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Protecting the New American Family: Updating Parentage Law to Protect Unwed, Same-sex Couples

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I clearly remember the day the Supreme Court announced its decision in Obergefell v. Hodges.[1] My wife and I were overjoyed, as it was our first realization of the power of the Supreme Court to, in one motion, create a better nation. We celebrated as her neighbors, two gay men who had lived together for decades, finally married on a stunning Tennessee summer day. It was the sweetest flavor of irony; Tennessee, an appellant in the suit and defender of marriage inequality,[2] was forced to legally recognize this couple's love.

LGBTQIA[3] advocates rejoiced,[4] with a sense that the fight for gay rights (and LGBTQIA rights more broadly) had been "won." While a subset of conservatives protested, Republicans more broadly silently accepted this decision.[5] As is so often the case, the sense of accomplishment following Obergefell gave way to a sort of complacency.[6]

The short-sightedness in declaring total victory for the LGBTQIA rights movement should have been clear from the beginning. In the years to follow, so-called "bathroom bills" would proliferate across the country,[7] attempting to deny transgender persons their right to live as they know themselves to be. It was not until 2020 that the Supreme Court handed down Bostock v.

[1] Obergefell v. Hodges, 576 U.S. 644 (2015).
[2] *Id.* at 653.
[3] "LGBTQIA" stands for "Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual."
[4] *See* Editorial Board, *A Profound Ruling Delivers Justice on Gay Marriage*, N.Y. TIMES (June 26, 2015), https://www.nytimes.com/2015/06/27/opinion/a-profound-ruling-delivers-justice-on-gay-marriage.html (last visited May 5, 2021).
[5] Rachel Larimore, *Conservative Reaction to Marriage Ruling is Mixed*, SLATE (June 26, 2015), https://slate.com/news-and-politics/2015/06/gay-marriage-ruling-conservative-reaction-is-mixed-and-opponents-quibble-with-legal-reasoning.html (last visited Mar. 29, 2021).
[6] Katy Dolan, *The Danger of Complacency after Obergefell*, HUFFINGTON POST (December 6, 2017), https://www.huffpost.com/entry/the-danger-of-complacency_b_8353728 (last visited Mar. 29, 2021).
[7] Joellen Kralik, *Bathroom Bill Legislative Tracking*, NATIONAL CONFERENCE OF STATE LEGISLATURES (October 24, 2019), https://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx (last visited May 5, 2021).

Clayton County,[8] extending workplace legal protections to gay and transgender persons.[9] Meanwhile, lethal hate crimes against transgender people hit an all-time high in 2020.[10]

While Obergefell extended the "constellation of benefits that the States have linked to marriage" to *married* gay persons,[11] the legal protections for unmarried gay couples, as compared to their heterosexual counterparts, remain far from functionally equal. Importantly, Obergefell does little to advance parental recognition rights for *unmarried* gay couples.

Though Obergefell is, doubtless, a clear victory for the LGBTQIA rights movement, the current state of parental recognition for unwed same-sex couples remains an issue. To some extent, this vindicates advocates, like the Gay Liberation Front, that questioned whether centralizing marriage was the proper strategy for the movement.[12] Despite the much-deserved rejoicing observed after Obergefell, the fight for LGBTQIA rights in the family law arena is far from over.

This article proposes that, while Obergefell is a clear victory for gay liberation, its ruling does little for the growing number of gay couples starting their families outside of marriage. More specifically, Obergefell is a victory for gay *marital* rights, but gay liberation, including gay parental recognition, is largely a work-in progress. Marriage rates have reached historic lows[13]

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[8] Bostock v. Clayton County, 140 S. Ct. 1731 (2020).
[9] *Id.* at 1754.
[10] *An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2020*, HUMAN RIGHTS CAMPAIGN (November 19, 2020), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/FatalViolence-2020Report-Final.pdf?mtime=20201119101455&focal=none (last visited May 5, 2021).
[11] *Obergefell*, 576 U.S. at 670.
[12] The Gay Liberation Front ("GLF"), founded in the wake of the Stonewall Riots, initially suggested challenging the marital unit, believing the nuclear family reinforces heteronormative principles. *Gay Liberation Front, Manifesto 1* (1971, rev.1978), https://sourcebooks.fordham.edu/pwh/glf-london.asp (last visited May 5, 2021). Conversely, other activists believed that granting same-sex marriage, itself, would be a rebuke of heteronormative values. Erik Eckholm, *The Same-Sex Couple Who Got a Marriage License in 1971*, N.Y. TIMES (May 16, 2015), https://www.nytimes.com/2015/05/17/us/the-same-sex-couple-who-got-a-marriage-license-in-1971.html (last visited May 5, 2021). For a legal analysis of this issue, *see* Steven K. Homer, *Against Marriage*, 29 Harv. C.R.-C.L. L. Rev. 50 (1994).
[13] Sally C. Curtin and Paul D. Sutton, *Marriage Rates in the United States, 1990-2018*, CENTER FOR DISEASE CONTROL (April 28, 2020) (last visited May 5, 2021), https://www.cdc.gov/nchs/data/hestat/marriage_rate_2018/marriage_rate_2018.htm (last visited May 5, 2021).

even as birth rates decline.[14] The percentage of cohabiting unmarried parents has continued to rise.[15] As the share of unmarried parents rises, parental recognition will naturally depend less on the marital presumption. As there will often be at least one non-biological parent in a same-sex couple, a robust statutory framework extending parental recognition under a more functional test will become of greater importance. Therefore, legislators should focus on functional definitions of parentage to protect the rights of unwed same-sex couples. This article emphasizes the need for updating state adoption laws, examines the jurisprudential development of parental recognition rights, and the ways this area of the law has historically failed unwed gay couples. Specifically, this article posits that failure to include functional schemes of parental recognition, such as de facto parenthood or "holding out" provisions, comes to the exclusion of unwed, same-sex parents.

In addition to the gaps left by the current scheme, there is an issue of unequal access to parental recognition. While straight, unmarried couples will typically establish their parentage through biology, the biological route is nearly always unavailable to at least one member of a same-sex relationship. In this sense, equality cannot be achieved by equal application of statutory schemes that exclude functional definitions of parentage. While there is an entire jurisprudential body to guide unwed biological fathers on how to establish parentage,[16] there is no equivalent Supreme Court guidance for unwed non-biological gay parents. Finally, although second-parent adoption exists in a number of states,[17] the statutory schemes often leave too much room for

[14] Brady E. Hamilton, Joyce A. Martin, and Michelle J.K. Osterman, *Births: Provisional Data for 2019*, CENTER FOR DISEASE CONTROL (May 2020), https://www.cdc.gov/nchs/data/vsrr/vsrr-8-508.pdf (last visited May 5, 2021).
[15] Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RESEARCH CENTER (April 25, 2018), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2018/04/Unmarried-Parents-Full-Report-PDF.pdf (last visited May 5, 2021).
[16] For a summary on unwed father parental recognition, *see* Brent Potash, *Unequal Protection: Examining the Judiciary's Treatment of Unwed Fathers*, 34 Touro L. Rev. 649 (2018).
[17] *Legal Recognition for LGBT Families*, NATIONAL CENTER FOR LESBIAN RIGHTS (2019), https://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf (last visited May 5, 2021).

judicial discretion, potentially to the detriment of gay parents, unmarried parents, and *especially* gay, unmarried parents.

Other barriers exist as well. Laypeople avoid legal formalities for a diverse set of reasons. Family Court is, all too-often, adversarial, even as it involves the most intimate areas of our lives. It is often expensive. When a parent already knows the child to be her own, or naively assumes the relationship with their partner will never break down, the psychological parent might not even sufficiently consider the necessity of legal formalities.[18] Despite the certainties in which attorneys often speak, we know that there is a gamble every time we enter the legal system.

A clear example of this legal uncertainty is evident from Hawkins v. Grese.[19] There, two unmarried lesbian women lived as co-parents with their baby girl, B.G., for nine years.[20] The couple never married, and the non-biological mother did not formally adopt B.G.[21] Yet, the non-biological mother, Denise Hawkins, held herself out as a mother to B.G. She did this first by co-parenting B.G. and cohabiting with Grese for seven-years, followed by an informal custody arrangement for two years.[22] Hawkins' relationship with Grese then disintegrated.[23]

Hawkins petitioned for custody and visitation with B.G.[24] The Juvenile and Domestic Relations Court, after considering extensive psychological testimony, concluded that Hawkins should be awarded joint custody and visitation rights.[25] On appeal, the Virginia Appellate Court held that, because Virginia had rejected de facto parenthood, Hawkins was merely *person with a*

[18] *See, e.g.*, A.H. v. M.P., 857 N.E.2d 1061, 1066 (Mass. 2006) (noting that plaintiff never formalized a second-parent adoption because she believed a threat to her parental status would only be a "worst-case scenario").
[19] Hawkins v. Grese, 809 S.E.2d 441 (Va. Ct. App. 2018).
[20] *Id* at 467.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id* at 467-68.

legitimate interest,[26] and could not overcome the presumption of biological parentage.[27] The Court held, that "pre-Obergefell, different-sex marriages did not automatically result in the spouses becoming legal parents of each other's children and the analysis of the Obergefell majority opinion does not compel a different conclusion with respect to same-sex marriages, *far less unmarried couples* of any sexual orientation."[28]

The level of legal uncertainty demonstrated above is unacceptable. To ensure parental recognition of unwed same-sex parents, it is imperative that states adopt parentage laws modeled on the 2017 Amendments to the Uniform Parentage Act. Its functional definitions of "parentage," which provide alternatives to adoption, the marital presumption, and biological recognition, will protect the rights of both unwed same-sex-parents and their psychological children. The UPA (2017) accomplishes this by including recognition of de facto parenthood,[29] in addition to the upgrading the "holding out" provision[30] that was first adopted in the UPA (1973).[31]

Part I of this article outlines the Supreme Court's law of parental recognition. Part II explores the traditional statutory avenues of parental recognition. Part III examines the insufficiency of these avenues as applied to unmarried same-sex couples. Part IV explores the protections offered to unwed, same-sex couples by the newly revised UPA, and urges its adoption.

[26] *Id* at 483, *citing* VA. CODE ANN. § 20-124.1.
[27] *Id* at 484.
[28] *Id* at 448.
[29] UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017).
[30] UNIF. PARENTAGE ACT § 204 (UNIF. LAW COMM'N 2017).
[31] UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973).

Part I

A. The Supreme Court's Jurisprudence of Parental Recognition

Parental recognition is but the first step to recognizing parental authority.[32] While the Supreme Court's parental authority jurisprudence has been of general application, its parental recognition jurisprudence has focused on unwed biological fathers.[33] A natural consequence of this fact is a jurisprudential focus on biology and marriage that leaves functional parenthood as an afterthought. This entangling of legitimacy and parentage,[34] regardless of what purpose it once served, naturally excludes unwed, same-sex parents, demonstrating the limits of focusing on the marital presumption or biology.

In Stanley v. Illinois,[35] the Supreme Court grappled with the rights of unwed fathers. Joan and Peter Stanley, an unwed couple,[36] conceived three children together,[37] and cohabitated for several periods over the course of eighteen years.[38] Pursuant to Illinois law, after Joan died, the children became wards of the state,[39] placed under the custody of a court-appointed guardian.[40] Peter, despite being a biological father active in his children's lives,[41] was given no parental rights under Illinois law.[42] It was not that Peter's parental rights were *terminated*; instead, the Illinois Supreme Court found Peter did not have parental rights to terminate.[43] The justification of the law

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[32] For an excellent exploration of the distinctions between these frameworks, *See* Douglas NeJaime, *The Constitution of Parenthood*, 72 Stan. L. Rev. 261, 279-81 (2020).
[33] Potash, *supra* note 16.
[34] For an entire article devoted to this subject, *see* Joanna L. Grossman, *Tying Parentage to Marital Status for Lesbian Co-Parents*, 20. Am. U.J. Gender Soc. Pol'y & L. 671 (2012).
[35] Stanley v. Illinois, 405 U.S. 645 (1972).
[36] *In re* Stanley, 256 N.E.2d 814, 815 (Ill. 1970).
[37] *Id.*.
[38] Stanley, 405 U.S. at 646.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 651
[42] *Id.*
[43] *In re Stanley,* 256 N.E.2d at 815 ("In any event, Stanley cannot show himself to be entitled to the rights accorded legal custodians and guardians to retain custody, since the class of legal custodians and guardians consists solely of persons to whom those rights have been affirmatively granted by the court.").

supposed that the father's failure to marry the mother was, itself, proof that the father was neglectful, and therefore unfit to parent or qualify as a parent.[44]

On appeal, the issue before the United States Supreme Court was whether unwed fathers could be deprived of their children absent a demonstration of unfitness.[45] According to Peter, being denied his children absent this showing deprived him of the equal protection of the Fourteenth Amendment, since married fathers and unwed mothers were not subject to this assumption of unfitness.[46] The Court agreed, and held that the statute was unconstitutional under both the equal protection clause *and* the due process clause.[47]

The Court concluded that, despite the Illinois statute, "Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him."[48] The Court held that the state's reliance on unwed status as proof of parental unfitness as applied to men, but not women, violates the Equal Protection clause.[49] In addressing the due process rights of unwed fathers, the Court noted that Stanley was both a biological father *and* an active parent to the children,[50] and that taking his children from him without a hearing violated his rights to due process.[51] This due process interest-- deriving both from biological status plus parental conduct-- would become colloquially known as the "biology plus" test.[52]

Stanley was followed by Quillon v. Walcott,[53] a case where a putative father challenged a Georgia law that allowed for adoption of the child by unilateral consent of the biological mother

[44] *Stanley*, 405 U.S. at 646.
[45] *Id*.
[46] *Id*.
[47] *Id*. at 657-58.
[48] *Id*. at 649 (*emphasis added).*
[49] *Id*. at 658.
[50] *Id*. at 651
[51] *Id*. at 649.
[52] *See, e.g.*, Michael J. Higdon, *Constitutional Parenthood*, 103 Iowa L. Rev. 1483, 1499 (2018); Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*., 72 Tex. L. Rev. 967, 975 (1994).
[53] Quillon v. Walcott, 434 U.S. 246 (1978).

if the father had not legitimated the child.[54] The biological father, Leon, had never married the biological mother, Ardell, and the couple never established a home together.[55] When the biological mother's husband, Randall Walcott, petitioned for adoption, Leon objected.[56] In doing so, Leon did not seek legal or physical custody of the child.[57] Analyzing the case, the Court summarized Stanley as balancing the state's interest in caring for children where the unwed father is unfit, versus the fit father's interest in care and custody of his children.[58] The Court acknowledged that Stanley did not address the situation before it in Quillon, where the state's interest in caring for its children was greater.[59] Ultimately, the Court held the due process protections for unwed fathers apply only where the father takes on "any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[60]

This holding defines the outer boundaries of the unwed father's constitutional rights, rather than a limitation of those rights. Unlike in Stanley, where the father was shown to be a fit, active psychological parent,[61] the father in Quillon failed to take any meaningful responsibility over the child's life and, thus, constitutional protections did not apply despite the biological connection.[62]

Caban v. Mohammad, decided only a year after Quillon, involved a challenge to a New York statute that gave mothers the right to withhold consent to an adoption without extending that same right to unwed putative fathers.[63] Abdiel Caban had fathered two children with Maria Mohammad while they lived together.[64] Sometime after the couple broke up, Maria wanted her

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[54] *Id.* at 249.
[55] *Id.* at 247.
[56] *Id.*
[57] *Id.*
[58] *Id* at 248.
[59] *Id.*
[60] *Id.* at 256.
[61] *Stanley*, 405 U.S. at 666.
[62] *Quillon*, 434 U.S. at 256.
[63] Caban v. Mohammad, 441 U.S. 380 (1979).
[64] *Id.* at 382.

new husband to adopt Abdiel's natural children.[65] These children, aged four and six, had spent substantial time living with Abdiel.[66] When Maria consented to the adoption of the children, Abdiel challenged the constitutionality of the New York statute, primarily on equal protection grounds.[67] The Court found the scheme violated equal protection, as it did not extend that same veto right to unwed fathers who had taken on that "significant responsibility" emphasized in Quillon.[68] The Court emphasized that the right to parenthood for unwed fathers can be created where the biological father assumes the responsibility of acting as a social father.[69]

Lehr v. Robertson required the Court to once again consider the rights of unwed fathers, this time in a challenge to the natural mother's husband's adoption of the child.[70] The natural father, Lehr, claimed that Robertson had interfered with his attempts to connect with their child to satisfy the "biology plus" test.[71] The State of New York, supporting Robertson, argued that Lehr had failed to financially support the natural mother, including during pregnancy.[72] In addition to his failure to support the mother,[73] Lehr had not registered with the state's putative father registry.[74] According to the State, Lehr lacked both the moral and financial will to establish a relationship with the *mother* through marriage, which demonstrated his lack of fitness as a father.[75] The Court ultimately sided with the state, basing its decision on two key points. First, The Court emphasized

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[65] *Id.* at 383.
[66] *Id.* at 389.
[67] *Id.* at 388.
[68] *Id.* at 393-94.
[69] *Id.* at 394 ("The effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child.").
[70] Lehr v. Robertson, 463 U.S. 248, 249-250 (1983).
[71] *Id.* at 269 ("According to Lehr, from the time [the mother] Lorraine was discharged from the hospital until August 1978, she concealed her whereabouts from him. During this time Lehr never ceased his efforts to locate Lorraine and [the child] Jessica and achieved sporadic success until August 1977, after which time he was unable to locate them at all. On those occasions when he did determine Lorraine's location, he visited with her and her children to the extent she was willing to permit it.").
[72] Brief for Appellee Attorney General of the State of New York, Lehr v. Robertson, 1982 WL 1044648, 18.
[73] *Lehr* at 252.
[74] *Id.* at 250-51.
[75] *Id.* at 263.

that Lehr could have signaled his intent to parent the child by marrying the child's mother.[76] Second, Lehr could have signaled his intent by registering as a putative father.[77] The Court held that biological connection allowed the father a chance to step in as a responsible parent, but that failure to seize that chance does not afford the father the Constitutional protections of parenthood.[78]

This line of cases is problematic for LGBTQIA couples, married or otherwise. These cases stand for the principle that *per se* denial of parentage based on failure to marry the person giving birth is unconstitutional,[79] but that failure to marry that person or otherwise indicate an intent to establish a relationship with the child may be used to demonstrate parental unfitness.[80] In these cases, biology did not make a man a legally-recognized father, but it provided him a chance to establish himself as one.[81] The prominence of biology in establishing parenthood for an unmarried partner is limiting LGBTQIA couples. In an unmarried heterosexual coupling, both parents might have a biological or genetic connection to the child. Conversely, in an unmarried same-sex coupling, typically only one "parent" will have a biological or genetic connection to the child.

Of course, same sex couples now have the option to legally marry to satisfy Lehr. However, this is not a requirement for heterosexual couples, where the biological mother is a natural, legally-recognized parent, and the father has a legal right to satisfy the "biology-plus" test. Hence, equal application of the unwed father cases to heterosexual and same-sex couples creates unequal results. The unwed father cases help the heterosexual biological father, but do little to protect a psychological, non-biological parent, which generally describes at least one parent in a same-sex

[76] *Id.* at 264.
[77] *Id.*
[78] *Id.* at 262.
[79] *Stanley*, 405 U.S. at 649-50.
[80] *Lehr*, 463 U.S. at 263.
[81] Grossman, *supra* note 34, at 704.

relationship. This forces the same-sex couple to either marry, or reside in a state which grants second-parent adoption.[82]

Applying the Lehr framework further hinders the gay non-biological parent's rights by allowing "failure to marry" as evidence of unfitness to parent.[83] While this applies equally to both heterosexual and homosexual couples, the changing dynamic of the American family-- that is, the increasing number of unwed parents-- requires a more functional definition of "parentage."

Part II: Traditional Avenues for Parental Recognition

A. Previous Iterations of the Marital Presumption of Parentage

Marriage is the primary means to establish the non-birth giver's parentage. Under previous iterations of the UPA, a husband is rebuttably presumed to be the father of any child born of his wife during the marriage.[84] In a number of states this presumption survives even against the *actual* biological father.[85] Even if the biological father asserts his rights, a child born to a married heterosexual couple may be rebuttably presumed to be the husband's child[86] without violating the due process rights of the biological father. The marital presumption has been incorporated into the UPA since its inception.[87] The UPA (1973) permitted a child, the natural mother, and presumptive father to bring actions declaring the existence or non-existence of a father-child relationship.[88] It also, rather clairvoyantly, did not provide standing for putative fathers not benefitting from the marital presumption to assert their parental rights to children born of the marriage.[89] The UPA

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[82] *Id.* at 702.
[83] *Stanley*, 405 U.S. at 649-50.
[84] UNIF. PARENTAGE ACT § 6 (UNIF. LAW COMM'N 1973); UNIF. PARENTAGE ACT § 607 (UNIF. LAW COMM'N 2002).
[85] Ala. Code § 26-17-607(a) (2021); Cal. Fam. Code §7540 (2021); Colo. Rev. Stat. § 19-4-107(1) (2021); Iowa Code § 600B.41A(3)(a) (2021); Or. Rev. Stat. § 109.070(2) (2021); Utah Code Ann. § 78B-15-607(1) (2021).
[86] Michael H. v. Gerald D., 491 U.S. 110, 131 (1989).
[87] UNIF. PARENTAGE ACT § 4 (UNIF. LAW COMM'N 1973).
[88] *Id. See also* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. Va. L. Rev. 547, 567 (2000).
[89] UNIF. PARENTAGE ACT § 6(a) (UNIF. LAW COMM'N 1973).

(1973) granted standing to challenge the marital presumption only to the child, his natural mother, or a man presumed to be the natural father,[90] and the presumption could only be rebutted by clear and convincing evidence.[91]

The UPA (2002) was substantially similar to the UPA (1973) in this regard, although it lowered the statutory period to challenge the presumption of paternity from five years to two,[92] and allowed both presumptive and putative fathers to challenge the presumption.[93] The shortened statute of limitations protects the relationship of the husband and child by limiting the time in which a challenge may be brought.[94]

While the gendered language of the marital presumption in past UPAs would be equally applied to same-sex couples in the wake of Pavan v. Smith,[95] the martial presumption is of diminishing importance due to the growing share of unmarried cohabiting parents,[96] and nearly equal number of same-sex married couple households and same-sex unmarried couple households.[97]

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[90] *Id.*
[91] *Id.* at §4(b).
[92] *Compare* UNIF. PARENTAGE ACT § 6 (UNIF. LAW COMM'N 1973) *with* UNIF. PARENTAGE ACT § 607 (UNIF. LAW COMM'N 2002).
[93] UNIF. PARENTAGE ACT § 602(3) (UNIF. LAW COMM'N 2002).
[94] *Id.* at § 607.
[95] Pavan v. Smith, 137 S. Ct. 2075 (2017) (extending the marital presumption to same-sex couples).
[96] Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RESEARCH CENTER (April 25, 2018), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2018/04/Unmarried-Parents-Full-Report-PDF.pdf (last visited May 5, 2021).
[97] *2019 Current Population Survey Annual Social and Economic Supplement*, UNITED STATES CENSUS BUREAU (2019), https://www.census.gov/data/datasets/time-series/demo/cps/cps-asec.2019.html (last visited May 5, 2021). *U.S. Census Bureau Releases CPS Estimates of Same-Sex Households*, United States Census Bureau (Nov. 19, 2019), https://www.census.gov/newsroom/press-releases/2019/same-sex-households.html (last visited May 5, 2021).

B. Previous Iterations of Parentage by Biological Tie

Absent surrogacy or IVF arrangements, the person giving birth to a child[98] is presumed to be that child's parent. With that presumption comes the full suite of rights, responsibilities, and social recognition associated with parenthood.[99] As paternity testing is typically not required at birth, and paternity can be asserted via a voluntary acknowledgement of paternity ("VAP"), heterosexual unmarried men may often claim biological father status without further verification.[100] Voluntary acknowledgments will typically prevail even against challenge by putative fathers or a later denial of parentage by the signatory.[101]

The UPA (1973) included a provision acknowledging blood-genetic testing, but provided little guidance to courts on how to consider genetic evidence.[102] The relevant provision indicated that courts may weigh the "statistical probability of the alleged father's paternity," but did not direct courts as to the amount of weight to be given to genetic evidence against other presumptions of paternity.[103] Likewise, the UPA (2002) merely directed courts to determine the "best interests of the child" when determining whether to order genetic testing where a child has a presumptive or acknowledged father.[104]

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[98] The UPA refers to the mother who gives birth. E.g., UNIF. PARENTAGE ACT § 201(a) (UNIF. LAW COMM'N 2002). I use the word "person" to recognize that transgender men may give birth.
[99] Samantha Bei-wen Lee, *The Equal Right to Parent: Protecting the Rights of Gay and Lesbian, Poor, and Unmarried Parents*, 41 N.Y.U. Rev. L. & Soc. Change 631, 636 (2017); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child*: *Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 Stan. J.C.R. & C.L. 201, 227 (2009).
[100] UNIF. PARENTAGE ACT § 302 (UNIF. LAW COMM'N 2002). Under the 2002 UPA, the Acknowledgement must state that there is no presumed father of the child, such as a husband of the mother. § 302(a)(3).
[101] *E.g.*, In the Matter of Gendron, 950 A.2d 151 (N.H. 2008); Buccieri v. Campagna, 889 A.2d 1220 (P.a. Super. Ct. 2005); Van Weelde v. Van Weelde, 110 So. 3d 918 (Fla. Dist. Ct. App. 2013).
[102] UNIF. PARENTAGE ACT § 12(3) (UNIF. LAW COMM'N 1973).
[103] Glennon, *supra* note 88, at 557.
[104] UNIF. PARENTAGE ACT § 608(b) (UNIF. LAW COMM'N 2002).

C. Previous Iterations of Parentage by Adoption

Finally, parentage can be established via adoption. Adoption guarantees all the same rights and responsibilities of parentage guaranteed to married, biological parents. Adoption laws are a statutory creation and vary greatly by state.[105] Despite the variance, such statutes typically include residency requirements,[106] age requirements,[107] and a home study designed to ensure safe and stable child placement, in accordance with the "best interests of the child."[108]

Particularly relevant to unmarried same-sex couples are second-parent adoption laws. Like other adoption statutes, the requirements and availability vary greatly from state to state.[109] Second-parent adoption creates a process by which an unmarried partner can legally adopt the other partner's biological or adoptive child, without requiring the termination of the other parent's parental rights.[110] This makes it an effective tool for same-sex couples in cases where the non-biological parent has no legal claim to parentage. Second-parent adoption bears full faith and credit protection, and must be honored in every state.[111] Final adoptions may not be contested by a party to the adoption absent extraordinary circumstances, and North Carolina appears to be the only appellate court that has invalidated a final adoption in this context.[112] The North Carolina Supreme Court, however, did so because the state legislature did not include second-parent adoption in its

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[105] *Legal Recognition of LGBT Familes*, *supra* note 17.
[106] Mary Kate Kearney & Arrielle Millstein, *Meeting the Challenges of Adoption in an Internet Age*, 41 Cap. U. L. Rev. 237, 246 (2013).
[107] *Id*.
[108] *Id*. at 248.
[109] *2020 State Equality Index*, HUMAN RIGHTS CAMPAIGN (2020), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/resources/HRC-SEI2020.pdf?mtime=20210124164058&focal=none (last visited May 5, 2021).
[110] *E.g.*, Vt. Stat. Ann. 15 § 1-102 (2021) ("If a family unit consists of a parent and the parent's partner, and adoption is in the best interests of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection.").
[111] V.L. v. E.L., 577 U.S. 404, 408 (2016).
[112] *Legal Recognition for LGBT Families*, *supra* note 17, at 4; *citing* Boseman v. Jarrell, 704 S.E.2d 494 (N.C. 2010) (invalidating a second parent adoption by the same-sex partner of the birth-giving mother).

statutory scheme,[113] while emphasizing that North Carolina adoption law is wholly statutory.[114] Thus, the Court held that second parent adoption by a same-sex partner was an impermissible procedure.[115]

Availability of second-parent adoption, especially for unmarried couples, varies. Only fifteen states, plus the District of Columbia, have state statutes or appellate decisions allowing same-sex second-parent adoption for unmarried couples.[116] Fourteen other states have certain counties that have previously granted parental recognition this way to unmarried same sex couples.[117]

Conversely, appellate courts in at least seven states have categorically held that unmarried couples may not practice second-parent adoption under their state's statutory frameworks.[118] Additionally, Utah prohibits cohabiting non-marital couples from adopting under their statutes.[119]

[113] *Boseman*, 704 S.E.2d at 496.
[114] *Id.* at 498.
[115] *Id.*
[116] *Legal Recognition for LGBT Families,* supra note 17, at 2-4.
[117] *Id.* at 2.
[118] *Id.* at 3.
[119] *Id.*

D. Previous Iterations of Parentage by "Holding Out"

Both the UPA (1973) and UPA (2002) included provisions for the "holding out" presumption of paternity.[120] The UPA (1973) provided that a man could be presumed to a child's parent when he resides with the child and "openly holds out the child as his natural child."[121] No statutory period was attached to the holding out provision, and therefore, it was widely subject to judicial discretion.[122] The presumption could be asserted to exist by any party, and only rebutted by a clear and convincing showing.[123] If the standard was met, this person would be assumed to be the "natural parent."[124]

Questions were "naturally" raised as to the meaning of "natural child." It appears that the drafters of the provision assumed "natural" to mean "biological,"[125] but some courts interpreted it otherwise. For example, the California Supreme Court came to a different conclusion in In re Nicholas H.[126] There, the Court was forced to examine the state's statutory scheme, which was based around the UPA (1973).[127] At the trial court, a father asserting he was entitled to the holding out presumption of parentage admitted he was not the biological father.[128] The trial court held that this did not preclude him from the presumption,[129] but the appellate court disagreed and reversed.[130] When the case reached the California Supreme Court, the Court examined both the

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[120] UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973); UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM'N 2002). *See also* Jeffrey A. Parness, *Comparable Pursuits of Hold Out and De Facto Parentage: Tweaking the 2017 Uniform Parentage Act*, 31 J. Am. Acad. Matrimonial Law. 157, 158 (2018).
[121] UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973).
[122] *Id*.
[123] UNIF. PARENTAGE ACT § 4(b) (UNIF. LAW COMM'N 1973).
[124] *Id*.
[125] Nancy D. Polikoff, *From Third Parties To Parents: The Case Of Lesbian Couples And Their Children*, 77 Law & Contemp. Prob. 195 (2014).
[126] In re Nicholas H., 46 P.3d 932 (Cal. 2002).
[127] *Id*. at 933.
[128] *Id*.
[129] *Id*. at 936.
[130] *Id*.

holding out provision,[131] and the provision granting courts authority to balance which presumption prevails when two presumptions are applicable.[132] Reasoning that the legislature would not have adopted a scheme potentially granting parental rights to non-biological fathers unless it intended to do so, the Court concluded that "natural" need not mean "biological."[133]

The UPA (2002)'s holding out provision was substantively similar to the UPA (1973)'s version,[134] but required that a putative parent hold him or herself out as a parent, and reside with the child, for a period of two years.[135] The UPA (2002) was also modified to apply equally to both paternity and maternity determinations.[136] This change was particularly beneficial to lesbian mothers. Following enactment of statutes mirroring the language of the UPA (2002), several state courts found that lesbian women, without a biological connection the child, may be parents to a child when they hold themselves out as the parent to a child whom they planned to raise with their partner.[137]

The marital presumption and holding out presumption-- unlike parentage by biological tie-- recognize a functional meaning of parenthood by focusing on the social relationship between the parent and the child. By focusing on the functional relationships between family memebers, these presumptions protect both same-sex parents and their children, without requiring the legal formalities associated with adoption. Additionally, the holding-out presumption protects the

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[131] *Id*. at 933.
[132] *Id*. ("The question presented by this case is whether a presumption arising under section 7611(d) is, under section 7612(a), necessarily rebutted when the presumed father seeks parental rights but admits that he is not the biological father of the child.").
[133] *Id*. at 937.
[134] UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973); UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM'N 2002).
[135] UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM'N 2002).
[136] Polikoff, *supra* note 125, n. 224.
[137] *E.g.*, Chatterjee v. King, 280 P.3d 283, 285 (N.M. 2012); Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013); Partanen v. Gallagher, 59 N.E.3d 1133 (Mass. 2016); Schnedler v. Lee, 445 P.3d 238 (Okla. 2019); In re Guardianship of Madelyn B., 98 A.3d 494 (N.H. 2014).

parental rights of those couples who decline to marry, who remain a growing percentage of American families.[138]

Part III

A. The Insufficiency of Protecting Gay Families with the Marital Presumption

Although it seems doubtlessly clear that the marital presumption does little to protect parental rights of unmarried gay couples, it is possible that it does not adequately protect **married** gay couples.

While Obergefell guaranteed marriage equality, the Court did not squarely address whether the marital presumption of parentage extends to gay couples. Pavan v. Smith got closer to answering this question in the affirmative, by holding that an Arkansas law requiring the name of a mother's husband be placed on a child's birth certificate, while not extending the same right to gay spouses, violated Obergefell.[139] Yet the Court, by relying heavily on the rights guaranteed by state statutes, did not totally foreclose the possibility that it was only *the disparate treatment* that violates Obergefell.[140] The Court emphasized that the marital presumption is a product of state law, stating that Arkansas "uses [birth] certificates to give married parents a form of legal recognition not available to unmarried parents. Having made that choice, Arkansas may not . . . deny married same-sex couples that recognition."[141]

This language indicates that a state may, consistent with Obergefell, deny gay couples the marital presumption by instead requiring adoption, so long as the treatment is not disparate as compared to straight married couples.[142] Several lower Courts have interpreted Pavan's mandate

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[138] Curtain, *supra*. note 13.
[139] *Pavan*, 137 S. Ct. at 2076.
[140] *Id.* at 2077 ("Because that differential treatment infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage,' we reverse the state court's judgment.").
[141] *Id.* at 2078-79.
[142] This observation, drastic as it may seem, has quietly concerned a number of family law scholars; *e.g.* NeJaime, *supra* note 32, at 318 (emphasizing that the plaintiffs in *Pavan* did not rely on a liberty interest).

as such. The Seventh Circuit recently upheld a District Court's issuance of a preliminary injunction requiring equal application of the marital presumption to same-sex couples,[143] while specifically emphasizing that *equal presumption* of parentage does not mandate applying a *rule* enforcing the marital presumption.[144] The Arizona Supreme Court deployed identical reasoning, to an identical result, with its state's own marital presumption law; the Court held that the state must extend the presumption to same-sex couples for the sake of providing equal protection, but not going so far as to require the marital presumption outside the statutory scheme.[145]

The idea that states would consider repealing their marriage presumption in order to deny same sex couples a marital parentage presumption is clearly alarmist and extremely unlikely. Doing so would require every parent to either complete DNA testing, or sign a voluntary acknowledgement of parentage. Regardless, this presents a novel constitutional thought experiment. Without the marital presumption, a heterosexual parental couple could rely on biological parental recognition to protect their parental rights. Conversely, the vast majority of same-sex couples will have at least one parent without a biological connection to the child. Therefore, even same-sex married couples would face uncertainty in establishing parentage.

B. Biological Parental Recognition Does Not Sufficiently Protect Unwed Same-Sex Couples

The limited ability for biological parental recognition to protect an unmarried gay person's parental rights are obvious. In nearly all same-sex parental relationships, at least one psychological and intended parent will not be biologically related to the child. While the protections offered by

[143] Henderson v. Box, 947 F.3d 482, 484 (7th Cir. 2020).
[144] *Id.* at 487.
[145] McLaughlin v. Jones, 401 P.3d 492, 494 (Ariz. 2017).

a biological parent, especially a biological mother, are robust, a non-biological mother or father will not benefit from genetic verification of parentage.

Under some states' schemes, biology becomes a central tool where parentage is determined by a voluntary acknowledgement of paternity.[146] Prior iterations of the UPA required a putative father signing a VAP to be an actual biological parent.[147] Applying this statute, a number of states have required that only biological fathers sign VAPs,[148] and some state courts have deemed an acknowledgement fraudulent if the parent signs with knowledge that he is not the biological father.[149] Other states, including Massachusetts, have taken the opposite approach and recognized VAPs validly executed by same-sex couples.[150] The UPA (2017) takes the latter approach. It allows "presumed parents," which includes parents benefitting from both the marital presumption and holding out presumption,[151] to sign and be bound by a VAP, regardless of whether they are a same or cross-sex couple.[152]

C. Agency Barriers to Same-Sex Adoption

In states where second-parent adoption is unavailable, same-sex couples who wish to adopt a child may be required to turn to private agencies to do so. Private agencies are typically more selective in the child placement process.[153] Even when second parent adoption is available, a home

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[146] Merle E. Weiner, *When a Parent is Not Apparent,* 80 U. Pitt. L. Rev. 533, 547 (2019), *citing* UNIF. PARENTAGE ACT § 302(a)(4) (UNIF. LAW COMM'N 2002).
[147] *Id*.
[148] Weiner, *supra* note 146, *citing* Jessica Feinberg, *Whither the Functional Parent?: Revisting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status,* 83 Brooklyn L. Rev. 55, 83 (2017); UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM'N 2002) ("a man claiming to be the genetic father of the child may sign an acknowledgment of paternity").
[149] Weiner, *supra* note 146, n.54 (2019).
[150] Partanen v. Gallagher, 59 N.E.3d, 1133, 1139 (Mass. 2016).
[151] UNIF. PARENTAGE ACT § 301; §204; (UNIF. LAW COMM'N 2017);
[152] The official comment to UNIF. PARENTAGE ACT § 301 states that the revision to the UPA (2002) "furthers the goal of ensuring that the act applies equally to children born to same-sex couples[.]".
[153] Samantha R. Lyew, *Adoption and Foster Care Placement Policies: Legislatively Promoting the Best Interests of Children Amidst Competing Interests of Religious Freedom and Equal Proteciton For Same-Sex Couples,* 42 J. Legis. 186, 187 (2016).

study will typically be required,[154] except upon waiver of the court.[155] Even when such waivers are permitted by law, extensive documentation, including submission of affidavits and letters in support of the adoption, will generally be required.[156]

Home studies, unfortunately, may serve to the detriment of unwed, same sex couples. Heteronormative views of what makes for a "stable" home environment are pervasive, and even charitable adoptive agencies are not immune from widespread biases.[157] This is particularly true among faith-based private adoption agencies.[158] If the agency is affiliated with a particular religious group, they might cite to their religious beliefs as a reason to decline certain couples, including both the unwed, and the gay.[159] While it is true that a religious agency may decline to place children with both heterosexual and homosexual couples, the impact on homosexual couples is disproportionate due to more limited ability to biologically conceive and, in fact, same-sex couples are approximately *seven times* more likely to adopt compared to their opposite-sex counterparts.[160]

Despite studies indicating that children raised by same-sex couples are just as well adjusted as those raised by opposite-sex couples,[161] some states have adopted, or are attempting to adopt,

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[154] Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. Juv. L. 1, 6-8 (1999).
[155] Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. Davis L. Rev. 305, 343 (2006) ("Despite second-parent adoption's clear analogy to step-parent adoption, there is never any waiver of home studies or waiting periods in second-parent cases.").
[156] *Id.* ("Even where the law allows a second-parent adoption petitioner to apply for a waiver, invariably such requests must be supported by 'numerous affidavits and letters attesting to the longevity and strength of the relationship between the prospective adopters and legal memoranda in support of such a waiver.'").
[157] Silvia Sara Canetto, *What Is a Normal Family? Common Assumptions and Current Evidence*, 17 J. Primary Prevention 31, 32 (1996).
[158] For academic work focused on this issue, *see* Peter Galluci, *Thou Shall Not Adopt; Sexual Orientation Discrimination in the Adoption Process*, 23 Cardozo J. Equal Rts. & Soc. Just. 465 (2017). *See also* Allison Whelan, *Denying Tax-Exempt Status to Discriminatory Private Adoption Agencies*, 8 U.C. Irvine L. Rev. 711 (2018).
[159] Whelan, *supra* note 158, at 718.
[160] Shoshana K. Goldberg and Kerith J. Conron, *How Many Same-Sex Couples in the U.S. are Raising Children*, U.C.L.A. School of Law Williams Institute (July 2018), https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/ (last visited May 5, 2021).
[161] Whelan, *supra* note 158, at 723-25.

laws which explicitly grant private adoption agencies the right to discriminate against same-sex or unwed couples based on their religious beliefs.[162] In the first few months of 2021 alone, at least four such bills were introduced in state legislatures.[163] Therefore, second parent adoption continues to prove to be an imperfect route for same sex unmarried couples to establish parentage.

1. Fulton's Threat to Unwed Same-Sex Couples

In the years following Obergefell, pro-religious (or, to some, anti-gay)[164] advocates have begun adopting Free Exercise challenges to accommodations for homosexual couples. Perhaps most famous among these challenges was Masterpiece Cakeshop v. Colorado Civil Rights Commission.[165] There, the cakeshop and its owner, Jack Phillips, refused to bake a wedding cake for a same-sex couple, citing to his religious beliefs.[166] This resulted in an investigation by the Colorado Civil Rights Commission.[167] The Commission found that Masterpiece Cakeshop had, on several occasions, discriminated against potential customers on the basis of their sexual orientation.[168] The Supreme Court took little issue with the Commission's conclusion. What the majority did object to, however, was the Commission's hostility towards Phillips.[169] During a public hearing discussing the case, a Commissioner stated that

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust . . . [using religious beliefs] is one of the most despicable pieces rhetoric that people can use . . . to hurt others.[170]

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[162] *Past Legislation Affecting LGBT Rights Across the Country*, American Civil Liberties Union (2020), https://www.aclu.org/past-legislation-affecting-lgbt-rights-across-country-2020 (last visited May 5, 2021).
[163] *Legislation Affecting LGBT Rights Across the Country*, American Civil Liberties Union (2021), https://www.aclu.org/legislation-affecting-lgbt-rights-across-country (last visited May 5, 2021).
[164] *See, e.g.*, Jay Michaelson, *The Supreme Court 'Fulton' Case is About Anti-LGBTQ Discrimination—Not 'Religious Freedom*, THE DAILY BEAST (February 24, 2020), https://www.thedailybeast.com/the-supreme-court-fulton-case-is-about-anti-lgbtq-discriminationnot-religious-freedom (last visited May 5, 2021).
[165] Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018).
[166] *Id.* at 1723.
[167] *Id.*
[168] *Id.* at 1726.
[169] *Id.* at 1729.
[170] *Id.*

The Supreme Court ultimately reversed the Commission's determination.[171] The Court held that government must remain neutral towards religious viewpoints in enforcement of laws of otherwise general applicability.[172] Since the Commission's decision was not neutral as to Phillips' religious viewpoint, the Court held it violated the First Amendment.[173] Since then, lower Courts have been forced to consider the exact extent to which religious beliefs can compromise LGBTQIA accommodations.

This legal tension has reached a new peak with the currently-pending Fulton v. City of Philadelphia.[174] In March 2018, the City of Philadelphia blocked Catholic Social Services, a local Catholic adoption agency, from placing children in foster homes.[175] The City did so due to Catholic Social Services' policy excluding same-sex couples from foster-home licensure.[176] In response, Catholic Social Services brought an action against the City, claiming that the City's actions violated its First Amendment Free Exercise, Establishment, and Free Speech rights.[177] The Third Circuit held that plaintiffs failed to show that the City targeted plaintiffs for their religious beliefs.[178] Instead, the Court believed that the City was acting in good faith to enforce its anti-discrimination laws.[179] The case is now pending before the Supreme Court. Fulton's petitioners rely greatly on Masterpiece Cakeshop in their briefs,[180] and are seeking a Free Exercise exception that would allow religious adoption agencies to deny foster parent applicants on the basis of sexual

[171] *Id.* at 1746.
[172] *Id.* at 1731-32.
[173] *Id.*
[174] Fulton v. City of Phila., 922 F.3d 140 (3rd Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).
[175] *Id.* at 146.
[176] *Id.*
[177] *Id.*
[178] *Id.* at 147.
[179] *Id.* at 165.
[180] Brief of Petitioners Sharonell Fulton, *et al*, 8-9, Fulton v. City of Philadelphia, No. 19-123).

orientation. Additionally, this case could provide an exception to grant adoptions to *unmarried* couples as well.[181]

During oral arguments, the conservative justices, and even Justice Breyer, indicated that the government has a more compelling state interest in combatting racial discrimination than same-sex discrimination, while Justice Kavanaugh flatly stated that the City of Philadelphia was "looking for a fight" and "looking for problems" by commanding all adoption agencies to screen same-sex couples.[182] Even assuming, arguendo, that the charities are acting in good-faith based on their sincerely held religious beliefs, ruling in petitioner's favor would create yet another structural barrier for same-sex couples seeking to adopt.

Part IV: The Urgency of Adopting the UPA (2017) to Protect Unwed Same-Sex Couples

The uncertainty presented by Fulton, and deficiencies in many states' statutes, makes adoption of the UPA (2017) all the more necessary to protect the rights of both same-sex parents and their children. Many current statutory regimes, including those based around prior versions of the UPA, are insufficient due to their failure to focus on the functional definitions of parentage. The UPA (2017) recognizes that parentage is not merely a product of biology,[183] or the parent's marital status,[184] and that psychological parents should not have to adopt their own child. Instead, the UPA (2017) focuses squarely on the importance of the parent-child relationship. Its upgraded provisions will more effectively protect the rights of unwed, same-sex parents, and states should move forward with its adoption.

[181] *Id*.
[182] A recording of the oral argument, and its transcript, can be found at https://www.oyez.org/cases/2020/19-123 (last visited May 5, 2021).
[183] Courtney Joslin, *Nurturing Parenthood Through the UPA (2017*), 127 Yale L.J. F. 589, 599 (2018).
[184] *Id*.

Three provisions are particularly protective of unwed, same-sex parents: the holding out provision;[185] extension of de facto parenthood;[186] and more inclusive voluntary assumption of parentage (VAP) provisions.[187] Any one of these three now gender-neutral provisions could have potentially prevented the injustice seen in Hawkins, making the UPA (2017)'s currently limited enactment all the more unjust.[188]

The newly revised UPA is, admittedly, imperfect. It fails to account for the fact that transgender men are capable of giving birth, and states which adopt UPA (2017) as otherwise written should be careful to apply gender-neutral terminology to provisions where it is not already employed. Similarly, provisions requiring notification to "a man who may be the genetic father of a child"[189] should be replaced with "an individual who may be a genetic parent." These provisions, however, may be easily fixed, and UPA (2017) remains a positive step towards gender neutrality.

The revised UPA, with these subtle updates in mind, will bring states that adopt it into compliance of the promise of Obergefell and Pavan, without the equal protection issues discussed earlier in this article. It can mitigate reliance on the marital presumption and biological ties, and free unmarried gay parents from the degradation of "adopting" their own child.

A. The UPA (2017)'s Codification of De Facto Parenthood

[185] UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017).
[186] *Id.* at § 609.
[187] *Id.* at § 301.
[188] As of 2021, only four states had adopted versions of the UPA (2017), with only four enacting versions of the Act. Uniform L. Commission, "2017 Parentage Act," https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f#:~:text=The%20Uniform%20Parentage%20Act%20(2017,UPA%2C%20last%20revised%20in%202002 (Last visited May 5, 2021).
[189] UNIF. PARENTAGE ACT § 204 (UNIF. LAW COMM'N 2017).

The 2017 edition, for the first time in UPA history, includes provisions providing for de facto parenthood.[190] De facto parenthood, an equitable doctrine already recognized in a number of jurisdictions,[191] provides an avenue for parental recognition focused on the functional meaning of parenting. This functional approach recognizes the interpersonal meaning of "parentage," to the benefit of both parents and children.

Under Section 609, a Court considering a claim of de facto parentage should consider a number of factors. These include whether the individual bringing the claim (1) "resided with the child as a regular member of the child's household for a significant period"; (2) "engaged in consistent caretaking of the child"; (3) "undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation"; (4) "held out the child as the individual's child"; and (5) "established a bonded and dependent relationship with the child which is parental in nature."[192] The Court must consider whether another individual has functionally similar parental ties with the child, and, importantly, whether recognition of the de facto parentage is in the best interests in the child.[193] In those jurisdictions that have recognized de facto parenthood, the entitlements of the de factor parent have varied.[194] However the UPA (2017)'s approach grants the full suite of parental rights to these functional parents.

The codification of de facto parenthood allows legislatures to grant parental rights to putative parents, rather than rely on judicial adoption or rejection of the remedy. In fact, the UPA (2017) provides that a Court may deny genetic testing to putative fathers challenging another's

[190] Joslin, *supra* note 183, at 592; UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017).
[191] *See, e.g.*, Conover v. Conover, 141 A.3d 31 (Md. 2016); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); Holtzman v. Knott, 533 N.W.2d 419 (Wis. 1995).
[192] UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017).
[193] *Id*.
[194] For example, in V.C. v. M.J.B, 748 A.2d at 554. the New Jersey Supreme Court held that while the de facto parent would be entitled to custody in the best interest of the child, and a presumptive right to visitation, "when the evidence concerning the child's best interests (as between a legal parent and psychological parent) is in equipoise, custody will be awarded to the legal parent."

parentage after considering equitable factors.[195] The UPA de facto provision, importantly, is gender neutral as well, much to the benefit of parents who would otherwise be outside its purview.[196]

The newest UPA's de facto parentage language is, however, imperfect. States adopting the UPA (2017) should be careful to include a provision under the "best interests of the child" analysis forbidding judicial consideration of marital status or sexual orientation. Additionally, the current drafting allows only for the claimed de facto parent to seek relief.[197] This creates the possibility that a de facto parent could decide to simply abandon their child and former partner without the obligation to pay child support. Indeed, the de facto provision serves only to protect the rights of the functional parent, should he choose to assert them. Absent this functional parent's assertion of his parental rights, or some other formal recognition of parentage, this parent could easily escape child support obligations by simply declining to assert parentage. Acting as a parent is not simply about protecting one's owns rights, but fulfilling the duties owed to the child, and state legislatures should include language to this effect when otherwise adopting the UPA (2017).

B. The UPA (2017)'s Upgraded Holding-Out Presumption

The newly-revised UPA amends the holding-out provision to apply without consideration of gender.[198] Despite the similarities, there are subtle differences between de facto parenthood and the holding-out presumption.[199] The holding-out provision is, in some ways, a codification of Stanley without the biological element. It recognizes a person who has openly proclaimed themselves to be a child's parent and has resided with the child for the statutory period.[200] The

[195] UNIF. PARENTAGE ACT § 503; 613(a) (UNIF. LAW COMM'N 2017).
[196] UNIF. PARENTAGE ACT § 609(a) (UNIF. LAW COMM'N 2017).
[197] *Id.* ("A proceeding to establish parentage under this section may only be established by an individual . . . who claims to be a de facto parent of the child.").
[198] *Id.* at §204(a)(2).
[199] For an academic comparison of the two doctrines, *see* Parness, *supra* note 120.
[200] UNIF. PARENTAGE ACT § 204 (UNIF. LAW COMM'N 2017).

provision estops the other parent, who has benefitted from this "holding out" of parentage, to deny parentage if the statutory period is met. Important to unwed couples, there is no requirement of marriage. So long as the cohabitation between the parents lasts for the statutory period, and the psychological parent claims parentage, that parent's legal rights will be protected.[201]

The provision, which has existed in some form since 1973,[202] examines the conduct of a putative parent, allowing parentage recognition based on the adult's treatment of a child as their own.[203] Under the provision, a presumed parent need not be a biological parent, or even married to the biological mother.[204] As such, the presumption granted by the statute is not reliant on a biological tie to solidify inchoate rights, as in the unwed fathers cases, but instead grants standing to establish parentage regardless of biological tie by using gender-neutral language.[205] While the UPA (2002) extended the holding out presumption to lesbian mothers, the updated statute, which speaks in term of the "individual," will now plainly extend the presumption to non-binary parents.[206] By using gender neutral language, it offers its protection to lesbian parents, while eliminating any potential argument that the law requires biological tie.[207]

C. The UPA (2017)'s VAP Provisions

Finally, the UPA incorporates gender neutral provisions for VAP recognition.[208] Historically, VAPs have been limited only to men, and are largely a product of federal law.[209] As

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[201] *Id*.
[202] Joslin, *supra* note 183, at 600.
[203] UNIF. PARENTAGE ACT § 204 (UNIF. LAW COMM'N 2017).
[204] *Id*.
[205] *Id*.
[206] *Id*.
[207] Joslin, *supra* note 183 at 601.
[208] UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM'N 2017)
[209] Nejaime, *supra* note 32, at 302 ("Congress shaped state policies and practices in ways that prioritized yet also minimized men's biological ties. Federal law required states to provide easy ways for unmarried fathers to establish paternity. Voluntary acknowledgments of paternity, by which a man attests to his status as the biological father, became the most common way to establish parentage for nonmarital children.").

women giving birth were, quite reasonably, presumed to be a parent to that child, VAPs were only necessary to solidify the father's parental rights.[210] To protect the rights of the "actual" father, many states adopted laws allowing only the biological father to assert parentage via VAP.[211] This presents an obvious problem for same-sex couples, as nearly every child to a same-sex child will be genetically unrelated to at least one parent. The modified UPA addresses this by replacing the "paternity" language with "parentage," and provides for parental rights of "an intended parent," in addition to the "presumed parent."[212] The provision also includes no consideration of marital status or sexual orientation.[213]

One potentially overlooked benefit to the new, inclusive VAP statute is that it allows same-sex parents to seek a formal acknowledgment of parentage outside the adversarial system.[214] De facto parenthood, and parentage via the holding out provision, will typically only arise in situations in which the unwed couple ends the romantic relationship and the "presumed" parent resists granting parental rights to the non-biological parent. As such, Section 301 provides an option for "intended" parents to establish their parentage prior to that occurrence.[215] Doing so allows the intended parent to obtain a formal judgment of parentage, bearing full faith and credit nationwide,[216] even if the presumed parent moves with the child to a state that would not otherwise recognize the intended parent as having parental rights.

Importantly, the VAP provisions also remove the indignity of a same-sex parent being forced to second-parent adopt their own child. In doing so, it eliminates the unequal barriers to

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[210] *Id*.
[211] Joslin, *supra* note 183, at 603. *But see* Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. Gender Soc. Pol''y & L. 467, 480-82 (2012) (noting that eight states have upheld VAPs despite evidence showing the signatory was not the biological father).
[212] UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM'N 2017).
[213] *Id*.
[214] *Id*.
[215] *Id*.
[216] 42 U.S.C. § 666 (a)(5)(C)(iv).

parentage presented to same-sex couples as compared to heterosexual couples. Indeed, it is already rather standard practice for unmarried men to consent to VAPs to establish paternity.[217] The gender inclusive nature of Section 301, therefore, does not create an additional legal barrier for same-sex couples, as is the case with second-parent adoption, but instead offers protection to unwed gay couples equal to their unwed heterosexual counterparts.

Conclusion

The dynamic realities of family composition have not, and will not, end in the post Obergefell world. As young adults continue to defy the restraints of the nuclear family or the institution of marriage, the law has failed to keep pace. Despite the clear victory of Obergefell, and all the justice it guaranteed, the emphasis on solving these family issues in the appellate court system seems to be, in hindsight, a strategic mistake. As state law is the primary means for regulating the family,[218] these issues could be fixed all too easily, and we need not rely upon appellate litigation to do so.

The fight for familial equality for our LGBTQIA brothers and sisters is far from over, despite the sense of victory we experienced the day Obergefell was decided. While same-sex marriage is the law of the land, parental recognition law remains insufficient in protecting the rights of unwed, same-sex parents. Obergefell was but one battle won. With Masterpiece Cakeshop on the books, and Fulton on the horizon, states need to take proactive measures to ensure the rights of same-sex parents remain protected. There is no need to rely on impact litigation, or the slow wheels of the justice within the court system. States can, and should, act today to expand

[217] Tianna N. Gibbs, *Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process*, 54 Harv. C.R.-C.L. L. Rev. 549, 554 ("[T]he VAP is the most commonly used paper court in the family law context.").
[218] Ann Laquer Estin, SHARING GOVERNANCE: FAMILY LAW IN CONGRESS AND THE STATES, 18 Cornell J. L. & Pub. Pol'y 267, 311 (2009).

recognition of the functional definition of parenthood. Enacting the UPA (2017) will help them do just that.