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The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity

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In 2000, I published a book, *From Partners to Parents: The Second Revolution in Family Law*.[1] In that book, I argued that the first revolution had dismantled the system of family obligation built on the ties between adults, and that a second revolution was rebuilding obligation on the basis of the remaining ties between adults and children. I then predicted that for the new regime to work it would be necessary to reexamine the adult ties necessary for children's well-being.[2]

In constructing this argument, I thought we at least knew who the parents were. That is, in reducing the emphasis on adult relationships such as marriage and dismantling the bright line distinctions between legitimate and illegitimate children, we would be left with parental ties defined by biology and adoption. Indeed, I was so confident that parenthood was a settled category that in the process of declaring that custody was ground zero in the gender wars[3]—and in the new regime based on parental obligation—I did not address the legal definition of parenthood.[4]

The definition of parentage—and with it the determination of which adults receive legal recognition in children's lives—has become the most contentious issue in family law. Not only are jurisdictions irreconcilably divided in their approach to parentage, decisions under settled law in a given county may not necessarily come out the same way.[5] There are two principal reasons for this. First, ironically, is greater certainty in the determination of biological parentage. We have an elaborate legal structure based on marriage designed to manage biological uncertainty. Certain knowledge is cracking the foundations of these structures. It is one thing to limit testimony about a woman's infidelity; it is another to bar DNA tests

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1. June Carbone, From Partners to Parents: The Second Revolution in Family Law (Columbia University Press, 2000).
2. *Id.* at 235–41.
3. *Id.* at 180.
4. *Id.* at 164–79 (addressing the remaking of fatherhood).
5. For a comprehensive review of recent parentage decisions, see Paula Roberts, Center for Law and Social Policy (CLASP), *Truth and Consequences, Parts I, II, and III, Paternity Disestablishment in 2004, available at* http://www.clasp.org (last visited on March 27, 2005).

that conclusively establish that the woman's husband is not the child's father.[6]

Second, greater marital instability has undermined the primary mechanism for recognizing functional parenthood. The stigma associated with illegitimacy once encouraged pregnant women to seek a man who "would give the child a name." All but one of the categories of presumed fatherhood in the original Uniform Parentage Act rested on the proximity between birth and marriage.[7] Once a man married a woman and assumed the responsibilities of fatherhood, the combination of the evidentiary rules associated with the marital presumption and estoppel principles (not to mention the stigma of divorce) limited the opportunities for escape.[8]

Perhaps just as critical, the decision to marry was associated with the assumption of responsibilities to mother *and* child. Divorce, if it did occur, was not taken lightly, and post-divorce obligations, to the extent they were enforced at all, were also seen as obligations to the continuing mother-child unit. Within this system, spousal support was more critical than child support.[9] Visitation, if it occurred, was secondary to the custodial determination and the expectation that a

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6. Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 Am. J. L. Med. 215, 22–22 (2002). Anderlik and Rothstein emphasize that we have no reliable indication at this point as to how many cases exist of misattributed paternity. Their estimates range from five to thirty percent. *Id.*

7. Uniform Parentage Act of 1973 § 4.

8. Indeed, if there has been any consistent thrust to the modern law of parentage, it has been to identify fathers and encourage the equal participation of both parents in the children's lives. This emphasis on equality, in contrast, for example, to the maternal presumption, or the historic opposition to joint custody, makes it more difficult to confer parental standing on adults who play an important, but unequal role, in children's lives. *See* Harris, Teitelbaum & Carbone, Family Law, 643–54 (evolution in thinking about joint custody from the need to have a single voice of authority to fairness between the parents), 877–99 (courts' difficulty in dealing with different positions of unmarried mothers and fathers entitled to shared decision-making power), 911–914 (diversity of stepparent roles) (3rd ed. 2005).

9. *See, e.g.*, Christopher L. Blakesley, Louisiana Family Law §§ 16.02, 16.03, *in* Louisiana Civil Code Series (1996).

> Louisiana's Civil Law tradition, from its French and Spanish beginnings, provided for the parental obligation of child support. The Common Law did not have such an auspicious beginning. The Elizabethan Poor Laws in England during the 16th century were the initial weak and ulteriorly motivated attempt to make the father pay the parish . . . for child support given his child . . . Louisiana's and continental Codes influenced child support legislation in the rest of the United States.

Id.

single primary caretaker, not two parents jointly, would be responsible for the child's well-being.[10]

Recent revolutions in family law have remade the basis for thinking about family obligation.[11] If parental obligation to children is independent of the adult relationship, then definition of that obligation must start with the recognition of parenthood. Biological parenthood, however, may or may not correspond with the assumption of parental responsibilities, and many of the adults playing parental roles may not necessarily have a biological relationship to the child.[12] In these circumstances, parental status becomes contested turf. Yet, uncertainty at the core of the definition of family produces not only legally contentious cases, but also confusion in the recreation of the moral obligations of adults. Who bears and who should bear responsibility for children? If we are not sure what the legal basis for parenthood is or should be, how can the law reinforce internalization of appropriate norms of parenthood?

This comment examines how this morass developed and what can be done about it. In doing so, it compares alternative bases for parenthood, starting with the marital presumption, biological paternity, and de facto or functional parents. It then focuses on the difference between ex ante bases such as adoption versus ex post determinations, such as those based on *in loco parentis*. Finally, this comment considers the extent to which the relationship between the adults remains important for the definition of parenthood.

This examination untangles the different meanings of parenthood. Many parentage cases address parentage as a category necessary for the determination of custody or support. This comment concludes that parentage should be, first and foremost, about identity. Parenthood is, now and historically, the legal category that answers the question: To which family does this child belong?[13]

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10. 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, 900 (1984). *See also* Taylor v. Taylor, 508 A.2d 964 (Md. 1986).

11. Carbone, *supra* note 1, at 48–49 (emphasizing the dismantling of the system based on marriage and legitimacy).

12. *See, e.g.*, Kim A. Feigenbaum, *The Changing Family Structure: Challenging Stepchildren's Lack of Inheritance Rights*, 66 Brook. L. Rev. 167, 173 (2000) (noting that more Americans live in step-families than in traditional families).

13. *See* Barbara Bennett Woodhouse, *Are You My Mother? Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 Duke J. Gender L. & Pol'y 107, 128 (1995).

I. WHAT IS THE ORIGIN OF PARENTHOOD? A TALE OF TWO CATEGORIES

Divorce remakes the terms on which families go forward.[14] In doing so, the termination of custody and support ordinarily starts with the legal assignment of parental status. But what is the origin of parenthood itself? Consider these two divorce cases that use radically different doctrinal approaches to address the issue.

A. Category 1: Ex Post Review

The Connecticut divorce case of *Doe v. Doe*[15] involved a custody dispute over a fourteen year old girl, who was conceived by artificial insemination between the husband and a surrogate mother.[16] The surrogate entered the hospital using Mrs. Doe's name. She entered Mr. and Mrs. Doe as the child's parents on the birth certificate, and the Does raised the child from birth. No adoption proceedings were initiated.[17] The Does separated when the child was seven. They initially agreed to a temporary joint custody order, which provided that the child's primary place of residence would be with Mrs. Doe.[18] Two and half years later, though, when the child was ten, the Does informed the court that the child "was not a child of the marriage."[19] Each party sought custody, and the father asserted that he was the child's only legal parent.[20]

The Connecticut Supreme Court ruled that the trial court had jurisdiction to consider Mrs. Doe's custody claims as a non-parental third party under a best interest test. Although Connecticut statutory law recognized a presumption in favor of parental custody rebuttable

14. *See* The Post Divorce Family: Children, Parenting, and Society, (Ross Thompson & Paul Amato eds., Sage Publications, 1999). "When a marriage ends, the family growing out of that marriage continues. While the structure of the family changes with divorce, the family itself does not disappear." *Id.*

15. Doe v. Doe, 710 A.2d 1297 (Conn. 1998).

16. *Id.* at 405–09. The child was born on April 30, 1983. The "Does" separated in early 1991, and initially agreed to temporary joint custody order. The child's primary place of residence was with Mrs. Doe. Two and a half years later, however, the parties informed the court that the child was not "a child of the marriage," and both husband and wife sought custody. They then secured termination of the parental rights of the surrogate and her husband in a separate proceeding on grounds of abandonment in September of 1995. *Id.*

17. *Id.* at 408.

18. *Id.* at 407–09.

19. *Id.* at 409.

20. *Id.* at 408.

by a showing of detriment to the child,[21] the court nonetheless concluded that:

> As these authorities make clear, the presumption does not mean that the nonparent must, in order to rebut it, prove that the parent is unfit. It means that the parent has an initial advantage, and that the nonparent must prove facts sufficient to put into issue the presumed fact that it is in the child's best interest to be in the parent's custody. Once those facts are established, however, the presumption disappears, and the sole touchstone of the child's best interests remains irrespective of the parental or third party status of the adults involved. In that instance, then, neither adult—the parent nor the third party—enjoys any advantage or suffers any disadvantage as a result of his or her parental or third party status.[22]

The court then concluded that the presumption had been rebutted by the fact that the plaintiff and defendant lived together and nurtured the child, they had shared joint custody through seven years of litigation, and the child's primary residence had been with the non-parent.[23] The almost-fifteen year old's best interests were with continuation of the joint custody award, which established her primary residence with Mrs. Doe.

This case left the legal definition of parenthood undisturbed while it used a best interests analysis to reconcile the child's interests with the facts the Does had created. The Connecticut approach employs after-the-fact decision-making, which takes the child as it finds her and gives deference to her needs. It is consistent with the calls of many of the most prominent family law theorists for a child-centered jurisprudence,[24] and with the ALI's recent efforts to recognize parenthood by estoppel.[25] Is it a model for custody decision-making? Most probably not—if the Supreme Court's decision in *Troxel v. Granville*[26] is to be taken at face value. The Connecticut Supreme Court, in response to *Troxel's* affirmation of parental rights under the United States Constitution, overruled the standard in *Doe,* holding:

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21. *Id.* at 454.
22. *Id.* at 455.
23. *Id.* at 456.
24. *See, e.g.*, Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 Utah L. Rev. 461; Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L. Rev. 1747 (1993); James G. Dwyer, *A Taxonomy Of Children's Existing Rights In State Decision Making About Their Relationships*, 11 Wm. & Mary Bill of Rts. J. 845 (2003).
25. American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations, § 2.03(1)(b) (2002).
26. Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000).

[T]he protected fundamental right of a parent to make child rearing decisions mandates that where a third party seeks visitation, that third party must allege and prove, by clear and convincing evidence, a relationship with the child that is similar in nature to a parent-child relationship, and that denial of the visitation would cause real and significant harm to the child.[27]

Would *Doe* come out differently under such a standard? It is impossible to know. The court might well find that loss of the child's primary residence at an age (nearly fifteen) when she is old enough to have strong preferences about the matter would constitute "real and significant harm."[28] But then in a subsequent case, the decision would presumably be made at the time of the parties' initial separation, before the seven years of litigation that proved critical in *Doe*. Under this type of after-the-fact decision-making, parental status remains uncertain until the day of the decision.

B. Category 2: Ex Ante Creation of Parental Status

In the infamous California case of *Buzzanca v. Buzzanca,*[29] the intended parents, John and Luanne Buzzanca, arranged for the creation of an embryo through donated egg and sperm. The parental status of the donors was terminated when they surrendered their parental rights in accordance with California law.[30] The embryo was then implanted in a gestational surrogate, who bore no genetic relationship to the child.[31] Shortly before the child's birth, Mr. Buzzanca sought a divorce, maintaining that there were no "children of the marriage."[32] Mrs. Buzzanca, in contrast, argued that the child should be treated as theirs, and requested child support from Mr. Buzzanca. The trial court, after accepting the parties' stipulation that the gestational surrogate and her husband had surrendered their parental rights, concluded that the child, Jaycee, had no legal parents, and Mr. Buzzanca could not accordingly be held liable for support.[33]

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27. In re Joshua S., 796 A.2d 1141, 1156 (Conn. 2002).

28. *Id.*

29. 72 Cal. Rptr. 2d 280 (Cal. App. 4th 1998).

30. *Id.* at 285, n.7; Cal. Fam. Code § 7613(b) (providing "[t]he 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 a child thereby conceived.").

31. *Buzzanca*, 72 Cal. Rptr. 2d 280 at 282.

32. *Id.*

33. *Id.* The Court of Appeal commented that the trial court "had—astonishingly—already accepted a stipulation that neither she nor her husband were the 'biological' parents." On the issue of Mrs. Buzzanca's parental status, the trial court also stated, "[s]o I think what evidence there is, is stipulated to. And I don't think there would be any more. One, there's no genetic tie between

The court of appeal reversed. The court stated bluntly, "Let us get right to the point: Jaycee never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate."[34] The result was a ruling that established parenthood on the basis of intent alone. The *Buzzanca* court concluded:

> Even though neither Luanne nor John are biologically related to Jaycee, they are still her lawful parents given their initiating role as the intended parents in her conception and birth. And, while the absence of a biological connection is what makes this case extraordinary, this court is hardly without statutory basis and legal precedent in so deciding. Indeed, in both the most famous child custody case of all time,[35] and in our Supreme Court's *Johnson v. Calvert*[36] decision, the court looked to *intent to parent* as the ultimate basis of its decision.[37] Fortunately, as the *Johnson* court also noted, intent to parent "correlate[s] significantly" with a child's best interests[38]. . . . That is far more than can be said for a model of the law that renders a child a legal orphan.[39]

Luanne and the child. Two, she is not the gestational mother. Three, she has not adopted the child. That, folks, to me, respectfully, is clear and convincing evidence that she's not the legal mother." *Id.* at 283.

34. *Id.* at 282.

35. The court references, "1 Kings 3: 25–26 (dispute over identity of live child by two single women, each of whom had recently delivered a child but one child had died, resolved by novel evidentiary device designed to ferret out intent to parent)." *Id.* at 293, n.19.

36. 851 P.2d 776 (Cal. 1993).

37. The court notes, "[w]hile in each case intent to parent was used as a tiebreaker as between two claimants who either had or claimed a biological connection, it is still undeniable that, when push came to shove, the court employed a legal idea that was unrelated to any necessary biological connection." *Buzzanca*, 72 Cal. Rptr. at 293, n. 20.

38. *Citing* Johnson v. Calvert, 851 P.2d 776, 782–83 (1993) (quoting Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 Wis. L. Rev. 297, 397 (1990)).

39. The court notes, "[i]t is significant that even if the *Johnson* majority had adopted the position of Justice Kennard advocating best interest as the more flexible and better rule, there is no way the trial court's decision could stand. *See* 851 P.2d at 788 (Kennard, J., dissenting)." *Buzzanca*, 72 Cal. Rptr. at 293, n.21. The court further reasoned because Luanne had cared for Jaycee since infancy and that "she is the only parent Jaycee has ever known" that it would be "unthinkable ... for Luanne not to be declared the lawful mother under a best interest test." *Id.* With respect to the father, the court notes that he "would not be the first man whose responsibility was based on having played a role in causing a child's procreation, regardless of whether he really wanted to assume it." *Id.*

Does this case stand for the principle that parenthood can be established by intent alone?[40] The outcome is in doubt. Following *Buzzanca*, state trial courts began to issue declaratory judgments finding parenthood on the basis of intention.[41] The *Buzzanca* court, however, limited its ruling to married couples who engineer the creation of a child,[42] and in the first appellate test of the post-*Buzzanca* rulings, the court of appeal rejected the idea of parenthood by contract.[43] The case is pending before the California Supreme Court.[44]

Resolution of the *Doe* and *Buzzanca* cases was an easy matter on the facts. In both cases, the parties to the dispute were a married couple who had engineered the birth of a child. In both cases, one of

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40. *See* Richard F. Storrow, *Parenthood By Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 Hastings L.J. 597 (2002).

41. In these cases, the intended parents sought declaratory judgments referred to as Uniform Parentage Act or "UPA declarations," recognizing the intended parents as the legal parents while the child was in utero. The court in *Kristine H. v. Lisa R.*, 16 Cal. Rptr. 3d 123 (Cal. App. 2d 2004), *rev'd and superceded by*, *Kristine Renee H. v. Lisa Anne R.*, 18 Cal. Rptr. 3d 668, 97 (Cal. 2004), observed:

> Amici curiae the Southern California Assisted Reproduction Attorneys (SCARA), the Family Pride Coalition and the Los Angeles Gay and Lesbian Center (collectively, SCARA) represent that prebirth judgments have been issued for "roughly five years," . . . SCARA represents to the court in its letter brief that "hundreds of families have come to rely on these judgments in the years since *Buzzanca*." According to SCARA, it "quickly polled six of its members who report that an adverse ruling in this case will potentially affect some 750 births.

From there, SCARA concludes that "thousands of cases in California" are potentially affected by a decision voiding either prebirth agreements and/or the declaration of parentage. SCARA, however, provides no corroborating documents or data to support this conclusion.

42. *See Buzzanca*, 72 Cal. Rptr. 2d at 287, n. 11. The *Buzzanca* court stated:

> In the present case we 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, Family Code section 7613, which contemplates parenthood on the part of a married man without biological connection to the child born by his wife. Whether section 7613 might be applied by a parity of reasoning, as we do today to a married couple, to a nonmarried couple is not before us and we will not speculate as to the answer.
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> *Id.*

43. Kristine H. v. Lisa R., 16 Cal. Rptr. 3d 123, 133–34. "A determination of parentage cannot rest simply on the parties' agreement. . . . Therefore, the judgment based on the parties' stipulation was in excess of the family court's jurisdiction and of no legal effect." *Id.*

44. The appellate court did, however, recognize the parental standing of the unmarried partner on the basis of other state doctrine. *Id.* at 138–43 (recognizing the unmarried partner as a presumed parent, who welcomed the child into her household and held out the child as her own).

the parties was trying to use legal uncertainty to gain an advantage over the other party, with the husband in *Doe* denying his wife's parental status in an effort to secure custody,[45] and the husband in *Buzzanca* denying his own paternity in an effort to escape liability for child support.[46] In both cases denying the mother legal parentage would have unsettled established custody arrangements to the detriment of the child.[47] Accordingly, the two cases might have readily been resolved on estoppel grounds without necessarily addressing the issue of parentage.[48]

Nonetheless, the two courts were eager to reconcile the resolution of the cases with the general law of custody and parentage in their respective states, and therein lies the rub. In both cases, the parties had established family arrangements that defied state law. In both cases, adoption would have resolved parental status with certainty,[49] and in both cases, the children's interests required recognition of the facts on that ground. So, the dilemma for the appellate courts was how to protect the children without rewarding their parents' circumvention of established law. The issue was further complicated by the need to provide guidance for future cases.

The two cases addressed the issues in almost opposite manners. One court, *Buzzanca*, squarely addressed the definition of parenthood, and resolved the matter on the basis of what seemed to be an *ex ante* determination focusing on the parties' intent at the time of the child's conception. The other court, *Doe*, refused to consider the circumstances that produced the child, instead relying on an *ex post* determination of the child's needs.[50] Neither ruling, however, produced certainty in the determination of parenthood, and neither

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45. Doe v. Doe, 710 A.2d 1297 (Conn. 1998).

46. *Buzzanca*, 72 Cal. Rptr. 2d at 282–83.

47. *Doe*, 710 A.2d at 1323–24; *Buzzanca,* 72 Cal Rptr. 2d at 294, n. 22 (observing that Luanne had custody of Jaycee since her birth).

48. Indeed, the *Buzzanca* court observed, "[t]here is no need in the present case to predicate our decision on common law estoppel alone, though the doctrine certainly applies." 72 Cal. Rptr. at 288.

49. In *Doe*, the surrogate was the genetic and gestational mother, and therefore in virtually all states a legal parent. The intended parents moved to sever her parental status on the basis of abandonment only after the divorce proceedings began, and the final order was not issued until the child was twelve. 710 A.2d at 1300–02. In *Buzzanca*, the court of appeal emphasizes its astonishment at the ease with which the trial court accepted the parties' stipulation that the gestational mother was not a legal parent. 72 Cal. Rptr. 2d at 282. See *supra* note 33, on the status of Mrs. Buzzanca.

50. Indeed, the *Doe* court emphasized, "we are not required in this case to decide whether, or to what extent, a surrogacy contract, by which the surrogate obligates herself to surrender the child to the child's father and his spouse, is enforceable. In this case, the surrogate did surrender the child, and the parental rights of the surrogate and her husband have been terminated." 710 A.2d at 1301.

ruling appears to have withstood the test of time. Most critically, neither case provides much guidance on the normative issue of parental obligation. What is the threshold that turns functional parents into legal parents, and can legal standards help translate legal duty into moral obligation?

II. PARENTHOOD: FIXED FROM BIRTH—OR NOT?

A. The Marital Presumption

The dilemmas of parenthood do not begin with assisted reproduction. Indeed, the clash between approval of the circumstances of conception and ratification of the arrangements needed to vindicate children's needs is an ancient one. For centuries, the marital presumption has served to mediate these disputes.[51] The presumption did so, however, by emphasizing marital regularity as central to the preservation of family stability. How did the presumption continue to uphold societal mores without sacrificing the needs of children? The answer is that it created an *ex ante* presumption that promoted family regularity while simultaneously permitting *ex post* determinations where necessary to preserve the presumption's validity. In addition, courts simply looked the other way in the face of inconvenient facts. The crisis in parenthood today stems from the inability to recreate this combination.

Critical to the creation (and perhaps the success) of the marital presumption has been the impossibility, until very recently, of determining paternity with certainty.[52] In the absence of biological

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51. *See* Lord Mansfield's Rule, articulated in *Goodright v. Moss*, 2 Cowp. 591, 98 Eng. Rep. 1257 (1777) (prohibiting either spouse from giving testimony in court which cast doubt on whether the husband was the child's father).

52. Theresa Glennon observes that:

> The protection of children born out of wedlock was hampered by the lack of accurate tests to prove paternity. Until the beginning of the twentieth century, there was no reliable scientific test available to identify the fathers of children born out of wedlock. In 1901, blood group testing was discovered by Dr. Karl Landsteiner at the University of Vienna. Blood group testing identified genetic markers in the blood by analyzing specific blood type antigens. Early types of blood group testing were often unable to exclude a man as the biological father. By the late 1970's human leukocyte antigen (HLA) tests had become able to both exclude and establish the probability of biological paternity. Scientific research moved ahead quickly, and by the late 1980's, DNA, or "genetic marker" testing provided probabilities of paternity greater than 99%.

Theresa Glennon, *Somebody's Child: Evaluating The Erosion Of The Marital Presumption Of Paternity*, 102 W. Va L. Rev. 547, 555–56 (2002). Courts, however, did not begin to admit such evidence until the 1930's and the acceptability and role of such tests remains a matter of dispute. *Id.* at 556–57.

proof, the methods of securing paternal attachment have varied enormously. Some societies placed an extraordinary premium on female virtue as the only way to guarantee the fidelity of the male line.[53] Other societies combined fewer restrictions on women with mechanisms for cementing parental attachment once the assumption of child rearing responsibilities was underway.[54] Within the Anglo-American tradition, the marital presumption has occurred at the fulcrum of a system designed to balance both concerns. In process, the law has furthered the internalization of a set of values associated with the interests of children.[55]

The marital presumption starts as a presumption about biology, but it really operates more as a presumption about the connection between marriage and parenthood. A child born to married parents is presumed to be their biological offspring; as a practical matter, this means that parents' names can appear on the birth certificate and the parents can make decisions about the child without anyone inquiring too closely about the nature of the family relationships.[56] Marriage requires a state license and a public ceremony; parentage within marriage requires much less. The Connecticut Does established their parentage through a lie—the surrogate mother entered the hospital under the name of Mrs. Doe.[57] Once she was accepted as the woman giving birth, her husband's legal status as a parent followed automatically.[58]

The marital presumption has long balanced a presumption of biology with the need to secure functional family relationships. Although Anglo-American practice has varied, custom has almost always placed considerable emphasis on female fidelity, and the corresponding stigmatization of illegitimacy and adultery.[59] Without

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53. *See, e.g.*, David M. Buss, *Sexual Conflict: Evolutionary Insights into Feminism and the "Battle of the Sexes," in* Sex, Power, Conflict: Evolutionary and Feminist Perspectives at 298 (David M. Buss & Neil M. Malamuth eds., 1996). "In a cross-cultural perspective, the ways in which men attempt to control women's sexuality is staggering." *Id.*

54. Anthropologists have identified sixteen societies in South America marked by a belief in "partible paternity," "the conviction that it is possible, even necessary, for a child to have more than one biological father." *Science and Technology: Paternity Test*, 350 The Economist 74, 75 (1999). Children in these societies fare the best with two or three fathers; if the mothers are too promiscuous, none of the fathers invest, but if two or three of the men mated with the mother near the time of conception and one dies, the others contribute to the child's well-being. *Id.*

55. *See generally* Carl Schneider, *The Channeling Function in Family Law*, 20 Hofstra L. Rev. 495 (1992) (describing the channeling role of family law).

56. *See* Harris, *supra* note 24, at 463.

57. Doe v. Doe, 710 A.2d 1297, 1302 (Conn. 1998).

58. The birth certificate is not critical in this respect to establish either of their parental statuses.

59. Carbone, *supra* note 1, at 89. One of the more testable variations over

the possibility of paternity tests, the only way to establish parentage was through testimony about the mother's sexual relationships.[60] The very force of these norms against illegitimacy and adultery, however, made the consequences of "bastardy" disastrous for the child.[61] Lynne Kolm comments that:

> In the agonizing conflict between a man's right to limit his paternity only to his actual offspring, and the right of a child born to a married woman to claim family membership, the common law, first in England and then in America, generally made paternal rights defer to the larger goal of preserving family integrity. The public policy behind this presumption is "one of the strongest known in the law."[62]

Nevertheless, the marital presumption was never absolute. With biological paternity as the cornerstone of assumptions about the meaning of family ties,[63] the marital presumption did not apply when paternity was obviously impossible. Early cases held that, "If a husband, not physically incapable, was within the four seas of England during the period of gestation, the court would not listen to evidence casting doubt on his paternity."[64] The presumption did not persist when it crossed the threshold from fiction to fantasy. For a child, however, born to parents who were in physical proximity and not provably impotent at the time of conception, the marital presumption could be effectively irrebutable. Chris Altenbernd comments:

> The level of proof required to overcome this presumption was extremely high, especially since the wife and husband were

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time is the percentage of brides pregnant at the altar, reflecting in part the acceptability of sexual relations after a betrothal. For an account of the law of illegitimacy, see Harry D. Krause, *Illegitimacy: Law and Social Policy* (Bobbs-Merrill 1971).

60. Harris, *supra* note 24, at 463.

61. Glennon, *supra* note 52, at 563. "If the marital presumption of paternity was successfully rebutted, the results were devastating: the child was declared a bastard, no longer entitled to support or inheritance from anyone." *Id.*

62. Lynne Marie Kohm, *Marriage And The Intact Family: The Significance Of Michael H. v. Gerald D.*, 22 Whittier L. Rev. 327, 335 (2000), *citing* In re the Estate of Robertson, 520 S.2d 99 (Fla. Dist. App. 1988) (holding that the evidence must be clear, strong and unequivocal to overcome the strong presumption that a child born in wedlock is legitimate).

63. *See, e.g.*, Bartlett, *supra* note 10, at 889. "Within the family, nature creates the link between the social order and parental rights. Nature works on parents to stir up their Diligence, wisely implanting in them a most tender Affection towards these little Pictures of themselves." 2 S. Puffendorf, On The Law Of Nature And Nations, ch. 2, § 4, at 915 (C. Oldfather & W. Oldfather trans., 1934).

64. In re Findlay, 253 N.Y. 1, 7 (1930). *See also* 1 William Blackstone, Commentaries on the Laws of England 129 (J. Chitty ed., 1857).

> prohibited from testifying and the biological father's testimony would have been a confession of a serious criminal offense. . . . The common law indirectly announced and implemented a policy that children need families, homes, heritage, and inheritance more than biological fathers need rights or even responsibilities.[65]

The key to the marital presumption thus became the evidentiary rule that limited testimony about the opportunities for infidelity.[66] After all, unless the wife's infidelity was coupled with the husband's lack of access, adultery did not prove non-paternity. So the courts dealt with the weighty matter of the child's status largely by looking the other way.[67]

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65. Chris W. Altenbernd, *Quasi-Marital Children: The Common Law's Failure in Privette and Daniel Calls for Statutory Reform*, 26 Fla. St. U. L. Rev. 219, 236 (1999). *See also* Gallo v. Gallo, 03-0794, 861 So. 2d 168, 174 (La. 2003).

> The fundamental ends achieved by such court action were preservation of the family unit, avoidance of the stigma of illegitimacy, and aversion to the disinheritance that resulted from a successful disavowal action. There is a public interest in dispelling doubts as to legitimacy which demands the establishment of a relatively short time for bringing challenges. These considerations contributed to this court's holding, in 1979, that the period of time in which a husband must file a suit for disavowal to defeat the presumption of his paternity is preemptive.

Id.

66. Glennon, *supra* note 52, at 564; *See also* County of Tioga v. South Creek, 75 Pa. 433, 437 (Pa. Super. Ct. 1874).

> [M]any reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous; and this, not so much from the fact that it reveals immoral conduct upon the part of the parents, as because of the effect it may have upon the child, who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency . . . .

Id.

67. Glennon, *supra* note 52 at 564. In Louisiana, the marital presumption was considered conclusive. *See* Smith v. Cole, 553 So.2d 847, 850 (La. 1989).

> The presumption was so rigorously applied that in . . . 1972, this court acknowledged it had never allowed a disavowal of paternity (although we recognized two appellate court decisions had permitted disavowels in cases where the children were born more than 300 days after judgments of separation had been rendered). Not even Mr. Tannehill's disavowal action succeeded, as the statutory prohibition against disavowal for natural impotence was also found to prohibit disavowal for sterility due to childhood disease.

Id.

Many states hold that the marital presumption applies only so long as is necessary to protect an intact family.[68] At divorce, family unity disappears, and many courts are therefore willing to hear evidence about the child's paternity that they might reject in the context of an on-going marriage. The doctrine of estoppel, however, is then used in some jurisdictions to prevent a husband who has acted as the father from denying paternity at divorce. The result could hold even when husband and wife knew that the husband did not father the child. A California court in the early sixties reacted to a husband's effort to disavow the eleven-year-old he had helped raise since birth with outrage. The court observed:

> There is an innate immorality in the conduct of an adult who for over a decade accepts and proclaims a child as his own, but then, in order to be relieved of the child's support, announces, and relies upon, his bastardy. This is a cruel weapon, which works a lasting injury to the child and can bring in its aftermath social harm. The weapon should garner no profit to the wielder; the putative father should earn no premium by the assertion of the illegitimacy of the child.[69]

Nonetheless, in affirming the possibility that estoppel could be used as a basis for ordering the husband in that case to pay child support, the court observed that the record failed to show that "the *husband*

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68. Brinkley v. King, 701 A.2d 176, 180 (Pa. Super. Ct. 1997).

> The public policy in support of the presumption of paternity is the concern that marriages which function as family units should not be destroyed by disputes over the parentage of children conceived or born during the marriage. Third parties should not be allowed to attack the integrity of a functioning marital unit, and members of that unit should not be allowed to deny their identities as parents.

Id. Indeed, Louisiana changed its presumption from conclusive to rebuttable in light of such considerations. *See also* T.D. v. M.M.M., 98-0167, 730 So. 2d 873, 878 (La. 1999).

> Once the bonds of matrimony are dissolved *a vinculo matrimonii*, the State's interest in preserving the marital family disappears. This does not ignore the fact that some rights spring from the dissolution of a lawful marriage, but recognizes instead the policy behind the codal provision and the perspective of our times. Today's realities are that illegitimacy and 'broken homes' have neither the rarity nor the stigma as in the past. When parenthood can be objectively determined by scientific evidence, and where illegitimacy is no longer stigmatized, presumptions regarding paternity are out of place.

Id. (Knoll, J., concurring).

69. Clevenger v. Clevenger, 11 Cal. Rptr. 707, 714 (Cal. Ct. App. 1961). The court further observed, "To be designated as an illegitimate child in pre-adolescence is an emotional trauma of lasting consequence. Having placed the cloak of legitimacy upon the child, having induced the child to rely upon its protection, the husband by abruptly removing it surely harms the child." *Id.* at 714–15.

represented himself to the child as his natural father" and that the boy had relied on the representations.[70] The court's sense of outrage over the husband's disavowal of the boy's legitimacy was directed less at the shame associated with extramarital conception than on the father's rejection of the boy's membership in his family. What reconciles these cases is the emphasis on the child's identity. While the emphasis on the stigma of "bastardy" has faded, the importance of permanence in the child's sense of self has not. The courts that continue to use estoppel to establish paternity emphasize that:

> *Estoppel* is based on the public policy that children should be secure in knowing who their parents are. If a certain person has acted as the parent and bonded with the child, the child should not be required to suffer the potentially damaging trauma that may come from being told that the father he has known all his life is not in fact his father.[71]

B. Non-Marital Children

The treatment of non-marital children in Anglo-American law starts with the common law doctrine of *filius nullius*, which literally means that a "bastard" is the child of no one, or more accurately that the child "is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived."[72] As a result, children whose paternity involved little doubt could be denied any relationship to their biological father.

The doctrine of *filius nullius* combines two premises that mirror the marital presumption. Certainly part of the issue goes back to the difficulty of determining paternity. The only way to be sure of paternity in that era before DNA tests was to be sure of the mother's virtue, and a woman giving birth without the benefit of marriage was

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70. *Id.* at 714.

71. Hamilton v. Hamilton, 795 A.2d 403, 405 (Pa. Super. 2002), *cited in* J.C. v. J.S., 826 A.2d 1, 6, n. 4 (Pa. Super. 2003); *Cf.* Doran v. Doran, 820 A.2d 1279 (Pa. Super. 2003) (where divorced husband stopped holding the child out as his own as soon as he learned the results of the paternity tests, DNA did not apply even though the child was eleven at the time, and the parties had been divorced since the child was five). *See also* In re Marriage of Pedregon, 107 Cal. App. 4th 1284 (2003) (reaffirming application of estoppel principles in case in which husband married mother when child was twenty-two months old, and acted as the father for more than twelve years).

72. Blackstone, *supra* note 64, at 459.

by definition untrustworthy.[73] Punishment of the extramarital sin was therefore central to the doctrine.[74]

Nonetheless, it is important to emphasize that the result was in symbolic and practical terms to deny the child membership within the family. A child who was undeniably the child of a given mother and father could be denied status as a member of either parent's family at the time of Blackstone, and his father's, if not his mother's, family thereafter. *Stanley v. Illinois*[75] is instructive.

Peter and Joan Stanley lived together intermittently for eighteen years and had three children without marrying.[76] When Joan died, the children were declared "wards of the State."[77] The relevant Illinois statute provided that, "'Parents' means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent."[78] The biological father of an illegitimate child was simply not a parent under Illinois law. As the Supreme Court explained:

> . . . under Illinois law, Stanley is treated not as a parent but as a stranger to his children, and the dependency proceeding has gone forward on the presumption that he is unfit to exercise parental rights. Insofar as we are informed, Illinois law affords him no priority in adoption proceedings. It would be his burden to establish not only that he would be a suitable parent but also that he would be the most suitable of all who might want custody of the children.[79]

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73. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 665, 92 S. Ct. 1208, 1220 (1972) (Burger, C.J., dissenting).

> In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood.

Id.

74. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 88 S. Ct 1509 (1968) (addressing constitutionality of Louisiana statute, which barred five illegitimate children from suing for the wrongful death of their mother). The lower courts had upheld the statute, finding that denial of illegitimate children's right of recovery was "based on morals and general welfare because it discourages bringing children into the world out of wedlock." *Id.*

75. *Stanley*, 405 U.S. 645, 92 S. Ct. 1208 (majority).

76. *Id.* at 646, 92 S. Ct. 1210.

77. *Id.*

78. Ill. Rev. Stat. 1967, ch. 37, par. 701–14 (1967).

79. *Stanley*, 405 U.S. at 648, 92 S.Ct at 1211. The Court further observed that the fact that Stanley was poor and unmarried made it unlikely he would meet such a test even if he pursued adoption. *Id.*

The State of Illinois defended the statutory presumption by arguing that "illegitimate children" were distinguished from "legitimate children" "not so much by their status at birth as by the factual differences in their upbringing. While a legitimate child usually is raised by both parents with the attendant familial relationships and a firm concept of home and identity, the illegitimate child normally knows only one parent—the mother."[80] The refusal to recognize the fathers of illegitimate children had therefore been decisions of practicality—the biological father typically played no part in the child's life and identity—even if fully identified and in the same household he did not count; he was not a legal parent, and the child was not (at least legally) a member of his family.

The *Stanley* Court declared the Illinois statute unconstitutional on equal protection grounds, holding that the law could not automatically treat unwed fathers differently from unwed mothers or married men.[81] While ruling that the states could not treat unwed fathers as unfit *per se*, however, the Court did not further address the issue of identity. Under what circumstances would a child be treated as part of the family of a non-marital father? The issue remains contentious more than thirty years after the *Stanley* decision.

C. Stepparents

Stepparents, that is, adults who marry a legal parent without a biological relationship to the child, have generally had a recognized relationship with the child during the marriage, but no continuing

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80. *Id.* at 653, n.5, 92 S. Ct. at 1213. Justice Burger observed in his dissent that:

> When the marriage between the parents of a legitimate child is dissolved by divorce or separation, the State, of course, normally awards custody of the child to one parent or the other. This is considered necessary for the child's welfare, since the parents are no longer legally bound together. The unmarried parents of an illegitimate child are likewise not legally bound together. Thus, even if Illinois did recognize the parenthood of both the mother and father of an illegitimate child, it would, for consistency with its practice in divorce proceedings, be called upon to award custody to one or the other of them, at least once it had by some means ascertained the identity of the father.

Id. at 666, n.4, 92 S. Ct. at 1220 (Burger, J., dissenting).

81. *Id.* at 658–59, 92 S. Ct. at 1216–17 (majority).

duties once the marriage ends.[82] The principal vehicle for stepparent recognition has been the doctrine of *in loco parentis*.

Marriage, however, did not ordinarily confer parental status in itself.[83] Rather the status arose when "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 loco parentis,* and the rights, duties and liabilities of such person are the same as those of the lawful parent."[84] The stepparents' responsibilities, however, are not permanent. They are voluntarily assumed and may be relinquished at will.[85] Moreover, just as the assumption of in loco parentis responsibilities can be assumed from the party's behavior, so, too, can the termination of those responsibilities be derived from factors such as the child's move out-of-the-house.[86] Margaret Mahoney explains that:

> Most lawmakers regard the stepparent-child relationship as derivative, that is, existing only by virtue of the marriage of the stepparent to the natural parent. Even in cases where a support duty existed during marriage, this model allows no extension of the obligation after marriage termination. In the words of one court, "[i]t is manifest, inasmuch as the liability for support of stepchildren is a collateral one, being as it

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82. Harris, *supra* note 24, at 466; *See* Hughes v. Creighton, 798 P.2d 403, 405–06 (Ariz. Ct. App. 1990) (holding cohabitant who believed he was natural father was not entitled to visitation); Gayden v. Gayden, 280 Cal. Rptr. 862, 867–68 (Ct. App. 1991) (holding female cohabitant not entitled to visitation after relationship with father ended); Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 (Ct. App. 1991) (holding female cohabitant not entitled to visitation after relationship with mother ended); Temple v. Meyer, 544 A.2d 629, 632 (Conn. 1988) (holding cohabitant who believed he was natural father not entitled to visitation); In re Marriage of Freel, 448 N.W.2d 26, 27–28 (Iowa 1989) (holding female cohabitant not entitled to visitation after relationship with father ended); Kulla v. McNulty, 472 N.W.2d 175, 182–84 (Minn. Ct. App. 1991) (holding female cohabitant not entitled to visitation after relationship with mother ended); Alison D. v. Virginia M., 572 N.E.2d 27, 29–30 (N.Y. 1991) (same); Ronald FF v. Cindy GG, 511 N.E.2d 75, 77 (N.Y. 1987) (holding cohabitant who believed he was probably natural father was not entitled to visitation); Cooper v. Merkel, 470 N.W.2d 253, 255–56 (S.D. 1991) (holding male cohabitant not entitled to visitation after relationship with mother ended); In re Z.J.H., 471 N.W.2d 202, 209–13 (Wis. 1991) (holding female cohabitant not entitled to visitation after relationship with mother ended).

83. *See, e.g.,* Trudell v. Leatherby, 212 Cal. 678, 681 (Cal. 1931).

84. Loomis v. State, 39 Cal. Rptr. 820, 823 (Cal. Ct. App. 1994).

85. Margaret M. Mahoney, *Support And Custody Aspects Of The Stepparent-Child Relationship*, 70 Cornell L. Rev. 38, 42 (1984).

86. *Id.* In addition, promises of support are not necessarily binding. *See, e.g.*, Sargeant v. Sargeant, 495 P.2d 618, 623 (Nev. 1972) (promises made by husband during marital separation held not binding at time of divorce).

were, an offshoot of the marriage itself, that once the marriage ends or is declared non-existent, the collateral liability to support stepchildren also ends."[87]

Underlying this doctrine is the conclusion that, absent adoption, the stepparent is not a "real" parent, that is, the stepparent does not have a permanent bond with the child constitutive of identity. This conclusion has two components. First, as Mahoney emphasizes, the obligation to the child is seen as derivative of the obligation to the legal parent. When the adult relationship ends, so does the obligation to the child. While the biological parent has a unique and permanent obligation to the child by virtue of his role in the child's conception,[88] the stepparent does not.[89]

The second factor is the desire to encourage remarriage. Parents with children from a prior relationship are often viewed as less desirable on the "marriage market."[90] If marriage to a legal parent triggered permanent support obligations to the child, it would further discourage the enterprise. Indeed, commentators have raised this concern to oppose even those obligations tied to *in loco parentis*.[91]

Visitation rights, unlike financial obligations, do not discourage marriage. But while legal parents can certainly agree to allow stepparent visitation following divorce, they are unlikely to be compelled to do so.[92] Although a few states, including California and Louisiana, have extended visitation rights to stepparents,[93] after

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87. Mahoney, *supra* note 85, at 52–53 (citing Cynthia M. v. Elton M., N.Y.S.2d 934, 935 (N.Y. Fam. Ct. 1972) (denying mother's petition for child support from former husband)).

88. *Id.* at 40.

89. Mahoney notes that it is the parent's reliance on the stepparent's support, rather than the child's, that provides the more compelling basis for post-divorce support. *Id.* at 56, 59.

90. *See* June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 Wm. & Mary Bill of Rts. J. 1011, 1033 (2003).

91. Mahoney, *supra* note 85, at 45–46.

92. *Id.* at 62.

93. *See* La. Civ. Code art. 136:

> B. Under extraordinary circumstances, a relative, by blood or affinity, or a former stepparent or step grandparent, not granted custody of the child may be granted reasonable visitation rights if the court finds that it is in the best interest of the child. In determining the best interest of the child, the court shall consider:
>
> (1) The length and quality of the prior relationship between the child and the relative.
>
> (2) Whether the child is in need of guidance, enlightenment, or tutelage which can best be provided by the relative.
>
> (3) The preference of the child if he is determined to be of sufficient maturity to express a preference.

Troxel,[94] stepparents must overcome the more strongly enforced presumptions in favor of the legal parents.[95] Moreover, visitation by itself, even when available as a matter of right, is not the same thing as parental status. It is ordinarily secondary to the parent's continuing custodial rights, and there is not, as there is with parental status, a necessary moral obligation to exercise it.[96]

III. PARENTHOOD: RENEGOTIATED IN LIGHT OF SUBSEQUENT EVENTS?

A. Erosion of the Marital Presumption's Utility and Moral Force

The combination of factors that made the marital presumption so effective has not endured. Certainly, the most dramatic change has been the advent of paternity tests. While neither the child's physical appearance nor testimony of non-access may conclusively prove or disprove paternity,[97] Glennon estimates the accuracy of DNA tests by the late eighties as greater than ninety-nine percent.[98] Courts could bar all evidence of infidelity, and still determine paternity with certainty. Indeed, even courts upholding the marital presumption

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(4) The willingness of the relative to encourage a close relationship between the child and his parent or parents.

(5) The mental and physical health of the child and the relative.

See also Cal. Civ. Code §§ 4351.5(a), (I) (1983):

> [I]n the proceedings under [the code sections dealing with annulment, marriage dissolution and separation proceedings], the . . . court has jurisdiction to award reasonable visitation rights to a person who is a party to the marriage that is the subject of the proceeding with respect to a minor child of the other party to the marriage, if visitation by that person is determined to be in the best interests of the minor child . . . Any visitation right granted to a stepparent pursuant to this section shall not conflict with any visitation or custodial right of a natural or adoptive parent who is not a party to the proceeding.

94. Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000).

95. *See* In re Marriage of W., 7 Cal. Rptr. 3d 461 (Cal Ct. App. 2003) (holding that application of a broadly worded visitation statute that permitted the court to order stepparent visitation without "a presumption that a parent's decision regarding visitation is in the best interest of the child" violated the parent's constitutional rights articulated in *Troxel*).

96. David Chambers, Stepparents, Biologic Parents, And The Law's Perceptions Of "Family" After Divorce in Divorce Reform at the Crossroads, 104-08, 118-19 (Stephen D. Sugarman & Herma Hill Kay eds., Yale University Press 1990) (conflicting expectations and difficulty of stepparent role).

97. Of course, in earlier eras, a notable exception involved interracial children to whom the marital presumption might not apply. Glennon, *supra* note 52, at 565, n.142.

98. *Id.* at 556.

cannot—and may not wish to—prevent the children from ultimately discovering the truth.

The grounds on which continued adherence to the marital presumption reached the Supreme Court, however, involved less the certainty of paternity tests than the continued moral force underlying the presumption. *Michael H. v. Gerald D.*[99] involved the circumstances in which the marital presumption may have the greatest continuing utility—*viz.*, the ability of an intact family to manage its affairs free from the interference of an outsider, even an outsider whose biological paternity is not in doubt.[100] Justice Scalia, writing the plurality opinion, observed that:

> [T]he legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.[101]

The dissent, in contrast, questioned the continued vitality of the forces that produced the marital presumption. Justice Brennan, for example, referred to the challenged statute "stubbornly" insisting on labeling Gerald the father "in the face of evidence showing a 98 percent probability that her father is Michael."[102] He commented: In the plurality's constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and

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99. Michael H. v. Gerald D., 491 U.S. 110, 109 S. Ct. 2333 (1989).

100. Naomi Cahn and I have observed, however, that the facts of the case look very different if considered at the point when the case was first brought rather than five years later when the Supreme Court issued its decision. Michael initially asserted his parental rights shortly after the relationship with Carole ended. Victoria was three at the time, Michael had been living with her and her mother, and everyone involved (most critically Victoria) treated Michael as the father. In contrast, by the time the Supreme Court rendered its decision in 1989, Victoria was living with Gerald and Carole in New York, two new children had been born into the marriage, and the California court's refusal in 1984 to recognize the man she regarded as her "daddy" had effectively ended her relationship with him. June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 Wm. & Mary Bill of Rts. J. 1011, 1045 (2003).

101. Michael H. v. Gerald D., 491 U.S. 110, 124, 109 S. Ct. 2333 (1989).

102. *Id.* at 148, 109 S. Ct. at 2355 (Brennan, J., dissenting).

in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did.[103]

The facts of the case underscore Justice Brennan's point. Justice Scalia began the opinion, noting that the "facts of this case are, we must hope, extraordinary."[104] Carole, an international model, and Gerald, a top executive in a French oil company, were married and lived in Playa del Rey, California "when one or the other was not out of the country on business."[105] Carole became involved in an "adulterous affair" with a neighbor, Michael H., and conceived a child, Victoria, though Gerald was listed as the father on the birth certificate.[106] When Gerald moved to New York City to pursue business interests, Victoria stayed with Carole in California, visited Michael in St. Thomas, returned to California with her mother and lived with "yet another man, Scott K."[107] Carole and Victoria spent time with Gerald in New York City, returned to Scott in California, spent more time with Gerald in New York, reconciled with Michael and lived with him for eight months in California.[108] Around the time Victoria turned three, however, Carole permanently parted ways with Michael, and resumed the marriage with Gerald in New York, where they subsequently had two additional children.[109] The idea that Gerald's legal status as a parent might turn on the stigma associated with adultery or illegitimacy was, by the time the case reached the Supreme Court in 1989, anachronistic to say the least.

The Supreme Court has not revisited the issue since, and the states courts, not unlike the Supreme Court itself, have fractured over the issue.[110] In *Callender v. Skiles*,[111] the Iowa Supreme Court echoed Justice Brennan's reasoning to maintain that:

> The traditional ways to establish legal parentage have dramatically changed in recent generations, as has the traditional makeup of the family. Scientific advancements

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103. *Id.* at 140, 109 S. Ct. at 2351.
104. *Id.* at 113, 109 S. Ct. at 2337 (majority).
105. *Id.*
106. *Id.*
107. *Id.* at 114.
108. *Id.*
109. *Id.*
110. The opinion in *Michael H.* could not command a majority of the court. Only Justice Rehnquist entirely joined Justice Scalia's plurality opinion. Justice O'Connor filed a concurring opinion in which Justice Kennedy joined. Justice Stevens concurred in the judgment, and four justices dissented. *Id.* at 112, 109 S. Ct. 2336. Justice Stevens' concurrence in the judgment, which provided the fifth vote for the judgment against Michael, was based on a reading of California law with which none of the other justices agreed. *Id.* at 136, 109 S. Ct. at 2348-49 (Stevens, J., concurring).
111. Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999).

> have opened a host of complex family-related legal issues which have changed the legal definition of a parent. It has also made the identity of a biological parent a virtual certainty. Social stigmas have also weakened. If we recognize parenting rights to be fundamental under one set of circumstances, those rights should not necessarily disappear simply because they arise in another set of circumstances involving consenting adults that have not traditionally been embraced. Instead, we need to focus on the underlying right at stake.[112]

The right at stake to which the Iowa court referred was the biological father's ability to establish the fact of paternity, and to a relationship with his child. On remand, the lower courts terminated the husband's parental status and ordered visitation for the "new" father.[113]

Over twenty states permit putative fathers to establish paternity even over the objections of the mother and her husband.[114] Some, like Iowa, recognize the ability to do so as a right granted by the state constitution.[115] Others, which continue to give greater force to the marital presumption, now permit easier circumvention.[116] What these states fail to answer coherently, however, is what has happened to the moral force of parenthood? When are parental rights accompanied by a duty to exercise them? The answer is that the marital presumption has not been replaced by any overarching definition of parenthood. Instead, the idea of parenthood has been divided into component parts that play out differently in different contexts, amplifying the legal, if not biological, uncertainties that today underlie the definition of parenthood.

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112. *Id.* at 190.

113. Callender v. Skiles, 623 N.W.2d 852, 857 (Iowa 2001). *See also* Serafin v. Serafin, N.W.2d 461, 462 (1977) (abolishing the long-standing rule that prevented husband or wife from rebutting husband's paternity).

114. *Id.* at 189. For more recent developments, see Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-Less When Nature Prevails In Paternity Actions*, 65 U. Pitt. L. Rev. 811 (2004).

115. *See* R. McG. v. J.W., 615 P.2d 666, 672 (Colo. 1980) (equal protection provision of Colorado Constitution mandated putative father be given standing to establish paternity while mother is married); In re J.W.T., 872 S.W.2d 189, 198 (Tex. 1994) (statute denying putative father standing to challenge paternity violated due process clause of state constitution), *superseded by statute* Tex. Fam. Code Ann. § 160.101(a)(3) (1996) (permits biological father to contest another man's status as presumed father). *See also* Brian C. v. Ginger K., 77 Cal. App. 4th 1198, 92 Cal. Rptr. 2d 294 (Cal. App. 4th 2000).

116. Jaqulyn A. West, Comment, *Maintaining the Legal Fiction: Application of the Presumption of Paternity and Paternity by Estoppel in Pennsylvania*, 42 Duq. L. Rev. 577 (2004).

B. Estoppel: What Remains of Reliance?

As the *Clevenger* case indicates, estoppel served as the moral backstop of the marital presumption.[117] Even when the fact of biological non-paternity could not be denied, the courts could still lock in a husband who had functioned as a child's father on the basis of estoppel. Decided in 1961, the case reflected a greater willingness to recognize uncomfortable biological facts, but it still reflected moral judgment: a man who knowingly embraced the paternal role could not so easily set it aside.[118]

While many states continue to observe estoppel principles, they do not have the force of a virtually irrebutable marital presumption. Alaska illustrates what has become the modern trend. Earlier Alaskan cases found that paternity by estoppel was "intended to avoid unfairness and emotional harm to the child from frustrating the child's expectation of care and support to adulthood . . . ."[119] In the 1999 case of *B.E.B. v. R.L.B.*,[120] the trial court relied on those cases to establish paternity in a case where a husband, who had undergone a vasectomy procedure, nonetheless acted as the father of a child born into the marriage for the first five years of the boy's life.[121] The Alaska Supreme Court reversed, and in doing so, rejected the *Clevenger* definition of estoppel altogether.[122] The court observed that the states observed two lines of doctrine in parenthood by estoppel cases. The first followed *Clevenger* in permitting a showing of prejudice based on emotional harm.[123] The second, which the

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117. Clevenger v. Clevenger, 11 Cal. Rptr. 707, 714 (Cal. Ct. App. 1961).

118. *Id.* The court reasoned:

> The relationship of father and child is too sacred to be thrown off like an old cloak, used and unwanted. We are dealing with the care and education of a child during his minority and with the obligation of the party who has assumed as a father to discharge it. The law is not so insensitive as to countenance the breach of an obligation in so vital and deep a relation, undertaken, partially fulfilled, and suddenly sundered.

Id. at 716.

119. Wright v. Black, 856 P.2d 477 (Alaska 1993).

120. B.E.B. v. R.L.B, 979 P.2d 514 (Ak. 1999).

121. The trial court found that the boy "would suffer emotional damage if B.E.B. were allowed to abandon the paternal role that he had voluntarily established with the boy." To protect the boy from this emotional harm, the court estopped the husband from denying paternity and ordered him to continue paying support. *Id.* at 515–16.

122. *Id.* at 518–20.

123. The court cited *Clevenger* for the proposition that, in a case involving paternity by estoppel, the traditional requirement of prejudice can be met in one of three ways:

> (1) the child is deprived of the mother's potential action to hold the natural father responsible for the support of the child; (2) the child gives his love

Alaska court described as the majority rule,[124] limited the showing of prejudge to financial harm.[125]

This second line of cases reasons that emotional bonding alone is not enough to invoke estoppel because:

> . . . to hold otherwise would create enormous policy difficulties. A stepparent who tried to create a warm family atmosphere with his or her stepchildren would be penalized by being forced to pay support for them in the event of a divorce. At the same time, a stepparent who refused to have anything to do with his or her stepchildren beyond supporting them would be rewarded by not having to pay support in the event of a divorce.[126]

The Alaska court despaired at the prospect of persuading a non-biological father to protect the child's emotional well-being. It concluded that an "order requiring the father to pay support or barring him from challenging paternity will hardly prevent him from publicly claiming that he is not actually the child's father."[127] Indeed, the court thought that an order to pay support "might itself destroy an otherwise healthy paternal bond by driving a destructive wedge of bitterness and resentment between the father and his child."[128] In short, in an era of frequently changing relationships, the court did not think that either the established bond with a young child or the promises of matrimony were enough to forge a permanent basis for non-biological parenthood.

This sense of impermanence affects even those states that continue to combine the marital presumption with estoppel on the

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and affection to the husband, expecting care and support until adulthood. Denying paternity later inflicts an emotional injury on the child; (3) the child, who has held himself out as legitimate, suffers a social injury when that status is removed.

Id. at 516 (*citing* Clevenger v. Clevenger, 11 Cal. Rptr. 707, 714 (Cal. Ct. App. 1961)).

124. *Id.* at 514.

125. Part of the explanation the court gave for its reversal of Alaskan doctrine was that "the parties in Wright do not seem to have alerted us to the large body of cases that are at odds with *Clevenger*, since the applicable estoppel standard was evidently uncontested. We thus appear to have accepted *Clevenger* as a conventional description of a uniformly accepted doctrine." *Id.* at 519.

126. *Id.* at 518 (*citing* Knill v. Knill, 510 A.2d 546 (Md. 1986); Miller v. Miller, 478 A.2d 351, 359 (N.J. 1984)). *See also* K.A.T. v. C.A.B., 645 A.2d 570, 573 (D.C. 1994); Wiese v. Wiese, 699 P.2d 700, 702 (Utah 1985); Quintela v. Quintela, 544 N.W.2d 111, 117–19 (Neb. Ct. App. 1996); K.B. v. D.B., 639 N.E.2d 725, 728–29 (Mass. App. Ct. 1994).

127. B.E.B. v. R.L.B, 979 P.2d 514 (Ak. 1999).

128. *Id.*

basis of emotional ties.[129] Consider, for example, the case of *Doran v. Doran* in Pennsylvania.[130] The child, William, Jr., was born in 1990. Just before the child's fifth birthday, the Dorans divorced and Mr. Doran agreed to pay child support. About a year after the divorce, Mr. Doran discovered that his wife had had an affair during the marriage, an affair he later learned had started before the child's birth and lasted more than a decade afterwards. He asked the mother whether the child was his. She said "yes," and he continued to accept the child as his own. In 2001, however, when the child was eleven, Mr. Doran became increasingly convinced that the child did not resemble him, and persuaded the mother to permit DNA testing.[131] The tests indicated that the "probability of paternity was zero percent!"[132] Mr. Doran suggested that they jointly tell the child, but the mother went ahead and told the child on her own. Mr. Doran then "gently as possible removed himself from the child's life in a way which he felt would cause the child the least amount of anguish and hurt,"[133] and moved to terminate child support.

The court first concluded that the marital presumption did not apply because "there is no longer an intact family or a marriage to preserve."[134] The court then considered the issue of estoppel explaining that:

> Estoppel in paternity actions is merely the legal determination that because of a person's conduct (e.g., holding out the child as his own, or supporting the child) that person, regardless of his true biological status, will not be permitted to deny parentage, nor will the child's mother who has participated in this conduct be permitted to sue a third party for support, claiming that the third party is the true father.[135]

Mr. Doran had clearly acted as the father from birth, exercised visitation and paid support after the divorce, and continued to see the

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129. *See* Barnard v. Anderson, 767 A.2d 592 (Pa. Super. Ct. 2001). The husband had a vasectomy after three children were born into the marriage. Three years later, his wife became pregnant, and they separated five months after the baby was born. The Superior Court held that the marital presumption of paternity did not apply because "the very purpose for application of the presumption, preservation of the marriage, has been thwarted and is no longer relevant, for the parties were divorced before the hearing of this matter." *Id.* at 595.

130. Doran v. Doran, 820 A.2d 1279 (Pa. Super. Ct. 2003).

131. *Id.* at 1281 (*citing* Fish v. Behers, 741 A. 2d. 721,723 (Pa. Super. Ct. 1999)).

132. Doran, 820 A.2d at 1281.

133. *Id.*

134. *Id.* at 1283.

135. *Id.*

child after he learned the result of the DNA tests.[136] Nonetheless, he argued that he had been deceived by the mother's conduct. The trial court agreed, finding that Mr. Doran would not have held the child out as his own had he known the truth, and therefore, could not be estopped from denying paternity.[137]

The marital presumption, where it applies, locks in parentage on the basis of the facts at the time of the child's birth. Estoppel, in contrast, looks at adult behavior after the child is born. In the *Doran* case, Mr. Doran's ability to deny parentage turned on two factors: the spouses' behavior toward each other, with particular emphasis on the mother's deceit, and the speed of Mr. Doran's disavowal of parenthood after he learned the truth of paternity. If Mr. Doran had done what he arguably might have regarded as "the right thing" and either shielded the child from knowledge of his origins or reaffirmed his paternal role without the biological connection, he would have continued to be liable for support.[138] Indeed, some commentators have concluded that, under Pennsylvania law, "unless the putative father ceases contact with the child upon learning that he is not the biological father, he will be forced to support that child"[139] —with, of course, the funds paid to the custodial parent who deceived him.

The earlier estoppel cases like *Clevenger*[140] emphasized the child's need for certainty and moral judgment of the husband's desire to escape responsibility. The modern cases, if they lock in paternity at all, seem resigned to the effective end of the relationship. The moral judgment then shifts to a determination of whether the mother's behavior excuses her husband, or whether the biological father's potential presence makes support unnecessary.[141] Either way, the focus becomes the continuation of support rather than the child's family membership.

C. Unmarried Fathers: Parentage and Lies

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136. *Id.*

137. *Id.* at 1284–85.

138. *See, e.g.*, J.C. v. J.S., 826 A.2d 1(Pa. Super. Ct. 2002) (applying estoppel where ex-husband continued to act as the father for several years after his ex-wife informed him that he was not the father of the child).

139. West, *supra* note 116, at 583.

140. Clevenger v. Clevenger, 11 Cal. Rptr. 707, 714 (Cal. Ct. App. 1961).

141. *See, e.g.*, Kohler v. Bleem, 654 A.2d 569 (Pa. Super. Ct. 1995). In this case, the mother told her husband that an "unknown man" had fathered the child. When the father learned the identity of the biological father years later, and found that it was someone who lived nearby, he separated from the mother and stopped contact with the child, who then established a relationship with the biological father. The Pennsylvania Superior Court refused to apply estoppel in a suit for child support against the biological father. *Id.* at 576.

The *Stanley* line of cases initiated greater recognition of the parental status of unmarried men without, however, guaranteeing certainty about their identity or the extent of their authority over the child. Although many states now confer parental status on the basis of biology alone,[142] the extension of parental rights to two people who do not necessarily have a relationship created problems of its own.[143] As a result what appears to be an *ex ante* system based on biology is in fact a far more fragile and insecure system of parental opportunity.

For unmarried fathers before *Stanley,* the law corresponded with widely held notions of moral obligation—marry the mother or forfeit the right to play a role in the child's life.[144] Fathers of all kinds are now encouraged to craft a commitment to the child independent of their relationship with the mother. For unmarried partners, the mother's pregnancy triggers a dilemma—under what circumstances should the father be identified and how should his role in the child's life be secured?

The most dramatic cases involve men who have objected to the mother's decision to place the child for adoption. Indeed, the three Supreme Court cases immediately following *Stanley* all involved mothers' efforts to terminate the parental rights of biological fathers in order to facilitate a stepparent adoption by the mother's new husband.[145] The Supreme Court affirmed the constitutional protection accorded the father's parental standing on the basis of what has been called "biology-plus," that is, biological paternity plus an established relationship with the child. The fathers who lived with mother and child after the child's birth and established a parental bond received constitutional protection; the fathers who had no such ties were accorded no protection even when the mother had frustrated their efforts to bond with the infant.[146]

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142. Harris, *supra* note 24, at 468.

143. Carbone, *supra* note 1, at 186–94.

144. *Compare* The Honorable John E. Fennelly, *Step Up or Step Out: Unwed Fathers' Paternal Rights Post-Doe and E.A.W,* 8 St. Thomas L. Rev. 259 (1996) (contending that unwed fathers should exercise parental rights or allow someone else to do so).

145. *See* Lehr v. Robertson, 463 U.S. 248, 258–61, 103 S. Ct. 2985 (1983); Caban v. Mohammed, 441 U.S. 380, 385, 99 S. Ct. 1760 (1979); Quilloin v. Walcott, 434 U.S. 246, 247–48, 98 S. Ct 549 (1978).

146. Stanley and Caban had established such relationships with the children and prevailed before the Supreme Court; Lehr and Quillion did not. For a fuller account of these cases, *see* Carbone, supra note 1, at 166–70. These cases differ from *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S. Ct. 2333 (1989), in that no marital relationship was involved. For a discussion of the cases extending this recognition of a constitutional right even to those fathers who conducted an adulterous affair, see *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294, (Cal. App. 4th 2000), and *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999).

As Leslie Harris observes, however, "under the statutes and case law of many states, custodial claims of unwed fathers are protected to a far greater extent than the Supreme Court has said is constitutionally necessary, even when this protection comes at the price of disrupting functional, but not biologically related, families."[147] Perhaps the most controversial recognition of unmarried biological fathers' rights has come in the cases in which the fathers have sought to undo adoptions arranged by the mother. The most infamous of the cases resulted in the transfer of four-year-old Baby Richard and two-and-a-half year old Baby Jessica from their adoptive parents to biological parents they did not know.[148]

The trajectory of these cases, at least to the extent the decisions focus on fairness between the parents rather than fairness to the child, parallels the decisional bases of the estoppel cases. In eras of biological uncertainty, the one certain parent, the mother, was entrusted with decision-making power. Today, in many jurisdictions, identification of the biological father confers equal decision-making powers, and the mother cannot place the child for adoption, thereby terminating the biological father's parental status, without his consent.[149] In the Baby Richard and Baby Jessica cases, the mothers did not identify the biological father and frustrated his attempts to become involved with the child. Once the respective courts ruled that the adoption had not successfully terminated his parental rights because of the mother's deceit, the father was entitled to custody, and the would-be adoptive parents who had raised the children from birth were legal strangers to the child no different from other third parties.[150] The child's fate, as in the estoppel cases, turned on the legal status of parenthood, and determination of that status depended on validating biology in the face of parental deceit.[151]

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147. Harris, *supra* note 24, at 468.

148. *See* In Interest of B.G.C., 496 N.W.2d 239 (Iowa 1992); In re Petition of Kirchner, 649 N.E.2d 324 (Ill. 1995), *cert. denied*, 115 S. Ct. 2599 (1995).

149. Carbone, *supra*, note 1, at 170. Many states require the consent of both parents for adoption unless one of the parents cannot be found, has abandoned the child, or is otherwise shown to be unfit. *Id.*

150. For more extended accounts of these cases, see Harris, *supra* note 24, at 468–73, and Carbone, *supra* note 1, at 170. *See also* Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L. Rev. 1747 (1993); Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?* 102 Colum. L. Rev. 337 (2002); Janet L. Dolgin, *Just a Gene: Judicial Assumptions about Parenthood*, 40 U.C.L.A. L. Rev. 637 (1993); Laurence C. Nolan, *"Unwed Children" and Their Parents Before the United States Supreme Court from* Levy *to* Michael H.*: Unlikely Participants in Constitutional Jurisprudence*, 28 Cap. U.L. Rev. 1 (1999).

151. The Illinois Supreme Court observed in the case of *Baby Richard* that:

> The adoption laws of Illinois are neither complex nor difficult of application. Those laws intentionally place the burden of proof on the

To remedy the harm caused by the long delays in the adoption cases, many states have attempted to lock in the determination of parental status as soon as possible after birth. Some states have very short periods for the exercise of parental rights.[152] Others require the father to demonstrate his commitment to mother and child during the pregnancy.[153] Many protect adoption petitions from collateral attack even in the case of deceit, but the typical period for finality for that legislation is one year.[154] These measures, however, have produced no uniformity in state approaches to paternity. Instead, they confer on biological parents the right to establish a relationship with the child; both the fact and legal status of parenthood may depend on whether the father succeeds in doing so.[155]

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adoptive parents in establishing both the relinquishment and/or unfitness of the natural parents and, coincidentally, the fitness and the right to adopt of the adoptive parents. In addition, Illinois law requires a good-faith effort to notify the natural parents of the adoption proceedings. These laws are designed to protect natural parents in their preemptive rights to their own children wholly apart from any consideration of the so-called best interests of the child. If it were otherwise, few parents would be secure in the custody of their own children. If best interests of the child were a sufficient qualification to determine child custody, anyone with superior income, intelligence, education, etc., might challenge and deprive the parents of their right to their own children. The law is otherwise and was not complied with in this case.

In re Petition of Doe I, *rev'd*, 638 N.E.2d 181, 182–83 (Ill. 1994), *rehearing denied*, 638 N.E.2d at 187 (Ill. 1994).

152. Nebraska, for example, requires filing a notice of intent to claim paternity within five days of the child's birth. Carbone, *supra* n.1, at 171. *See also* Deborah L. Forman, *Unwed Fathers and Adoption*, 72 Tex. L. Rev. 967, 1000–03 (1994); Alison S. Pally, *Father by Newspaper Ad: The Impact of In Re the Adoption of a Minor Child on the Definition of Fatherhood*, 13 Colum. J. Gender & L. 169 (2004) (providing an account of Florida legislation providing notice by newspaper ad to biological fathers).

153. *See* Matter of Raquel Marie X, 559 N.E.2d 418 (N.Y. 1990), *appeal following remand*, 570 N.Y.S.2d 604 (A.D. 1991); C. V. v. J. M. J., 810 So. 2d 692 (Ala. App. 1999); Matter of Adoption of Doe, 543 So. 2d 741 (Fla. 1989); Adoption of Michael H., 898 P.2d 891 (Cal. 1995) (en banc).

154. *See, e.g.*, In re adoption of S.L.F., 27 P.3d 583 (Utah App. 2001).

155. Jeffrey Parness concludes that:

Failures of unwed biological fathers to meet statutory paternity norms also can result from poor legislative drafting where the necessary steps to parenthood remain unclear. For example, one law that simply says an unwed biological father must avoid "neglect of, or misconduct toward the child" in order to participate in any later adoption proceeding. Other laws say that to participate, unwed fathers must provide "reasonable and consistent payments" amounting to "tangible means of support" or make "reasonable efforts" toward "parental commitment" although "thwarted" by the mother or her agents. Here, the statutory requirements are so vague that they promote unfettered judicial discretion. They invite courts to consider irrelevant (in the evidentiary sense) circumstances such as the

Fatherhood, of course, also depends on identification of the biological parent and while there is little pressure for uniformity in state custody decisions, the federal government has exercised considerably more interest in child support. To that end, uniform statutes and federal legislation have attempted to facilitate identification of the biological parent at birth.[156] Birth certificates were intended to perform that function, but such certificates were frequently incomplete, especially for the unmarried.[157] Moreover, the mere fact of a man's name on the birth certificate did not necessarily mean that either he is the genetic father or that he had consented to the appearance of his name.[158] A new process, involving voluntary acknowledgments of parenthood, has been developed to remedy these limitations. The Uniform Parentage Act of 2000, drafted to implement the federal legislation requiring that the states adopt hospital-based programs to encourage paternity identification, provided, "The mother of a child and a man claiming to be the father of the child conceived as the result of sexual intercourse with the mother may sign an acknowledgment of paternity with intent to establish the man's paternity."[159] The 2002 version of the Act changed the term "conceived as the result of sexual intercourse" to refer instead to "a man claiming to be the genetic father of the child."[160] The drafters explained:

> PRWORA does not explicitly require that a man acknowledging parentage necessarily is asserting his genetic parentage of the child. In order to prevent circumvention of adoption laws, § 301 corrects this omission by requiring a sworn assertion of genetic parentage of the child. A 2002 amendment provides that a man who signs an acknowledgment of paternity declares that he is the genetic

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bonding between the child and the prospective adopting couple or the comparative fitness of the biological father and the prospective adopting couple.

Jeffrey A. Parness, *Participation of Unwed Biological Fathers in Newborn Adoptions: Achieving Substantive and Procedural Fairness*, 5 J. L. Fam. Stud. 223, 229–30 (2003).

156. *See* 42 U.S.C. § 666(a)(5)(C) (1998) (providing that a state must have a simple civil process for parents to voluntarily to acknowledge paternity, which must include a hospital-based program "focusing on the period immediately before or after the birth of a child.").

157. Jeffrey A. Parness, *Federalizing Birth Certificate Procedures*, 42 Brandeis L.J. 105 (2003); Jeffrey A. Parness, *Designating Male Parents at Birth*, 26 U. Mich. J.L. Ref. 573, 576–78 (1993).

158. Jeffrey A. Parness, *Designating Male Parents At Birth*, 26 U. Mich. J.L. Ref. 573, 577 (1993).

159. Uniform Parentage Act of 2000 § 301.

160. Uniform Parentage Act of 2002 § 301.

> father of the child. Thus both the man and the mother acknowledge his paternity, under penalty of perjury, without requiring the parents to spell out the details of their sexual relations. Further, the amended language also takes into account a situation in which a man, who is unable to have sexual intercourse with his partner, may still have contributed to the conception of the child through the use of his own sperm.[161]

The Act gives the parties sixty days to file for rescission, but is otherwise conclusive.[162] Even in the case of fraud, the Act establishes a two-year time limit for contesting parental status.[163]

The Act is intended to establish a streamlined system for establishing paternity.[164] As with the marital presumption, no court proceeding or paternity tests are necessary; it is enough for the woman giving birth and the man acknowledging paternity to sign and file the statement.[165] The system, however, has not succeeded in preventing challenges based either on the use of such declarations to circumvent adoption or to include the desired father without certainty about his biological status. Consider the case of the *County of Los Angeles v. Sheldon P.*[166] The child, J., was born in July 1997, and in accordance with the California statute, the mother was encouraged to sign a voluntary acknowledgment before she left the hospital.[167] The biological father (Sheldon) had refused to give the mother financial help and the mother wanted to make sure that someone would have legal authority over the child if anything happened to her.[168] Accordingly, she asked a friend, Leon, whom she knew could not be the biological father, to sign the declaration.[169] Sheldon, however, later reconciled with the mother and lived with and supported mother and child for several years.[170] When Sheldon moved out, the mother sought assistance from the county. In seeking child support from the

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161. *Id.* cmt. to § 301.
162. *Id.* § 307.
163. *Id.* § 308.
164. *See, e.g.*, County Of Los Angeles v. Sheldon P., 126 Cal. Rptr. 2d 350, 352 (Cal. App. 2002) (noting with respect to a similar statute that "[t]he Legislature further found that a simple system for voluntary paternity declarations would result in a significant increase in the ease of establishing paternity and a significant decrease in the time and money needed to establish paternity, and was in the public interest.").
165. Uniform Parentage Act of 2002 § 302.
166. County of Los Angeles v. Sheldon P., 126 Cal. Rptr. 2d 350 (Cal. App. 2002).
167. *Id.* at 342.
168. *Id.*
169. *Id.*
170. *Id.*

biological father, the county moved to set aside the voluntary acknowledgment of paternity.[171] The appellate court concluded that there was ample factual record to set aside the acknowledgment, as the mother asked Leon to sign the declaration while under pain medication, was not advised that she could leave the hospital without providing information about the child's father, and was not given the proper explanatory materials as required by Cal. Fam. Code § 7572.[172]

This case demonstrates the difficulty of securing any determination of paternity. So long as the parties were in agreement, no one inquired too closely into their affairs. Sheldon, the biological father, was aware of the pregnancy, but did not inquire into the presence of Leon's name on the declaration. Had he not reunited with the mother, Leon would have remained J.'s legal father even if Leon had never developed a relationship with her. In the meantime, the county action was not initiated until after J. turned three, and the effort to establish a formal record of Sheldon's paternity occurred only because the county wished to establish responsibility for child support.[173]

The appellate action turned on the hospital's failure to follow the right procedures in securing the declaration, but imagine the consequences of a better-informed hospital staff. If the staff had correctly explained the law to J.'s mother, documented its procedures in writing, and secured her signature during a period in which she was not on medication, should the outcome really have been different? Sheldon was both J.'s biological father and the only man to perform the role. Leon was a friend of the mother's, volunteering without any apparent intention to bond with the child. While other cases have found voluntary acknowledgments to be conclusive,[174] there is no guarantee that the results will correspond with assumption of a paternal role.

Voluntary acknowledgments of paternity are intended to function much like the marital presumption.[175] They create a hard to rebut

171. *Id.* at 340–41.
172. *Id.* at 347–48.
173. *Id.* at 340–41.
174. *See, e.g.*, People ex rel. Department of Public Aid v. Smith, 818 N.E.2d 1204 (Ill. 2004) (supporting that a father's acknowledgment of paternity is conclusive under state law). In *Smith*, two days after the child was born, Smith executed a voluntary acknowledgment of paternity. Subsequently, Smith learned through DNA testing that the child was not his biological child. *Id.* Smith then brought an action to declare the nonexistence of the parent-child relationship. The court concluded that under the Parentage Act of 1984 (750 ILCS 45/6(d) (West 2002)), a signed acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact. *Id.*
175. *Id.* at 397.

presumption of paternity with a minimum of judicial intervention. And like the marital presumption, they require the cooperation of both parents. When, however, these voluntary declarations prove to be a fiction, or when they do not withstand the test of time, it is not clear that they serve the child's interest in acquiring a permanent identity. Indeed, at a time when the marital presumption is increasingly viewed as an anachronism, the more limited commitment of a voluntary acknowledgment may prove harder to dislodge.

D. Stepparents Revisited: Legal Recognition Now, Later or Forever?

The common law drew clear distinctions between biological parents and stepparents, who attained their legal status only through their marriage to an adult with parental status.[176] A number of states, however, now extend the concept of *in loco parentis*, or open ended custody statutes, to provide a basis for stepparent visitation. John Gregory observes that one of the first recognitions of stepparents' custodial rights occurred in Pennsylvania in 1980.[177] In *Spells v. Spells*, the court observed:

> It is our belief that a *stepparent* may not be denied the right to visit his stepchildren merely because of his lack of a blood relationship to them. Clearly, a *stepparent* and his young stepchildren who live in a family environment may develop deep and lasting mutual bonds of affection. Courts must acknowledge the fact that a stepfather (or stepmother) may be the only parent that the child has truly known and loved during its minority. A stepparent may be as devoted and concerned about the welfare of a stepchild as a natural parent would be. Rejection of visitation privileges cannot be grounded in the mere status as a stepparent.[178]

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176. For an overview of these issues, see Mary Ann Mason and Nicole Zayac, *Rethinking Stepparent Rights: Has The ALI Found A Better Definition?*, 36 Fam. L. Q. 227, 229 (2002).

177. It is hardly, however, the first recognition of the custodial rights of a stepparent. *See, e.g.*, Commonwealth ex rel. Kraus v. Kraus, 138 A.2d 225 (Pa. Super. Ct. 1958).

178. John DeWitt Gregory, *Defining the Family in the Millennium: The Troxel Follies*, 32 U. Mem. L. Rev. 687, 691–92 (2002), *citing* Spells v. Spells, 378 A.2d 873, 879 (Pa. Super. Ct. 1977). In granting stepparent visitation, the court based its decision on a combination of the doctrine of *in loco parentis* and an open-ended best interests test.

Wisconsin has extended the doctrine of *in loco parentis* beyond stepparents married to a legal parent to anyone who assumes the parental role. In 1995, the Supreme Court of Wisconsin held:

> To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, [although the contribution need not be monetary,] without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[179]

Both the Pennsylvania and the Wisconsin recognition of the visitation rights of stepparents rest on an *ex post* determination. As with the doctrine of *in loco parentis*, it is not the mere fact of partnership with a legal parent that confers parental status. Instead, it is the recognition of bonding with the child over a period of time, rather than the moment of marriage itself, that results in an attachment that may be in the child's best interests to maintain.

The American Law Institute, in its Principles of Family Dissolution, attempts to provide a comprehensive approach to stepparent recognition through the recognition of two new categories of parties entitled to custody upon separation, irrespective of marital status.[180] The first category involves parents by estoppel. Under the Principles, parent by estoppel includes, in addition to those with a good faith belief in biological paternity, those who:

> (b)(iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or

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179. *Holtzman v. Knott* (In re H.S.H-K), 533 N.W.2d 419, 421 (Wis. 1994), *cert. denied*, 516 U.S. 975 (1995). *But see* In re Nelson, 825 A.2d 501 (N.H. 2003) (refusing to follow *Holtzman* where partners are unmarried).

180. Am. L. Inst., Principles of the Law of Family Dissolution: Analysis and Recommendations (2002).

> (iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.[181]

It also includes, under the definition of a "de facto parent," those who for a significant period of time not less than two years,

> (i) lived with the child and,
> (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform care taking functions,
> (A) regularly performed a majority of the caretaking functions for the child, or
> (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.[182]

These definitions do not depend on marriage. They do not depend on an *ex ante* assumption of responsibilities. They also do not depend on biology. Instead, they require two things: the agreement of the legal parent, setting up an estoppel-based argument,[183] and an *ex post* conclusion that the adult has assumed a parental role for the requisite period and that recognition is in the child's best interests.[184]

The two categories are, nonetheless, quite different from each other. Parenthood by estoppel extends parental standing to individuals who assume parental responsibilities through an agreement with a legal parent. De facto parents acquire the right to seek visitation in accordance with their previous involvement in caretaking. Both of these statuses are dependent on a finding that they are in the child's best interests. They are clearly designed to protect the child's interest in a continuing relationship with adults with whom they have developed an emotional bond. Nonetheless, they distinguish parents by estoppel, who acquire the full legal rights of parents, from those adults who may have a right to continued contact with the child without equal standing with the child's legal parents.

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181. *Id.* § 2.03(b).
182. *Id.* § 2.03(c).
183. *Id.* § 2.03(b)(iii), (iv), (c)(ii).
184. In most cases two years. *See id.* § 2.03(b)(iv), (c).

The ALI Principles differ from traditional *in loco parentis* cases based upon their emphasis of "a prior co-parenting agreement with the child's legal parent" in the case of parent's by estoppel[185] or "agreement of a legal parent to form a parent-child relationship" in the case of de facto parents.[186] The authors comment: "A parent cannot be estopped from denying parent status to an individual who has functioned as such, if that parent did not earlier agree to the arrangement giving rise to the estoppel."[187] The emphasis is accordingly on the adult conduct involved in entering into a partnership and then reneging on his promises. But the co-parenting agreements to which the ALI refers are hardly stand alone agreements limited to parenting. Indeed, to the extent the courts have addressed the issue of parenthood by agreement, they have rejected the concept, insisting that intent cannot by itself establish parental status.[188] Instead, such agreements have come in the context of marriage[189] or in the context of marriage-like relationships, often where, as in the case of same-sex couples, marriage is unavailable.[190]

In 1990, Nancy Polikoff argued for the extension of these equitable principles to same-sex couples. She observed that:

> The mother in *Atkinson* was not rejecting the institution of marriage when she asserted sole parental rights to the exclusion of the rights of her ex-husband. She was merely invoking traditional legal doctrine to undo the family unit that she had created for her child. Similarly, the biological mother in a lesbian-mother family would not be rejecting lesbian parenthood if she tried to exclude the legally unrecognized mother from visitation or custody of her child.

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185. *Id.* § 2.03(b)(iii).

186. *Id.* § 2.03(c)(ii).

187. *Id.* § 2.03(b)(iv). The Comment further observes:

> Agreement, however, may be implied from the circumstances. For example, the legal father who knows that his child is being raised by the mother and her husband and who fails to visit or support the child has, by this conduct, communicated his acceptance of this arrangement and is estopped from later denying parental status to the stepfather. In contrast, the legal father who acknowledges the stepfather's role but who continues to exercise his own parental rights and responsibilities has not agreed to stepfather's status as the child's parent.

Id.

188. *See, e.g.*, Kristine H. v. Lisa R., 16 Cal. Rptr. 3d 123 (Cal App. 4th 2004), *rev. granted*, 97 P.3d 72 (2004).

189. *See, e.g.*, Atkinson v. Atkinson, 408 N.W.2d 516 (Mich. Ct. App. 1987) (husband recognized as equitable parent in spite of the lack of a biological tie where mother encouraged development of father-son relationship).

190. *See, e.g.*, Holtzman v. Knott, 533 N.W.2d. 419 (Wis. 1995).

> She also would be invoking traditional legal doctrine merely to dismantle the child's family unit.[191]

Polikoff's article influenced the outcome of *Holtzman v. Knott*.[192] Both the article and the case contributed to the development of the ALI Principles. But Polikoff's passionate argument was not about estoppel; it was not about the fairness of the relationship between the adults. Instead, her plea was for the recognition of the *family* that had been created.

IV. CONCLUSION: THE RECREATION OF IDENTITY

> *It was the relation of the individual to his lineage (relatives by blood or marriage, dead, living or yet to be born) which provided a man of the upper classes in a traditional society with his identity, without which he was a mere atom floating in a void of social space.*
>
> —Lawrence Stone, *The Family, Sex, and Marriage in England, 1500–1800*, 29 (1979)

Stone powerfully links identity to a socially constructed sense of family. While his conception of lineage, in this era before the discovery of genes, is closely tied to assumptions about biology, it just as clearly depends on marriage, and on a selective identification with potential relatives. Stone's formulation, after all, refers to a *man* of the *upper classes*, and it almost certainly references the law of inheritance in a society of patrilinear descent and primogeniture.

Societies differ substantially in the construction of family, even among those that share traditions of patrilineal descent. Teemu Ruskola[193] observes, for example, that:

> In the strictly Confucian view, membership in the lineage descended in the male line only. Ritually speaking, women were in effect nonpersons, mere begetters of (male) persons. Since all household property was owned by the undivided patrilineage to which women did not belong, they held no rights of their own to lineage property—although they did have the right to be supported by their male kinsfolk. The

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191. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 Geo. L.J. 459, 486 (1990).

192. *Holtzman*, 533 N.W.2d. at 437.

193. Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 Stan. L. Rev. 1599 (2000).

> undivided ownership of lineage property among men reflects in turn the ritual understanding of the patrilineage. As legal historian Shuzo Shiga explains the father-son bond, "During the father's lifetime the son's personality is absorbed into the father's, while after the latter's death his personality is extended into that of his son. Father and son are a continuum of the same personality, not two beings in mutual rivalry."[194]

This fusing of father-son identity had legal consequences—Russkola observes that fathers lacked testamentary powers because they were seen as trustees for their sons.[195] The legal consequences reinforced the definition of family; women in many areas could not inherit because they were seen as members of their husband's, not their father's, family, and in a patrilineage, property in the hands of women was property that belonged to a different family line.[196]

Conversely, Jewish law makes the mother's identity central to the child's religious status. In an article on cloning, Michael Broyde observes that "in the case of intermarriage, regardless of the father's religion, Jewish law never recognizes the father as having any rights or obligations with respect to the child; he is not the legal father."[197] Moreover, Jewish law posits that "status determinations are fundamentally immutable and determined at birth."[198] Broyde accordingly concludes that, in cases of assisted reproduction, the sperm donor is the child's father whether he wishes to be or not, and children cannot be adopted; "they can merely be raised by someone other than their parents."[199] Within Judaism, the law "discovers" rather than determines identity.[200]

While the determination of identity may vary with different cultures, the child's right to some identity is fundamental. Article 8 of the United Nations Convention on the Rights of the Child, for example, protects "the right of the child to preserve his or her identity, including nationality, name and family relations."[201] Barbara Woodhouse recognizes that "[i]dentity itself is a contested

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194. *Id.* at 1627–28.

195. *Id.* at 1628.

196. *See* Carole J. Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong* 34 Colum. J. Transnat'l L. 335, 339 (1996) (noting that these traditions were not abolished in the New Territories of Hong Kong until 1994, and that by then the insular rural societies of the New Territories were rapidly changing).

197. Michael Broyde, *Cloning People: A Jewish Law Analysis of the Issues*, 30 Conn. L. Rev. 503, 519–20 (1998).

198. *Id.* at 507.

199. *Id.* at 519.

200. *Id.*

201. United Nations Convention on the Rights of the Child, art. 8, Nov. 20, 1989, 28 I.L.M. 1448, 1456.

and contextual concept."[202] She nonetheless cites Masson and Christine Harrison, who have described identity as "an organizing framework which holds the past and present together providing some anticipated shape to future life."[203]

This comment demonstrates that the legal determination of parenthood should be first and foremost about the construction of identity.[204] If parenthood is to be constitutive of the child's identity, if it is to provide "an organizing framework which holds the past and present together," it needs a measure of permanence. While identity is not a static concept, and a child's development involves a continuous creation and refinement of her sense of herself in relationship to her caretakers and the community surrounding her,[205] the sense of who she is should provide a measure of continuity and stability.

Legal determinations of parenthood, in contrast, too often turn on the immediate issue before the court. Should a husband who finds out that he is not the biological father of the child of his wife's that he has raised since birth be liable for child support even if he never plans to see the child again? Should the non-biological partner who jointly undertook the rearing of a child conceived through artificial insemination be eligible for visitation? Should the mother's act of reassuring her unmarried partner that he is the child's biological father affect whether he has standing to seek custody when DNA tests reveal that he has no biological connection to the child? The determination of parental status is often used to resolve these issues in circumstances in which the result has no necessary relationship to a definition of parenthood constitutive of the child's identity. The determination of child support may, as in the *Buzzanca* case, correctly determine the liability of a man who will never play an important role in the child's life.

These cases are difficult because the legal system ordinarily intervenes in the relationship only at its dissolution; that is, at a point where construction of permanent relationships may be impossible. In addition, the determination of parenthood has become so painful because of the confluence of three long term trends in American society that make instability the norm instead of the exception in American families. First, divorce rates have risen to one of every two

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202. Woodhouse, *supra* note 13, at 110.

203. *Id.* (*citing* Judith Masson & Christine Harrison, *Identity: Mapping the Frontiers*, Paper Presented Before the 8th World Congress of the International Society for Family Law 2 (June 28–July 2, 1994)).

204. *See* Woodhouse, *supra* note 13, at 111. "[L]aw is both an active agent in prescribing, proscribing, and attributing identity, and a public medium for choosing and enacting it." *Id.*

205. *Id.* at 111–12.

marriages.[206] The marital presumption works reasonably well, even in an era of DNA testing, for married couples who do not inquire too closely. It may also be a reasonable presumption for couples who like Carole and Gerald, elect to stay together.[207] It is less effective when the husband decides that discovery of his wife's infidelity has destroyed his relationship with mother and child. Second, non-marital births have risen to one-third of all births.[208] While these fathers may be more likely to be identified than in the *Stanley* era, and while more may choose to play a role in the child's life, there is no necessary correlation between biology and commitment. The children of these relationships may experience a series of caretakers over the course of their childhood, with only a few ever eligible for parental or parent-like status.[209] Finally, the growing number and recognition of same-sex couples has reframed the legal determination of parenthood in many jurisdictions. Both the ALI principles, and some of the cases on which they are based, were decided in the context of committed relationships between intimate partners who could not marry. Is the idea of consent a proxy for commitment? Is estoppel a substitute for the marital presumption? Is adoption to be superceded by presumptions growing out of acknowledgment and consent? Will the allocation of parental status bear any necessary relationship to a duty to assume the role?

Reconstructing a legal definition of parenthood that can be constitutive of identity requires more than simply deciding the conflicts that reach the courts. It requires reconsidering the "channeling function" of law, and looking for the pressure points that can help reconnect moral obligation to the child with the legal determination of parental status. Accomplishing this will require working through the following difficult subjects.

A. Biology Matters, Even if it is Not the Only Thing that Matters.

In an era of increasing knowledge about the role of genetics, biological identity will likely increase in importance. A 1992 federal study, "Supporting Our Children," observed that "Parentage determination does more than provide genealogical clues to a child's background; it establishes fundamental emotional, social, legal and economic ties between parent and child . . . . Parentage determination also unlocks the door to government provided

206. Carbone, *supra* note 1, at 86–87.
207. Michael H. v. Gerald D., 491 U.S. 110, 109 S. Ct. 2333 (1989).
208. Carbone, *supra* note 1, at 49.
209. *See* Polikoff, *supra* note 191, at 474–75.

dependent's benefits, inheritance, and an accurate medical history for the child."[210]

Even when the child is unlikely to develop an emotional bond with the biological parent, knowledge of genetic heritage is likely to play a role in shaping identity.[211] Barbara Woodhouse argues for recognition of a child's right to identity that includes, in addition to a right to continued association with those parents with whom the child has bonded, "a second component, one that becomes more important as children mature."[212] She describes this second component as a right to claim the child's "identity of origin," that is, a right to know and explore, commensurate with her evolving capacity for autonomy, her identity as a member of the family and group into which she was born."[213]

This right to knowledge of the "identity of origin," is gaining increasing salience in the adoption context, with many adoptees pressing for open records, and in the case of artificial insemination by donor, with a number of countries mandating disclosure of sperm donor identity when the child turns eighteen.[214]

For identity disclosure to have an impact in cases of family dissolution, however, biological identity should be determined at birth. Relationships based on falsehood are unlikely to last.[215] This reasoning is consistent with Wendy Kaminer's conclusion that "if the cornerstone of your identity is a lie, it may be in your best long-term interest to uncover it."[216] One can imagine a hospital scenario where

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210. U.S. Comm'n on Interstate Child Support, Supporting Our Children: A Blueprint for Reform 120 (1992).

211. *See, e.g.* Nancy E. Dowd, *Redefining Fatherhood* 213–31 (2000) (distinguishing between right to knowledge about biological identity and use of biology to establish paternity).

212. Woodhouse, *supra* note 13, at 128.

213. *Id.*

214. *See, e.g.*, Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case For Opening Closed Records*, 2 U. Pa. J. Const. L. 150 (1999); Lucy R. Dollens, *Artificial Insemination: Right of Privacy and the Difficulty in Maintaining Donor Anonymity*, 35 Ind. L. Rev. 213 (2001); Gordana Kovacek Stanic, *The Significance of Biological Parentage in Yugoslav Family Law*, 31 Cal. W. Int'l L.J. 101, 110 (2000) (noting that Sweden and Austria require identity disclosure in AIDs cases while Yugoslavia does not); Timothy Caulfield, *Canadian Family Law and the Genetic Revolution: A Survey of Cases Involving Paternity Testing*, 26 Queen's L.J. 67, 75–76, 89–90 (2000) (finding evidence of an increased trend to recognize a right to genetic identity in Canada and Europe); Anderlik & Rothstein, *supra* note 6, at 105 (summarizing literature on disclosure of sperm donor identity).

215. June Carbone & Naomi Cahn, *Which Ties Bind? Redefining The Parent-Child Relationship In An Age Of Genetic Certainty*, 11 Wm. & Mary Bill of Rts. J. 1011, 1066–70 (2003).

216. Wendy Kaminer, *Fathers in Court*, Am. Prospect, Oct. 9, 2000, at 62, *also available at* http://www.prospect.org/web/printfriendly-view.ww?id=5525 (last

the proud parents of every newborn compare their DNA profiles with the child's, looking for similarities and differences. Although issues will arise in the determination of which genetic conditions should be the object of such tests, and which might be better left undisclosed, securing parental identity at birth would have an obvious impact on the determination of parenthood. Those adults surprised at the lack of a biological connection would be faced with a decision in the child's infancy whether or not to assume a parental role. If married parents or those signing voluntary acknowledgments of paternity decide to do so, the presumption in favor of their status as parents should become irrebutable.[217]

B. The Relationship Between the Adults Matters.

In his plurality opinion in *Michael H. v. Gerald D.*, Justice Scalia observed that:

> The family unit accorded traditional respect in our society, which we have referred to as the "unitary family," is typified, of course, by the marital family, but also includes the household of unmarried parents and their children. Perhaps the concept can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance—if it is stretched so far as to include the relationship established between a married woman, her lover, and their child, during a 3-month sojourn in St. Thomas, or during a subsequent 8-month period when, if he happened to be in Los Angeles, he stayed with her and the child.[218]

Justice Scalia's conception of the unitary family, to which, of course, he attached constitutional significance, started with the married family, which he grounded in the "historic respect" accorded to the relationships that developed within it.[219] Particularly given the *Stanley* line of cases, he conceded its extension to "the household of

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visited May 14, 2005).

217. This proposal is complex and extends well beyond the scope of this article. The two factors that may ultimately compel such measures are mandatory genetic testing at birth for disease, and the difficulties with voluntary acknowledgments of paternity based on deliberate efforts to conceal the identity of the biological fathers. Nonetheless, the questions of whether the state can mandate such tests, and under what circumstances that tests should be waivable raise issues that are properly the subject of lengthy treatment on their own. *See* Carbone & Cahn, *supra* note 215, at 1066–70; Anderlik, *supra* note 6.

218. Michael H. v. Gerald D., 491 U.S. 110, 124 n.3, 109 S. Ct. 2333, 2342 (1989).

219. *Id.* at 123, 109 S. Ct. at 2342.

unmarried parents and their children," but rejected recognition of so unstable a relationship as that between Carole, Victoria and Michael.[220]

While much of Justice Scalia's opinion rests on his historical analysis of the lack of recognition accorded the "adulterous natural father,"[221] his conception of the "unitary family" can be justified independently. In deciding which fathers have a constitutional right to a custodial relationship with their children, Justice Scalia emphasized that "biological fatherhood plus an established parental relationship" are two "isolated factors" on which to base constitutional protection.[222] Instead, his conception of the unitary family seems to require an established family relationship, presumably one that involves setting up a common household and making some commitment to the newly created family beyond visiting when Michael happened to be in town.[223] Janet Dolgin, in attempting to reconcile *Michael H.* with the earlier fatherhood cases, echoes this aspect of Justice Scalia's analysis. She observes: "A biological father does protect his paternity by developing a social relationship with his child, but this step demands the creation of a family, a step itself depending upon an appropriate relationship between the man and his child's mother."[224]

This analysis has implications that extend beyond the Supreme Court's willingness to recognize paternal rights. I have argued elsewhere that in the adoption cases, the relationship between mother, the father and child is the missing part of the analysis necessary to protect children's interests.[225] But it should also apply to the grant of parental status to adults without a biological connection to the child.

The ALI, in creating a category of parenthood by estoppel, extends parental status to individuals who have "lived with the child since the child's birth, holding out and accepting full and permanent

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220. *Id.* at 124.

221. See Justice O'Connor's concurring opinion in which Justice Kennedy joins, concurring in all of Justice Scalia's opinion except for footnote 6, in which he articulates his mode of historical analysis. *Id.* at 132, 109 S. Ct. at 2346-47 (O'Conner, J., concurring).

222. *Id.* at 123, 109 S. Ct. 2342 (majority).

223. This is not to say that Justice Scalia's description of the family relationships in *Michael H.* is accurate, only that the description of the facts illustrates his conception of what a unitary family requires. *See* Carbone & Cahn, *supra* note 215, at 1045.

224. Janet L. Dolgin, *Just A Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. Rev. 637, 671 (1993). She commented further that "[t]he relationship between a father and a child cannot be effected like any relationship between two autonomous individuals, free to come and go as they agree. A man becomes a father by relating to his child *in the context of family*." *Id.* at 672.

225. *See* Carbone, *supra* note 1 at 164–79.

responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities."[226] This definition resonates with the part of Justice Scalia's analysis that emphasizes the establishment of a household. But it replaces biological paternity with a "co-parenting agreement." The emphasis on consent is likely to meet potential *Troxel* objections in that recognition of non-biological parents without adoption might otherwise infringe on the rights of legal parents.[227] Nevertheless, while the ALI does not say so directly, this conception of estoppel almost certainly anticipates a committed relationship between the adults—and the creation of a family.[228]

The challenge for implementation of both the ALI principles and the idea of the unitary family more generally will be how to determine when a family has been created. While many jurisdictions have been willing to recognize estoppel between married couples,[229] fewer have been willing to extend the principle to unmarried couples.[230] Up until now, recognition of same-sex parents could not rest on their ability to marry, but with the adoption of same-sex marriage in Massachusetts, civil unions in Vermont, domestic partnerships in California and the like, many states will be able to distinguish between same-sex couples with and without a formal relationship.[231] Should they do so?

Justice Janice Rogers Brown, in her dissent from the California case approving second-parent adoptions, wished to limit adoptions by same-sex couples to those registering as domestic partners. She observed: "The Legislature's insistence that the adopting parent have a legal relationship with the birth parent reflects the fact that the adoptive parent's relationship with the child does not exist in a

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226. American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations, § 2.03(b) (2002).

227. *Compare* Emily Buss, *"Parental" Rights*, 88 Va. L. Rev. 635, 681 (2002) (arguing that *Troxel* depends on the legal definition of parenthood) *with* David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 Rutgers L.J. 711, 714 (2001) (asserting that the plurality's approach amounted "to an implicit rejection of strict scrutiny" and greater flexibility).

228. The ALI limits its discussion of the inference of consent to cases in which a non-custodial biological parent does not intervene in the creation of the new parental relationship. *See* ALI, *supra* note 226, at n. 177, cmt. (b)(iv).

229. *See, e.g.*, Atkinson v. Atkinson, 408 N.W.2d 516 (Mich. Ct. App. 1987).

230. *See, e.g.*, In re Nelson, 825 A.2d 501 (N.H. 2003) (rejecting recognition of unmarried stepparents).

231. Grace Blumberg, one of the reporters responsible for the ALI Principles, has argued that "same-sex couples have been the dominant force in the movement to regularize nonmarital cohabitation." Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 Notre Dame L. Rev. 1265, 1268–69 (2001).

vacuum but is related to the parents' relationship with each other . . . . If the two adults are uncertain whether the second parent will be a permanent resident of the household, the adoption ought to wait until they are ready for that commitment."[232] *Sharon S.* involved the legality of the ten to 20,000 adoptions that took place before the legislature authorized domestic partnerships.[233] Restricting adoption to domestic partners in that case would have destabilized the legal relationships in a large number of existing families. Brown's point, however, has greater salience prospectively. Tying parenthood to formation of the child's identity requires not just the legal parent's consent to the inclusion of the other adult, but their mutual commitment to a permanent relationship with the child. That, in turn, requires a lasting commitment to each other.[234]

The more difficult application of these principles may well involve unmarried heterosexual couples. Disputes over voluntary acknowledgments of paternity often involve adults who have not made a commitment to each other. The *Sheldon* case, for example, involved an acknowledgment by a friend of the mother with no commitment to the child, and a biological father who lived together with mother and child for three years without ever seeking to secure his legal status as a parent.[235] The decision to rescind the parental status of the mother's friend substituted a biological father who had participated in the creation of a unitary family for a father who was no more than a name on the form. The failure to recognize Sheldon, had it occurred, might have posed issues of constitutional significance.[236] What drives these cases, in which the child may well have no father accepting a permanent obligation, is child support.[237] This in turn raises the issue of whether parenthood status should be

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232. Sharon S. v. Superior Court, 73 P.3d 554, 586–87, 2 Cal. Rptr. 3d 699, 737 (Cal. 2003).

233. *Id.* at 437.

234. See Marsha Garrison's observation that:

> Marriage is a public commitment. "In the marriage ceremony the public recognizes and supports the couple's reciprocal bond, and guarantees that [the couple's] . . . commitment . . . will be honored as something valuable not only to the pair but to the community at large." The couple who exchange vows "agrees to be subject to a complex set of behavioral expectations defining the roles of spouse and parent, expectations that will restrict their freedom and guide their behavior in the relationship."

Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. Rev. 815 (2005) (citations omitted).

235. County of Los Angeles v. Sheldon P., 126 Cal. Rptr. 2d 350, 352 (Cal. App. 2002). He did, however, insist on determining biological paternity. *Id.*

236. *Id.* at 1347–48.

237. *See, e.g.*, Dowd, *supra* note 211, at 93. "Economic fatherhood is now the primary concern of the law." *Id.*

an all or nothing status, conferred on two and only two adults to the exclusion of all others.

C. Parental Rights May Need to be Unbundled.

The *Sharon S.* dissent, in trying to restrict adoption to legally united parents, invoked the specter of multiple parenthood. Justice Brown observed that:

> Parental authority cannot not be divided because it goes beyond ministerial functions; the parent "direct[s] the child's activities; . . . make[s] decisions regarding the control, education, and health of the child; . . . [and exercises] the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship." . . . Devolving these responsibilities on a multitude of parties would lead to a variety of conflicts and inconsistencies . . . .[238]

Justice Brown is almost certainly right that custodial responsibilities cannot be infinitely divided. Indeed, at least part of the basis for the Supreme Court's decision in *Troxel* was its recognition that the Washington statute at issue in the case permitted third parties to question virtually every element of parental decision-making.[239]

Yet, separation of the different elements of parental responsibility does not necessarily entail recognition of equal decision-making rights. Louisiana's recognition of dual paternity provides an instructive case in point. In *Smith v. Cole*,[240] the husband and wife separated, the wife began a relationship with another man and bore a child before the divorce became final. When the second relationship dissolved, the mother sued the biological father for child support. He asserted the marital presumption as a defense. The Louisiana Supreme Court held:

> Louisiana law may provide the presumption that the husband of the mother is the legal father of her child while it recognizes a biological father's actual paternity. When the presumptive father does not timely disavow paternity, he becomes the legal father. A filiation action brought on behalf of the child, then, merely establishes the biological fact of paternity. The filiation action does not bastardize the child or otherwise affect the child's legitimacy status. The result here

238. Sharon S. v. Superior Court, 73 P.3d 554, 586, 2 Cal. Rptr. 3d 699, 737 (Cal. App. 2003).
239. Troxel v. Granville, 530 U.S. 57, 67–68, 120 S. Ct. 2054, 2061.
240. Smith v. Cole, 553 So. 2d 847 (La. 1989).

> is that the biological father and the mother share the support obligations of the child.[241]

Recognition of the "biological fact of paternity" together with the husband's status as a legal parent did not needlessly divide the responsibilities of fatherhood. Instead, it acknowledged the truth of the child's origins and provided him with more than one guarantor. On the specific issue of the biological father's obligation for child support, the case's outcome is no different from those in Pennsylvania. The child's status as a child of a marriage did not serve as a shield for a biological parent with an established relationship with the child.[242]

The Louisiana Supreme Court, in its defense of dual paternity, has cited the same passages as Justice Brown.[243] In *Gallo v. Gallo*, the opinion also referred to Justice Scalia's passage in *Michael H.* about the sum of parental rights.[244] It did so, however, to affirm the husband's obligation to pay child support even after the mother and the biological father signed a declaration acknowledging the biological father's paternity. Again, the outcome differs from those in other states only in its honesty; the fact that the husband remains obligated to support a child he helped rear does not alter the facts of biology, nor give two men simultaneous decision-making authority. The Louisiana opinions do, however, ratify the moral obligations of both fathers to the child.[245]

Other states may be surreptitiously following Louisiana's lead. In the California case of *Jesusa V.*, a married woman with five children separated from her husband and had a child with another man.[246] When the child was almost two, the child's father beat the

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241. *Id.* at 855.

242. *See, e.g.*, Kohler v. Bleem, 654 A.2d 569 (Pa. Super. Ct. 1995).

243. 03-0794, 861 So. 2d 168, 1799 (La. 2003) (discussed in greater detail in *infra* note 245).

244. The court noted that parental status "embraces the sum of parental rights with respect to the rearing of a child, including the child's care; the right to the child's services and earnings; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship." Michael H. v. Gerald D., 491 U.S. 110, 118–19, 109 S. Ct. 2333, 2339–40 (1989), *cited in* Gallo v. Gallo, 03-0794, 861 So. 2d 168, 179 (La. 2003).

245. Indeed, the *Gallo* court emphasizes that the community property tradition in Louisiana recognizes a child support obligation based on marriage that goes considerably beyond the common law tradition. 861 So. 2d at 179. "Louisiana's Civil Law tradition, from its French and Spanish beginnings, provided for the parental obligation of child support. The Common Law did not have such an auspicious beginning." *Id.*

246. In re Jesusa V., 85 P.3d 2 (Cal. 2004).

mother, requiring her hospitalization. The father was arrested and sentenced to jail, with a deportation order to follow. The husband, with the mother's support, sought custody of the six children. The California Supreme Court concluded that the child had two presumed fathers, and that it could pick the one "which on the facts is founded on the weightier considerations of policy and logic."[247] Unlike Louisiana, the California Supreme Court insisted, that at the end of the day, the child could have only one presumed father. It nonetheless observed, "[T]here is so much more to being a father than merely planting the biological seed. The man who provides the stability, nurturance, family ties, permanence, is more important to a child than the man who has mere biological ties. . . . By finding [Paul] is the presumed father, this court is protecting and preserving a family unit, the integrity of a family unit."[248] Only by recognizing multiple fathers and picking the one that offered the best prospects for "stability, nurturance, family ties, permanence" could the court link parental status with the child's need for a sustainable identity.[249]

Conversely, the stepparent cases, at least those involving adults who marry the legal parent of an older child, should be resolved without invoking parental status at all. The ALI's category of de facto parenthood does not require revocation of any other parent's legal status, and does not allow for an award of custody. Instead, it recognizes the child's ties with another adult through the limited award of visitation.[250] It nonetheless seeks to preserve the emotional bonds that may still be strong at the time of separation while deferring to the primacy of the legal parent's relationship with the child. It is a misguided notion of equality, or all or nothing parenthood, that undermines more realistic recognition of the stepparent role.[251]

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The challenge in future cases will be to unpack the elements of parenthood in ways that encourage adults to accept parental responsibility. Marriage involves an unmistakable exchange of

247. *Id.* at 2, 11.

248. *Id.* at 7–8.

249. It is important to emphasize that this case did not rest on either the strict application of the marital presumption, since the separation had occurred before the pregnancy, or estoppel. Instead, the important part of the ruling was the court's conclusion that proof of paternity did not rebut presumed fatherhood status in itself. *Id.* at 19.

250. *See* ALI, *supra* note 226, § 2.03(c).

251. It is striking that the vast majority of post-*Troxel* cases address grandparent, not stepparent rights. *See* Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference after Troxel v. Granville*, 88 Iowa Law Review 865 (2003).

promises and commitment.[252] The threshold to parenthood is dramatically lower. Yet, both should involve a substantial and permanent commitment to the child. It is difficult for this to happen if the commitment is based on a lie, or if the parents are not also making a commitment to each other. Louisiana, in its recognition of dual paternity, emphasizes the assumption of responsibilities that come both with marriage and with biological paternity.[253] Perhaps the time has come to initiate a ceremony modeled on christening. Shortly after the child's birth, the parent or parents committing themselves to the child's future should join in establishing a permanent identity. Married couples should reaffirm their commitment to each other as well as marking, in a public way, their independent commitments to the child. Unmarried couples who are undertaking family obligations should celebrate the occasion publicly as well as in the private documents necessary to establish parentage. If marriage can no longer constitute the sole method of creating legally recognized families, then the obligation to children should compel its own ceremonies and celebrations.

252. Garrison, *supra* note 234, at 872 ("legally recognized commitments are extraordinarily meaningful to those who make them").

253. *See, e.g.*, Gallo v. Gallo, 03-0794, 861 So. 2d 168, 177 (La. 2003), *citing* La. Civ. Code art. 227 (1993). "Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children." *Id.* Thus, proof of birth during marriage establishes the obligation of support. *See also* Smith v. Cole, 553 So.2d 847, 854 (La. 1989). "The presumed father's acceptance of paternal responsibilities, either by intent or default, does not enure to the benefit of the biological father. It is the fact of biological paternity or maternity which obliges parents to nourish their children. The biological father does not escape his support obligations merely because others may share with him the responsibility." *Id.*