male and one female only). This remains true despite the fact that creative uses of reproductive technology and the social emergence of new family forms frequently make the courts' constructions of parent and family woefully inaccurate and inadequate. Through an analysis of California family law statutes and parental status cases (stemming from 1872 to 1998), I will demonstrate that the California courts continue to construct parenthood as a gendered status by uncritically, unnecessarily, and inappropriately using biological reproduction as the model against which all social parents are judged.

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9. *See* Dawn D. v. Superior Court, 952 P.2d 1139 (Cal. 1998); *In re* Guardianship of Z.C.W., 84 Cal. Rptr. 2d 48 (Cal. Ct. App. 1999); West v. Superior Court, 69 Cal. Rptr. 2d 160 (Cal. Ct. App. 1997). I am specifically leaving aside the issue of parental status obtained through adoption. In the cases examined here, none of the social parents legally adopt the children they are parenting.

10. Lesbian- and gay-headed two-parent families and families created through contract surrogacy are a few examples. Today it is not unreasonable that five separate individuals might claim parental status based on their intimate involvement in a reproductive scenario. These individuals might include a sperm donor, an egg donor, a gestational surrogate, and a contracting couple who initiate and pay for the reproductive event in the hopes of creating a child that they can raise as their own.

Although this analysis pertains specifically to California law, it is broadly applicable. Numerous states maintain laws similar to those discussed below and many courts, both State and Federal, reach comparable decisions employing similar reasoning.[11] Indeed, in many areas, including the ones discussed here, the California courts find themselves "out in front" and their decisions frequently influence the reasoning employed by courts in other states.

If we believe, as the courts have previously asserted, that it is impermissible to treat women differently than men simply because tradition and/or history appears to demand it, then we must begin to challenge ongoing disparities in the judicial treatment of non-biological mothers and fathers. As the analysis below will demonstrate, men and women can and do frequently carry out acts of social parenting in ways that are strikingly similar to one another. The courts' failure to recognize these similarities, hidden as they are underneath an artificially imposed model of biological difference, results in a fundamental breach in the guarantee of equal treatment.

In Part I of this article, I briefly review the way legal scholars commonly define sex-based discrimination, particularly as it pertains to issues of reproduction. Part II is a brief historical review of legal constructions of parenthood. In Part III, I examine two legal concepts: retroactive legitimation and presumed fatherhood. Both concepts were introduced in 1872 and each independently encouraged judges to think of fatherhood as consisting of two distinct spheres, the biological and the social. I then trace the legal development of these concepts through a series of presumed father, retroactive legitimation, and putative father cases. In Part IV I extend the analysis to include legal constructions of

11. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 248–49 (1983) (holding that where the putative father had never established a substantial relationship with his child, the failure to give him notice of pending adoption proceedings did not deny the putative father due process or equal protection since he could have guaranteed that he would receive notice by mailing a postcard to the putative father registry); Caban v. Mohammed, 441 U.S. 380, 380 (1979) (dealing with a holding by New York's highest court that a New York Domestic Relations Law's sex-based distinction between unmarried mothers and unmarried fathers did not violate the Equal Protection Clause (the United States Supreme Court eventually overturned the State Court's decision and held the statute unconstitutional)); Quilloin v. Walcott, 434 U.S. 246, 246–47 (1979) (finding that a Georgia statute denying the father of an illegitimate child the authority to prevent the adoption of the child by the husband of the child's mother did not violate the Constitution); Stanley v. Illinois, 405 U.S. 645, 645 (1972) (holding that due process and equal protection laws entitled unwed fathers to a hearing on fitness accorded to all other parents whose custody of their children is challenged).

motherhood by introducing lesbian co-mother and female surrogacy cases into the mix. This allows me to directly compare legal constructions of motherhood to legal constructions of fatherhood. In Part V I discuss gendered aspects of the legal institution of marriage and the complicated role marriage plays in legal constructions of parenthood. In Part VI I delve into several recent lesbian co-mother and surrogacy cases to explore how some judges are attempting to expand legal constructions of motherhood in ways that would bring them more on par with legal constructions of fatherhood. And finally, in Part VII, I offer final remarks and conclude that judges' inability to conceive of a gender neutral subject, at least when considering issues related to human reproduction, creates serious legal disadvantages for virtually all women. As the analysis below makes clear, the resulting discrimination is grounded in gendered constructions of parenthood and not, as many courts conclude, in the biological differences between men and women.

I. DEFINING SEX-BASED DISCRIMINATION

Feminist scholars have long argued that legal constructions of both spouse and parent are deeply influenced by social constructions of gender.[12] Traditionally, the courts have understood husbands and fathers as

12. For a wide-ranging series of discussions regarding women's historical relationships to the family, the labor market, and parenthood, see generally PHILIPPE ARIÈS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (Robert Baldick trans., 1962); KATHERINE O'DONOVAN, SEXUAL DIVISIONS IN LAW (1985); DEBORAH RHODE, JUSTICE AND GENDER (1989); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, *in* HISTORY OF WOMEN IN THE UNITED STATES: DOMESTIC RELATIONS AND LAW 132 (Nancy F. Cott ed., 1992); Teresa Brennan & Carole Pateman, *Mere Auxiliaries to the Commonwealth: Women and the Origins of Liberalism*, 27 POL. STUD. 183 (1979); Carol Brown, *Mothers, Fathers, and Children: From Private to Public Patriarchy*, *in* WOMEN AND REVOLUTION: A DISCUSSION OF THE UNHAPPY MARRIAGE OF MARXISM AND FEMINISM 239 (Lydia Sargent ed., 1981); Richard H. Chused, *Married Women's Property Law: 1800–1850*, *in* HISTORY OF WOMEN IN THE UNITED STATES: DOMESTIC RELATIONS AND LAW 153 (Nancy F. Cott ed., 1992); Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America*, *in* HISTORY OF WOMEN IN THE UNITED STATES: DOMESTIC RELATIONS AND LAW 286 (Nancy F. Cott ed., 1992); Heide Hartmann, *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, *in* WOMEN AND REVOLUTION: A DISCUSSION OF THE UNHAPPY MARRIAGE OF MARXISM AND FEMINISM 1 (Lydia Sargent ed., 1981).

distinctly different from wives and mothers. While historically the courts' gendering of these familial roles has been explicit—as when women and children were deemed the property of husbands/fathers—over the last 30 years the courts have attempted to move in the direction of gender-neutrality.[13] Displaying this shift toward gender neutrality, courts today frequently take the position that "sex based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as bread-winner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the average woman compared to the average man."[14]

However, as Hillary Allen argues, despite a fairly determined move toward the development of gender neutral laws and practices, the goal of gender neutrality is ultimately unachievable so long as the courts remain incapable of imagining a gender-free subject.[15] This is especially true in the area of human reproduction where gender differences frequently develop directly from the physical manifestations of pregnancy.

As many feminists acknowledge, reproduction represents a special case, an instance in which women are indisputably different than men. As Herma Kay notes, "[w]hen the specific question is raised about what equality between women and men might mean, the debate focuses on a particular set of differences: the biological differences that define the two classes of male and female."[16]

Generally, the legislature has resolved the issue of sex-based differences that arise during and immediately following pregnancy by supporting policies and procedures that are designed to neutralize the negative social consequences many women suffer as a result of the physical manifestations of pregnancy.[17] As noted above, while some of

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13. *See* Kay, *supra* note 4, at 36–43; Nadine Taub & Wendy Williams, *Will Equality Require More Than Assimilation, Accommodation, or Separation from the Existing Social Structure at 55–58, in* FEMINIST JURISPRUDENCE 48, 49 (Patricia Smith ed., 1993); Christine A. Littleton, *Reconstructing Sexual Equality at 255–60, in* FOUNDATIONS: FEMINIST LEGAL THEORY 251–53 (D. Kelly Weisberg ed., 1993). The authors argue for different models of gender equality.
14. Williams, *supra* note 4, at 130.
15. HILLARY ALLEN, JUSTICE UNBALANCED: GENDER, PSYCHIATRY AND JUDICIAL DECISIONS 121 (1987).
16. Kay, *supra* note 4, at 181.
17. The 1978 Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1982), amended Title VII to provide that "women affected by pregnancy, childbirth, and related medical conditions shall be treated the same as other persons not so affected but similar in their ability or inability to work."

these policies and procedures may be facially discriminatory—often because they are made applicable to women but not men—in practice, when they are used to counter the social and economic costs of pregnancy, they have generally been deemed permissible.[18] Generally speaking, while sex-based policies and procedures are impermissible in most circumstances, they are legal when designed and utilized specifically to reduce the social and economic costs of pregnancy and childbirth for women.

As Kay argues, the only time men and women should be situated differently under the law is when they are engaged in biological reproductive behavior.[19] At all other times, and under all other circumstances, the existence of policies or procedures that make a person's sex factually relevant, in a way that bestows either advantage or disadvantage upon members of one group or the other, violates the very notion of sex-based equality under the law.[20]

II. Grounding Parenthood in Biological Reproduction

A. Natural Law and Legal Constructions of Parenthood

Historically, family law in the U.S. was derived using the natural law assumption that the right of individuals to raise their biological offspring exists independently of any governmental law or regulation.[21] This right, it is claimed, is pre-political, a condition "the law presupposes rather than creates."[22] Under this assumption, judges have declared that, "Unless parents are left free to raise their own children, the entire social fabric will be destroyed: 'man' will be 'denaturalized,' the instincts of humanity stifled, and one of the strongest incentives to

18. *See, e.g.*, Cal. Fed. Sav. & Loan Assoc. v. Guerra, 479 U.S. 272, 272–73 (1987)(finding that a California law requiring employers to reinstate women after a reasonable pregnancy disability leave did not violate Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act of 1978).

19. Kay, *supra* note 4, at 36.

20. The law does, however, occasionally allow for sex-based discrimination to occur in the military, such as when men are drafted and deployed in combat units while women are not.

21. *See generally* Elizabeth Bartholet, Family Bonds: Adoption and the Politics of Parenting (1993).

22. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family has Failed*, 70 Va L. Rev. 879, 887–88 (1984) (citation omitted).

the propagation and continuance of the human race destroyed."[23] Through statements of this sort, judges have historically grounded legal constructions of parenthood in consanguinity.

It is important to note, however, that in practice the putative natural rights of biological parents have often been abrogated. Examples include state laws that have denied these rights to slaves,[24] court decisions that have either denied or restricted the child custody rights of lesbian and gay parents,[25] and the enforcement of presumed parent statutes.[26] Despite the existence of both statutory law and legal precedent that clearly unhinges legal parent status from biological reproduction, many jurists vigorously resist attempts to displace the biological narrative underlying traditional legal constructions of parenthood.[27]

B. Early Constructions of Mother and Father

Much of the legal framework guiding the development of family law in the United States was originally imported from the British system and then altered according to the interests and concerns of the legislatures of individual states. One modification that occurred in California regarded the British laws governing legitimacy. An examination of British laws throughout the seventeenth century shows that children's legitimacy status was originally inseparable from the marital status of their parents.[28] As Kay explains, under British law, children born outside of wedlock were considered irreparably illegitimate.[29] These children,

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23. *Id.* at 888.
24. *See, e.g.*, JOHN HOPE FRANKLIN & ALFRED A. MOSS JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 53–161 (6th ed., 1988) (regarding the lack of parental rights of blacks under slavery).
25. For examples of courts imposing restrictions on the custody and visitation rights of lesbian and gay parents, see, for example, S.E.G. v. R.A.G., 735 S.W.2d 164 (Mo. Ct. App. 1987); *In re* J. S. & C., 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974) *aff'd*, 362 A.2d 54 (N.J. App. Div. 1976); *In re* Jane B., 380 N.Y.S.2d 848 (Sup. Ct. 1976). *But see In re* Marriage of Birdsall, 243 Cal. Rptr. 287, 291 (Cal. Ct. App. 1988) (holding that a restraining order prohibiting a gay father's visitation with his son was unreasonable).
26. *See infra* text accompanying notes 35–52.
27. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 56–57 (Haw. 1993)(arguing Natural Law, when considering principles of privacy, liberty, and justice, to refute requests by lesbian and gay couples to obtain marriage licenses).
28. Herma Hill Kay, *The Family and Kinship Systems of Illegitimate Children in California*, 67 AM. ANTHROPOLOGIST SPECIAL PUBL. ON ETHNOGRAPHY L. 57, 58–59 (1965).
29. *Id.* at 58–59.

alternately considered "the child of nobody" and "the child of everybody," lacked a legal connection to either of their biological parents.[30] Their parents in turn had no legal duty to support them.[31] It is worth noting that just because a child was born illegitimate did not mean that his or her parents necessarily abandoned it. Indeed, one or both parents frequently cared for illegitimate children until they reached adulthood. It does, however, demonstrate that under seventeenth century British law the *legal* construction of parenthood was gender neutral, as legal recognition of either the mother or the father depended upon marriage.

The nature of these illegitimacy laws, Kay argues, began changing in the mid-eighteenth century as governmental officials, interested in securing some care and protection for illegitimate children, began legally tying them to their biological mothers for the first seven years of life.[32] Some years later officials further strengthened this legal relationship by extending the number of years mothers were legally responsible for their illegitimate children from seven to sixteen.[33] In this way the legal definition of parent became gendered. Mothers became women who biologically reproduced children whereas fathers remained men who biologically reproduced children solely within the institution of marriage.

III. California's Aggressive Decoupling of Fatherhood From Biological Reproduction

A. Presumptive Fatherhood

In 1872, California legislators, wishing to strengthen the State's support for marital families and soften the negative effects of illegitimacy on children, passed a pair of laws. The first, a presumed father statute, awarded father status to fertile married men who were living with their wives at the time their wives became pregnant. The second, a retroactive legitimation statute, allowed men to retroactively legitimate children born outside of marriage by accepting their illegitimate children into their homes and treating them as if they were legitimate. Together these laws further broadened existing legal constructions of

30. *Id.* at 59.
31. *Id.* at 58–59.
32. *Id.* at 59.
33. *Id.*

fatherhood by allowing judges to attach father status to men who were already connected to children either biologically or socially.

The legislature's actions were undoubtedly driven, at least in part, by the economic empowerment of men relative to women that existed during the eighteenth and nineteenth centuries. As numerous scholars have noted, women living in early American society experienced both legal and economic subordination that largely prevented them from accessing or acquiring wealth independent of their relationships with men.[34] This legislative action gave judges the ability to legally tie children who would otherwise be deemed fatherless, and thus illegitimate and penniless, to men.

The first of these laws, the Presumed Father Statute[35] established that whenever a child is "conceived during a time when the mother [is] living in the same house with her husband . . . and the husband is not impotent . . . the child is conclusively presumed to be legitimate. . . ."[36] Following are two presumed father cases, the first from 1902 and the second from 1998. As these cases demonstrate, interpretations and applications of the statute have changed very little since its inception.

Mills: The California Supreme Court case *In re Mills's Estate*[37] provides an example of how the Presumed Father Statute was originally interpreted and used by the courts. Application of the statute allowed the courts to award custody and control of married women's children to their husbands, helping to insulate marital families and protect the legal stature of husbands within those families. In *Mills*, a married woman, Diana Chatham, approached the court seeking to have her deceased paramour declared the legal father of her children so that they could inherit from his estate. In court Mrs. Chatham testified that:

> [B]efore either of the [children in question] were begotten, she ceased to occupy the room with her husband, and . . . never had sexual intercourse with him after that time . . . [T]hereafter [she] slept with Robert Mills in a bedroom in the home of herself and husband, and . . . her husband knew that

34. *See, e.g.*, RHODE, *supra* note 12, at 9; Basch, *supra* note 12, at 141; Brown, *supra* note 12, at 242–43; Chused, *supra* note 12, at 206–17; Hartmann, *supra* note 12, at 20–23. The authors argue that women in the eighteenth and nineteenth centuries were largely excluded from the public realm, including most lucrative entrepreneurial positions and governmental posts.

35. The Presumed Father Statute, CAL. CIV. CODE § 193 (Deering 1996), was first enacted in California in 1872.

36. Kay, *supra* note 28, at 61.

37. 70 P. 91 (Cal. 1902).

> Mills was habitually having sexual intercourse with her . . . [Furthermore, she testified] her husband knew that Mills was the father of [her children].[38]

Despite this testimony, the court declared that Mr. Chatham was the legal father of his wife's children.[39] It concluded that although he might not be their biological father, he was not absent from the home at the time they were conceived, no evidence was presented proving him to be impotent or sterile, and he had accepted the children into his home and treated them as his own.[40]

As this decision makes clear, social fathering, when performed within state sanctioned families, is more important to the legal definition of fatherhood then mere biological reproduction. As Janet Dolgin notes, while biological reproduction is key to the legal definition of motherhood, the key factor in legal determinations of fatherhood is a man's relationship to the biological mother.[41] Indeed, in presumed father cases, the social relationship a man has with a woman, as determined through marriage and his relationship with her children, may completely override the fact of biological paternity.

Dawn D.: The California Supreme Court case *Dawn D. v. Superior Court*[42] is recounted to demonstrate the extent to which the California courts are willing to elevate the State's interest in the marital family above the interests of biological fathers. In this case, the California Supreme Court refused an alleged biological father's attempt to secure a blood test that could have been used to conclusively determine paternity.

The biological mother, Dawn, separated from her husband Frank and began living with her boyfriend Jerry. Soon thereafter Dawn became pregnant. Upon discovering that she was pregnant, Dawn left Jerry and returned to Frank. After learning of Dawn's pregnancy, Jerry approached the court seeking recognition as the child's biological/legal father.

Both the superior and appellate courts agreed with Jerry, ordering Dawn and the child to submit to blood tests in an effort to determine biological paternity. The California Supreme Court, however, reversed,

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38. *Id.* at 92.
39. *Id.* at 94.
40. *Id.* at 92.
41. Janet Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 650–60 (1993).
42. 952 P.2d 1139 (Cal. 1998).

arguing that the law in California "may be applied to preclude an alleged biological father from establishing his paternity of a child born during the mother's marriage to another man."[43] The court concluded that "[t]he husband in this case is presumed to be the child's natural father, as the child was born during the marriage."[44]

As Dolgin notes, while "the law . . . understands the family to include a biological aspect and a social aspect,"[45] it is clear that when the social interest of maintaining the marital family is weighed against the interests of biological fathers to maintain relationships with their children, the former trumps the latter. Eric G. Andersen adds that the courts also weigh the child's interest in having its mother's husband recognized as its legal father.[46] Decisions such as this insure that social and legal fatherhood resides in the man who is also the head of the child's family.[47] Used in this way, the Presumed Father Statute blurs the boundaries between biological and social fatherhood by encouraging judges to substitute the biological fact of reproduction with a very loosely construed presumption of that fact for some married men.

The construction of the law, however, specifically its requisite presumption of consanguinity and its restricted application to married men, allows the courts to simultaneously unbind biological reproduction from the legal construction of fatherhood, all the while denying that they are doing so.[48] While presumed father determinations are purportedly based on an inference about biological fact, they are actually little more than judicial prescriptions about marriage and family. As Marjorie Maguire Shultz notes, "[t]he important issue becomes not who is, but who *should* be having sex with the mother: her husband."[49] This legal slight-of-hand is extremely important because it allows judges to apply the law without undermining the natural law assertion that biological consanguinity remains fundamental to the legal construction of parent.[50] That the substitution of social fathers for biological fathers is

43. *Id.* at 1140.
44. *Id.*
45. Dolgin, *supra* note 41, at 642.
46. Eric G. Andersen, *Children, Parents, and Nonparents: Protected Interests and Legal Standards*, 3 BYU L. REV. 935, 939–41 (1998).
47. *Id.* at 960–69.
48. By restricting application to married men, the statute invokes the unspoken assumption that these men have exclusive and ongoing sexual relations with their wives.
49. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 2 WIS. L. REV. 297, 317 (1990).
50. As will be discussed later in the paper, judges frequently use this assertion to fend off parental claims made by non-biological mothers. *See infra* Part IV.

masked with the claim that because the husband could have impregnated his wife it is proper to assume that he did impregnate her, does nothing to change the fact that the law creates a non-biologically-based definition of natural fatherhood.

Finally, the statute works to preserve traditional notions about men and their relationship to families, i.e., women and children. As Dolgin argues, it is traditionally marriage (the conscious formation of a legally recognizable family) and not biological reproduction that has been the door to parental status for men. The social relationships men develop and maintain with women through marriage act as the legal conduit for the relationships men form with children—whether their own biological offspring or simply the offspring of their wives.[51] While biological reproduction does offer men an opportunity to develop a relationship with their children, it provides no guarantee that such a relationship will be legally recognized and/or supported. Men's biological paternity, or the lack thereof, counts remarkably little in their attempts to form legally recognizable parental relationships with the children of married women.[52] This fact, as we will see below, makes legal definitions of fatherhood remarkably different than legal definitions of motherhood.

B. Retroactive Legitimation

In 1872, along with the passage of the Presumed Father Statute, California legislators passed the Retroactive Legitimation Statute.[53] As with the Presumed Father Statute, this legislation was enacted to help ease the deleterious effects of illegitimacy on children. This law established the means by which unmarried biological fathers could legitimate their

51. *See* Dolgin, *supra* note 41, at 648–49 (arguing that the courts apply this model even in cases where the man seeking parental status is unquestionably known to be the biological father). If the man does not have a well-established relationship with his child's mother, the courts are unlikely to grant his request for legal father status. The exception is when denying a biological father parental status will render a child fatherless. When faced with potentially fatherless children, judges frequently recognize the parental rights of biological fathers, even when doing so goes against the wishes of the child's birth mother. *See, eg.*, Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

52. Since marital status trumps biological status for men, married men may gain parental status regardless of their biological connection to their wives' children, and single men who impregnate married women lose parental status regardless of their biological connection to their paramours' children.

53. CAL. CIV. CODE § 230 (Deering 1960) (repealed 1975).

children retroactively—at some point after a child's birth—through a procedure known as "conduct" legitimation. According to the Act:

> The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such a child is thereupon deemed for all purposes legitimate from the time of its birth.[54]

In 1874, the legislature added that any "child born before wedlock becomes legitimate by the subsequent marriage of its parents."[55]

On its face, this Retroactive Legitimation Statute appears to contradict the logic supporting the Presumed Father Statute, i.e., that men's relationships with children be filtered through their relationships with the mothers of those children. In practice, however, the courts' application of the Retroactive Legitimation Statute does not directly challenge this reasoning. While retroactive legitimation did allow judges to circumvent the heretofore requisite marital relationship between fathers and mothers, as the cases below demonstrate, the law encouraged judges to take this step only when otherwise legitimate father figures (husbands) were absent from the equation. Thus, the courts did not use the statute to undermine already existing marital families, but rather used it as a way of providing fathers for children whose only other option was illegitimacy. Indeed, so long as these decisions were rendered in the shadow of the Presumed Father Statute any threat they might pose to the sanctity of the marital family was neatly circumvented.

Retroactive legitimation is important to this analysis because its application neatly divides the legal construction of fatherhood into distinct components; the social and the biological. While allowing some unwed fathers access to parental status does appear to bring the legal construction of fatherhood more on par with the legal construction of motherhood (i.e., both men and women who reproduce outside of marriage can now be deemed legal parents), the two constructions remain far from equivalent. While females continue to gain parental status via the act of biological reproduction, parental status for men continues to attach in large part to their social parenting behaviors.[56]

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54. *Id.*

55. *Id.*

56. *But see* Nguyen v. INS, 533 U.S. 53 (2001) (rejecting the father's status based on the performance of social reproductive behaviors in cases involving the naturalization of

Indeed, what retroactive legitimation actually accomplishes is a broadening of the pool of behavior judges may use to justify attaching fathers to otherwise illegitimate children. The law, on its face, appears to broaden the legal construction of fatherhood only slightly (i.e., to include unwed biological fathers who maintain a father-like relationship with their children). But, as the cases below reveal, judicial manipulations of the social reproductive behaviors required under the law lead to a much more expansive outcome. As this analysis reveals, by the 1960s, judges had set aside virtually all of the social parenting requirements contained within the law allowing them to focus almost exclusively on biological consanguinity.[57] Of extreme importance, however, is the method used to set these requirements aside. Although all of the judges appeared willing to seriously compromise the validity of one or another of the requirements individually, none expressed the opinion that social components of fatherhood should be altogether removed from the equation. Thus, social parenting remains a critical component of legal constructions of fatherhood even as it takes on an extremely nebulous character.

Blythe: The California Supreme Court in *Blythe v. Ayres*,[58] for example, retroactively legitimated a child even though that child had never been received into her father's home as the statute requires. In this case, Mr. Blythe, an unmarried man and the alleged biological father, met and engaged in sexual relations with the child's mother during a short trip to England. Following this brief interlude Mr. Blythe returned to California never to travel outside the United States again. His daughter, born and raised in England, did not travel to America until after her father's death; indeed, she testified in court that she had never actually met the man.

The court, in deciding to grant the young woman retroactive legitimacy, made note of the fact that Mr. Blythe "declared the plaintiff to be his child to all persons upon all occasions. . . . acknowledged the child to its mother and to its grandmother before it was born . . . and

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individuals born outside the United States to mothers who are not American citizens). This case does, however, strongly support the argument being made here that the legal construction of parenthood is gendered.

57. This trend continued such that by the 1990s, the courts were willing to grant father status based on little more than a blood test genetically linking an alleged father to his child (usually for the purpose of allowing the state to collect child support payments from the alleged father). *See* Dolgin, *supra* note 41, at 645.

58. 31 P. 915 (Cal. 1892).

[even requested] that [she be] named and baptized Florence Blythe."[59] The court noted that Mr. Blythe resided "in lodging houses" with his mistress and that he was not legally married.[60] It then neatly circumvented the requirement that fathers accept their children into their homes by finding that Mr. Blythe, as a single man, had no home or family into which he could receive his child. Declaring that section of the statute unenforceable, the court proceeded to grant the daughter retroactive legitimacy.

While the court was willing to set aside a portion of the statute that Mr. Blythe clearly could not meet, it rigorously attended to the remaining social parenting requirements. Thus, the court's decision to invalidate an individual requirement can in no way be read as an indication that it considered social parenting unimportant to legal constructions of fatherhood.

McNamara: In *Estate of McNamara*,[61] the California Supreme Court again addressed the issue of what constitutes a family into which a man must accept his child before retroactive legitimation can be bestowed. In this case, the court was presented with a married woman (Mrs. Bettencorte) who left her husband to live with her lover (Mr. McNamara) with whom she eventually begot and bore a child.[62] The child, while born to a married woman, was illegitimate because its mother was not living with her husband at the time of its birth.

The court reasoned that, while "[t]he relation between McNamara and Mrs. Bettencorte was, to be sure, unlawful. . . . this does not negative [sic] the plain fact that the family relation existed."[63] In addition, the court argued that, ". . . . in signing the child's birth certificate [and] describing himself as the father"[64] McNamara had fulfilled all of the obligations required under the law to retroactively legitimate the child.[65]

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59. *Id.* at 922.
60. *Id.* at 923.
61. 183 P. 552 (Cal. 1919).
62. *Id.* at 554.
63. *Id.* at 558.
64. *Id.*
65. In *Laugenour v. Fogg*, 120 P.2d 690 (Cal. Ct. App. 1942), the court puts an interesting twist on the gender politics active in *McNamara* by finding against a married man who had left his wife and taken up residence with his lover who eventually bore his child. In *Laugenour*, the court determined that a married man is unable to create a family with anyone other than his wife. As his family consisted of himself and his wife, and he had never invited his child into that family, the court determined that he had not fulfilled the requirements of California Civil Code Section 230 and thus could not be declared the legal father of his mistress' child. *Id.* at 692.

In this case, instead of setting aside a piece of the statute as the *Blythe* court chose to do, the court modified the definition of family so as to include the father, his mistress and her child. While Mrs. Bettencorte was married to someone other than Mr. McNamara (presumably preventing her from being part of a family consisting of herself, McNamara and their child) the courts could not easily assign father status to her husband (using the Presumed Father Statute) because she was not living with him at the time the child was born. Thus, the court did what it could by awarding father status to Mr. McNamara (the man with whom the mother and child had developed a family-like relationship) rather than leave the child fatherless.

The court bent the legal definition of family to accommodate the situation before it. By doing so, it was able to grant an otherwise illegitimate child legitimacy. At the same time it strengthened the developing position that biological fathers who act like fathers—i.e., form family-like relationships with the mothers of their children—should be granted legal father status. Thus, while this decision may have rendered the legal definition of family somewhat negotiable, it, like the decision in *Blythe,* accentuated the courts' commitment to the social reproductive component of the legal definition of fatherhood.

Lund: In *In re Lund's Estate*,[66] the California Supreme Court was faced with a retroactive legitimation request posed by a young man who did not begin living with his father until well after the age of eighteen and who had never lived with his father in the state of California. This case raised serious questions about the meaning of accepting a *child* into one's home and family.[67]

In *Lund* the court determined that:

> Andrew Lund sent to Norway *for his son Bert Lund,* not for a person designated as the illegitimate child of Caroline Anderson. It was Bert Lund, *the acknowledged son of Andrew,* who traversed the long route from Norway, on the high seas of the world, across the Atlantic Ocean, through half of the United States, to the family home in Minnesota. There, in compliance with the second requirement of the California statute, and further evidencing compliance with the first, Bert was received into the family with the full consent of both Andrew and his wife Agnes. From then on, conforming to the

66. 159 P.2d 643 (Cal. 1945).
67. *Id.* at 646.

> third specification of the statute, Bert was treated as if he were a legitimate child . . . .[68]

Here, the court reads the term child to mean offspring—rather than one who has not yet reached the age of majority—by focusing on the relationship between the father and his son rather than on the son as an individual. By focusing on the relationship rather than on the individual, the court identifies the son as a perpetual child, thereby allowing it to extend the time frame in which the statute remains applicable indefinitely. Bert did not migrate to the United States until after reaching adulthood. Yet, when he moved into his father's home and family, he did so as a child—a child who required the courts assistance in shrugging off the hardships of illegitimacy. As in the two previous cases, the court manipulated a single aspect of the statute just enough to allow it to cover the idiosyncrasies of the case before it.

Wilson: In *In re Wilson's Estate*,[69] California's court of appeals was asked to clarify what behavior is necessary to fulfill the requirement that a father treat his child "as if it were legitimate." At the heart of this case is the question, what do fathers normally do with their children?

Here, the court is faced with a father who, by all accounts, has spent little more than a couple of afternoons in the presence of his child. The court record reveals that on one visit, "the baby remained [with its mother in the father's home] from about noon to dusk, slept on the couch and was played with by the [father] and [the child's paternal grandmother]."[70] On an almost identical visit one year later, "the father [did] such natural things as fondling the child and holding her in his arms and playing with her."[71]

In this decision, the court describes the simple act of holding and fondling a child (even if only for a very short period of time) as "natural" parenting behavior. According to Dolgin, the courts often use the term natural to invoke an image of nature itself—a way of being that is good, decent, and occasionally even inevitable.[72] By identifying the father's admittedly limited interactions with the child as "natural," the court raises the significance of the acts, making them appear far more important than they might otherwise be. This allows the court to then favorably compare the man's admittedly limited behavior to the behav-

68. *Id.* at 655.
69. 330 P.2d 452 (Cal. Ct. App. 1958).
70. *Id.* at 453.
71. *Id.* at 454.
72. Dolgin, *supra* note 41, at 668.

ior of legitimate fathers (read, husbands living in legally sanctioned families with their wives and children).

It is worth noting, however, that this reasoning is purely tautological. The court labels the father's behavior "natural" based entirely on his biological connection to the child. First, it is biological consanguinity that makes the behavior special, and then it is the special nature of the behavior that allows the court to recognize the fact of biological consanguinity.

By this point the courts have seriously pared down virtually all of the social parenting requirements contained within the Retroactive Legitimation Statute.[73] Indeed, it appears that as long as a biological father openly acknowledges his paternity and interacts with his child(ren) on some level (not necessarily in person), and for some period of time (an afternoon or two will do), the courts will award him legal father status provided there is no husband also seeking that status.

Lavell: In a final retroactive legitimation case, *Lavell v. Adoption Institute*,[74] the court of appeals effectively eviscerated what remained of the Retroactive Legitimation Statute. In this case, Frederick Lavell approached the courts seeking recognition as the legal father of a child born to a woman to whom he was not married, and with whom he no longer lived. The child's mother had placed the child for adoption against Lavell's wishes and without his consent. The issue of the child's legitimacy was important because in 1960, the year the case was heard, both parents of a legitimate child had to consent to its adoption while the mother of an illegitimate child was permitted to make that decision unilaterally.[75]

At the time, the only way the courts could grant parental status to unmarried fathers was through retroactive legitimation. This action was complicated, however, by the fact that the child's mother had left the father's home several weeks prior to giving birth and the father had never actually met or interacted with the child.[76]

The court held that:

> [T]he unborn child of unwed parents is an existing person . . . and we believe is . . . capable of being received into the family of the father . . . . The child must be treated as if it were

73. The one social requirement that remains untouched is the public acknowledgment of paternity.

74. 8 Cal. Rptr. 367 (Cal. Ct. App. 1960).

75. *Id.* at 368.

76. *Id.*

> legitimate, but this requirement may not be construed as applying only to a child after its birth.[77]

In this case, the court substitutes "unborn child" for "child" in the language of the statute, allowing it to extend the statute's applicability backward in time, seemingly to the point of conception. It then determined that the mere act of living with the fetus's mother and acknowledging oneself to the fetus's genitor successfully fulfilled all of the social fathering requirements contained within the statute. In effect, the court swept aside all of the social parenting requirements contained within the statute, and based its determination of legitimation on biological consanguinity alone.

Like the Presumed Father Statute, the Retroactive Legitimation Statute encouraged judges to split the definition of fatherhood into two distinct spheres: the biological and the social. One unique aspect of the Retroactive Legitimation Statute, however, was that it provided a venue for judges to practice manipulating the social aspect of fatherhood. While biological paternity remained relatively stable, social fatherhood became extremely malleable. Judges began picking and choosing between various aspects of social fatherhood, replacing one with another seemingly at will and even refashioning them when necessary. Indeed, by the 1960s, the courts had modified the components of the statute to such an extent that the only social behavior still *required* was an acknowledgment of paternity.[78] By choosing to manipulate these requirements, instead of simply disregarding them altogether, however, the courts left intact the legislature's split definition of fatherhood while expanding considerably their control over its applicability.

While we can only guess at the motivation driving these judges to manipulate the social aspect of fatherhood in this way, it is useful to note that in all of the cases discussed above (with the exception of *Lavell*), the courts were asked to award father status posthumously. The requests came from the children themselves and there is no evidence that any of their mothers objected. Indeed, these awards of father status had no apparent social costs. They were unbound from questions of custody (with the exception of *Lavell*, yet even there the mother had already relinquished custody herself) and allowed judges to distribute the fathers' estates to their biological child(ren). The judges in all of the

77. *Id.* at 370.

78. Recall, however, that the courts only grant paternity to unmarried men who reproduce children with women who are not legally attached to and living with husbands. *See supra* text accompanying notes 37–40, 42–44.

above cases had to decide between awarding parental status to biological fathers or leaving children legally fatherless.

In a similar vein, retroactive legitimation never threatened either the primacy of the mother/child relationship or the existence of already established nuclear families. Although *Lavell* appears to be an exception, in that case the mother had already abandoned her position as parent by relinquishing the child for adoption. Thus, the court was free to award parental status to the father without challenging the primacy of the mother-child bond; indeed, the issue before the court in *Lavell* was recognizing the biological father or rendering the child legally parentless. As for protecting already existing nuclear families, the statute clearly stated that a father had to invite his child into his home *with* the permission of his wife if he had one.[79] This caveat presumably gave existing wives some power to prevent their husbands' illegitimate children from undermining the inheritance rights of their legitimate children if they so desired.

Finally, this broadening of the application of the Retroactive Legitimation Statute appears to have reduced the disparity between the legal constructions of fatherhood and those of motherhood. The parental rights of unmarried biological fathers become more similar to those granted unmarried biological mothers.[80]

As the next series of cases demonstrates, however, throughout the 1970s and 1980s the gap between legal constructions of motherhood and legal constructions of fatherhood begins to widen again. By coupling the language of the Presumed Father Statue with the newly malleable definitions of social fatherhood produced through the retroactive legitimation cases above, the courts create new social routes to parenthood for men that remain largely unavailable to women.

C. Putative Fatherhood

In 1973, the California legislature melded the concept of presumed fatherhood with aspects of retroactive legitimation within the Uniform Parentage Act (UPA). Once married, adults in California fall under the jurisdiction of the UPA. This law is designed to facilitate the creation of

79. *See supra* text accompanying note 54.

80. The exception, of course, remains where single men and women reproduce with married partners. While a single woman who reproduces with a married man retains her parental status, a single man who reproduces with a married woman remains at risk of losing his parental status to his partner's husband.

legal relationships between married adults and children who are either born or adopted into the family. According to the UPA:

> A man is presumed to be the natural father of a child if . . .
>
> (a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated . . . .
>
> (b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law . . . .[81]
>
> (c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law . . . and either of the following is true:
>
> (1) With his consent, he is named as the child's father on the child's birth certificate.
>
> (2) He is obligated to support the child under a written voluntary promise or by court order.
>
> (d) He receives the child into his home and openly holds out the child as his natural child.[82]

Clearly, the UPA creates conditions under which men can become legal fathers, usually, but not always, by replacing biological reproduction (the physical act of becoming a father) with marriage (a social commitment to assume the role of father should the opportunity present itself within the confines of the marriage). However, in some cases, such as under section (d) of the UPA, men can become legal fathers simply by receiving children into their homes and representing themselves as biological fathers.

There is no evidence that the legislature, in creating either presumed fatherhood or retroactive legitimation, consciously intended to

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81. The legal rights of non-biological fathers over children born to their presumed wives remain intact even if their marriage is later determined to be technically not legal. CAL. FAM. CODE § 7611 (West 1996).

82. CAL. FAM. CODE § 7611 (West 1996).

alter the legal construction of natural fatherhood from a single category consisting of both social and biological reproduction to discrete categories of biological consanguinity and social reproduction. Indeed, the evidence suggests that the legislature made a conscious attempt to maintain biological consanguinity as a key component of the legal definition of natural fatherhood. As the cases below reveal, however, the courts' increasingly creative manipulations of the legal definition of fatherhood—always in the service of securing legal fathers for otherwise fatherless children—eventually led to the creation of a new definition of "natural fatherhood," one that is completely void of biological consanguinity.[83]

Valle: In the appellate case *In re Marriage of Valle*,[84] a woman, Lucinda Valle, sued her husband Manuel for child support following the breakdown of their marriage. Lucinda and Manuel, though married, had no biological children of their own. Following a brief visit to Mexico in 1966, they reentered the United States with Manuel's five-year-old nephew and one-year-old niece using false birth certificates that identified the two adults as the children's biological mother and father. From that point forward, according to court records, "the children regarded [them] as their natural parents, and [they] likewise considered and treated the children as their own."[85]

In this case, the court invoked the legal framework of equitable estoppel, a doctrine borrowed from commercial law.[86] According to the court:

> Under well settled California law four elements must be presented in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be appraised of the facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be

83. For an interesting discussion of the social and legal forces that combine to unhinge legal constructions of family from their traditional domestic anchor and open space for the introduction of new (often market/contractual based) representations of familial relationships, see Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519 (1994).

84. 126 Cal. Rptr. 38 (Cal. Ct. App. 1975).

85. *Id.* at 40.

86. Equitable estoppel is defined as "[t]he effect of voluntary conduct of a party whereby he is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct." BLACK'S LAW DICTIONARY 483 (5th ed. 1979).

> ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.[87]

The court then argued that the doctrine could be used to confer parental status, stating simply: "While pronounced and applied primarily within the context of commercial transactions, the elements of estoppel have equal application to establish the relationship between a child and his putative father."[88] The court concluded that estoppel is a condition that "runs in favor of the child, not the spouse."[89] In other words, it is not the husband who is estopped from abandoning his wife, but rather the father who is estopped from abandoning his children.

The doctrine of equitable estoppel, as it was applied here, drew heavily from precedent set in earlier presumed father and retroactive legitimation cases. As commonly occurs in presumed father cases, the customarily important biological relationship between the alleged father (in this case Manuel) and the children (his niece and nephew) was replaced by the putative father's familial status. After failing to establish a direct biological connection between Manuel and the children, the court shifted their attention to Manuel's marital status (his relationship to the children as filtered through his relationship with their putative mother), and declared that to be sufficient grounds upon which to assign parental status.

Note, however, that Manuel was never married to the children's biological/legal mother; she continued to reside in Mexico. Manuel was married to the children's social mother, a woman with no legal standing herself.[90] This appears to preclude the court's use of the UPA to grant Manuel father status. To solve this problem, the court temporarily abandoned family law and used commercial law instead. While equitable estoppel allowed the court to maneuver around restrictions inherent in the UPA, the court carefully crafted its decision using the same discourse about husbands and families that family court justices had been using for years.

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87. *Valle*, 126 Cal. Rptr. at 41 (citations omitted).

88. *Id.*

89. *Id.* (citation omitted).

90. Although it appears as though the court, in granting Manuel father status, must also simultaneously grant Lucinda mother status, thus opening a social route to parental status for women, the issue of Lucinda's parental status was never before the court. Because the court never directly addressed Lucinda's parental status, the case may not be used as precedent by other social mothers seeking parental status. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

As in more traditional presumed father cases, the fact of biological consanguinity was replaced with a very loosely construed presumption of that fact, albeit a slightly different presumption than heretofore invoked in presumed father cases. In this case, the presumption of biological fatherhood was established through the perception of the children, not the court. In essence, the court argued, as long as a man plays the role of father convincingly enough to cause the children to conflate his act of social reproduction with biological reproduction, the court may assign him legal father status.

In order to shift the presumption in this way, the courts focused exclusively on the social aspects of Manuel's fathering. Knowing full well that Manuel was not the children's biological father, the court focused instead on the fact that Manuel had, nevertheless, invited the children into his home, held himself out as their father, and treated them as if they were legitimate. The court in effect determined that Manuel had retroactively legitimated a pair of children who were not his biological offspring. Put a slightly different way, the court used Manuel's marital status to grant him presumed father status, all the while ignoring the fact that the woman to whom he was married was not the children's biological or legal mother. Whichever you prefer, the outcome was to financially tie Manuel to children for whom he had done little more than voluntarily assume a fathering role.

Johnson: In the appellate case *In re Marriage of Johnson*,[91] Patricia Johnson sued her former husband, Andrew, for the ongoing support of her son Jimmy, a child born before her marriage to Andrew and biologically unrelated to him. The court again invoked the terms of equitable estoppel to reason that Andrew fit the definition of a "putative" father. The court reasoned that:

> Andrew assumed the role of Jimmy's father from the very moment of Jimmy's birth and continued to play that role for Jimmy's entire life. Jimmy has known Andrew only as his father and has known no other in that capacity. Although Andrew apparently never expressly represented to Jimmy that he was his father, it is patently clear that his conduct was such that an implied representation to that effect was made and

91. 152 Cal. Rptr. 121 (Cal. Ct. App. 1979).

> that Andrew intended Jimmy to accept and act upon such representation.[92]

Here, the court again used aspects of both presumed fatherhood and retroactive legitimation to legally connect a non-biological father to a child living within his family. And again, the court used the marital relationship between the husband and the child's mother as the conduit for that connection. As in *Valle*, the court modified the traditional presumption of fatherhood by focusing on what the child presumably believed. Likewise, the result was to further remove biological consanguinity from the equation, allowing the court to award father status based entirely on a husband's father-like behavior.

Again, employing the doctrine of equitable estoppel, the court strengthens the notion that the legal definition of fatherhood includes men who are neither biological nor adoptive parents, but who nonetheless accept children into their families and rear them as their own. This broadening of the legal construction of fatherhood was accomplished through a modification of the presumption of biological consanguinity originally introduced in the Presumed Father Statute, which was then coupled with the social aspects of fatherhood as constructed through retroactive legitimation. Traditionally, men whose wives have borne children have been assigned father status. Now, men who marry women with young children and married men who, with their wives, accept young children into their homes and act as fathers towards them, may be assigned father status as well. The preceding case law demonstrates that the legal construction of fatherhood has been significantly altered from what it was 150 years ago, with the most striking change being that biological consanguinity is no longer an obligatory component of the legal construction of "natural" fatherhood. This does not, however, mean that judges have completely abandoned traditional notions of parenthood or that anyone who acts like a parent will be recognized as such by the courts.

Indeed, the courts' use of the marital relationship as the conduit for parental status, when coupled with a requisite presumption of biological consanguinity (even one that is very loosely construed), seriously restricts the field of social parents to whom the practice is applicable. The marriage requirement, for example, restricts application to traditional male/female pairs. The necessity of a presumption of biological consanguinity, on the other hand, gives the courts

92. *Id.* at 123–24.

considerable control in determining exactly when and to whom parental status will be assigned.

Halpern: In *In re Marriage of Halpern*,[93] the appellate court applied a boundary of sorts to the ever broadening construction of fatherhood as a way of granting a biological mother's request to block her husband's attempt to secure post-divorce visitation with her biological child. In this case, the child's mother, Gale, discovered that she was pregnant shortly after she began living with her soon-to-be husband Paul. Although Gale informed Paul that he was not the child's biological father, Paul consented to marry Gale and raise the child as his own. Throughout the pregnancy Paul acted as Gale's Lamaze coach; he was present in the delivery room, he listed himself as the father on the child's birth certificate, and he remained home to care for the child after Gale returned to work.[94] Eleven months after the child's birth, however, Gale and Paul separated. Paul visited the child five or six times in the month following their separation until Gale informed him that "the child was having difficulties" and unilaterally stopped the visits.[95]

The court determined that Paul was not a de facto parent and that "there is no estoppel of any kind . . . in favor of Paul with respect to visitation."[96] To maneuver around precedent set in *Valle* and *Johnson*, this court determined that the child, at eleven months of age, "was not old enough to recognize a father or to know what a father is."[97] This lack of recognition, the court reasoned, undermined the all-important presumption of biological consanguinity. Without a presumption, the court concluded, there existed no grounds upon which to grant Paul father status.

It is of no small consequence that the court was aware of Gale's plans to remarry and that she intended her new husband to become the child's social and legal father. Tipping its hat to this new arrangement the court concluded, "[b]ecause of [the child's] age . . . she would get over any disturbance very quickly if the assumed new stepfather took over."[98]

In this case, the court declined to grant an existing social father (Paul) parental status, reasoning that the all-important presumption of

93. 184 Cal. Rptr. 740 (Cal. Ct. App. 1982).

94. Paul, a writer, agreed to work from the couple's home, allowing him to care for the child during the day. *Id.* at 742.

95. *Id.* at 743.

96. *Id.* at 749.

97. *Id.* at 743.

98. *Id.*

biological consanguinity was unavailable because no one believed it to be true. The court did determine that Paul had performed fatherhood in compliance with the standards established in *Valle* and *Johnson* (i.e., he was a married man who had accepted a child into his family, declared himself its father, and treated it as if it were his own). It concluded, however, that the relatively short duration of the marriage, coupled with the immaturity of the child, undermined his claim to parental status.

It is not unreasonable to conclude in this case that the mother's engagement to another man influenced the court's conceptualization of the child's family structure. Unlike in previous cases where the alternative had been fatherlessness, the issue in this case was not whether the child would have a father, but rather who that father should be. Here, the court simply reasoned that the most appropriate father, when neither of the available options is the child's biological father, is that person who can most closely approximate the normative standard of fatherhood. Although the court did not go so far as to declare Gale's fiancé her child's legal father, its ruling did clear the way for that transition to occur.

This decision raises important questions regarding the courts' willingness to assign father status to a non-biological father over its biological mother's objections. Although it is impossible to know, it is reasonable to assume that the court would have ruled differently if Gale had requested that Paul be declared the child's father. Had Gale made this request, there would have been no incentive for the court to find a way around *Valle* and *Johnson* and the issue of whether or not the child actually believed Paul to be her father would not have arisen.

Although it is tempting to conclude from *Halpern* that the courts intend the presumption of fatherhood to be bound—on both ends—by the age and knowledge of the children involved,[99] the evidence does not generally support this conclusion. While the *Halpern* court did use the child's lack of presumption to justify its decision, the court in *Valle* failed to raise this issue even though the elder child was five years old when he moved into the Valle family. This evidence suggests that the *Halpern* court, like those before it, considered the legal construction of fatherhood to be somewhat malleable. Indeed, the decision in *Halpern* illustrates judges' apparent willingness to sacrifice strict legal constructions of fatherhood in favor of more traditional constructions of family.

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99. Courts faced with children who are either very young when a marriage disintegrates or older than three or four years when the father/child relationship is established would lack a reliable presumption of biological consanguinity.

By the time *Halpern* was decided, it was clear that the courts were willing to attach parental status to non-biological fathers under a limited set of conditions. These conditions include a minimal presumption of biological consanguinity, a marital union, and a desire on the part of the child's mother (usually its biological mother, but occasionally its social mother)[100] to have her husband declared a legal father.

This development of putative father status represents an important advancement in the ability of the courts to tie otherwise fatherless children to men presumably able to secure their financial well being. As a result, mothers gain considerable power to unilaterally determine the nature of any post-divorce relationship that will exist between their husbands and their children. When mothers express a need for post-divorce financial assistance in the form of child support, the courts generally respond by espousing the importance of the father/child relationship and then using that relationship as justification for legally tying the father to the children.[101] On the other hand, when mothers choose to forgo this future support, especially if there is a replacement father waiting in the wings, the courts generally downplay the importance of the father/child bond, thereby justifying a decision to deny the former husband parental status.[102]

As Dolgin argues, judicial decisions in paternity cases like these share a set of tacit assumptions.[103] First, the mother-child relationship is always seen as primary.[104] The father-child relationships (whether based in biology or not) are always secondary.[105] This means that if there is a conflict between mothers and fathers regarding child custody matters, a mother's assertion regarding the needs of the child(ren) will almost always trump a father's assertion of parental rights. Second, women's biological ties to children are seen as largely inseparable from their social ties to children.[106] Biological mothers, in the courts' view, are naturally compelled to behave as social mothers.[107] On the other hand, men's biological ties to children are seen as largely irrelevant to their social ties to children.[108]

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100. *See supra* notes 84–90 and accompanying text.
101. *See supra* notes 84, 91 and accompanying text.
102. See *supra* note 93 and accompanying text.
103. Dolgin, *supra* note 41, at 642–46.
104. *Id.*
105. *Id.*
106. *See id.*
107. *See id.*
108. *See id.*

This split between biological and social parenting for men has created an ideological space that is absolutely crucial to the courts' broadening of the legal definition of fatherhood beyond biological reproduction. In this ideological space between biological and social parenting, legal fatherhood has become a medley of parenting behaviors—some biological and some social—that may be freely mixed and matched so long as certain parameters are maintained. These parameters help contain the innovative potential of this mix-and-match design by grounding the results in traditional notions of family.

In addition to tacit assumptions about parenthood, these decisions rely upon and continually re-inscribe tacit assumptions about family. For example, the courts continually assume that marriage is the only appropriate venue for family construction and that nature imposes restrictions on the configuration of the parenting dyad—restricting it by size as well as by sex.[109] As I will demonstrate below, these assumptions severely limit judges' ability to broaden legal constructions of

109. In June of 2002, the California Supreme Court broadened the parameters of presumed fatherhood yet again by dropping the marriage requirement altogether. *See In re* Nicholas H., 46 P.3d 932 (Cal. 2002). In this case, Thomas (the presumed father) sued for custody of his ex-girlfriend's son Nicholas. While Nicholas' biological mother, Kimberly, strenuously objected to Thomas' attempts to gain custody of Nicholas, she was effectively removed from the case when she was declared unfit to parent Nicholas herself. *Id.* at 934–35. While the court determined that Thomas was not Nicholas' biological father, it reasoned that no biological father had been identified, leaving Nicholas potentially parentless. *Id.* at 933–34. Rather than render Nicholas parentless, the court held that while claims of presumptive fatherhood are rebuttable using evidence (such as that obtained through DNA testing or testimony by the presumed father to the effect that he is not the biological father) that successfully undermines the presumption of biological consanguinity upon which such cases are often based, in this case, any evidence undermining the claim of presumptive fatherhood (such as a lack of marriage between the presumptive father and the child's biological mother combined with evidence that the presumptive father is not the biological father) is to be considered irrelevant. *Id.* at 933–34. In its conclusion, the court found:

> Section 7612(a) provides that "a presumption under Section 7611 [that a man is the natural father of a child] is a rebuttable presumption affecting the burden of proof *and may be rebutted in an appropriate action* only by clear and convincing evidence." When it used the limiting phrase *an appropriate action*, the Legislature is unlikely to have had in mind an action like this—an action in which no other man claims parental rights to the child, an action in which rebuttal of the section 7611(d) presumption will render the child fatherless. (emphasis added)

Id. at 941. Note, however, that even this maneuver maintains the naturalization of the male/female parenting dyad as the court first determines that there is no other recognizable father available before awarding Thomas parental status.

motherhood akin to what we have just seen regarding legal constructions of fatherhood.

IV. Legal Constructions of Motherhood

Although the courts in the 1970s-1980s gave biological mothers the power to unilaterally determine the post-divorce relationships between their former husbands and their children, this trend appears to have run contrary to the joint custody movement that was also gaining popularity in California during this time. According to Lenore Weitzman, changes in the social structure of the family as well as changing expectations of women's roles both inside and outside the family, facilitated an increase in judicial preference for joint custody awards.[110] The social forces driving this shift included increasing numbers of women (including young mothers) working outside the home,[111] a fairly widespread belief in the restructuring of labor (including child-related labor) inside the home,[112] and a recognition that children generally benefit from maintaining post-divorce relationships with both of their parents.[113] As more women became financially self-sufficient and more men became, theoretically involved in the day-to-day care of their children, many medical practitioners, invoking the "best interest of the child standard," argued for the widespread application of joint-custody arrangements.[114]

Given these changing conditions, some judges undoubtedly became uncomfortable with the practice of allowing biological mothers unfettered power to determine the nature of the post-divorce relationships between their ex-husbands and their children. Nonetheless, in

110. Weitzman, *supra* note 12, at 231.

111. *See* Arlie Hochschild, The Second Shift: Working Parents and the Revolution at Home 2 (1989); Harriet B. Presser, *Shift Work and Child Care among Young Dual-Earner American Parents*, 50 J. of Marriage & Family 133, 133 (1988).

112. *See* Phyllis Moen, Women's Two Roles: A Contemporary Dilemma 62–66 (1992); Presser, *supra* note 111, at 133–48. The author argues that, although a majority of married women now work outside the home, many of whom are mothers, the distribution of labor within the home has shifted very little; women continue to do the vast majority of all household labor, especially labor that is child-related.

113. *See* Scott Coltrane, Gender and Families 153–54 (1998); Carol Smart, *The Legal and Moral Ordering of Child Custody*, 18 J.L. & Soc'y 485, 498 (1991); Leighton E. Stamps et al., *Judges' Beliefs Dealing with Child Custody Decisions*, *in* Child Custody: Legal Decisions and Family Outcomes 3–16 (1997).

114. *See* Weitzman, *supra* note 12, at x (stating that California was at the forefront of both the no fault divorce and the joint-custody movements).

1980, the court in *Perry v. Superior Court*,[115] pointing to a proffered stipulation that the children were not "of the marriage," denied parental status to a husband who had for many years acted as father to his wife's children.[116] Shortly after this decision, under intense lobbying by numerous judges, the California legislature passed Family Code Section 4351.5 (hereinafter FCS 4351.5) allowing judges to apply both the obligations and the rights of parenthood to stepparents.[117]

This statute gave judges explicit jurisdiction to grant limited parental rights (specifically visitation rights) to stepparents provided said rights do not "conflict with any visitation . . . right of a natural . . . parent who is not a party to the proceeding."[118] Unlike the Presumed Father Statute that required judges to employ a presumption of biological consanguinity, this law eliminated the need for the presumption altogether. Under FCS 4351.5, judges can grant limited parental rights without a finding of biological consanguinity (real or imagined), provided the parent-child relationship is formed within the institution of marriage.

This statute initiated several important changes in the field of child custody. It instructed judges to grant visitation to former husbands who acted like fathers to their wives' children, even in cases where the wives strenuously objected.[119] This served to level the playing field somewhat between men and their former wives by elevating the importance of the children' interests in the overall equation. While the estoppel holdings allowed wives to prevent their husbands from financially deserting children with whom they had formed a parent-like relationship, FCS 4351.5 allowed husbands to prevent their wives from severing the emotional aspects of those relationships as well.

The enactment of FCS 4351.5 also opened a very narrowly construed social route to parental status to a relatively small number of women. For the first time women who were not biological mothers (but who were married to men who were custodial fathers) could obtain court-ordered visitation with children they had parented. In reality,

115. 166 Cal. Rptr. 583 (Ct. App. 1980).

116. *Id.* at 584–86. The justices noted that the stipulation removed the court's ability to apply a presumption of biological consanguinity. *Id.* at 586 n.5. Just as important, however, was the wife's objection to her husband's request for father status. *Id.* at 584–86.

117. The statute uses a gender-free definition of stepparent and is thus applicable to women as well as men. CAL. FAM. CODE APP. § 4351.5 (West 1994).

118. CAL. FAM. CODE APP. § 4351.5(j) (West 1994).

119. Presumably the courts would not override objections grounded in legitimate concerns for the child's safety.

however, the rights women have gained through FCS 4351.5 are very limited, especially when compared to the rights afforded men, first through the Presumed Father Statute and later by the UPA. Although women who have lived for some period of time with their husbands' children can use FCS 4351.5 to insure post-divorce visitation with those children, the language of the statute generally prevents judges from interpreting the law in such a way as to award full parental status (something all presumed fathers obtain) to these non-biological mothers.[120] Similarly, while the UPA continues to allow judges to replace some undesirable and/or absent biological fathers with more highly desirable and present social fathers, FCS 4351.5 does not extend this ability in the direction of women. Under FCS 4351.5 judges may grant stepmothers limited visitation, but only in ways that do not interfere with the rights of either of the biological parents.

Finally, the application of FCS 4351.5 is restricted to the institution of marriage; it only applies to stepparents. This severely limits the scope of the law in ways that exclude social mothers who co-parent children in non-traditional families. As I will demonstrate in the next series of cases, many non-biological mothers lose contact with children they have parented—regardless of the quality, duration, or importance of those relationships—because the law continues to severely limit a judge's ability to recognize non-biological mothers as legitimate parents.

In the last decade of the twentieth century California's high courts considered seven lesbian co-mother custody cases and several additional heterosexual co-mother custody cases. Each case challenged the courts' traditional legal constructions of motherhood. As with the cases above, the mothers in these cases invited the courts to expand traditional notions of parenthood for the purpose of tying children to adults who had voluntarily accepted them into their families and assumed the role of parent. What the analysis below reveals, however, is that when social parents are female they directly (although often inadvertently) challenge many of the assumptions fundamental to legal constructions of motherhood and family. When this occurs judges frequently respond by narrowly constructing parenthood in ways that preserve traditional constructions of motherhood and family.

Curiale: *Curiale v. Reagan*[121] began as a request for visitation made by a lesbian woman who had co-parented her former partner's biological child during the course of their intimate relationship. Angela

120. CAL. FAM. CODE APP. § 4351.5 (West 1994).

121. 272 Cal. Rptr. 520 (Cal. Ct. App. 1990).

Reagan, the child's biological mother, and Robin Curiale began living together in an intimate and exclusive relationship in 1982. Two years into the relationship the couple, wishing to jointly parent a child, acquired a donation of sperm that they used to impregnate Robin by means of artificial insemination. In June of 1985, Robin delivered a child, and for the next three years Angela co-parented the child while acting as the family's sole financial provider. In December of 1987, Robin and Angela ended their relationship and Angela left the family home.

Following their breakup, the women voluntarily entered into a written agreement that included joint physical custody of the child. Six months after their breakup, however, Robin unilaterally severed the co-parenting agreement and forbade Angela further contact with the child. Angela responded by filing a complaint with the court seeking recognition as the child's de facto parent and reinstatement of the agreed upon visitation schedule.

In court Angela argued that she should be legally recognized as a de facto parent because she and Robin clearly expressed their intention to co-parent, and because the child recognized her as a parent. The court, however, responded that there existed "no statutory basis for plaintiff's claim of parental status."[122] The court affirmed the trial court's decision that the plaintiff lacked standing and that it was without jurisdiction to award her either custody or visitation.

This case follows *Halpern* in that the biological mothers in both cases resisted their former partners' attempts to obtain parental status. Unlike *Halpern*, however, the child in *Curiale* was approximately two and a half years old at the time the adult relationship was terminated. This would appear to situate the case within the window of opportunity outlined in *Halpern*. In other words, the child was old enough to recognize Angela as her mother, but not old enough to understand that, biologically speaking, she could have only one mother. Thus, the presumption of parenthood upon which the courts in both *Valle* and *Johnson* relied is apparently available here. Despite the availability of this child-based presumption, however, the court declined to even consider the possibility that a child could have two mothers, a proposition that clearly violated traditional constructions of family.

Nancy S.: In *Nancy S. v. Michele G.*[123] the co-parents, Nancy and Michele, began living together in August of 1969, and two months later

122. *Id.* at 521–22.

123. 279 Cal. Rptr. 212 (Cal. Ct. App. 1991).

they held a private "marriage ceremony." In 1979, they secured a donation of sperm that Michele used to impregnate Nancy via artificial insemination. In June of 1980, Nancy gave birth to the couple's first child. Several years later, repeating the procedure, they added a second child to their family. Michele was listed on both children's birth certificates as their father,[124] and both children were given her family name. By all accounts, both women held the children out publicly as their own and together they functioned as loving and involved parents.

In January of 1985, the couple separated and began sharing custody of the children. Following a jointly agreed upon visitation schedule both children spent considerable time in both homes. After approximately three years, Nancy sought to change the visitation schedule. Michele, unhappy with Nancy's proposed changes and unable to broker a compromise, turned to the courts for assistance.

To receive assistance from the courts, however, Michele had to gain standing. To accomplish this, she needed the court to recognize her as either a legal parent or a parental surrogate in whom they could invest parental rights. To this end Michele proposed the court could: 1) recognize her as a de facto parent, 2) recognize that she stood in loco parentis with regard to the children, 3) use equitable estoppel to prevent Nancy from denying her parental relationship with the children, or 4) recognize that she fits a "functional definition of parenthood."[125]

For her first proposition, Michele drew from *In re. B.G.*[126] in which the court had defined a de facto parent as one who, "on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care."[127] To this argument the court responded, "These facts may well entitle appellant to the status of a 'de facto' parent. It does not now, however, follow that as a 'de facto' parent appellant has the same rights as a parent to

124. At this time California birth certificates had only two spaces for parents' names and these were labeled "mother" and "father".

125. I obtained this information through an interview with Michele's attorney Amy Oppenheimer conducted in Oakland CA in 1996 and by reviewing briefs submitted in the case. *See* Appellant's Reply Brief to the Court of Appeal of the State of California First Appellate District Division One and the Amici Curiae brief to the Court of Appeal of the State of California First Appellate District Division One submitted by the Gay and Lesbian Parents Coalition International, The San Francisco Bay Area Lesbian/Gay Parenting Group, Carla A, Danielle H and Laurie F-H, and Ted W in Support of Defendant/Appellant. These briefs are unpublished and on file with the author.

126. 523 P.2d 244 (Cal. 1974).

127. *Id.* at 253 n.18.

seek custody and visitation over the objection of the children's natural mother."[128]

In making a claim of in loco parentis Michele cited the decision in *Loomis v. State*.[129] In that case, the court ruled that:

> a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to legal adoption, does stand *in locus parentis*, and the rights, duties and liabilities of such person are the same as those of a lawful parent.[130]

In response, the appellate court noted that in the context of torts:

> [T]he concept of in loco parentis has been used to impose upon persons standing "in loco parentis" the same rights and obligations imposed by statutory and common law upon parents. It has also been applied to confer certain benefits upon a child, such as more favorable inheritance tax treatment, or workers' compensation benefits. The concept of "in loco parentis," however, has never been applied in a custody dispute to give a nonparent the same rights as a parent. . . .[131]

Clearly, courts have used the concept of in loco parentis at various times to extend a variety of rights and benefits to children who would otherwise be disadvantaged simply because the people acting as their parents held no legal status as parents. The courts have determined that it is generally acceptable and proper to recognize putative parents as legal parents when doing so serves the best interest of children. It is hard to imagine anything more important to a child then maintaining an ongoing relationship with an adult who has acted as a primary parent for five and nine years respectively. Nonetheless, despite the fact that Michele was, by all accounts, an outstanding parent, the court declined to protect those parent-child relationships by extending parental status to her.

Interestingly, the court did mention that FCS 4351.5 allows judges to grant visitation to stepparents within the context of divorce settle-

128. *Nancy S.*, 279 Cal. Rptr. at 216.
129. 39 Cal. Rptr. 820 (Dist. Ct. App. 1964).
130. *Loomis*, 39 Cal. Rptr. at 822 (citation omitted).
131. *Nancy S.*, 279 Cal. Rptr. at 217 (citations omitted).

ments.[132] The court, however, declined to apply the law to this case, arguing that because Michele and Nancy's marriage was not legal in California, they remained outside the scope of the law.[133] Although theoretically the court could have set aside the marriage requirement arguing that its unavailability made it unenforceable with regard to lesbian and gay couples, it chose instead to argue that the law simply did not apply to lesbian and gay couples.[134]

In support of her equitable estoppel claim, Michele argued, in part, that "the children developed the deep psychological bonds of a parent-child relationship" with her based on Nancy's insistence that they were "equal parents both legally and functionally."[135] The court, however, declined to apply equitable estoppel to the case for two reasons. First, they argued that although estoppel has been used "for the purpose of imposing support obligations on a husband . . . [it] has never been invoked in California against a natural parent for the purpose of awarding custody and visitation to a nonparent."[136] Second, the court noted that:

> [While] [o]ther states . . . have begun to use the doctrine . . . to prevent a wife from denying the paternity of her husband . . . . even where . . . tests had excluded the husband as the natural father. . . . [T]he use of the doctrine . . . is rooted in "[o]ne of the strongest presumptions in law [i.e.] that a child born to a married woman is the legitimate child of her husband."[137]

As the court aptly noted, "[n]o similar presumption applies in this case."[138]

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132. *Id.* at 217.

133. Court records show that Michele and Nancy had participated in a private marriage ceremony and did at one time consider themselves to be a married couple. *Id.* at 214. The State of California, however, does not recognize the marriages of same-sex couples. For a discussion of the State's denial of marriage benefits to same-sex couples and how it affects the issues discussed here, see *infra* Part V.

134. Recall that in *Blythe*, for example, the court maneuvered around the requirement that a biological father accept his child into his home and treat it as if it were legitimate. It did so by arguing that Mr. Blythe, a single man, had no home into which to accept his child and thus could not be held accountable to that particular requirement. Setting the requirement aside, the court proceeded to grant Mr. Blythe parental status retroactively. *See supra* text accompanying notes 58–60.

135. Appellant's Reply Brief 10–11 (Sept. 2, 1990) (unpublished, on file with the author).

136. *Nancy S.*, 279 Cal. Rptr. at 217–18 (citations omitted).

137. *Id.* at 218 (citations omitted).

138. *Id.*

These arguments, however, strip the estoppel claim of its intent as originally spelled out in *Valle* and later reiterated in *Johnson*. In those cases the justices asserted that equitable estoppel could be used to assist the courts in maintaining parent-child relationships, provided it was determined that a child had developed a parent-child relationship with a person they believed to be their natural parent. In neither case was the social father married to the biological mother at the time the children were born, so technically, neither father fell under the scope of existing family law. This is precisely the reason the courts turned to equitable estoppel in the first place.

The court in *Nancy S.*, however, refused to make this shift. Although the evidence indicated that the children had developed a parent-child relationship with Michele and that a continuation of this relationship was important to their psychological well-being, the court declined to cite this evidence and use it as a basis for its decision.[139] Instead, the court employed a narrow interpretation of existing family law statutes, effectively ruling that the law of *Valle* and *Johnson* does not apply to women.

One plausible explanation for the court's refusal to support Michele's estoppel claim lies in the fact that Michele, as the co-mother of slightly older children, disrupted the legal fiction normally used to support the equitable estoppel claim. In other words, by the ages of four and eight, the children theoretically could have known enough about reproduction to understand that only one of their mothers could be a "natural" parent. If the legal fiction used to support the estoppel argument rests upon what the children believe regarding their biological parentage at the time of the trial, it would cease to function as soon as the children were old enough to understand the biological particulars of human reproduction.

If we compare the facts in *Valle* to the facts in *Nancy S.*, however, we find that in the first instance the children were one and five years old when they were transferred from their biological parents in Mexico to their aunt and uncle in California. At the time of the divorce they were nine and fourteen years old. The court in that case readily assumed that the eldest child, at five years old, would not have distinguished between his biological parents and his aunt and uncle, an assumption that stretches the imagination under any conditions. Likewise, they appear

139. There was considerable evidence presented at trial supporting Michele's claim that removing her from the children's lives would be psychologically harmful to them. *Id.* at 215 n.4.

ready to assume that this child never spoke with his younger brother about their life in Mexico or the existence of their biological parents, again a stretch. The children in *Nancy S.*, by comparison, were born into Nancy and Michele's family and it was the only family they had ever known. Within that family both Nancy and Michele referred to themselves and each other as "mother," and they encouraged the children to do so as well. At the time of separation these children were one and four years old and at trial they were four and eight years old.

It is arguable that if a presumption existed in *Valle* at the time of trial (based on what the youngest child believed), it must also have existed in *Nancy S.* (again, based on the beliefs of the youngest child). That the former court declared the presumption valid while the latter court specifically declared it invalid indicates that there may exist additional tacit assumptions regarding the use of the presumption. In *Valle*, the court was asked to secure the financial future of the children by using the presumption to legally tie the children to their non-biological father and then ordering him to pay child support. That the court had to broaden the legal definition of father to accomplish this goal appears to be of little concern, and indeed doing so fit neatly into already existing legal trends. In *Nancy S.*, however, the court was asked to secure the future emotional well-being of the children by using the presumption to legally tie the children to their non-biological mother and order her former partner to allow visitation. That the legal definition of motherhood would have needed to have been broadened to accomplish this goal appears to have disturbed the court, and indeed, doing so would have strayed from existing legal trends. Unlike in the previous father status cases where legal constructions of parenthood had been treated as malleable and readily manipulated in the service of other goals, in this case, the legal construction of parent—specifically mother—was treated as sacrosanct and defending it became the goal.

Finally, Michele urged the court to adopt "a 'functional' definition of parenthood in order to protect on-going relationships between children and those who function as their parents."[140] Michele argued that a "functional" parent would include "anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature."[141] The court rejected Michele's arguments, claiming that "expanding the definition of a 'parent' in the manner advocated by

140. *Id.* at 219.

141. Appellant's Reply Brief to the Appellate Court, *supra* note 125, at 12–13.

appellant could expose other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of step-parents or other close friends of the family."[142]

The court's claim, however, completely ignores the history of father status cases recounted above in which the courts have in fact increasingly expanded the definition of natural parent in the very ways suggested by Michele. That the courts have consciously limited this expansion to men begs the question: under what conditions is sex-based discrimination justifiable?

The key to the numerous contradictions raised in *Nancy S.* lies in the fact that the category "parent," as it is constructed under California law, has never been sex neutral. As *Nancy S.* makes clear, father and mother are not interchangeable parental categories even when biological reproduction is removed from the equation, i.e., when the courts are asked to assign parental status to non-biological parents.[143]

Gayden:[144] In 1991, the same appellate court heard an appeal brought by a father who had been ordered to share custody (specifically visitation) of his biological child with a former girlfriend. In this case, a custodial biological father and his girlfriend, not the child's biological mother, lived together for some period of time (the exact time is in dispute, but ranged from somewhere between six months and a little over one year). According to the girlfriend, during that time the child's biological mother had little or no contact with the child, leaving the husband's girlfriend to assume the role of mother, which she did. For approximately two years following their separation, which occurred when the child was twenty-one months old, the non-biological mother continued to visit the child on a regular basis and occasionally kept the child overnight in her home.[145]

The trial court granted the non-biological mother visitation, citing the parent-like relationship she had developed and maintained with the child. The appellate court, however, reversed, holding:

> [E]xcept where the legislature has otherwise specifically provided elsewhere in the Family Law Act, visitation rights

142. *Nancy S.*, 279 Cal. Rptr. at 219.

143. For a somewhat different argument as to why the third party doctrine should not be applied in lesbian co-mother custody cases, see Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377 (1994).

144. *In re* Marriage of Gayden, 280 Cal. Rptr. 862 (Cal. Ct. App. 1991).

145. *Id.* at 863.

> regarding a minor child may not be granted to a non-parent . . . over the joint opposition of parents having custody of the child merely upon a finding that such an award will promote the best interests of the child. . . . [V]isitation must not be allowed unless it is clearly and convincingly shown that denial of visitation would be detrimental to the child.[146]

Although the court denied visitation to this non-biological mother, it appears to have opened the door for non-biological mothers in cases to follow by arguing:

> As strong as the rights of [biological] parents must be, there may be instances in which a child would be significantly harmed by completely terminating his or her relationship with a person who has (1) lived with the child for a substantial portion of the child's life; (2) been regularly involved in providing day-to-day care, nurturance and guidance for the child appropriate to the child's stage of development; and (3) been permitted by a biologic[al] parent to assume a parental role. The needs of the child, which are the most important consideration, may sometimes require that a visitation award be made to such a "de facto parent."[147]

It was, however, many years before a court elected to apply this standard to other non-biological mothers. When it finally did, it set the bar considerably higher than anything previously considered for non-biological fathers.

Calvert: *Johnson v. Calvert*[148] was the California Supreme Court's first surrogacy case. It originated when Mark and Crispina Calvert, unable to reproduce a child themselves due to Crispina's prior hysterectomy (which had removed her uterus but not her ovaries), entered into a gestational surrogacy agreement with Anna Johnson. In January of 1990, a zygote created from Mark's sperm and Crispina's egg was medically implanted into Ms. Johnson's womb, successfully impregnating Ms. Johnson. Soon thereafter, however, relations between the Calverts and Ms. Johnson deteriorated and the Calverts filed a petition with the court "seeking a declaration that they were the legal

146. *Id.* at 867.
147. *Id.* at 868.
148. 851 P.2d 776 (Cal. 1993).

parents of the [as yet] unborn child."[149] Ms. Johnson responded by arguing that she, and not Ms. Calvert, was in fact the child's legal mother.

Ms. Calvert's argument rested on the notion that biological consanguinity is fundamental to legal constructions of natural parenthood. Individuals, she argued, become parents through the act of genetic reproduction. She and Mr. Calvert are the child's rightful and legal parents, she argued, because the child is their genetic offspring.[150]

Ms. Johnson countered with the argument that gestation, and not biological consanguinity, is in fact the central component of legal constructions of natural motherhood. During her nine-month pregnancy, she argued, she and the child had become deeply emotionally bonded with one another, a state unique to natural motherhood that neither of the Calverts was able to achieve.

Although Ms. Johnson appears to have had precedent on her side,[151] the trial court rejected her claim arguing that, "Anna's relationship to the child is analogous to that of a foster parent, providing care, protection, and nurture [sic] during the period of time that the natural mother, Crispina Calvert, was unable to care for the child . . . ."[152]

The trial court's decision is interesting because it appears to reverse legal constructions of motherhood and fatherhood. Traditionally, courts have recognized women who give birth to children as the legal mothers of those children independent of any other familial relationships. Fathers, on the other hand, are recognized as legal parents through the familial relationship they develop with their child's mother. In fact, the courts have justified differences in legal constructions of motherhood and fatherhood by arguing that women develop an emotional bond with their children during pregnancy while men do not.[153] Indeed, numerous courts, including the United States Supreme Court,[154] have

149. *Id.* at 778.

150. *Id.* at 779.

151. The U. S. Supreme Court, for example, has distinguished biological mothers from biological fathers by arguing that women form a relationship with their children while they are in utero, a condition men (and presumably others who do not gestate a fetus) cannot possibly achieve. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 665 (1972) (Burger C.J., dissenting); Caban v. Mohammed, 441 U.S. 380, 397 (1978) (Stewart, J., dissenting). This assertion operates tacitly in many of the cases discussed above as well. *See supra* notes 37, 42 and accompanying text.

152. Valerie Hartouni, *Breached Birth: Reflections on Race, Gender, and Reproductive Discourse in the 1980's*, 2 CONFIGURATIONS 73, 81 (1994) (quoting the trial transcript).

153. *See supra* note 151.

154. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 665 (1972) (Burger C.J., dissenting); Caban v. Mohammed, 441 U.S. 380, 397 (1978) (Stewart, J., dissenting).

argued that it is this special pre-birth relationship that pregnant women form with their fetuses (along with subsequent strong and dependable mothering behaviors this relationship theoretically fosters), and not biological consanguinity, that has made women who carry fetuses indisputable parents. And it has traditionally been the theoretical existence of this unique relationship that has allowed the courts to treat biological mothers and biological fathers differently from one another. Indeed, biological fathers are routinely denied parental status based on the idea that biology alone does not make one a parent.[155]

In a similar vein, Judge Parslow argued that maternal bonds "were likely to occur . . . only within the sanctity of a proper family unit among 'married mothers with husbands whose babies they carry.' "[156] This statement also appears to have reversed legal constructions of motherhood and fatherhood by treating Ms. Johnson more like a biological father—one whose relationship to a child is based on his place in that child's family—than the birth mother she was.

Responding to an appeal filed by Ms. Johnson, Justice Sills ventures even further along this path by arguing that:

> There is not a single organic system of the human body not influenced by an individual's underlying genetic makeup. Genes determine the way physiological components of the human body, such as the heart, liver, or blood vessels operate. . . . The fact that another person is, literally, developed from a part of oneself can furnish the basis for a profound psychological bond.[157]

It is not clear why genetics suddenly became of paramount importance to the courts, especially considering their long history of downplaying its importance in favor of other factors (the pre-birth bonding experience for mothers and the marital relationship for fathers). What is clear is that the courts have used this reasoning to remove a child from its birth mother for the purpose of placing it with its genetic parents.[158]

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155. *See supra* note 41 and accompanying text.

156. Hartouni, *supra* note 152, at 81.

157. Anna J. v. Mark C., 286 Cal. Rptr. 369, 380–81 (Cal. Ct. App. 1991).

158. Dolgin, *supra* note 41, at 676 (arguing that the courts, faced with a choice between placing the child with a single, poor, African-American mother and a married, middle class, white/Filipino couple, delved into biology as a way of rationalizing their choice of the Calverts over Ms. Johnson). *See also* Deborah R. Grayson, *Mediating Intimacy:*

The *Calvert* case is unique because it represents the first time the courts are faced with a claim to parental status that calls into question the biological model the courts are accustomed to invoking when making mother status decisions. When faced with competing claims to mother status—both of which invoked a portion of the traditional model of reproduction but neither of which conformed entirely to that model—the courts chose the woman who, when joined with the child's biological father, most closely approximated the traditional family.[159]

Moschetta: The appellate case *In re Marriage of Moschetta*[160] was presented as a traditional surrogacy case that began when Robert and Cynthia Moschetta hired a surrogate to be inseminated with Robert's sperm.[161] The surrogate became pregnant, carried the fetus to term, and then turned the child over to the Moschettas who began raising it as their own. Six months later, however, the Moschetta's marriage deteriorated and Robert left the couple's home taking the child with him. Cynthia, seeking a legal separation, petitioned the court to establish herself as the child's legal mother. Shortly thereafter, the surrogate mother reentered the picture arguing that she, and not Cynthia, was in fact the child's legal mother.

The trial court sided with the surrogate mother, declaring Robert the child's legal father and the surrogate it's legal mother. It then ordered those two adults to share legal and physical custody of the child. Robert appealed the decision, seeking to have Cynthia declared the child's legal mother. In his appeal Robert argued that a gender-neutral application of the Uniform Parentage Act would allow for the legal recognition of both presumptive fathers and presumptive mothers. Put another way, by simply replacing the UPA'S gendered term "father" with the gender-neutral term "parent" the courts could recognize wives, like Cynthia, as presumed parents.

The appellate court declined to award Cynthia parental status arguing that "in cases directly involving human reproduction, individuals of different sexes may be distinguished on the basis of

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Black Surrogate Mothers and the Law, 24 CRITICAL INQUIRY 525, 525–46 (1998); Hartouni, *supra* note 152, at 73–88.

159. Although the California Supreme Court used a somewhat different rationale—finding that Ms. Calvert was the legal mother because she intended to procreate the child for the purpose of becoming its parent—it reached the same conclusion. *Johnson*, 851 P.2d at 782.

160. 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994).

161. Cynthia Moshetta was sterile. *Id.* at 895.

different reproductive roles."[162] In essence, the court argued, it is reasonable to systematically exclude all women from the umbrella of parental responsibilities and protections created by the Presumed Father Statute and later the UPA because, after all, women become biological mothers differently than men become biological fathers.

While the model of biological reproduction being invoked here may be factually accurate—men and women do indeed become parents through different biological processes—the relevance of the model remains unclear. After all, the very purpose of the Presumed Father Statute, and later the UPA, was to allow the courts to grant legal father status to married men who are not the biological fathers of their wives' children. To exclude all women from these statutes is to impose biological reproduction on women in a way that it is not imposed on men. Women become natural mothers only by carrying out an actual act of biological reproduction, while men become natural fathers merely by possessing the organs necessary to successfully carry out the act of biological reproduction.

The *Moschetta* court further argued that it could not grant Cynthia presumed parental status because the Presumed Father Statute clearly states that a man must be fertile and theoretically capable of impregnating his wife for the statute to be applicable. As was made clear by the surrogacy agreement, Cynthia was in fact sterile and thus physically incapable of producing a child.

However, California Family Code section 7613 specifically protects the parental rights of sterile husbands by including them under the Presumed Father Statute provided they support their wives' reproductive behavior.[163] As there is no question that Cynthia supported Robert's reproductive behavior, a gender-neutral reading of that law would make it applicable to Cynthia as well. If applied, it would have made Cynthia's sterility irrelevant to her presumptive parenthood.

Finally, once again attempting to convince the court to embrace a gender-neutral reading of the law, Robert argued:

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162. *Id.* at 896 n.8.

163. CAL. FAM. CODE § 7613(a) (West 1994) "If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived." Furthermore, the law states that, "The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of the child thereby conceived." CAL. FAM. CODE § 7613(b) (West 1994).

> [B]ecause he and Cynthia took [the child] home from the hospital and Cynthia afterwards held the child out as her own, Cynthia should be presumed to be the natural mother because she "received" the child into her home. Therefore, just as Robert's "receiving" [the child] into his home would establish that he was the presumed father, Cynthia's "receiving" [the child] into her home made Cynthia the child's presumed mother.[164]

To this assertion the court responded, "[o]n the simplest level, the argument is unpersuasive because Cynthia never held [the child] out as her 'natural' child. There never was any doubt that [the child] has no biological, natural or genetic connection with Cynthia."[165] In short, the court argued that Cynthia, as a non-biological mother, simply did not have the capacity to effectively mimic the role of the biological mother.

To fully unpack this argument we must begin by dividing the legal construction of parenthood into its corresponding domains: motherhood and fatherhood. Both constructions begin with the reproductive equation in which men and women play distinctly different roles. The male role is generally brief in duration and hidden from public view—it consists of the male's ejaculation of sperm, most often directly into a woman's vagina, and usually in private.[166] The female role, on the other hand, occurs over a much longer period of time and is considerably more visible. While the initial act of conception often occurs in private, the gestation of a fetus creates changes in the body that make most pregnancies highly visible. Pregnancies culminate in the physical act of giving birth, an act that is also frequently witnessed by others, including medical professionals, family members, and close friends. Finally, many biological mothers breast-feed their infants for a period of time following the birth, an act of mothering that publicly reinforces the biological connection between the mother and infant.

In arguing that "[t]here never was any doubt that [the child] has no biological, natural or genetic connection with Cynthia", the court invoked this biological model of reproduction as the standard against which it measured Cynthia's acts of motherhood. In other words, the court asked the question, "[h]as the parent before us adequately per-

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164. *Moschetta*, 30 Cal. Rptr. 2d at 897 (footnote omitted).

165. *Id.*

166. Of course, today, some men become biological fathers by ejaculating into a cup which is then turned over to a doctor who introduces the specimen directly into a women's vagina, uterus, or even a test-tube, where it is united with an egg.

formed his or her sex-based role in the reproductive scenario?" This is a very slippery question, however, because the courts in presumed parent cases are not dealing with biological parents. In most presumed parent cases the courts are dealing with non-biological parents. This basic fact fundamentally changes the equation. While the courts attempt to frame their discussions in biological terms, in reality they are talking about gendered behavior. What they are really asking is, "[h]as the parent before us performed their parenting duties in a gender-appropriate way?" If the answer to this question is yes, the court assigns parental status and if the answer is no, it rebuffs claims to parental status.

For men, an affirmative answer to this question generally requires little more than a judge who is able to imagine that the alleged father successfully completed an act of sexual intercourse with his wife around the time of conception. Indeed, as the decisions in both *Valle* and *Johnson* made clear, the presumption is all about men's ability to mimic the male reproductive role, not actual biological reproduction.

For women to obtain parental status when measured against this model, however, the court must go much further. In addition to imagining that a woman successfully completed an act of sexual intercourse with her husband around the time of conception, judges must imagine that she carried the fetus for roughly nine months, that she gave birth, and even possibly that she was capable of breast-feeding the infant following the birth. This, according to the *Moschetta* court, is simply too much to imagine.

The obvious problem with this model is that it divides social parents (individuals who by definition have not biologically reproduced the children they are raising) into distinctly different groups based on their reproductive organs, i.e., by sex. The standard against which social fathers and social mothers are measured is sex-based even though their parenting behavior is not sex specific. The result is that one group has access to socially constructed advantages that the other does not.

These cases make clear that a complicated relationship exists between an alleged parent's sex (the physical reproductive organs s/he possesses and the related reproductive role to which they are assigned by nature), his/her gender (the social role of mother or father assigned to men and women by society), and parental status (the likelihood a court will assign a social parent legal parental status). Men who become social fathers are significantly more likely than women who become social mothers to be declared legal parents. This fact is underlined by the *Moschetta* court's assertion that the laws used to justify the assignment of

natural father status to non-biological fathers are "rooted in the old law of illegitimacy" and therefore not applicable to women.[167]

V. Understanding the Role of Marriage in Parental Status Decisions

Historically, family law in the United States has been derived using the natural law assumption that the right of individuals to raise their biological offspring exists independently of any governmental law or regulation.[168] This right, proponents claim, is pre-political—a condition "the law presupposes rather than creates."[169] Relying upon this assumption, courts have ruled that, "[u]nless parents are left free to raise their own children, the entire social fabric will be destroyed: 'man' will be 'denaturalized,' the 'instincts of humanity stifled, and one of the strongest incentives to the propagation and continuance of the human race destroyed.'"[170] Through statements of this sort, courts historically have constructed a system of family recognition that assumes biological consanguinity.[171]

This assumption is fundamental to early constructions of both retroactive legitimation and presumed fatherhood. Retroactive legitimation allowed courts to recognize and support biological relationships that existed between unmarried fathers and their natural children, while early presumptions of fatherhood required at least an assumption that a husband was the biological father of his wife's child(ren).[172]

Judith Butler argues, however, that the origin story of the biologically-based family, built as it is upon an "authoritative account about an irrecoverable past, makes the constitution of the law appear as

167. *Moschetta*, 30 Cal. Rptr. 2d at 897.

168. Bartlett, *supra* note 22, at 887–88 (citations omitted).

169. *Id.*

170. *Id.* at 887.

171. It is important to note, however, that despite the apparently all-encompassing nature of judicial constructions of the traditional family, in practice, the putatively natural rights of biological parents have often been abrogated, as for example in state laws that denied these rights to slaves, see Franklin & Moss, *supra* note 24, at 53–161 and court decisions that have denied custody to lesbian and gay parents, see *supra* note 25. Indeed, the very existence of these counterexamples illuminate how the law is used to construct some parental relationships as "natural" while maintaining others as either unnatural or nonexistent.

172. It is worth noting, however, that both the presumption of biological consanguinity and marriage have recently been removed from the equation in some instances. *See supra* note 109.

a historical inevitability."[173] The utility of this particular origin story is that it creates a legal fiction that separates the origin of the traditional nuclear family from that of all other family types, constructing the traditional nuclear family as the only natural family type. In doing so, it legitimizes the legal oversight of "artificial" families, allowing the legislature to strictly control the types of families that are created.[174]

Building on these natural law assumptions, state legislatures, including California's, have constructed the institution of marriage in ways that specifically strengthen the ideological melding of marriage and biological reproduction. For example, marriage becomes legally available around the same time that human reproduction becomes biologically possible. Marriage legally joins two presumably fertile adults (always one male and one female) to each other, preferably before, but, when necessary, after, the propagation of children begins.[175] Indeed, marriage laws provide male/female couples with a relatively fast, easy, and cheap means of forming a legally recognizable family unit. While only heterosexual (theoretically monogamous) couples may marry, those who do so gain access to a myriad of public and private benefits designed to support "legitimate" families in our society.[176]

As courts in Hawaii and Vermont have recently determined, however, legal constructions of marriage that preclude same-sex couples promote sex-based discrimination.[177] To create laws that allow men to form legally recognizable families with women, while preventing

173. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY, 36 (1990).

174. It also supports state and federal sanctioning of the traditional nuclear family, which facilitates its location at the top of a governmentally-promoted hierarchy of family types.

175. Early polygamy laws provide an example of marital unions that, while not limited to one man and one woman, still use biological reproduction as their basis. While a man could marry multiple wives, he could not marry another man nor could his wives marry each other.

176. According to the U. S. General Accounting Office, in 1997 the federal government alone maintained literally hundreds of laws designed to funnel a wide range of financial benefits directly to families formed through marriage. The federal government privileges married couples regarding Social Security benefits; housing and food stamps; veteran's benefits; taxation; federal civilian and military service benefits; employment benefits; immigration and naturalization; trade, commerce, and intellectual property; financial disclosure and conflict of interest; crimes and family violence; loans, guarantees, and payments in agriculture; federal natural resources; and Indian affairs. GENERAL ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT (GAO/OGC-97-16) (1997).

177. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Baker v. State, 744 A.2d 864 (Vt. 1999).

women from forming legally recognizable families with other women or men from forming legally recognizable families with other men, creates a system that fundamentally discriminates on the basis of sex. It is, after all, the sex of the individuals involved that holds the entire equation together. To deny Jill the opportunity to marry Diane, while extending that opportunity to Dennis simply because Jill is female and Dennis is male, is to differentiate between Jill and Dennis on the basis of their sex.

If marriage laws are themselves discriminatory, all of the adjoining laws that select married couples for preferential treatment are equally suspect. A woman experiences sex-based discrimination when she is refused the right to legally marry a same-sex partner, and this discrimination is compounded if, based on this initial act of discrimination, she is then denied familial rights, responsibilities, and/or benefits *because* she is not legally married. This is largely what is occurring in lesbian co-mother custody cases. The California courts repeatedly refuse to extend parental rights to lesbian non-biological mothers, citing the fact that they never legally married the partners with whom they developed a co-parenting relationship.[178] The courts refuse them parental rights arguing that they are ineligible for such rights because they failed to establish their parent-child relationships within the context of legally recognizable families.[179]

As the analyses of the aforementioned surrogacy cases suggest, however, this is only one piece of a larger story.[180] As the decisions in *Calvert* and *Moschetta* reveal, the institution of marriage itself is fundamentally gendered. Husbands, because they are male, access an enhanced set of marriage-based rights and benefits compared to the rights and benefits available to wives. Laws like the Presumed Father Statute, the Retroactive Legitimation Statute and later the UPA, because they are written and interpreted in sex-specific ways, fundamentally gender the rights and benefits available to men and women through marriage. Husbands, for example, may consent to the reproductive behavior of their spouses with the expectation that they will be recognized as legal parents if and when their spouses successfully reproduce. Wives, on the other hand, do not enjoy this legal right. Husbands may become legal fathers simply by accepting children into their homes and treating them as their own while no comparable means of achieving parental status exists for wives. The State's desire to ideologically tie marriage to

178. *See supra* notes 121, 123 and accompanying text; *infra* notes 198, 206 and accompanying text.

179. *See id.*

180. *See supra* notes 148, 160 and accompanying text.

biological reproduction results in a sex-based system that discriminates against non-biological mothers.

By combining these analyses we can begin to understand how the gendered nature of the institution of marriage affects the parental rights of all men and women, whether married or not. First, marriage divides the adult population into two groups; those who live in legally recognizable families, and those who do not. This division is extremely important to adults and children living in two-parent families. Adults who establish their parent-child relationships within the context of marriage gain a level of recognition and protection for those parent-child relationships that are largely unavailable to unmarried adults. Adults excluded from marriage, such as those who choose to co-parent with partners of the same sex, must utilize other legal avenues, if available, for protecting their parent-child relationships. One such avenue is the second parent adoption.[181] As previously noted, however, extra-marital avenues for securing parent-child relationships are expensive and legally tenuous and none carry all of the legal rights and protections available through marriage.[182]

But marriage itself further subdivides the adult population into two groups: those who marry men (always women) and those who marry women (always men). As demonstrated in the analyses above, individuals who marry women gain access to an enhanced set of parental rights, responsibilities, and protections when compared to individuals who marry men.

As a result, a hierarchical system for categorizing non-biological parents has developed. Non-married (usually lesbian) non-biological

181. While some unmarried non-biological parents have been able to secure legal recognition of, and protection for, the relationships they form with their partners' children through a procedure known as the second parent adoption, these adoptions are both expensive and time consuming. Even in California, where these adoptions were first pioneered over fifteen years ago, many judges refuse to grant them, arguing that their legality remains suspect. *See* Susan E. Dalton, *Protecting Our Parent-Child Relationships: Understanding the Strengths and Weaknesses of Second-Parent Adoptions, in* QUEER FAMILIES QUEER POLITICS, CHALLENGING CULTURE AND THE STATE 201–20 (Mary Bernstein & Renate Reimann eds., 2001). The recent passage of Assembly Bill 25, effective January 2002, should make it easier for unmarried non-biological co-parents to secure their parental rights by allowing them to secure legal adoptions using the stepparent adoption procedure. ASSEMB. 25, 2001–02 Sess. (Cal. 2001).

182. Because the second parent adoption process is a judicial rather than a statutory creation, its legal viability is questionable. Indeed, in a recent appellate case the court questioned the legal viability of all such adoptions. *See* Sharon S. v. Superior Court, 113 Cal. Rptr. 2d 107, 113 (Cal. Ct. App. 2001), *review granted*, 39 P.3d 512 (Cal. Jan. 29, 2002) (No. S102671).

mothers exist at the bottom of the hierarchy. These non-biological parents are frequently assigned/awarded no parental rights or responsibilities. Married non-biological mothers exist in the middle of the hierarchy. Through marriage, these non-biological parents achieve an extremely limited set of parental rights. Married non-biological fathers exist at the top of the hierarchy. Marriage for them frequently carries an extended package of parental rights and responsibilities.[183] In other words, the courts' assignment of parental status (and all of the rights and responsibilities that adhere to that status) is based primarily on an adult's position in this parenting hierarchy, a position that is based on his/her sex and marital status.

VI. Planting Seeds of Change

In addition to creating inequality between men and women, the courts' sex-based application of the UPA uncritically ties legal constructions of motherhood to traditional understandings of women as mothers and traditional constructions of family. This becomes increasingly apparent and burdensome as new reproductive scenarios and imaginatively different family constellations emerge in today's society. As the final analysis below reveals, a yawning precipice is developing between the realities of family life and the parameters of family law. As the cases in this section make clear, existing legal constructions of mother and family, mired as they are in traditional constructions of gender and sexuality, make it extremely difficult for judges to recognize and support many of the parents and families that come before them. This failure to recognize and support non-traditional parents and the families they create renders the courts unable to adequately protect the physical and emotional needs of children raised in these families.

Mental health professionals overwhelmingly argue that maintaining the relationships children form with social parents (male or female) is critically important to the future mental, emotional, and physical health

183. Gay non-biological fathers are excluded from this discussion because the California courts have yet to hear a parental status case involving a gay non-biological father. For a discussion of why gay men parent and co-parent at rates far lower than lesbian women, see Susan E. Dalton, We are Family: Understanding the Structural Barriers to the Legal Formation of Lesbian and Gay Families in California 300–02 (1999) (unpublished doctoral dissertation, University of California at Santa Barbara) (on file with author).

of children.[184] Even so, many judges concede that it remains extremely difficult to legally recognize and support social mothers, especially when these mothers are lesbian. Indeed, judges serious about protecting the health and well-being of children raised in non-traditional families are having to scramble to develop new ways of legally recognizing these families and the parent-child relationship created within them.

Buzzanca: The appellate case *Buzzanca v. Buzzanca*[185] was initiated by a wife seeking her husband's support of a child she obtained through a gestational surrogacy agreement. In this case, a married couple, John and Luanne Buzzanca arranged to have an embryo, genetically unrelated to either of them, implanted in a surrogate. Following the implantation procedure, but before the child's birth, Luanne and John separated. After the child was born Luanne took custody and began raising it as her own. When John filed for divorce, Luanne sought to have herself recognized as the child's legal mother and John declared its legal father so that the court would order John to pay child support.

John responded by noting that neither he nor Luanne was biologically related to the child nor had either legally adopted it. Therefore, he argued, neither he nor Luanne was a legal parent and as a non-parent he could not be held financially responsible for the child. If anything, he concluded, the surrogate was the child's natural mother and her husband was its presumed father.[186]

The superior court ruled that the child had no legal parents. After accepting a stipulation that neither the surrogate nor her husband were the child's legal parents, it concluded that Luanne "could not be the mother because she had neither contributed the egg nor given birth. And John could not be the father, because, not having contributed the sperm, he had no biological relationship with the child."[187] The appellate court, however, reversed, declaring both Luanne and John legal parents.[188]

This case is important because it represents the first published decision in California in which the courts recognize, as a legal parent, a social mother who has no biological, physical, adoptive, or stepparent

184. *See* The Bureau of Nat'l Affairs, Inc., *Opinion of the Hawaii Circuit Court, First Circuit*, 23 FAM. L.REP. 2001, 2003–09 (1996).

185. 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

186. The surrogate mother strenuously opposed John's attempts to foist legal motherhood upon her and requested, per their surrogacy agreement, that she and her husband be released from the suit. *Id.* at 282.

187. *Id.*

188. *Id.* at 293.

relationship to the child. How the court accomplishes this feat reveals the many differences that continue to exist in current legal constructions of mother and father status.

The appellate court began by chastising the superior court's failure "to consider the substantial and well-settled body of law holding that there are times when *fatherhood* can be established by conduct apart from giving birth or being genetically related to a child."[189] By modifying elements of the UPA[190] and elements of the Artificial Insemination Statute,[191] and then combining the two, the court determined that it could recognize John's parental status. While both statutes specifically apply to married men whose wives give birth—a requirement that would theoretically make them inapplicable here—the court, following what has become something of a tradition, simply ignored this technicality and attached parental status to John.[192]

The court then extended parental status to Luanne by arguing that she and John together represented a marital unit to which parental status may be attached. Here the court reasoned:

> Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband *and* wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. . . . The only difference is that in this case—unlike artificial insemination—there is no reason to distinguish between husband and wife.[193]

As in previous cases, the driving social force in this case appears to be the desire to secure the financial future of an otherwise fatherless child by legally tying that child to the closest available father figure: a male who had previously, by word or deed, agreed to assume the role of father. What is new, however, is that the court devised a way to grant parental status to a social mother. But there is a catch. John and Luanne's parental statuses were legally constructed using somewhat

189. *Id.* at 282.

190. Specifically those parts relating to presumed fatherhood. *Id.* at 284.

191. CAL. FAM. CODE § 7613 (West 1994).

192. This was accomplished through a broad interpretation of the marital requirement. Although the statutes are clearly intended to apply to married men whose wives give birth, the court reinterpreted them as applicable to any married man who has consented to the reproductive behavior of a woman for the purpose of producing a child he intends to raise within his family. *Buzzanca*, 72 Cal. Rptr. 2d at 286.

193. *Id.* at 282.

different rationale. As a result, the ensuing mother and father statuses remain hierarchically ordered. The court granted John parental status based on the fact that he was married to Luanne and had consented to a woman's reproductive behavior on his behalf. The court could have stopped at this point because, as we have witnessed both here and in *Valle*,[194] a man can be granted parental status independent of his wife.[195]

Luanne's parental status, on the other hand, was dependent upon John's parental status. What the court did was to identify a path through which it could grant John parental status and then unite Luanne, through her marriage, to John and move them down the path to parental status as a singular unit. Luanne, the court argued, could be granted parental status because she "is situated like a husband in an artificial insemination case."[196] By merging Luanne with John in this way, the court temporarily grants Luanne honorary male status allowing her to side-step all the hurdles the law presently places in the way of non-biological mothers.

It is important to note both the unusual parameters of this case and the resulting restrictive nature of the decision, because both severely limit the group of women to whom the decision is likely to be deemed applicable in the future. The decision, for example, does nothing to alter the language of existing statutes that continue to refer specifically to men and husbands, nor does it alter the role assigned to mothers under the statutes (mothers remain women who bear children). By recognizing Luanne as "like a husband" instead of modifying the language of the statutes to make them clearly applicable to women as women, the court limits the decision to women who, with their husbands, enter into gestational surrogacy agreements.

Finally, the court itself distinguishes this decision from those rendered in other non-biological mother cases (specifically lesbian mother cases) by arguing:

> [W]e are dealing with a man and woman who were married at the time of conception and signing of the surrogacy agreement, and we are reasoning from a statute, section 7613, which contemplates parenthood on the part of a married man without biological connection to the child born by his wife. . . . It is enough to say that because the *Nancy S.* and

194. *See supra* notes 84–90 and accompanying text.

195. Recall that in *Valle* Manuel was declared a legal father although the court never addressed his wife's parental status. *See supra* notes 84–90 and accompanying text.

196. *Buzzanca*, 72 Cal. Rptr. 2d at 288.

> [*Z.C.W.*] cases . . . involve[ed] *non* married couples at the time of the artificial insemination, they are distinguishable.[197]

With that said, the court neatly retains traditional divisions between families created with and without the benefits of marriage as well as gendered constructions of parent and family. The statement leaves little doubt that the court did not intend to recognize or support non-biological mothers who create parent-child relationships outside the boundaries of traditional families.

Z.C.W.: In the appellate case *In re Guardianship of Z.C.W.*,[198] a lesbian non-biological mother attempted to secure visitation with two children she had helped raise within the context of a lesbian-headed two-parent family. Cognizant of the courts' previous refusals to recognize the parental status of non-biological mothers, she attempted to sidestep the issue of motherhood entirely by framing her request as a guardianship action.

This guardianship action was unique, however, because guardianship actions traditionally seek a change of custody, i.e., that the children be removed from the parent's home and placed with the guardian ("full guardianship"). To support guardianship actions the courts generally require proof that a failure to remove the child(ren) from the home of the custodial parent(s) will result in physical, emotional or mental harm to the child(ren).

In this case, however, the non-biological mother used the guardianship action to seek visitation only. She did not argue that the biological mother presented a danger to the children nor did she seek full custody of the children. Instead, she argued that the children would be harmed if their biological mother were allowed to unilaterally sever the parent-child relationship that existed between her and the children.

The superior court responded by noting that while unusual, this guardianship action appeared to represent the only means by which lesbian non-biological parents in California might successfully seek court-ordered contact with children with whom they have parent-like relationships. Agreeing to hear the case as a "non-traditional" guardianship action, the court then turned to the issue of detriment. Building on its categorization of the case as "non-traditional", the court further determined that "a limited 'visitation guardianship' should be granted if it is proven that a natural parent harms her children unnecessarily by deny-

197. *Id.* at 287 n.11.

198. 84 Cal. Rptr. 2d 48 (Cal. Ct. App. 1999).

ing them visitation with a meritorious de facto parent who is out of favor."[199]

The court determined that while it might be willing to grant limited visitation to a "meritorious" de facto parent in a similar case, the behavior of the non-biological mother in this case was not meritorious enough to justify such a decision.[200] Instead, the court determined that the non-biological mother "was a de facto and psychological parent of the children during the time she lived with respondent but that she subsequently lost that status."[201] Consequently, "the trial court denied the petition for a guardianship, finding that there was no evidence of 'any detriment of significance' to the children . . . ."[202]

On appeal the decision was affirmed. The court quoted the *Curiale* opinion: "The Legislature has not conferred upon one in plaintiff's position, a nonparent in a same-sex bilateral relationship, any right of custody or visitation upon termination of the relationship."[203]

While the non-biological mother in this case failed to gain court-ordered visitation, she did succeed in convincing the trial court that there exists legal grounds upon which a claim by a non-biological mother may be heard. By situating herself as a legal guardian instead of a legal parent, she successfully maneuvered around the restrictive definition of parent contained within the UPA and gained the right to be recognized as a party able to bring suit.[204]

Ironically, after strategically abandoning her claim to mother status as a condition of having her case considered, the non-biological mother was then required by the court to prove that she was not just a parent but a super-parent in order to win the case. It is worth noting that very few, if any, of the non-biological fathers discussed above would have been deemed parents had their parenting behavior been evaluated using this standard.[205] Sadly, it may have been the very grounds upon which

199. Guardianship of Z.C.W. and K.G.W., County of Alameda No. 248043-1, 3–4 (Cal. Super. Ct. 1997).

200. *Id.* at 4.

201. *In re Guardianship of Z.C.W.*, 84 Cal. Rptr. 2d at 50.

202. *Id.* The appellate court noted that it had been a full year since the last visit between the non-biological mother and the children and that in that time the children had apparently adjusted to her absence. *Id.* at 49.

203. *Id.* at 50 (quoting Curiale v. Reagan, 272 Cal. Rptr. 520, 520 (Ct. App. 1990)).

204. The appellate court attempted to pass the ball to the legislative branch, stating: "We conclude that this issue is more appropriately addressed to the Legislature and that appellant is not entitled to any relief here." *Z.C.W.*, 84 Cal. Rptr. 2d at 49.

205. Indeed, recently in *In re Nicholas H.*, 46 P.3d 932, 934–35 (Cal. 2002), the California Supreme Court granted parental status to a man with several serious legal

the non-biological mother gained the hearing—the fact that she was a guardian and not a parent—that opened the door to the intense scrutiny under which she eventually lost her right to continue parenting. Had she been a legitimate parent in the eyes of the court, her legal rights as a parent (including maintaining a relationship with her children) would have far outweighed the less than meritorious behavior that occurred in response to the biological mother's refusal to allow her visitation with the children. Indeed, some of the very same behavior that hurt her, including her surreptitious visits with the children and her insistence on sending them letters and contacting them by telephone, would probably have worked in her favor.

Olivia J.: In the appellate case *In re Guardianship of Olivia J.*,[206] the trial court dismissed (without an evidentiary hearing) a claim of limited guardianship filed by a lesbian non-biological mother who sought court-ordered visitation with her former partner's biological child.[207] As in *Z.C.W.*, the non-biological mother in this case argued that the biological mother's decision to sever the relationship between her and the child was psychologically detrimental to the child.

Dismissing the case, the trial court reasoned that the non-biological mother "is not a parent of the child and therefore, in the absence of an allegation of abuse, neglect or abandonment, [she] could not, as a matter of law, establish that parental custody was detrimental to the child."[208] Despite noting that the non-biological mother could be a de facto parent, the court concluded that "as a matter of law, the loss of the minor's relationship with [the non-biological mother] 'is not the kind of detriment which can provide the legal basis for a guardianship when the guardianship is opposed by a parent.'"[209]

Reversing this decision, the appellate court argued that a non-biological mother can gain limited visitation if she successfully establishes that the "loss or termination of a child's relationship with [her is].

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infractions against him including arrests for domestic violence (beating the child's mother) and failure to complete a court-ordered anger management course. The court noted that the non-biological father to whom they eventually assigned parental status "was not a perfect candidate for fatherhood, if any such there be. . . . [t]he strength of the presumption under section 7611(d) does *not* depend on the presumed father's being a paragon. What is dispositive is the presumed father's relationship with, and responsibility for, the child." *Id.* at 935 n.2.

206. 101 Cal. Rptr. 2d 364 (Cal. Ct. App 2000).

207. *Id.* at 366. The trial court determined that "it had no power to order visitation unless a temporary or permanent guardian had been appointed." *Id.* (footnote omitted).

208. *Id.*

209. *Id.* at 367 (citation omitted).

. . detrimental to the child."[210] It noted, however, that "the right of parents to retain custody . . . is fundamental and may be disturbed '. . . only in extreme cases of persons acting in a fashion incompatible with parenthood.'"[211] Reemphasizing the non-biological mother's status as a nonparent, the court concluded that it is proper to gauge her parental behavior using an exceptionally high standard.

The decisions in *Z.C.W.* and *Olivia J.* create a quasi-parental status for non-biological mothers who construct two-parent families with female partners, forming parent-child relationships with their partners' biological children.[212] Because these mothers cannot marry their partners, they are routinely classified as non-family members and thus nonparents. As non-parents they are held to an exceptionally high standard of parenting. If found to be truly exceptional parents, they are then granted a limited right to ongoing visitation with the children for whom they had been primary parents.

VII. Conclusion

The preceding analysis illustrates that women who form parenting relationships with children to whom they are biologically unrelated are treated differently under the law than are men who form parenting relationships with children to whom they are biologically unrelated. Men who assume the role of parent for children living in their families are frequently assigned parental status while women who assume the role of parent for children living in their families are almost always denied parental status. To routinely assign men a status that is commonly denied women under similar circumstances is to discriminate on the basis of sex.

Sex-based discrimination in the assignment of parental status is not the result of lawmakers' intent to unfairly disadvantage women in relation to men. It is, rather, the outgrowth of a century and a half of legislative and judicial attempts to address sex- and gender-based disparities that are the result of biological (sex) and socially constructed (gender) differences in parenting. It is important to note, however, that while sex-based differences in reproduction do exist, laws such as the

210. *Id.* at 368.

211. *Id.* at 368–69 (citations omitted).

212. I identify this categorization as "quasi-parenthood" because with the exception of ongoing contact it includes none of the usual rights and/or responsibilities of parenthood.

Presumed Father Statute, the Retroactive Legitimation Statute, and the Uniform Parentage Act have primarily been used to mitigate gender-based differences between men and women: the gendered division of public and private life, the resulting unequal access to wealth, and the gendered constructions of child-rearing.

Both the Presumed Father Statue and the Retroactive Legitimation Statute were originally designed to secure fathers (read, financial benefactors) for children who would have otherwise suffered the deleterious effects of illegitimacy (poverty and social stigmatization). They accomplished this goal by expanding the legal definition of fatherhood.

Following industrialization, women were increasingly relegated to the private sphere of home and family, becoming closely identified with the roles of wife, mother, and homemaker. At the same time, they were increasingly excluded from meaningful participation within the public sphere (politics and labor markets) and were frequently denied access to most of the benefits available to persons who achieved success in those realms (wealth, power, prestige, and status).[213]

Men, on the other hand, became closely identified with the roles of husband, father, and breadwinner. Men, increasingly tied to the public sphere, used their positions therein to gain access to wealth, power, prestige, and status.[214] It became men's job to financially support wives and children, and increasingly, the economic well-being of women and children depended upon their familial relationships with men.[215]

This gendered division of society into separate public and private spheres made it extremely desirable to legally tie children to men both willing and able to financially support them. In 1872, the California legislature acted to facilitate this process by expanding the legal definition of natural fatherhood in two ways. First, it provided the legal means to tie married non-biological fathers to their wives' children (the Presumed Father Statute), and then it created a legal link between bio-

213. Women who gained some measure of wealth, power, prestige, and status usually did so through their husbands. *See generally* RHODE, *supra* note 12, at 9–11; Brown, *supra* note 12, at 242–43; Chused, *supra* note 12, at 153–219; Grossberg, *supra* note 12, at 286–311.

214. Admittedly not all men achieved wealth, power, prestige, and status in the public realm. Indeed some, particularly non-white men, were specifically excluded from positions associated with the accumulation of these dividends. *See* OLIVER C. COX, CASTE, CLASS & RACE chapters 16 & 17 (1948). *See generally* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (6th ed., 1988).

215. *See supra* note 213.

logical fathers and the children they reproduced outside the context of marriage (the Retroactive Legitimation Statute).[216]

Over the next 100 years, however, social conditions changed considerably, and these changes significantly altered the social construction of parenthood. Women's labor force participation grew steadily throughout the twentieth century.[217] Women gained increasing access to higher education.[218] In 1964, the Civil Rights Act, which included provisions for the equitable treatment of women in the labor force, became the law of the land.[219] As women's labor force participation changed, so too did their families. Notable changes included rising divorce and remarriage rates as well as an increasing tendency of unmarried women to keep and raise their children.[220]

In the 1970s, the California courts encountered a series of divorce cases in which wives (who were usually but not always biological mothers)[221] sought the courts' assistance in securing their children's financial futures by legally tying their husbands (who were not the children's biological fathers) to their children as legal fathers. The courts responded to these requests by invoking the commercial concept of equitable estoppel and then using it to further expand the legal construction of fatherhood. This strategy allowed them to creatively combine components of the Presumed Father Statute (a carefully recrafted presumption of fatherhood) with components of retroactive legitimation (a man's acceptance of a child into his home and family) for the purpose of assigning parental status to men who were undeniably not the biological genitors of the children in question. As with earlier expansions of fatherhood, this move allowed courts to legally tie otherwise fatherless children to men who voluntarily assumed the role of father, within the context of legitimate families, for the purpose of securing children's financial well-being.

Throughout the 1980s, advances in reproductive technology, coupled with increasingly lenient social control over sexuality, led to the

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216. Biological fathers who reproduced outside of marriage were generally assigned father status, provided that the women with whom they reproduced were not married and living with their husband. *See supra* notes 34–52 and accompanying text.

217. RHODE, *supra* note 12, at 30; MARY P. RYAN, WOMANHOOD IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT 253–54, 305 (3d ed. 1983).

218. RHODE, *supra* note 12, at 54 (noting that the number of college degrees granted to women rose from "a postwar low of 25 percent to over 50 percent in the mid-1980s. . . .").

219. RHODE, *supra* note 12, at 56–57.

220. ANDREW J. CHERLIN, PUBLIC & PRIVATE FAMILIES (3d ed. 2002).

221. *See supra* note 84 and accompanying text.

emergence of several new familial formations. Included in these new family groupings were two-parent lesbian-headed families and two-parent heterosexual-headed families in which the traditional biological connection between the mother and child had been technologically altered—specifically through the use of contract surrogacy. As one might expect, these changes eventually led to the creation of new forms of parental conflict. These new parental conflicts, often regarding the parental status of non-biological/non-adoptive mothers, began entering the California courts in the early 1990s.

These cases directly challenged the courts' reliance upon traditional constructions of family and raised important questions regarding legal constructions of parenthood and the well-being of children. At their core was the question: Are non-biological mothers, who accept children into their families and raise them as their own, comparable to non-biological fathers who do the same? Phrased a slightly different way: Should previous expansions of the legal construction of fatherhood also apply to legal constructions of motherhood?

On a somewhat related issue, the courts were also asked to reexamine their conceptualization of children's well-being, specifically as it is measured through their ongoing relationships with parental figures. Here the question before the courts was: Should children's emotional well-being (secured through the preservation of their relationships with parental figures who act as mothers) receive the same legal protection as their financial well-being (secured through the preservation of their relationships with parental figures who act as fathers)?

Complicating these issues considerably are social and legal constructions of marriage, motherhood, and the nuclear family, all of which artificially conflate biological reproduction and the social act of parenting. Many legislators and judges, for example, falsely assume that because biological reproduction requires and is limited to a male/female pair, legal constructions of the family should (many argue *must*) be limited in the same way. This erroneous assumption serves to mask the socially constructed nature of the legal family, casting the nuclear family as a biological imperative and all other family forms as naturally/legally suspect.

But as the above analyses reveal, it is actually the nuclear family model, and not the biological parent-child relationships that theoretically support and define the standard, to which the courts are actually committed. Indeed, it is their strong commitment to that model, coupled with a somewhat malleable commitment to the biological nature of certain parent-child relationships, existing both within and outside that

model, that have allowed the courts to repeatedly expand the legal definition of fatherhood. What is troubling, however, is the courts' willingness to characterize the biological nature of fatherhood as relatively pliable, while simultaneously characterizing the biological nature of motherhood as rigid and unyielding.

The logic supporting the resulting legal constructions of fatherhood and motherhood, constructions that are different in both kind and effect and should thus raise a red flag with regard to sex-based discrimination, is artfully crafted using well-placed references to biological reproduction. These repeated invocations, specifically referencing male and female differences in reproduction, are used to establish the nuclear family as "natural." This designation routinely invokes tacit assumptions regarding the biological nature of the relationships between the parents and children living as a nuclear family, effectively masking the fact that biological consanguinity is a necessary component of this family model only some of the time.

It soon becomes apparent that assumptions of natural law, including that families are created when men and women come together in opposite sex pairs for the purpose of producing and raising biological children, continue to strongly influence legal constructions of parenthood and family. Within this paradigm, women are more closely identified with their bodies than are men. Mothers remain individuals who experience a deep and otherwise unobtainable bond with their fetuses/infants resulting in the natural awaking of a nurturing instinct.[222] This nurturing/mothering instinct, so the story goes, is crucial to the very survival of our society because it, in large part, insures the survival of our children.

These assumptions, although largely tacit, provide the rationalization for the legal construction of separate categories of biological mother, biological and non-biological father, and non-biological mother. Biological mothers are cast as women who gestate and bond with fetuses/babies during reproduction and who are primarily responsible for the emotional well-being of their children. Biological and non-biological fathers alike are cast as individuals who experience little or no "natural" emotional ties to children, although they may develop such ties over time. Whether or not such a relationship develops, however, these men, once they have voluntarily

222. Although, as we saw in *Calvert*, even this categorization of motherhood may be set aside in favor of creating and maintaining a socially acceptable nuclear family. *See supra* note 148 and accompanying text.

assumed the role of father/financial provider, may be estopped from abandoning that role. Like fathers, non-biological mothers are seen as having no "natural" emotional relationship with the children that they parent, although such a relationship may develop over time.

The fate of fathers and non-biological mothers diverge, however, when courts are asked to recognize and preserve the relationships these parents have forged with the children in their families. This is because, unlike fathers, who are cast into a role that is complementary to the role occupied by biological mothers (financial versus emotional caretaker), non-biological mothers are always cast as competitors for the role properly occupied by biological mothers.[223] In a nuclear family model, in which parenting roles are tied to biological reproduction (families correctly contain one mother and one father), the mothering role is based in large part on a biological awakening of the maternal instinct. Mothers and fathers do different things (fathers are breadwinners while mothers are emotional caretakers); there simply exists no space for non-biological mothers. Whereas non-biological fathers are commonly seen as acceptable replacements for missing biological fathers, non-biological mothers (commonly cast as emotional caretakers rather than financial providers) are not. Nor are non-biological mothers seen as reasonable replacements for biological mothers. At best, lacking a biologically-driven maternal instinct, non-biological mothers are seen as poor imitations of the original.

This logic, of course, rests on a gendered division of the category "parent," in which women are assigned the emotional and care-giving labor while men are assigned the role of financial provider. In a society in which both men and women emotionally care for children as well as fill the role of financial provider, however, judges could logically begin the process of uncoupling parenthood from gender. The resulting family model would be one in which a missing parent of either sex is replaceable with an existing parent of either sex, provided it can be shown that the resulting parental dyad works to the benefit of the child. Indeed, the parental equation only becomes rigid (irreducibly gendered) when tied to biological reproduction.

Not incidentally, the courts continued commitment to the nuclear family model has the effect of placing a child's economic well-being well ahead of their emotional well-being in cases of family dissolution. The

223. To stick with the performance metaphor, non-biological mothers are cast as understudies to biological mothers, while fathers, both biological and non-biological, are cast as co-stars.

court's willingness to assign parental status to non-biological fathers, but not non-biological mothers, means that they are frequently able to act in ways that secure the financial well-being of children but not in ways that secure the emotional well-being of children.

The problem today is that society has changed in ways that call into question traditional constructions of parental roles, family formation, and even biological reproduction. Women, for the most part, are no longer financially dependent upon men. This allows women to change their male partners much more freely than in past generations, a transformation that has rendered the traditional nuclear family largely obsolete. Some women may even avoid men altogether, creating intimate and familial relationships with other women.[224]

Indeed, changes in women's education and workforce participation, in addition to changing the ways many women and men structure their families, are dramatically altering the roles women and men play within families. It is relatively rare today to find a family in which the husband is solely responsible for the family's financial well-being, while his wife limits her activities to providing emotional care for her husband and children. More commonly, wives and husbands split the provider role. Indeed, many social scientists are now arguing that men, as well as women, are expanding their parental roles. As women become financial providers, some men are likewise taking on the role of emotional caretakers.[225]

Families of today also take many different forms. In addition to the "traditional" nuclear family (which is now in the minority),[226] many children today live in stepparent and blended families,[227] single-parent families (most often headed by the mother), lesbian- and gay-headed

224. Some women purchase sperm directly from sperm banks allowing them to forego any contact with a male sperm donor.

225. COLTRANE, *supra* note 113, at 96–105.

226. *See* Mary Jo Patterson, *Single motherhood reported on the rise*, THE STAR LEDGER, July 14, 1993, at 1 (finding that the proportion of families that meet the strict definition of 'traditional'—married-couple families in which the husband works and the wife does not—has plunged in recent years); *see also* CHERLIN, supra note 220, at 68–69 (arguing that the percentage of "traditional" nuclear families, as opposed to stepfamilies, blended families, single-parent families, lesbian- or gay-headed families, etc. is now well below fifty percent).

227. Both stepparent families and blended families are created through marriages that occur after the birth of at least one child between one of the child's biological/legal parents and another adult who is biologically unrelated to the child. Stepparent families are created when a parent marries a non-parent, while blended families are created when two adults, both with children, marry each other, or two adults already living in a stepfamily situation have a child themselves.

families (single-and two-parent),[228] and multigenerational families (often created when grandparents take over the raising of their grandchildren). Each of these family forms contains their own unique constellation of parental figures.

Complicating this picture further still, advances in reproductive technologies have dramatically altered traditional understandings of the relationships between biological consanguinity, the physical reproduction of children, and family formation. Today an individual or couple can purchase an egg harvested from an unknown woman, have it joined in a test-tube with sperm collected from an unknown man, and then have the resulting gonad inserted into the womb of a surrogate mother. Not too far in the future, if medical technology continues at its current pace and along its present course, cloning will allow women to reproduce children without the use of sperm, removing men from the reproductive equation entirely. The simple reality is that parenthood, and in recent years specifically motherhood, is becoming increasingly detached from strict notions of biological reproduction.

As our society moves further and further away from traditional modes of reproduction and family formation, it becomes increasingly troublesome to judge modern parents and the families they create against a model that is hundreds of years old. While lawmakers have generally recognized the problems inherent in this practice regarding the legal constructions of fatherhood—and have thus updated these constructions over the years—they have consistently refused to do so with regard to legal constructions of motherhood. The result is legal policy, hopelessly mired in traditional notions of motherhood and family, that unfairly works to the disadvantage of women. The defense of tradition cannot justify legal policy when that policy results in the judicial practice of discrimination. ⚘

228. Most of these families are created when lesbian or gay parents leave heterosexual relationships and retain custody of children produced during those relationships. These parents may raise their children by themselves or join with a same-sex partner who may or may not become the child's second parent. Increasingly, however, lesbian- and gay-headed families are created when a same-sex couple decides to introduce a child or children into their already existing same-sex relationship. If the couple is female, they may use artificial insemination or if the couple is male they may hire a surrogate. Both male and female couples may also use adoption to secure a child.