

# CONCEIVING PARENTS

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*This Article revisits the contested question of parentage determination upon a child's birth and argues that the relationship between prospective parents should be a factor in recognizing or refusing to recognize an individual as a parent. According to this approach, whether the pertinent parties were involved in a committed long-term relationship or merely hooked up, or the child's conception was the result of rape, should be considered as part of the decision regarding the status of each of them as a legal parent. Existing laws and legal scholarship have focused either on biology or on intent but have overlooked relationships.*

*This Article does not suggest that relationships between potential joint parents be the only factor determining parentage. Rather, it suggests that relationships be considered together with two other considerations—biology and intent—in all cases of at-birth parentage determination, regardless of the “method” of conception, be it sex-based or through Assisted Reproductive Technologies (ART).*

*Beyond the specific proposals for making parentage determinations, this Article offers a vision of legal parenthood as an “all or nothing” indissoluble relationship. The perception of parenthood has been diluted over the last few decades as a side-effect of the (desirable in itself) erosion of parental exclusivity and the disaggregation of parental rights and responsibilities that followed. This Article suggests that the erosion of parental status all-inclusiveness and permanence contradicts children's interests. In order to restore the meaning of parenthood as an enduring commitment, it argues that at-birth parentage determination should confer upon legal parents all the duties, responsibilities, privileges, and rights associated with parenthood, regarding both their vertical relationship with the child and their horizontal relationship with a co-parent, when there is one.*

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INTRODUCTION

The birth of a child is also the birth of a parent. Nonetheless, in the legal realm, deciding who is a child’s parent remains a deeply contested question.<sup>1</sup> Family law scholarship considers parentage as an issue that concerns merely the relationship of the would-be parent and the child. This is so even though more often than not the law recognizes for each child more than one, but not more than two, legal parents, in accordance with the ideal of bi-

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<sup>1</sup> See, e.g., June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1295–97 (2005); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 838 (2000).

parenting.<sup>2</sup> Existing scholarship on parentage thus fails to adequately take into account that in recognizing more than one parent to a child the law not only creates two vertical relationships between an adult and a child, but also a horizontal relationship between the joint parents. This horizontal relationship is gaining growing attention in recent family law scholarship.

Emerging family law scholarship considers what obligations joint parents should owe one another, “separate and apart from any obligation they may or may not have as former spouses or partners.”<sup>3</sup> Such obligations may include requirements to cooperate in co-parenting their children, to enable one another to be involved in the children’s lives, to fulfill financial obligations that go beyond child support to share the costs of raising their children (the personal costs that parenthood exacts from parents), and various additional obligations.<sup>4</sup> However, this scholarship addresses joint parenting as an issue that arises only after a settled understanding of parentage. In other words, although parentage is a contested legal category, the scholarship on the joint parenthood relationship takes parental status as a given and only considers the appropriate legal implications of this status (in terms of specific rights and obligations towards another parent).

This Article offers a novel approach, which brings together the inquiry on parentage determination and the inquiry on joint parenting with the purpose of offering a more comprehensive and reasoned analysis. This Article argues that first-order parentage determination should be shaped by the recent notions of the meaning of joint parenting. Understanding parenthood not only as a vertical but also as a horizontal relationship, which involves

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<sup>2</sup> The term “bi-parenting” is used by Katharine Baker in her scholarship. *See, e.g.*, Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 16, 64 (2004) [hereinafter *Bargaining or Biology?*]; Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 673 (2008) [hereinafter *Bionormativity and the Construction of Parenthood*]. *See infra* Part I.C for a critical discussion of this legal ideal. When addressing *legal* parenthood, it is theoretically possible that a child will be born with no legally recognized parents. *See, e.g.*, LFA (Jerusalem) 1118/14 Jane Doe v. Ministry of Welfare and Social Services (2015) (ISR.). Whether or not a legal system should recognize the possibility of a child being born with no legal parents is a normative legal question each legal system should decide.

<sup>3</sup> Ayelet Blecher-Prigat, *The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents*, 13 THEORETICAL INQUIRIES L. 179, 180 (2012); *see also* MERLE H. WEINER, A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW 131–82 (2015) (proposing a new “parent-partner” status to describe the relationship between adults who have a child together); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 223–33 (2015) (arguing that “the relationship between parents is essential to child well-being.” *id.* at 223). *See generally* Karen Syma Czapanskiy, *Chalimony: Seeking Equity Between Parents of Children with Disabilities and Chronic Illnesses*, 34 N.Y.U. REV. L. & SOC. CHANGE 253 (2010) (advocating a new form of financial remedy for non-married co-parents of children with disabilities or chronic illnesses); Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197 (2012) (discussing the changing rights, obligations, and responsibilities of co-parents after divorce).

<sup>4</sup> *See* text accompanying notes 33–36 *infra*.

rights and obligations between joint parents, should affect the way parentage is determined.

This Article's new approach to parentage determination emphasizes that legal parenthood is not merely a theoretical kinship status or identity,<sup>5</sup> but a legal institution that involves comprehensive duties and rights. Thus, parentage determination is not made in the abstract, detached from specific obligations and rights.<sup>6</sup> Rather, it is made for the purpose of imposing obligations or bestowing rights. In designing rules to govern parentage determination, we should therefore inquire into the justifications for imposing the relevant duties and bestowing the pertinent rights.

This Article further argues that in the course of this inquiry, at-birth parentage should be understood as creating an all-encompassing inclusive status, conferring upon recognized legal parents all the duties, responsibilities, rights, and entitlements that go along with parentage. Parentage determination cannot be made for the only purpose of imposing child support obligations, or merely recognizing an entitlement to have a relationship with the child, which requires the cooperation of the other parent. At-birth parentage determination should explain and justify the conferral of the overall rights and duties of parenthood as both a vertical relationship between an adult and a child, and a (potential) horizontal relationship between joint parents, when more than one parent is recognized.

It is argued here that family law scholarship on parentage, which has focused either on intent or on biology, has failed to provide an adequate basis for parentage determination understood this way. This Article, therefore, revisits the contested question of at-birth parentage determination and argues that the relationship between potential joint parents should be a central factor in determining a child's parentage. The law should consider the relationship between the pertinent adults in creating, or refusing to create, a joint parenthood relationship. Relationships matter because when it is determined that a child has more than one parent, parenthood creates an indissoluble connection between the joint parents. Adding relationships as a factor also responds to concerns about emphasizing choice at the expense of commitment, dependency, and equality, on the one hand,<sup>7</sup> and to concerns about the limitations and impoverished meaning of biology-based parenthood, on the other.<sup>8</sup>

According to this Article's approach, whether the relevant parties were involved in a committed long-term relationship, merely shared a one-night stand, or the child's conception was the result of rape, should be considered in the decision regarding the status of each of them as a legal parent. As this

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<sup>5</sup> For a piece highlighting the perception of parenthood as an identity, see Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747, 754 (2015).

<sup>6</sup> See text accompanying note 287 *infra*.

<sup>7</sup> See Emily J. Stolzenberg, *The New Family Freedom* 3–5 (Aug. 8, 2017) (unpublished manuscript) (on file with the Harvard Journal of Law & Gender).

<sup>8</sup> See *infra* Part IV.B.

Article will later elaborate, this approach might lead to the denial of a party's parentage, and so to an unwillingness to create a joint parenthood relationship. In this respect, this Article challenges bi-parenting as an ideal. At-birth parentage should not be based on a normative goal of recognizing two parents.

Although existing laws of parentage and legal scholarship seem to neglect relationships, the reality is that relationships are often considered in parentage determination, even if not explicitly. The marital presumption is, of course, the most notable example, although it is often depicted as a proxy for biological paternity.<sup>9</sup> However, for parentage determination purposes, existing case law and statutes recognize and value only the heterosexual marriage relationship, or a relationship that mimics it. Thus, in the context of Assisted Reproductive Technologies (ART), spouses of biological parents are recognized as legal parents, allegedly based only on the factor of intent.<sup>10</sup> In cases of sex-based reproduction outside of marriage, application of the biology-plus test recognizes the parental status of biological fathers who lived with the mother in a relationship that mimics heterosexual marriage.<sup>11</sup> In calling to reorient parentage determination to take notice of the relationship between conceiving adults, this Article emphasizes that the valuation of relationships should go beyond the sexual-romantic bond. Various committed relationships should be recognized in deciding a child's parentage.

This Article does not suggest that relationships between potential joint parents should be the only factor determining parentage. Rather, it recognizes the place of other considerations—intent and biology—in all cases of at-birth parentage determination, regardless of the “method” of conception, whether sex-based or through ART. This Article rejects the existing approach, which takes the manner of conception to be a central differentiating factor and applies different rules to govern parentage determination in the context of sex-based reproduction, on the one hand, and ART, on the other. This Article explains that while the circumstances of conception might be relevant, since sex can indicate a different relationship between the conceiving adults, this should be considered as only one aspect of the general inquiry into the parties' relationships. The manner of conception itself should not be a decisive factor that differentiates and assigns different rules for parentage determination.

In explaining why both intent and biology should be considered in all cases of parentage determination, this Article makes an additional contribution to existing scholarship on parenthood. The Article offers an understanding of intent that slightly differs from existing theories of intentional

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<sup>9</sup> See, e.g., Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2292–93 (2017).

<sup>10</sup> See *infra* Part III.A.

<sup>11</sup> See *infra* Part III.B.

parenthood in order to address various limitations in predominant understandings of intent.

Parentage determined according to the framework proposed in this Article should create an all-inclusive status. Nonetheless, such parenthood need not be exclusive. Those who do not fall under the definition of parenthood proposed in this Article should not necessarily be considered legal strangers to the child in question. By rejecting parental exclusivity, this Article responds to potential concerns about the practical implications of its proposal, which might exclude some progenitors from legal parenthood, for instance in cases of unplanned pregnancies that occurred in the context of a no-strings-attached relationship. This Article calls for the recognition of “progenitorship” or “birthing parenthood” as a distinct legal category that may impose limited obligations (i.e., support) and provide limited rights (i.e., visitation) to progenitors, with the primary goal of safeguarding children’s interests. However, for the benefit of children, a clear and defined hierarchy should be maintained between the different categories of relationships with children, with the legal all-inclusive parenthood maintaining its primacy.

This Article thus offers a novel comprehensive scheme that addresses both the meaning of legal parenthood and the way it should be determined. To unpack, explain, and defend this scheme, this Article proceeds as follows: Part I presents the growing body of scholarship on joint parenting and shows how the indeterminacy of parentage determination underlies some of the disputes regarding the scope and nature of the mutual obligations between joint parents. It calls to bring together the inquiry on joint parenting and the inquiry on at-birth parentage determination. Part II presents the perception of parenthood as an all-inclusive status, which underlies this Article’s approach to parentage determination. Part III argues that the relationship between potential joint parents should be a central factor in making at-birth parentage determinations, and presents the role relationships in fact play in existing laws of parentage. Part IV explains that the relationship between the conceiving adults should not be the only factor determining parentage, but rather should be taken into account together with the other, more common factors, of biology and intent in all cases of at-birth parentage determination.

The remaining parts of this Article address possible weaknesses of its proposed framework for at-birth parentage determination. Part V addresses the problem of broad judicial discretion that might result from this complex multifactor regime for parentage determination. It offers the use of presumptions to mitigate judicial discretion: presumptions that distinguish between cases of long committed relationships between the pertinent adults and cases of casual, no-strings-attached relationships. It also establishes a presumption excluding rapists from parental status.

Part VI addresses concerns regarding safeguarding children’s interests, especially equality for children, securing children’s financial needs, and children’s interests in having relationships with biological parents. It offers a

new legal category of progenitorship, which might confer limited rights and obligations on individuals who are not legal parents.

Last, Part VII addresses gender- and class-related concerns involved in parentage determination. It focuses on the issues of reproductive choice and the power dynamics between mothers and fathers regarding the parenting of joint children. It shows how the overall analysis proposed in this Article responds to these concerns.

### I. DO WE KNOW WHO IS A (CO) PARENT?

This Part considers emerging family law scholarship on joint parenting and the mutual obligations co-parents should owe one another. It demonstrates that although the existing literature seems to share a normative ground that calls for shifting the focus of family law to the relationship between joint parents, there are significant variations and strong disagreements in this literature regarding the particular legal arrangements that should apply to co-parents. This Article suggests that such disagreements in fact reflect a deeper dispute regarding the definition of parenthood. In other words, although parentage is a contested legal category, the scholarship on joint parenting assumes that parenthood is settled and we know who a child's parents are. It takes parental status as given and only considers the expected legal implications of this status (in terms of specific rights and obligations). However, the uncertainty concerning the definition of parenthood affects and is reflected in some of the disagreements regarding the scope and nature of the obligations of joint parenthood.

This Article argues that the question of at-birth parentage determination and the question regarding the scope and nature of the obligations joint parenthood imposes are interrelated. The question of who should be considered a (co-)parent should be shaped by the notion of parenthood as a horizontal relationship, which involves rights and obligations between joint parents. This Article, therefore, calls for reorienting parentage laws to place greater emphasis on the relationship between the individuals who conceived as a factor in the legal determination of parenthood, both when conception occurs through ART and when conception occurs through sex. The law should consider the relationship between prospective joint parents in defining parenthood itself and in creating (or failing to create) an indissoluble joint parenthood relationship.

Indeed, this Part also warns against conflating the argument that co-parenthood is a significant relationship that the law should acknowledge with the argument that each child should have two co-parents. This is an unwarranted leap. It is emphasized that *when* a child has more than one parent, the horizontal relationship between the joint parents is a significant relationship. However, this does not mean that for each child the law should recognize two parents. On the contrary, given the significance of the hori-

zontal relationship between co-parents, the obligations it imposes, and the indissolubility of this relationship, in some cases the relationship between the parties who conceive warrants that only one legal parent be recognized.

A. *The Horizontal Relationship Between Co-Parents*

Recent family law scholarship has been paying growing attention to the horizontal relationship between joint parents and the obligations joint parents owe one another.<sup>12</sup> This scholarship emphasizes that when a child has more than one parent, the relationships that are created are not merely vertical between each adult-parent and the child. Rather, the joint parenthood also creates a horizontal relationship between the adults who share parenthood.

In a comprehensive book dedicated to the horizontal relationship between parents, Merle Weiner powerfully argues that there is no term, either in law or in everyday speech, to express the relationship between joint parents.<sup>13</sup> Phrases such as “my child’s father” (or mother) focus on the relationship between the child and the other parent, connoting distance and separation between the two parents. Terms such as “my (ex-)spouse” or “my (ex-)partner” focus on the relationship the parents shared as romantic partners rather than as joint parents. Weiner rightfully argues that the lack of a term is an indicator of the essence of the problem, which is the invisibility of the joint parenthood relationship in law and society alike.<sup>14</sup>

Various other scholars, such as Clare Huntington,<sup>15</sup> Cynthia Starnes,<sup>16</sup> Karen Czapanskiy,<sup>17</sup> and myself,<sup>18</sup> have called on the law to redefine its interest in adult family relationships so that the relationship created by joint parenthood be recognized as one that yields varied obligations—whether they be cooperation in parenting or financial obligations—between joint parents. This scholarship emphasizes that the parenthood relationship imposes not only obligations that the parent owes the child, but also obligations that each parent owes the other parent(s). As a first step toward making the joint parenthood visible, Weiner offers the phrase “parent-partner” to express the relationship between joint parents.<sup>19</sup> Clare Huntington calls for the recognition of a new legal designation of “co-parent” that underscores the indissoluble nature of parents’ connections.<sup>20</sup>

While adult partnerships are governed by the ideology of an easy and clean break, the parenthood relationship is, and should be, governed by an

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<sup>12</sup> See generally *supra* note 3.

<sup>13</sup> WEINER, *supra* note 3, at 32–33.

<sup>14</sup> *Id.* at 33–37.

<sup>15</sup> Huntington, *supra* note 3, at 168–76.

<sup>16</sup> Starnes, *supra* note 3, at 198–204.

<sup>17</sup> Czapanskiy, *supra* note 3, at 254–55.

<sup>18</sup> Blecher-Prigat, *supra* note 3, at 180–81.

<sup>19</sup> WEINER, *supra* note 3, at 2.

<sup>20</sup> Huntington, *supra* note 3, at 226–27.



opposite ideology, one which sees it as a relationship “for life,”<sup>21</sup> with “no exit” option.<sup>22</sup> This perception should apply beyond the vertical parent-child relationship to also shape the relationship between joint parents.<sup>23</sup> Indeed, Australian law professor Patrick Parkinson has argued that the relationship between joint parents should be indissoluble.<sup>24</sup>

As I noted elsewhere, to some extent, this perception of the joint parenthood relationship is already reflected in current law:

Today, live-apart parents are expected to cooperate in co-parenting their children. Each parent is legally expected to respect and encourage the involvement and engagement of the other parent in the children’s lives. Joint physical custody arrangements have come increasingly into favor . . . the widespread “friendly parent” provisions direct courts to award (physical) custody to the parent most likely to foster the child’s relationship with the other parent. Joint legal custody, which provides both parents with legal authority to make childrearing decisions, is currently the norm. Sharing decision-making authority in matters that concern the child’s health-care, education, and the like also requires parents to cooperate with one another . . . .<sup>25</sup>

Strong justifications support reorienting family law to focus on the horizontal relationship between joint parents. Defining family relationships between adults based on their being joint parents places long-term commitment, nurture, and care (for children) rather than romantic love and sexual affiliation at the center of family law.<sup>26</sup> In addition, focusing on joint

<sup>21</sup> See John Eekelaar, *Are Parents Morally Obligated to Care for Their Children?*, 11 OXFORD J. LEGAL STUD. 340, 340 (1991) (referring to former British Prime Minister Margaret Thatcher, who was known for her catchphrase “parenthood is for life.”).

<sup>22</sup> ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 4–7 (2004).

<sup>23</sup> See Blecher-Prigat, *supra* note 3, at 188; Parkinson, *supra* note 24, at 244–47; Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 770 (1985) (“parents are forever”).

<sup>24</sup> See PATRICK PARKINSON, FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD 39–42 (2011); Patrick Parkinson, *Family Law and the Indissolubility of Parenthood*, 40 FAM. L.Q. 237, 238 (2006). Referring to modern custody law, which supports joint custody, Parkinson argues that the indissolubility of the joint parenthood relationship is also endorsed by the law. See *id.* at 244–46.

<sup>25</sup> Blecher-Prigat, *supra* note 3, at 189.

<sup>26</sup> The argument that nurturing relationships rather than romantic-sexual affiliations should be considered core family connections is most associated with the work of Martha Fineman. See, e.g., MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 226–33 (1995). Fineman, however, is concerned merely with the vertical relationship of parent and child, or more precisely of mother and child, which she views as epitomizing a relationship of long-term commitment for nurture and care. Fineman overlooks the horizontal relationships between joint parents. Her disregard stems, most probably, from her criticism of the privatization of care. She argues against the privatization of childrearing, suggesting that the value of childcare implies that childrearing should receive public support and that public funds should guarantee children an adequate standard of living. *Id.* at 213–17. Addressing

parenthood better fits with today's reality of family life, where the conjugal bond between a man and a woman does not necessarily constitute the basic relationship of a family.<sup>27</sup> Marriage rates are declining,<sup>28</sup> there is a significant rise in extramarital childbearing,<sup>29</sup> and it has become more common for individuals who have no romantic-sexual attachments to enter into explicit agreements to have and raise children together.<sup>30</sup>

If the shift "from partners to parents" was described by June Carbone as the second revolution in family law,<sup>31</sup> the growing focus on the horizontal relationship between joint parents may be considered the third revolution. This third revolution builds upon the trend Carbone described, given that the first wave of shifting attention to parenthood centered on the vertical relationship of parent and child.<sup>32</sup> In pursuit of this third revolution, this Article argues that reorienting family law to place greater emphasis on joint parenthood requires rethinking not only about the specific obligations and rights that joint parents should owe one another, but also of the way parentage itself is determined.

### B. *The Scope of Co-Parenthood Obligations and the Indeterminacy of Parentage*

The emerging scholarship on joint parenting shares a common normative basis in calling for recognition of the relationship between joint parents as a distinct legal category. Attempts to translate this normative goal into concrete doctrinal recommendations, however, reveal significant variations and disagreements regarding the particular arrangements that should be derived from the joint parenthood relationship. The works of Cynthia Starnes, Merle Weiner, and Karen Czapskiy, as well as my own earlier work, emphasize the financial obligations that joint parenthood creates between co-parents.<sup>33</sup> Clare Huntington's work focuses on parenting as an activity, call-

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the financial obligations between joint parents might suggest that childrearing costs should be (privately) assumed by a child's parents, contrary to Fineman's basic approach. See Blecher-Prigat, *supra* note 3, at 187–88.

<sup>27</sup> See Huntington, *supra* note 3, at 184–85.

<sup>28</sup> See *id.* at 184.

<sup>29</sup> *Id.* at 186–91.

<sup>30</sup> See, e.g., *Co-Parents*, PRIDE ANGEL, <http://www.prideangel.com/p106/Co-parent.aspx> [<https://perma.cc/D7FG-WEF6>]; *Co-Parenting*, ALT. FAMILY LAW, <http://www.alternativefamilylaw.co.uk/en/gay-lesbian/co-parenting.htm> [<https://perma.cc/JUG6-TWLU>]; *Shared Parenthood*, NEW FAMILY, <http://www.newfamily.org.il/en/shared-parenthood/> [<https://perma.cc/R7QR-88QJ>].

<sup>31</sup> JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW*, at xiii (2000). On the first revolution and the counterrevolution in modern family law, see Karin Carmit Yefet, *Marrying Divorce to the Constitution: Dissolution as a Fundamental Right* (2012) (unpublished J.S.D. dissertation, Yale Law School) (on file with the Harvard Journal of Law & Gender).

<sup>32</sup> Blecher-Prigat, *supra* note 3, at 183.

<sup>33</sup> In particular, we argue that when one parent assumes a significantly larger portion of the caregiving, the law should impose financial obligations on the other parent toward the former; whether such financial obligation should reimburse the former for losses in

ing for the state to create norms that would help live-apart joint parents effectively co-parent their children and to recognize the obligation each of them owes the other to enable them to be involved in the children's lives.<sup>34</sup>

More profound differences concern the breadth of the argument, and involve debates over which categories of relationships between joint parents should confer which type of obligations. Some scholars limit their proposals to married, or formerly married, joint parents. Cynthia Starnes and Karen Czapanskiy, for example, address only joint parents who were formerly married. They merely seek to recognize the distinct financial obligations the parties owe one another as co-parents, distinguishing them from their mutual obligations as spouses.<sup>35</sup> The works of both Merle Weiner and Clare Huntington, on the other hand, bring unmarried parents to the center of the discussion.<sup>36</sup> Huntington, in particular, is concerned only with unmarried co-parents, seeking to impose on them mutual obligations that will facilitate their cooperation in co-parenting their children.<sup>37</sup> Weiner also applies her argument to co-parenthood both within and outside of wedlock. She would impose on every parent, whether married or not, an obligation to either assume a fair share of childrearing or financially reimburse the other parent for the disproportionate share of care-work the latter assumes.<sup>38</sup>

The arguments that underlie the call for a greater emphasis on the horizontal relationship between joint parents cannot support a distinction between married and unmarried joint parents. The normative claim underlying such a call is that parenting, responsibility, and care for children are not an aspect of the partnership relationship, but rather stand on their own as values and relationships that the law should take into account. Joint parenthood *as such*, therefore, creates obligations between co-parents, regardless of whether the parties shared a relationship as spouses or romantic partners.

However, various scholars, including Naomi Cahn, June Carbone, and Jane Murphy, have expressed concern about imposing obligations between

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earning capacity as the result of the extra care or should entitle the caretaking parent to share in the financial gains of the other parent is an issue we debate. *See, e.g.*, Blecher-Prigat, *supra* note 3, at 193–95; Czapanskiy, *supra* note 3, at 262–63; Starnes, *supra* note 3, at 203; Merle H. Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 VILL. L. REV. 135, 139 (2014). In her book, Weiner went beyond financial obligations and developed four other obligations that parent-partners owe one another: a duty to aid when the other parent is in distress (e.g., as in a medical emergency), a duty not to abuse the other co-parent, a heightened duty of loyalty in contracting between them, and a duty to do “relationship work” by undertaking co-parenting training. WEINER, *supra* note 3, at 319–93. My own earlier work recognized mutual obligations of cooperation in parenting joint children; however, as this obligation is already legally recognized, my work emphasized the financial aspects of the joint parenthood relationship that are currently overlooked by law. Blecher-Prigat, *supra* note 3, at 189–90.

<sup>34</sup> Huntington, *supra* note 3, at 223.

<sup>35</sup> Czapanskiy, *supra* note 3, at 255; Starnes, *supra* note 3, at 201.

<sup>36</sup> WEINER, *supra* note 3, at 24; Huntington, *supra* note 3, at 168–70.

<sup>37</sup> With the exception of cases with a history of domestic violence and abuse. Huntington, *supra* note 3, at 227.

<sup>38</sup> WEINER, *supra* note 3, at 12, 411–12, 428.

never-married co-parents.<sup>39</sup> Cahn and Carbone argue that the idea of designating a status that recognizes the relationship between two parents who have a child together and imposing obligations from one parent to another on the basis of that relationship is attractive, but “not for all parents of all classes in every situation.”<sup>40</sup> They warn that “most proposals to encourage stronger two parent relationships sacrifice unmarried women’s greater autonomy in an effort to encourage greater paternal involvement.”<sup>41</sup> These scholars highlight the socioeconomic status of the vast majority of non-married parents and their racial characteristics. In doing so, their work expresses concern about forcing low-income, mostly nonwhite parents into the court system and warns of the harmful effects of loss of privacy and control, which would destabilize these parents’ relationships with their children.<sup>42</sup>

The concerns raised by Cahn, Carbone, and Murphy regarding the works of Weiner and Huntington do not address unmarried parents as such. They focus, rather, on never-married, low-income parents who conceived in the “traditional” sex-based way, usually unintentionally. My own earlier work on the financial obligations between joint parents considered unmarried as well as married joint parents. However, it only addressed unmarried joint parents by choice, such as when a man and a woman enter a parenthood relationship without sharing any romantic-partnership relationship.<sup>43</sup> It left the issue of unplanned joint parenthood an open question.<sup>44</sup>

If one accepts the principle that joint parenthood imposes obligations between joint parents simply by virtue of the child they parent in common, it is hard to justify the qualification of such obligations only to some parents, of some classes, in some situations. The legal meaning and implications of parenthood cannot be contingent upon class or “the situation.”

I would venture to suggest, however, that the doubts about applying co-parenthood obligations on never-married parents who conceived unintentionally

<sup>39</sup> See Naomi Cahn & June Carbone, *Women’s Autonomy and the Parent-Parent Status*, CONCURRING OPINIONS (Oct. 26, 2015), <http://concurringopinions.com/archives/2015/10/womens-autonomy-and-the-parent-parent-status.html> [https://perma.cc/8B7P-AXQP]; Solangel Maldonado, *Online Symposium on Merle Weiner’s “A Parent-Partner Status for American Family Law.”* CONCURRING OPINIONS (Oct. 25, 2015), <https://concurringopinions.com/archives/2015/10/online-symposium-on-merle-weiners-a-parent-partner-status-for-american-family-law.html> [https://perma.cc/Q466-273P]; Jane Murphy, *The Potential Harm to Low Income Families from the Parent-Partner Status*, CONCURRING OPINIONS (Oct. 26, 2015), <https://concurringopinions.com/archives/2015/10/the-potential-harm-to-low-income-families-from-the-parent-partner-status.html> [https://perma.cc/6BJV-T8V].

<sup>40</sup> Cahn & Carbone, *supra* note 39.

<sup>41</sup> *Id.*

<sup>42</sup> Murphy, *supra* note 39.

<sup>43</sup> My work recognizes multiple parenthood and so can be applied to such arrangements between a lesbian couple and a man, or a gay couple and a woman, to parent together. See Blecher-Prigat, *supra* note 3, at 180–81.

<sup>44</sup> See *id.* at 205–07. Indeed, this aspect of my work was criticized by Weiner. See WEINER, *supra* note 3, at 177–78.

tionally in fact reflect deeper doubts about the definition of parenthood, and more specifically paternity. In other words, the debate is not over the scope of obligations that should be conferred on some parents, but rather whether some individuals are indeed (co-)parents.

I argue that the debate over the scope of the joint parenthood obligations exposes the deeper questions that still exist about how parenthood should be determined, and more specifically about the place of intent and biology in determining parentage. Defining parentage is among the most contentious issues in modern family law,<sup>45</sup> and the uncertainty about parentage lies at the core of the debate over the scope and content of the obligations joint parenthood should impose (much as it lies at the core of other family law debates). This Article, therefore, brings together the inquiry about parentage determination and the inquiry about joint parenting, offering a more comprehensive and reasoned analysis.

### C. *Joint Parenting and Bi-Parenting*

The debate over the obligations owed to each other by two individuals who unintentionally conceived together through sex, and therefore have a joint biological child, is not only a debate about the definition of parentage. Rather, it is also about bi-parenting as an ideal, and whether parentage laws should be based on a normative goal of recognizing two parents for each child. Huntington and Weiner take it as given that for each child conceived through sex, both the biological mother and the biological father are the child's legal parents. The disagreement between Huntington and Weiner on the one hand and Cahn, Carbone, and Murphy on the other can also be read as a disagreement about whether, in some cases, the law should recognize two legal parents who are co-parents, or just one parent.

Family law has endorsed bi-parenting as the normative rule.<sup>46</sup> This ideal prescribes that for each child, the law should assign no fewer (and no more) than two parents. It therefore serves as the basis for criticizing both single parenthood and multiple parenthood.<sup>47</sup> This ideal is often justified by arguments regarding the (best) interests of children.<sup>48</sup> Nonetheless, at least with regard to children born to unmarried mothers following an unplanned pregnancy, the existing legal approach, which assigns legal paternity based on the man's biological connection to the child (and on his having had sexual

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<sup>45</sup> See Carbone, *supra* note 1, at 1295–96.

<sup>46</sup> See Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 11–15 (2008).

<sup>47</sup> See *id.* at 11–12; see also Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 47–49 (2007) (exploring the reasons why the “‘more-than-two’ parent family is so widely agreed to be undesirable, even while so many people practice alternatives to the two-parent nuclear family norm,” *id.* at 49).

<sup>48</sup> See Appleton, *supra* note 46, at 62–64. It is likely, though, that the goal is not to guarantee two caregivers as much as it is to guarantee two sources for private financial support.

intercourse with the mother), has thus far failed to guarantee two involved and active parents to each child. Indeed, in some cases, unmarried biological (and therefore legal) fathers, who are often poor and are not in a stable relationship with the mother, cannot provide either day-to-day care or financial support to the child.<sup>49</sup> In this respect, the work of both Huntington and Weiner, though each approaches the problem from a different perspective, can be read as attempts to remedy what they perceive as the impediments to providing each child with two involved and active parents.

Both authors rightfully claim that in order to guarantee that a child's parents will both be involved and active in the child's life, a central element is the relationship between the two parents. However, both Weiner and Huntington take it as given that every child born the traditional, sex-based way has (and should have) two legal parents: a mother and a father. They therefore endorse bi-parenting as the ideal. This Article challenges that working premise and posits that the argument regarding the advantages of bi-parenting should be distinguished from the argument regarding the significance of the joint parenthood relationship. Arguing that the law should acknowledge the horizontal relationship between the two parents *when* a child has more than one parent is different from arguing that each child *should* have two parents. While this Article endorses the arguments concerning the significance of the horizontal joint parenthood relationship, it does not endorse bi-parenting as an ideal. Its approach to parentage determination is, therefore, not based on a normative goal of assigning two parents (or any ideal number of parents) for each child.<sup>50</sup> It offers a framework that recognizes and values single parents, multiple parents, and also two parents alike.

## II. PARENTAGE AS AN ALL-INCLUSIVE STATUS

The starting point for this Article's approach to parentage determination is the understanding of legal parenthood as a legal institution that involves comprehensive duties and rights, and not merely a theoretical kinship status or identity.<sup>51</sup> Thus, parentage determination is not made in the abstract, detached from specific obligations and rights.<sup>52</sup> Rather it is made for the purpose of imposing obligations or bestowing rights. Traditionally, parenthood has been thought of as an "all-or-nothing" exclusive status.<sup>53</sup> Conferral of

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<sup>49</sup> See, e.g., Huntington, *supra* note 3, at 191–96.

<sup>50</sup> It does this without belittling the difficulties these parenthood relationships raise. However, as noted by Appleton, at least with regard to multiple parenthood, the difficulties are not unique to situations of more than two parents. Multiple parenthood only highlights issues raised by joint parenting by two. See Appleton, *supra* note 46, at 13–15.

<sup>51</sup> The perception of parenthood as an identity is highlighted in Jessica A. Clarke's work, *supra* note 5, at 754.

<sup>52</sup> See text accompanying notes 287 *infra*.

<sup>53</sup> See 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, 883–85 (1984).

legal parenthood involved all the rights, privileges, and duties regarding the parent's children, while those categorized as nonparents had none.<sup>54</sup> Over the last few decades, the exclusivity of legal parenthood has been heavily criticized for being incompatible with the contemporary reality of family life in which many nonparents play a significant role in children's lives.<sup>55</sup> Some scholars have also challenged the inclusiveness of parental status, suggesting that the law can recognize legal parents for limited purposes, such as for imposing support obligations.<sup>56</sup>

This Article argues that unbundling legal parenthood and disaggregating parental rights and responsibilities is undesirable. It posits that one should not be awarded with the legal status of "a parent" and only have parental entitlements, or only bear some of the obligations of parenthood. Such parceling out of parental rights and duties dilutes and undermines the meaning of parenthood as an indissoluble commitment, to the detriment of children.

Furthermore, legal institutions or statuses such as parenthood perform an important role in conveying the notions and ideals intended by the law.<sup>57</sup> They express, support, and enhance social goods and ideals.<sup>58</sup> Whether we

<sup>54</sup> See *id.*

<sup>55</sup> See Appleton, *Parents by the Numbers*, supra note 46, at 20–21; Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 314–32 (2007); Kessler, supra note 47, at 74; Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 85 (2004); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 394 (2008).

<sup>56</sup> See, e.g., Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 913 (2006); see also Kessler, supra note 47, at 74 (“[W]e may need to further disaggregate the bundle of parental rights. Currently, it is all or nothing.”).

<sup>57</sup> As widely recognized, the law can convey ideas and ideals through its categories, statuses, and rules. On the expressive role of law, see, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021–25 (1996). This view usually encompasses two related accounts. The first concerns the symbolic aspect of law, and the second concerns the law's ability to direct and affect human behavior. See, e.g., Lewis A. Kornhauser, *No Best Answer?*, 146 U. PA. L. REV. 1599, 1624–25 (1998); Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503, 567–68. The second, and more consequentialist, account is debatable, since much still remains puzzling in the interaction between law and human behavior. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 144–45 (1991); Neil MacCormick, *On Legal Decisions and Their Consequences: From Dewey to Dworkin*, 58 N.Y.U. L. REV. 239, 251–55 (1983). This is particularly true in the realm of family life and intimate relations, where ideology, emotions, and other powerful extralegal forces affect human behavior. Nonetheless, the expressive function of law is not limited to its social effects, which are somewhat speculative. On the grounds for endorsing the expressive function of law other than its potential social effects, see Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 69–70 (1995). For my current purposes, I adopt a modest version whereby, whatever the admittedly unknown influence of legal rights, they should point in the direction that is normatively desirable.

<sup>58</sup> For this argument regarding property, see Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1519–21 (2003). For the specific expressive role of marital prop-

think of the expressive role of law in terms of its concrete social effect or merely in its symbolic meaning, the law needs to convey its messages and ideals in ways visible to individuals in society. Since individuals are unlikely to know the particular details of specific legal obligations or entitlements, what is visible to them are fundamental and familiar legal concepts.<sup>59</sup> Parenthood as a popular symbol may achieve desired social effects by leading to the internalization of the ideals of enduring commitment and responsibility toward children in ways impossible to attain through the independent rights and duties that construct this status.

When parenthood is perceived as a mere bundle of independent duties and rights, with an infinite number of potential combinations for bundling them together, it loses its powerful connotations, and cannot perform any expressive role.<sup>60</sup> In other words, understanding that parenthood is a legal institution that involves specific duties and rights, not just an abstract legal identity, should not mislead us to thinking of parenthood as just a laundry-list of independent duties and rights. The rights and duties, which parenthood involves, share a normative basis. A certain measure of stability is also required for the law to have any effective influence,<sup>61</sup> which is unattainable when the status of parenthood is unbundled and its various constituent elements are capable of being regrouped in countless ways.<sup>62</sup> Dissolving parenthood would therefore hinder its crucial expressive function.

In order to restore the meaning of parenthood as an enduring commitment and to maintain the important expressive function of parental status, this Article argues that at-birth parentage determination should be understood as an “all-or-nothing” status, conferring upon legal parents all the du-

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erty, see Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 97–98 (2004).

<sup>59</sup> See Hanoch Dagan, *Just Compensation, Incentives, & Social Meanings*, 99 MICH. L. REV. 134, 149–50 (2000) (quoting Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 791 n.177 (1999)).

<sup>60</sup> It is true that historically parenthood implied a dominating and patriarchal status expressing proprietary interests in children, traces of which are still evident today. See, e.g., MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 46 (1994); James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 932–39 (2003); Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1042–43 (1992). And yet, maintaining parental status as a legal category is still worthwhile because, as a fragmented bundle of obligations and entitlements, it is unlikely to convey any message at all—neither one of proprietary interest in children, nor one of commitment, responsibility, and care.

<sup>61</sup> See Dagan, *supra* note 58, at 1562–63. But deconstructing legal concepts and addressing each element separately also sends a false message concerning the expressive role of law. The specific bundle of obligations and entitlements is not a random event lacking any integrity; rather, a normative ideal unifies the various obligations and entitlements, and this ideal is what the law attempts to express. *Id.* The legal concepts, statuses, and categories, then, represent the ideals that unify the different obligations and entitlements.

<sup>62</sup> This should not mean that the specific duties, obligations, and rights that comprise legal parenthood should remain fixed and unchangeable.



ties, responsibilities, privileges, and rights associated with parenthood.<sup>63</sup> At-birth parentage should not be determined solely for purposes of imposing child support obligations or for purposes of merely recognizing an entitlement to have a relationship with the child, which requires the cooperation of the other parent.

In designing rules to govern parentage determination, we should therefore inquire into the justifications for imposing the relevant duties and bestowing the pertinent rights. At-birth parentage determination should explain and justify the conferral of the overall rights and duties of parenthood as both a vertical relationship between an adult and a child, and a (potential) horizontal relationship between joint parents, when more than one parent is recognized.

### III. RELATIONSHIPS MATTER

This Article suggests that the relationship between prospective parents should be a central factor in determining an individual's status as a parent or nonparent. According to this approach, whether the individuals who conceived together shared an ongoing committed relationship, or merely "hooked-up," makes a difference for parentage determination.<sup>64</sup>

Relationships matter because when it is determined that a child has more than one parent, parenthood creates an indissoluble connection between the joint parents. Relationships also matter because intent and biology (understood in terms of either genetics or gestation) each fail to provide an adequate justification for parental determination. Basing parenthood on biology alone imbues parenthood with an impoverished meaning, and it is also inadequate given the growing use of gamete donation and surrogacy. However, making intent the decisive factor in determining parentage might too heavily emphasize choice, at the expense of commitment, dependency, and equality.<sup>65</sup> Adding relationships as a factor responds to each of these concerns.

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<sup>63</sup> See, e.g., Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 475–77 (2013); Courtney G. Joslin, *Protecting Children(?) : Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1221–22 (2010). The same is true with attaining parenthood through adoption. In the case of adoption, conveying an unequivocal message of parenthood as an enduring relationship is especially important given the troubling doctrine of adoption annulment. See generally Margaret M. Mahoney, *Permanence and Parenthood: The Case for Abolishing the Adoption Annulment Doctrine*, 42 IND. L. REV. 639, 642–43 (2009) (arguing for the abolition of the doctrine of adoption annulment).

<sup>64</sup> See *infra* Part IV.

<sup>65</sup> See, e.g., Stolzenberg, *supra* note 7. Of course, as Stolzenberg notes, choice *can* align with commitment, as is the case with parentage through ART and sometimes functional parenthood. *Id.* at 27–30. However, suggesting that intent should be the decisive factor in all cases of parentage determination confers a too heavy weight on choice.

This Part demonstrates that although existing laws of parentage and legal scholarship seem to neglect relationships, relationships are in fact considered (though not explicitly) both in how parentage is determined in actuality, and in how parentage determination has figured in legal scholarship. The marital presumption is, of course, the most notable example, although it is often depicted as a proxy for biological paternity.<sup>66</sup> The first subsection of this Part shows that in scholarship and in practice in the context of ART, intent is often used to recognize spouses of biological parents as legal parents.<sup>67</sup> The relationship with the biological parent is purportedly considered only as indicative of the spouse's intent to conceive a child, but in fact it is valued (and should be valued) in its own right. The following subsection shows that in cases of sex-based reproduction outside of marriage, relationships also come into play because application of the biology-plus test recognizes the parental status of biological fathers who lived with the mother in a relationship that mimics heterosexual marriage.<sup>68</sup> However, for parentage determination purposes, only the heterosexual marriage relationship, or a relationship that mimics it, are relationships that are recognized and valued.<sup>69</sup> This Part, however, emphasizes that the valuation of relationships should go beyond the sexual-romantic bond and various committed relationships should be recognized in deciding a child's parentage.

A. *Parentage Determination and ART:  
Intent and Marriage at the Center*

In legal scholarship, the most significant factor in parentage determination in the context of ART should be "intent."<sup>70</sup> John Lawrence Hill, one of the earliest and most cited proponents of making intent the central factor in determining parenthood in the context of ART, supports this position by arguing that "[w]hat is essential to parenthood is not the biological tie between parent and child but the pre-conception *intention* to have a child, accompanied by the undertaking of whatever action is necessary to bring a child into the world."<sup>71</sup> Hill grounds his intent-based model on the right to procreate and offers an "intentional interpretation of the right of procreation."<sup>72</sup> The right to procreate, as he defines it, is "the right to bring a child

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<sup>66</sup> NeJaime, *supra* note 9, at 2292–93.

<sup>67</sup> See *infra* text accompanying notes 77–81.

<sup>68</sup> See *infra* Part III.B.

<sup>69</sup> See *infra* Part III.B.

<sup>70</sup> Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 322–23.

<sup>71</sup> John Lawrence Hill, *What Does It Mean to Be a "Parent"?: The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 414 (1991).

<sup>72</sup> *Id.* at 386. For an interesting example in which intent seemingly bore significance for payment of social security benefits to posthumously born children, see Arianne Renan Barzilay, *You're on Your Own, Baby: Reflections of Capato's Legacy*, 46 IND. L. REV. 557, 561–66 (2013).

into the world in an effort to have a family . . . a normative safeguard to protect the *intention* to create and raise a child.”<sup>73</sup>

Although the law seems to follow theoretical writing in ascribing more weight to intent, intent as an individual’s state of mind with respect to parenting a child is hardly ever a standalone factor determining parenthood. In order to provide a basis for legal parenthood, intent will generally accompany another factor, such as genetics or gestation.<sup>74</sup> For example, when the female’s reproductive functions are divided between two women—one who provides the genetics (the egg) and another who carries the pregnancy—intent decides which among these women will be recognized as the child’s legal mother.<sup>75</sup> If the genetic contributor is the woman who intended to bring into being and raise the child as her own, the process will be described as “(gestational) surrogacy” and the genetic mother will be recognized as the

<sup>73</sup> Hill, *supra* note 71, at 385–86.

<sup>74</sup> Therefore, various jurisdictions apply the laws of adoption in the absence of either a genetic or a biological connection to the child of at least one parent. See Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 599 (2002). Some states even require an adoption procedure in cases of traditional surrogacy. See, e.g., *id.* at 609–10. One of the rare cases to recognize intent-based parenthood absent a genetic or biological tie to the child by any of the intended parents is *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 291–93 (Cal. Ct. App. 1998). The case involved a married couple, Luanne and John Buzzanca, who contracted with a surrogate to gestate an embryo they had acquired and to which neither had contributed gametes. *Id.* at 282. After the surrogate became pregnant, John filed a petition for dissolution of marriage, asserting that “there were no children of the marriage.” *Id.* In response, Luanne asserted “that the parties were expecting a child” and that she and John were the legal parents of the child. *Id.* The child was born a few days later, and John argued he was not the child’s father. *Id.* at 282–83. The trial court held that the child had no legal parent, but the appellate court reversed, finding that the intended parents, Luanne and John, were the lawful parents. *Id.* at 282, 293. The court held that intent-based parenthood is not limited to cases where the intended parents have a genetic tie to the children, “but [applies] to any situation where a child would not have been born ‘but for the efforts of the intended parents.’” *Id.* at 291 (quoting Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993)). According to the court, both Luanne and John caused and intended the child’s conception, birth, and gestation, and therefore they were the legal parents of the child. *Id.* at 293. Nonetheless, as noted by Dolgin, “*Buzzanca* differed from the majority of cases occasioned by reproductive technology in that custody of the child was sought by too few, rather than by too many, potential parents.” Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 538 (2000). Neither the surrogate mother nor the egg or sperm donors sought recognition as the child’s parent. Only Luanne wanted to be recognized as a parent. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 282, 288. Outside the United States, in a case where a single woman contracted with a surrogate to gestate an embryo created through egg donation and sperm donation, the Israeli Supreme Court held that Israeli law does not recognize parenthood by intention alone. The Court held that either a genetic tie to the child, through gestation and birth, or a partnership relationship with the genetic or gestating parent should accrue to intent for the law to recognize an individual as a parent. LFA (Jerusalem) 1118/14 Jane Doe v. the Ministry of Welfare and Social Services (2015) (Isr.).

<sup>75</sup> For a comparative discussion of parentage determination in the case of egg transfer between lesbian partners, see Ruth Zafran, *More Than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple—The Israeli View*, 9 GEO. J. GENDER & L. 115, 115–16 (2008).

legal mother of the child.<sup>76</sup> If the gestational carrier is the one who initiated the process with the intent to parent a child, the process will be deemed “egg donation” and the birth mother will be recognized as the legal mother of the child.<sup>77</sup>

Most often, however, intent is invoked to recognize the parental status of the person who intended to bring the child into the world based on the relationship this person has with the biological-genetic parent. Marriage to the biological parent provides the strongest support for the intended parent’s parental status. As Richard Storrow and Courtney Joslin have observed, parenthood by intention has largely been recognized in cases that involve married couples.<sup>78</sup> Thus, when a married woman gets pregnant through artificial insemination with a sperm donation, her husband will be recognized as the child’s father under all states’ statutes that define paternity in cases of artificial insemination by donor.<sup>79</sup> The literal text of the vast majority of these statutes applies only to married couples, and even refers specifically to husbands and wives.<sup>80</sup> While most of these statutes condition the husband’s paternal status on his consent to the insemination, there is a strong presumption that the husband gave such consent.<sup>81</sup> Since paternity has traditionally been defined based on marriage to the mother, recognizing the husband’s paternity in cases of artificial insemination by donor (AID) is in fact a simple application of traditional family law principles to the AID context.<sup>82</sup>

Nonetheless, relationships that are not formalized as marriage are not accorded similar recognition in determining parentage. When AID takes place in the context of an unmarried partnership relationship, whether

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<sup>76</sup> This rule started in case law. *See, e.g.*, *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993); *De Bernardo v. Gregory*, No. FA074007658S, 2007 WL 4357736, at \*4 (Conn. Super. Ct. Nov. 7, 2007). It is now part of numerous states’ laws. *See, e.g.*, CAL. FAM. CODE § 7960 (2014); CONN. GEN. STAT. § 7-36(17) (2017); 750 ILL. COMP. STAT. 47/1-47/75 (2016); N.H. REV. STAT. ANN. § 168-B:25 (2014); TEX. FAM. CODE ANN. § 160.754 (2011); UTAH CODE ANN. § 78B-15-801 (2012).

<sup>77</sup> *See, e.g.*, *McDonald v. McDonald*, 608 N.Y.S.2d 477, 480 (N.Y. App. Div. 1994); *see also NeJaime, supra* note 9, at 2299–300 (describing a Tennessee case in which a mother who received eggs via donation was still deemed the legal mother of her triplets because of the biological maternal connection she shared with them as the birth mother).

<sup>78</sup> *Joslin, supra* note 63, at 1184–85, 1192; *Storrow, supra* note 74, at 639–40.

<sup>79</sup> *Storrow, supra* note 74, at 623–24.

<sup>80</sup> *Joslin, supra* note 63, at 1184–85.

<sup>81</sup> *Storrow, supra* note 74, at 623–24.

<sup>82</sup> *Garrison, supra* note 1, at 896–97. The significance of marriage to parenthood determination in ART-based conception is reflected also in the laws that govern parenthood in cases where reproductive technology proceedings took place after divorce. The 2000 Uniform Parentage Act (UPA) provides that ex-spouses are not legal parents of children born through ART that occurred after the divorce, unless they expressly consented to the completion of the ART. UNIF. PARENTAGE ACT § 706 (amended 2002), 9B U.L.A. 72 (2011). Various states have adopted this, or a similar, provision in their legislation. *See, e.g.*, Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 414–15 (2013); Melanie B. Jacobs, *Intentional Parenthood’s Influence: Rethinking Procreative Autonomy and Federal Paternity Establishment Policy*, 20 AM. U. J. GENDER SOC. POL’Y & L. 489, 506–07 (2012).

heterosexual or same-sex, and the decision to bring and raise a child was a joint decision of the partners, then the parental status of the biological mother's partner is less secure. Only a few states' statutes apply through their literal terms to unmarried couples in a way that recognizes the biological mother's partner as the legal parent of the child.<sup>83</sup> Moreover, the plain language of most of the statutes that do refer to unmarried partners refers only to heterosexual couples, recognizing the mother's male partner as the father of the child.<sup>84</sup>

The doctrinal landscape of surrogacy and parentage determination is much more complex.<sup>85</sup> The reason for this complexity is the normative concerns and anxieties that surrogacy raises with regard to the exploitation of women and the commodification of women's bodies, human life, and children.<sup>86</sup> Various states prohibit commercial surrogacy altogether;<sup>87</sup> other states recognize only gestational surrogacy where the gestational surrogate is not genetically related to the child;<sup>88</sup> and some of these latter states also add the requirement that at least one gamete be donated by the intended parents.<sup>89</sup> Under state laws that do recognize surrogacy in one form or another, intent is, again, most often recognized as conferring parental status on the married partner of the biological legal parent. Marriage to the genetic-biological parent guarantees the highest protection to an intended parent, especially when the latter has no biological-genetic connection to the child.<sup>90</sup> A woman who is married to the genetic father will be recognized as the legal mother of a child conceived through surrogacy regardless of whether she is genetically

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<sup>83</sup> Joslin, *supra* note 63, at 1186–87.

<sup>84</sup> *Id.* It is questionable whether such limitations are constitutional. *See, e.g.*, D.M.T. v. T.M.H., 129 So. 3d 320, 342–344 (Fla. 2013). *But see* Russell v. Pasik, 178 So. 3d 55, 57–59 (Fla. Dist. Ct. App. 2015).

<sup>85</sup> Joslin, *supra* note 63, at 1179 n.3.

<sup>86</sup> For a discussion of these concerns, see Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1223–29 (2013).

<sup>87</sup> *See, e.g.*, NEB. REV. STAT. § 25-21,200 (2016); N.M. STAT. ANN. § 32A-5-34(f) (2010).

<sup>88</sup> *See, e.g.*, NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2010); N.D. CENT. CODE ANN. §§ 14-18-05, 14-18-08 (2009); DEL. CODE ANN. tit. 13, §§ 8-101–8-904 (2009); UTAH CODE ANN. § 78B-15-801 (LexisNexis 2012); WASH. REV. CODE ANN. §§ 26.26.011–26.26.914 (West 2013); WYO. STAT. ANN. §§ 14-2-401–14-2-907 (2017).

<sup>89</sup> Victoria Degtyareva, Note, *Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent*, 120 YALE L.J. 862, 899 (2011).

<sup>90</sup> Storrow, *supra* note 74, at 615.

related to the child.<sup>91</sup> Unmarried partners of the biological-genetic parent will not be as protected.<sup>92</sup>

Joslin and Storrow have criticized these different rules reserving the privilege of intentional parenthood to married couples, and more specifically to the spouses of the biological parents.<sup>93</sup> They have called for an expansion of intentionalism to apply to varied family forms, so as to recognize both female and male partners of biological parents as the legal parents of the resulting child.<sup>94</sup>

### B. *Sex-Based Reproduction: Relationships Also Matter*

In cases of sex-based reproduction, the decisive factor in determining and defining parentage is, at first glance, biology. Legal parenthood is assigned to both the man and the woman who conceive through sex, regardless of their relationship or their intentions, and even against their wishes. The reality of parentage determination, however, is much more complex, even in cases when conception occurs the traditional, sex-based way.

The most notable example of relying on factors other than biology to determine parentage is of course the marital presumption, though it is often depicted as a proxy for biological paternity.<sup>95</sup> The presumption determines the paternity of children born into marriage and considers the husband of a woman who gives birth to a child as the child's father.<sup>96</sup> All U.S. state laws maintain the marital presumption, although under most states' laws it can be rebutted.<sup>97</sup> Still, in some states rebutting the presumption is practically impossible or very difficult, so it is marriage rather than biology that determines parentage.<sup>98</sup>

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<sup>91</sup> *Id.* at 644–45. *But see* NeJaime, *supra* note 9, at 2309–11. Yet even according to NeJaime, fifteen states recognize the intended mother as a legal mother even absent a genetic connection to the child. *Id.* at 2309 n.238. Eleven states require that the intended parent adopt the child absent a genetic connection. *Id.* at 2309 n.239. Still, in some states trial courts have provided parentage judgment to nonbiological intended parents, without requiring them to adopt the child. *Id.*; *see also* Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor's Musing on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1245 (2014) (describing states in which “surrogacy contracts are neither clearly enforceable nor clearly unenforceable”).

<sup>92</sup> Storrow, *supra* note 74, at 639–40.

<sup>93</sup> Joslin, *supra* note 63, at 1180–81; Storrow, *supra* note 74, at 662.

<sup>94</sup> Joslin, *supra* note 62, at 1222–28.

<sup>95</sup> NeJaime, *supra* note 9, at 2292–93.

<sup>96</sup> *See, e.g.*, Baker, *Bargaining or Biology?*, *supra* note 2, at 12–13; Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 BUFF. L. REV. 465, 471 (2016); Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 248 (2006).

<sup>97</sup> Baker, *Bargaining or Biology?*, *supra* note 2, at 12.

<sup>98</sup> June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 671 (2016); Jacobs, *supra* note 96, at 477; *see also* NeJaime, *supra* note 9, at 2272–73 (describing the history of the marital presumption in the Anglo-American legal system).

But even regarding children conceived through sex outside of marriage, biology does not truly determine parentage.<sup>99</sup> In a series of cases known as the “unwed fathers cases,” the Supreme Court stated that a biological tie alone is not sufficient to confer paternal status, but only when it is accompanied by parental performance.<sup>100</sup> According to the Court, the biological tie *does* confer a unique opportunity upon genetic fathers to undertake paternal conduct so as to achieve parental status.<sup>101</sup> While some commentators and courts have interpreted this “biology plus” requirement as involving parental function and a relationship *with the child*,<sup>102</sup> one might also read these cases as suggesting a focus on *the relationship between the biological mother and the biological father*.

June Carbone and Janet Dolgin have each submitted that the Supreme Court unwed fathers cases can be read to suggest that the relationship between the man and the woman who conceive together matters for parentage (and more precisely paternity) determination.<sup>103</sup> The Court not only (and perhaps not even primarily) considered the relationship between the genetic father and the child, but rather focused on the relationship the former had with the mother. Dolgin has offered a more critical reading of the Court’s approach, as did Martha Fineman. Each argued that what the Court was looking for is a relationship that mimics the marital relationship. Only when the biological father had maintained a social relationship with the mother that resembled a traditional conjugal relationship in a nuclear family was he recognized as a legal father.<sup>104</sup>

Still, the unwed fathers cases concern paternal entitlements. In determining child support obligations, the relationship between the conceiving adults does not seem to play a role. For the purpose of imposing child support, biology alone seems to determine parentage for children born the traditional, sex-based way outside of marriage.<sup>105</sup> But even in this limited context,

<sup>99</sup> See Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER, SOC. POL’Y & L. 347, 379–81 (2012).

<sup>100</sup> See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 129 (1989); Lehr v. Robertson, 463 U.S. 248, 262 (1983); Caban v. Mohammed, 441 U.S. 380, 394 (1979); Quilloin v. Walcott, 434 U.S. 246, 256 (1978); Stanley v. Illinois, 405 U.S. 645, 658 (1972).

<sup>101</sup> Appleton, *supra* note 99, at 380–81.

<sup>102</sup> See, e.g., Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 437 (2007); Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 832–33 (2006).

<sup>103</sup> Carbone, *supra* note 45, at 1337–41; Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 671–72 (1993).

<sup>104</sup> FINEMAN, *supra* note 26, at 85; Dolgin, *supra* note 103, at 654; see also Melissa Murray, *What’s So New About The New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 411 (2012) (describing how the Court has privileged relationships that mimic marriage); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 253–54 (1995) (describing recent Supreme Court cases that “suggest that legal paternity continues to depend more on the father’s relationship with his children’s mother than on a genetic tie with the children,” *id.* at 253).

<sup>105</sup> See, e.g., Appleton, *supra* note 99, at 362; Baker, *Bargaining or Biology?*, *supra* note 2, at 6–9.

suggesting that biology solely determines parenthood for the man and the woman who conceive together misses a significant aspect of the reality of parenthood determination. In practice, the interrelationship between the parties plays a significant role. If neither the man nor the woman who conceives wishes to assume parental status, they can place the child for adoption (when it concerns a healthy baby).<sup>106</sup> No one (not even the state) will impose parenthood or any parental obligation, including child support, on either of them.<sup>107</sup>

The assignment of legal parenthood usually requires the involvement of one biological parent. It is only when one biological parent (usually the mother) assumes a parental role that this parent can impose parental status on the other biological parent (usually the father) against the latter's wishes.<sup>108</sup> Single parenthood is never imposed against a party's wishes based on biology alone. Biology is invoked as the *sine qua non* for legal parenthood only to create a joint parenthood relationship, that is to attach a co-parent to an already recognized legal parent. The reason for this seems to be the legal ideal of bi-parenting, which strives to guarantee for each child more than one legal parent.

The legal preference for bi-parenting is purported to be motivated by children's best interests.<sup>109</sup> The perception that underlies this policy is that every child is better off with having no fewer (and no more) than two parents. However, in attempting to guarantee two parents for every child (sometimes by forcing parenthood on one parent or forcing two individuals to parent together even when they never intended to share a parenthood relationship), the law considers parenthood only as a vertical relationship between an adult parent and a child. The child's interests, according to this view, are better served by having two such vertical parenthood relationships rather than one.

Existing law of parentage overlooks the fact that when a child has more than one parent, the joint parenthood also creates a horizontal relationship between the adults who share parenthood. The relationship that is created is

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<sup>106</sup> The arguments I advance in this Article are limited to parenthood determination regarding healthy newborns. When a child is born with a disability or chronic illness, the progenitors' obligations will be more extensive. *See supra* text accompanying note 2.

<sup>107</sup> Theoretically, each of them is under an obligation to pay child support until the child is placed for adoption. However, it is doubtful that this obligation is enforced in practice, either for biological or adoptive parents. For example, in cases of failed (or broken) adoption, the legal obligation of the adoptive parents to pay child support is rarely (if ever) enforced. *See, e.g.,* Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 *CAP. U. L. REV.* 437, 455 (2012). Cases of failed or broken adoption present a stronger case for enforcing support obligation, as they involve parents who assumed a parental role and only then sought to terminate the parent-child relationship.

<sup>108</sup> Theoretically, the male and the female can each compel parenthood on the other. In reality, the gendered dimension of compelled parenthood cannot be ignored. *See infra* discussion in Part VI.

<sup>109</sup> *See infra* Part V.



a triad, of which the joint parenthood relationship is a significant edge. Given the significance of the joint parenthood relationship, the law should consider the relationship between prospective joint parents in first-order parentage determination and in creating (or refusing to create) an indissoluble joint parenthood relationship.

### C. *Relationships that Count*

As the previous sections show, relationships matter in making parentage determination, though it is only marriage, or marriage-like relationships, that actually count under existing laws. Whether conception occurred through ART or whether it was through the traditional sex-based way, marriage plays a dominant role in establishing parentage, more than the role of genetics, gestation, or intent. This Article rejects the conservative approach which considers only marriage or marriage-like relationships between the conceiving adults to justify recognition of parental status. Still, the very idea that the relationship between the conceiving adults matters for parentage determination is normatively the right idea.<sup>110</sup>

In her article, “Postmarital Family Law,” Clare Huntington argues that we are living in a post-marital world, where marriage is no longer the basis for family life.<sup>111</sup> As American family law has traditionally been based on marriage, this “seismic shift” that American family life is undergoing is, according to Huntington, “the single most important issue facing family law today.”<sup>112</sup> Huntington argues that addressing the needs of nonmarital families “entails a new theory of state regulation as well as new doctrines, institutions, and norms in practice.”<sup>113</sup> However, as rightfully noted by Huntington, the fact that *marriage* is becoming less relevant for family law in general, and parenthood law in particular, does not mean that *relationships between adults* do not matter. To the contrary, they are especially central to parenthood.<sup>114</sup>

In the context of ART, the analysis offered by Joslin and Storrow suggests a similar conclusion. While both Joslin and Storrow reject marriage as

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<sup>110</sup> See Carbone, *supra* note 45, at 1337–41. However, the potential legacy of the unwed fathers cases of making relationships matter has remained dormant. Instead, the law in many states has shifted toward emphasizing biology. NANCY DOWD, REDEFINING FATHERHOOD 114 (2000); Dwyer, *supra* note 60, at 866–67.

<sup>111</sup> Huntington, *supra* note 3, at 169–75.

<sup>112</sup> *Id.* at 167. One, of course, might debate the observation that we are in a “post-marital” world, especially after *Obergefell v. Hodges*, 576 U.S. 2584, 2608 (2015), and the recognition of marriage equality to same-sex couples. Likewise, it is questionable whether it is appropriate to refer to the population as a whole when referring to marriage trends, since, as noted by Naomi Cahn and June Carbone, families based on marriage still characterize families at the top of the economic ladder. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 62–63 (2014).

<sup>113</sup> Huntington, *supra* note 3, at 167.

<sup>114</sup> *Id.* at 173.

a factor in determining parenthood, they both consider the actual partnership relationship between the potential intentional parent and the biological-genetic parent. They give significant weight to the factor of relationships, though as an indicator of intent to (co-)parent, which supports the intended parent's claim to parental legal status.<sup>115</sup> However, both Storrow and Joslin focus on romantic-sexual relationships that prospective intended parents have with the biological legal parent. Storrow's and Joslin's suggestions thus reinforce what Martha Fineman has referred to as the sexual family, where the romantic-sexual bond is considered as the core family relationship.<sup>116</sup>

This emphasis on a romantic-sexual partnership as the appropriate basis for (joint) parenthood is also reflected in adoption law. This is not surprising given that adoption law is predicated on and reflects the norms and principles that govern parentage at birth. In the 2007 New York case of *In re Garrett*,<sup>117</sup> a state court refused to allow the mother's brother to adopt her child and become a joint parent with her. The court reasoned that developments in adoption law were all "predicated on the rationale that the relationship between the proposed adoptive parents is the functional equivalent of the traditional husband-wife relationship, albeit between same-sex couples or unmarried partners."<sup>118</sup>

Subsequent adoption case law has occasionally departed from the sexual family model, recognizing that varied relationships such as friendship and extended family can form the basis for a supportive and strong joint parenthood relationship.<sup>119</sup> In *re Adoption of G.*, the court allowed two friends who did "not have a spousal or romantic relationship, and [did] not live together" to adopt a child together and thus become joint parents.<sup>120</sup> Another court approved the adoption of three children by their paternal grandmother together with their paternal aunt.<sup>121</sup> However, recently, the Supreme Court of Pennsylvania reversed a decision that allowed the mother's father to adopt her twin children and become a joint parent with her.<sup>122</sup> The Court noted that "although there is absolutely no issue of incest in this case . . . allowing a grandparent to adopt his or her child's children and co-parent

<sup>115</sup> Joslin, *supra* note 63, at 1223–28; Storrow, *supra* note 74, at 677–78.

<sup>116</sup> FINEMAN, *supra* note 26, at 226–33.

<sup>117</sup> 841 N.Y.S.2d 731 (N.Y. Sur. Ct. 2007).

<sup>118</sup> *Id.* at 732.

<sup>119</sup> Other legal systems have also grappled with the question of allowing platonic friends or extended kin to legally become joint parents. *See, e.g.*, Cour Constitutionnelle [CC][Constitutional Court] decision no 25/2017, Feb. 16, 2017, <http://www.const-court.be> (Belg.); Cour Constitutionnelle [CC][Constitutional Court] decision no 95/2017, July 13, 2017, <http://www.const-court.be> (Belg.); Radhika Sanghani, *Child-sharing: Meet the Best Friends Who've Legally Adopted Together*, THE TELEGRAPH (Mar. 31, 2017), <http://www.telegraph.co.uk/women/family/child-sharing-meet-best-female-friends-who-ve-legally-adopted> [<https://perma.cc/867H-Q84B>].

<sup>120</sup> *In re Adoption of G.*, 978 N.Y.S.2d 622, 630, 632 (N.Y. Sur. Ct. 2013).

<sup>121</sup> *In re Adoption of A.*, 893 N.Y.S.2d 751, 751 (N.Y. Fam. Ct. 2010).

<sup>122</sup> *In re Adoption of M.R.D. and T.M.D.*, 145 A.3d 1117, 1117 (Pa. 2016), *rev'g In re Adoption of M.R.D. and T.M.D.*, 128 A.3d 1249 (Pa. Super. Ct. 2015).

them with his or her child raises the possible societal perception of an incestuous relationship between the grandparent and his child, a relationship which is both a criminal offense and which carries a social stigma.”<sup>123</sup> Such a statement clearly rests on the assumption that joint parents share a romantic-sexual relationship.

The controversy as to whether siblings or platonic friends should be able to legally parent together reflects an understanding that the relationship between prospective joint parents is relevant in considering whether to recognize their status as legal parents, as this Article suggests. Nonetheless, in calling to consider relationships as a significant factor in making parentage determination, this Article seeks to go beyond the sexual family model and make a broad claim about the significance of relationships.<sup>124</sup> Thus, in arguing that it makes a difference whether the individuals who conceived together shared an ongoing committed relationship, this Article does not consider only romantic-sexual relationships, but also close platonic friends, as elaborated in greater detail below.<sup>125</sup>

#### IV. NOT ONLY RELATIONSHIPS

In seeking to introduce relationships as a factor in determining parentage, this Article does not suggest that relationships should be the sole consideration. While intent and biology each fail to provide an adequate basis for parentage standing on their own, they are far from irrelevant. Rather, relationships should be considered together with both intent and biology. This Part argues that in all cases of at-birth parentage determination, whether in the context of traditional sex-based reproduction or ART, intent, biology, and the relationship between the conceiving adults should be considered together to determine a child’s parentage.

As the main purpose of this Article is to establish the role of relationships in making parentage determination, this Article does not offer a formula for weighing the different factors of relationship, biology, and intent in each case. The goal of this Article is to open up a discussion that acknowledges the significance of relationships alongside the already familiar concepts of biology and intent.

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<sup>123</sup> *Id.* at 1129 n.3.

<sup>124</sup> For a consideration of friends as joint parents, see Jessica R. Feinberg, *Friends as Co-Parents*, 43 U.S.F. L. REV. 799, 802–03 (2009); Cynthia R. Mabry, *Joint and Shared Parenting: Valuing All Families and All Children in the Adoption Process with an Expanded Notion of Family*, 17 AM. U. J. GENDER, SOC. POL’Y & L. 659, 660 (2009). For thoughtful criticisms of the law’s ignorance of friendship relationships, see Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 190–93 (2007); Pamela Laufer-Ukeles & Shelly Krecizer-Levy, *Family Formation and the Home*, 104 KY. L.J. 449, 450–455 (2016).

<sup>125</sup> See *infra* Part IV.

In order to advance such a discussion, a few additional points are explored. First, suggesting that a factor is relevant does not make it a necessary requirement for parentage. Parentage can and should be determined in varied cases absent a biological connection, and even absent intent, when other factors, most notably the relationship between the conceiving adults, provide strong normative justification for conferral of parental status. Second, with regard to intent, this Part offers an understanding of intent that slightly differs from existing theories of intentional parenthood in order to address various limitations in predominant understandings of intent. Lastly, this Article argues that relationships, biology, and intent are relevant factors in making at-birth parentage determination regardless of the manner of conception. This last point contrasts with the existing approach, which takes the manner of conception as a central differentiating consideration and applies different rules to govern parentage determination in the context of, on the one hand, “traditional” sex-based reproduction and, on the other, conception through ART.

Making the manner of conception the decisive differentiating factor can lead to unintelligible results, as illustrated by *In re M.F.*,<sup>126</sup> where two genetic siblings who shared the same male and female progenitors, and had been both born to and raised by their biological mother and her same-sex partner, were found to have different legal parents.<sup>127</sup> The court held that the male progenitor was not the legal father of one child but should be recognized as the legal father of the second child, only because it was legally presumed that one child was conceived through ART and the other through sexual intercourse.<sup>128</sup>

The argument advanced in this Article does not suggest that the circumstances of conception are entirely irrelevant. As discussed in a following

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<sup>126</sup> *In re Paternity of M.F.*, 938 N.E.2d 1256 (Ind. Ct. App. 2010).

<sup>127</sup> The two children were born to J.F. while she was in a committed long-term relationship with a same-sex partner. *Id.* at 1257–58. After the relationship between the women ended (when the children were twelve and five years old), J.F. filed a paternity suit against W.M., the biological father. *Id.* at 1258. The latter argued that while he was genetically related to the children, he was merely a sperm donor, and invoked a Donor Agreement relieving him of all financial obligations and denying him any parental rights. *Id.* Both parties conceded that the viability of the agreement depended upon the manner of conception. *Id.* at 1260. The agreement was valid if conception occurred through ART (provided that a physician performed the procedure) and invalid if conception followed sexual intercourse. *Id.* W.M.’s parental status, thus, depended upon on the method of conception, of which there was no proof in the case. Regarding the eldest child, the court held that J.F. bore the burden of proof as to the manner of conception, since she was seeking to avoid the Donor Agreement, which clearly applied to that child. *Id.* Since she was unable to prove conception through sexual intercourse, the agreement was valid; and so W.M. was not the legal father of the first child and was relieved of child support obligation. *Id.* at 1260–61. Regarding the second child, however, the court held that the agreement did not clearly apply. *Id.* at 1263. The case was therefore remanded with instructions that the lower court decide on W.M.’s paternity based on a presumption of conception by sexual intercourse. *Id.* The case thus resulted in one of these two siblings having only a legal mother, and the other having both a legal mother and a legal father.

<sup>128</sup> For a critical analysis of this case, see Appleton, *supra* note 99, at 373–74.

part, good-faith consensual sex<sup>129</sup> is a circumstance that should be taken into account as part of the consideration of the relationship between the conceiving adults. However, the manner of conception itself is not a decisive factor that should differentiate and assign different rules for parentage determination.

### A. Intent

This Part suggests that there are good reasons to maintain intent as a factor in parentage determination, especially if it is not considered as the only factor. It acknowledges various limitations of the concept of intent, and addresses them, but argues that despite such limitations, the concept of intent embodies desirable values in the meaning of parenthood, especially as an aspirational goal the law should express.

As discussed above, intent is a significant factor in parentage determination in the context of ART.<sup>130</sup> However, most theorists who advance intentionalism as the basis for parenthood confine their argument to the ART context. Storrow, for example, explains that “[u]nlike coitus, which can be a nonprocreative act, assisted reproduction’s sole aim is procreation.”<sup>131</sup> Hill, as well, limits his intent-based parenthood model to the context of ART, noting that “[i]ntentionality . . . is not the only way to acquire parental status,” and in cases of unplanned pregnancies, biology should provide the basis for parenthood.<sup>132</sup>

In practice as well, intent seems to have no place in parentage determination in the context of sex-based reproduction. Parenthood (or more precisely paternity) can be imposed in cases where no meaningful consent to either sex or its implications could have taken place,<sup>133</sup> in cases where the parties agreed *ex ante* that the man is providing his semen as a donation,<sup>134</sup> or in cases that allegedly involve deceit regarding the use of contraceptives or ability to conceive.<sup>135</sup>

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<sup>129</sup> See Shari Motro, *The Price of Pleasure*, 104 Nw. U. L. REV. 917, 920 (2010).

<sup>130</sup> See *supra* text accompanying notes 69–72.

<sup>131</sup> Storrow, *supra* note 74, at 597.

<sup>132</sup> Hill, *supra* note 71, at 387.

<sup>133</sup> See, e.g., L.M.E. and Family Independence Agency v. A.R. S., 680 N.W.2d 902, 915 (Mich. Ct. App. 2004); S.F. v. State *ex rel.* T.M., 695 So. 2d 1186, 1189 (Ala. Civ. App. 1996); Mercer Cty. Dep’t of Soc. Servs. v. ALF M., 589 N.Y.S.2d 288, 289–90 (N.Y. Fam. Ct. 1992); see also Dana Johnson, Comment, *Child Support Obligations that Result from Male Sexual Victimization: An Examination of the Requirement of Support*, 25 N. ILL. U. L. REV. 515, 519–29 (2005) (discussing cases where male victims of sexual crimes were held liable to support the child born out of the sexual crime).

<sup>134</sup> See, e.g., Budnick v. Silverman, 805 So. 2d 1112, 1113 (Fla. Dist. Ct. App. 2002).

<sup>135</sup> See, e.g., Beard v. Skipper, 451 N.W.2d 614, 614–15 (Mich. Ct. App. 1990); Hughes v. Hutt, 455 A.2d 623, 624–25 (Pa. 1983); see also Jill E. Evans, *In Search of Paternal Equity: A Father’s Right to Pursue a Claim of Misrepresentation of Fertility*, 36 LOY. U. CHI. L.J. 1045, 1065–92 (2005) (describing judicial patterns in adjudicating paternal misrepresentation of fertility claims); Michael J. Higdon, *Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried*

Intent is argued to be unsuitable as a basis for parentage in cases of sex-based reproduction, in view of the reality of unplanned pregnancies in the U.S. In fact, a little more than half of all pregnancies in the U.S. are unintended.<sup>136</sup> This reality raises two major concerns regarding the application of intent-based parenthood in this context. The first concern relates to class and gender and focuses on the inaccessibility of effective contraceptives and abortion to many women.<sup>137</sup> This limited reproductive choice seems hard to reconcile with intent-based parenthood, and could be used to justify assigning parentage to both the man and the woman who conceive through sex, regardless of their intentions.

The second concern relates to children's interests, and focuses on the implications of applying intent-based parenthood, which might exclude a significant portion of progenitors from the legal definition of a parent, to the detriment of children. Indeed, the existing legal approach has been developed as a counter-response to the traditional common law doctrine of illegitimacy, which considered children born out of wedlock to be "*filius nullius*," or children of no one.<sup>138</sup> This approach places children's interests at its center and expresses a powerful and compelling idea that children should not suffer as a result of being born to unmarried parents.<sup>139</sup>

Gender and class concerns, as well as children's interests, are thoroughly addressed in subsequent parts of this Article.<sup>140</sup> At this stage, I will make only a few short observations regarding children's interests. First, various scholars have criticized the existing approach, expressing doubts as to whether it truly serves children's interests.<sup>141</sup> Second, equality for children in general is much more complex; it is highly questionable whether taking marital children as the mold and applying the same formal rules to children born

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*Men*, 66 ALA. L. REV. 507, 514–30 (2015) (providing an overview of laws affecting unmarried fathers differently than mothers).

<sup>136</sup> *Unintended Pregnancy in the United States*, GUTTMACHER INST. (Sept. 2016), <http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html> [<https://perma.cc/PFM9-ZZAK>].

<sup>137</sup> See, e.g., Motro, *supra* note 129, at 935–37.

<sup>138</sup> Under traditional English law, these children had neither a legal mother nor a legal father. American law recognized the legal relationship between children and their unmarried biological mother, but not a relationship between the biological father and the child. Children born out of wedlock had no claim to their fathers' name, property, support, or companionship. June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1096 (1999); Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 68 (1995).

<sup>139</sup> Appleton, *supra* note 99, at 355. A more critical view would say that it purports to put children's interests at its center but it actually reflects the state's financial interests by securing private financial support for children. See *infra* discussion in Part V.A.

<sup>140</sup> See *infra* Part VII.

<sup>141</sup> See, e.g., Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1160–61 (2003) ("Children do not necessarily need two parents to thrive, and the imposition of a second parent not only infringes on the single parent's rights as a parent, but, as a practical matter, may not benefit the child. . . . Children benefit from increased resources, not from coerced parenthood."); Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 461–63.

outside marriage will truly serve the interests of children or guarantee their right to equality.<sup>142</sup> Last, there is a difference between eradicating children's stigmatization and the label "illegitimate," and suggesting that having one legal parent in itself stigmatizes a child.

Beyond the reality of deficient reproductive choice, there are other reasons to pause before endorsing intent as a factor in parentage determination. One such reason is the research indicating that the more parenthood, and especially motherhood, is perceived as a choice, the more mothers are economically penalized in the job market.<sup>143</sup> Tamar Kricheli-Katz has indeed found that in states with a higher percentage of non-mothers, a higher rate of legal abortions, and more state funding for abortions for lower-income women, there is greater discrimination against mothers in the job market.<sup>144</sup> Kricheli-Katz explains that this finding seems to be counterintuitive, as these states tend to be the more liberal states, and thus are expected to be more egalitarian.<sup>145</sup> A laboratory experiment supported Kricheli-Katz's proposition that conceptualizing motherhood as a choice leads employers to judge mothers and provides them with a justification to discriminate.<sup>146</sup> Emphasizing intent in parentage determination might reinforce the perceptions of motherhood as voluntary and a lifestyle choice, which already exist in the United States, leading to the undesired effect of reducing commitment to gender equality.<sup>147</sup>

The reality of limited reproductive choice, together with the possible implications of an intent-based perception of legal parenthood regarding gender equality in the job market, might suggest that parentage determination be based on a view of parenthood as unpredictable and beyond human control.<sup>148</sup> Such a view would lead to rejecting intent as a factor in parentage determination.

<sup>142</sup> Cahn, *supra* note 141, at 1165–67.

<sup>143</sup> Tamar Kricheli-Katz, *Choice, Discrimination, and the Motherhood Penalty*, 46 L. & SOC'Y REV. 557, 561 (2012).

<sup>144</sup> *Id.* at 568–72.

<sup>145</sup> *Id.* at 561–62.

<sup>146</sup> *Id.* at 573–80; see also Deborah Dinner, *Strange Bedfellows at Work: Neomaterialism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 481–82 (2014) (describing how the business lobby used the notion of reproductive choice to classify pregnancy as a "voluntary" condition rather than a temporary disability," *id.* at 481).

<sup>147</sup> Kricheli-Katz, *supra* note 143, at 557–59. Because men who become fathers are viewed as providers rather than as primary caregivers, being a father sometimes works to the advantage of men. *Id.* at 562. Therefore, it is less likely that men will be penalized when parenthood is perceived to be a choice, but rather more probable that they will benefit from such perceptions. *Id.* Because different mechanisms may be involved in individuals' reactions to the "right choices" of the respective sexes, Kricheli-Katz limits her analysis to women only. *Id.*

<sup>148</sup> For a description of such a normative position, see Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 314 (1988) (citing K. LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 167–71 (1984)).

Another reason to think twice about making intent a factor in parentage determination concerns the indeterminacy of intent. As thoughtfully noted by Janet Dolgin, the concept of intent is deceptively simple.<sup>149</sup> Thus, scholars debate various questions: Whose intent should be considered? At what moment in time? Must intention be mutual? How do we resolve competing or conflicting intentions?

This Article suggests that despite the limitations of the concept of intent, and despite the reality of deficient reproductive choice, there are good reasons to maintain intent as a factor in parentage determination (albeit not the only factor). The greatest risk of forsaking intentional parenthood, even as an ideal, is that it might support the dismantling of the already fragile reproductive rights of women. Giving up on intent and imposing involuntary parenthood also “imbue[s] [parenthood] with a negativity that diminishes those . . . who fulfill the role willingly, honorably, and lovingly.”<sup>150</sup> The concept of intent, as an aspirational goal, embodies desirable and positive values in the meaning of parenthood. As noted by Dara Purvis, the intent theory of parenthood incorporates a forward-looking perspective and “facilitates a prospective view of planning for parenthood.”<sup>151</sup>

This Article therefore proposes that intent be considered not merely as a tie-breaker or a supplement to existing parentage determination regimes, but at the same time it should not be considered the only or primary factor.<sup>152</sup> Nonetheless, in view of the reality of limited reproductive choice, and since the existing understanding of intent makes it unsuitable as a consideration in parentage determination in the context of sex-based reproduction, this Article offers an understanding of intent that slightly differs from existing theories of intentional parenthood.

Most intent theories of parenthood consider only pre-conception intent, granting “parental rights and responsibilities to those who caused a child to come into being with the intent of parenting that child once it was born.”<sup>153</sup> Other scholars have expanded the idea of intent-based parenthood and blurred the lines between intent-based parenthood and functional

<sup>149</sup> JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 177–78 (1997). For a case that exemplifies the complexities inherent in attempting to make a determination based on intent, see, e.g., *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789 (Cal. Ct. App. 2014).

<sup>150</sup> Baker, *Bargaining or Biology?*, *supra* note 2, at 20.

<sup>151</sup> Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 *YALE J.L. & FEMINISM* 210, 222 (2012).

<sup>152</sup> For a thorough analysis of intent as a tie-breaker or supplement, see Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 *N. ILL. U. L. REV.* 433, 438–41 (2005). Recently, Melanie Jacobs has suggested that intent-based parenthood is a superior parentage establishment doctrine that should be expanded beyond the context of ART to all cases of parentage determination. Jacobs, *supra* note 96, at 466–67. Jacobs did not elaborate on implementation of this proposal, instead leaving it for future development. *See id.* at 496–97.

<sup>153</sup> Baker, *Bionormativity and the Construction of Parenthood*, *supra* note 2, at 701; see, e.g., Hill, *supra* note 71, at 414; Shultz, *supra* note 70, 307–11.



parenthood. For example, Melanie Jacobs advocates for defining parenthood in lesbian families based on intent.<sup>154</sup> However, her interpretation of intent—and specifically her insistence on going beyond pre-birth intention and considering an intent to parent that accompanies functional parenting and begins after the child's birth—suggests that she, in fact, considers function. Similarly, Richard Storrow suggests that intent “is in essence an aspect of parental function,” and that factors such as preparing for birth and intending to parent are sufficient to create functional parenthood.<sup>155</sup>

This Article adheres to maintaining the distinction between intent-based and function-based models of parenthood.<sup>156</sup> Functional parenthood can only be determined *ex post*, based on actual care and function as a parent. However, there are significant benefits to identifying a child's parents at birth in a manner not made possible by functional theories. At-birth parentage determination should be forward looking and allocate clear responsibilities, for the benefit of the child. Still, maintaining the distinction between intent and function in parentage determination does not demand that only pre-conception intent be considered. This Article suggests that consideration of pre-conception intent should be the general rule.<sup>157</sup> However, in cases where no pre-conception intent existed, mainly because pregnancy itself was unplanned, intent can be established at the time of birth or soon thereafter.

This proposition is not based merely on practical considerations. It also reflects the idea that intent to become a parent does not emerge as a momentary event, but rather is a process that evolves and develops over time. It also better fits the reality of limited reproductive choice. The fact that a pregnancy is *unplanned* does not necessarily mean it is *unwanted*.<sup>158</sup> Although decisions regarding parenthood are made in a world of limited reproductive choice, the reality of reproduction and parenthood choices is more complex than can be captured in a binary description of options: planned (intended) parenthood or unplanned (unintended parenthood). The spectrum is more varied.

At-birth intent determination (or soon thereafter) is still forward looking and embodies the positive values of willingly assuming a parental role and planning for parenthood. This approach, however, stops short of considering actual function or relationship between the adult and the child after birth.<sup>159</sup>

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<sup>154</sup> Jacobs, *supra* note 152, at 448.

<sup>155</sup> Storrow, *supra* note 74, at 678–79.

<sup>156</sup> For a more detailed discussion of this position, see Laufer-Ukeles & Blecher-Prigat, *supra* note 63, at 482–83.

<sup>157</sup> This is subject to a limited exception in cases where, soon after the child's birth, the gamete donors or gestational carrier changes their minds and wishes to be recognized as a parent, and all other relevant parties agree to such a change.

<sup>158</sup> For the distinction between unintended and unwanted pregnancies, see, e.g., *Unintended Pregnancy in the United States*, *supra* note 136.

<sup>159</sup> In practice, if parenthood is not determined at the time of birth or soon thereafter, the functioning of one as a parent or absence of such functioning will probably still be

### B. Biology

This Article suggests that biology should also be considered a factor in parentage determination. Biological ties, whether genetics or gestation, are relevant to parenthood, both in the context of ART and in the context of sex-based reproduction.<sup>160</sup> Considering biology as part of parentage determination doctrine might raise concerns about perpetuating the bionormative regime of parentage.<sup>161</sup> Nonetheless, suggesting that genetics and gestation should be *a factor* in deciding parentage does not necessitate this outcome. As Katharine Baker explains, bionormativity is not merely about the importance of a biological connection, but rather embodies an understanding of parenthood as private, exclusive, and binary.<sup>162</sup> One can consider biology as relevant, without endorsing a bionormative perception of parenthood.

Although the law and legal scholarship seem to emphasize biology only in the context of sex-based reproduction, biology is significant in the context of ART as well. First of all, people mostly use ART in order to conceive their own genetically related child.<sup>163</sup> Both heterosexual couples and same-sex couples use ART instead of adopting a child, because they prefer to have a child who is genetically related to at least one of the parties.<sup>164</sup> State laws as well require either that one prospective parent carry the pregnancy, or that one have a genetic tie to the child. Thus, state laws that recognize surrogacy in one form or another usually require a genetic connection to at least one of the intended parents.<sup>165</sup> This requirement does not necessarily attest to the significance of biology in defining parenthood, but rather reflects a concern that people should not be able to “order up a baby.”<sup>166</sup> Still, it suggests that genetics are a relevant factor in parentage determination. Also, as noted above, while intent is given weight in parentage determination in the context of ART, intent is hardly ever a standalone factor determining parentage. Rather, intent often accompanies another factor, such as genetics or gestation, in order to provide a basis for legal parentage.<sup>167</sup>

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used as evidence to establish (or of failure to establish) intent. This Article therefore supports means that facilitate the early establishment of legal parenthood.

<sup>160</sup> Gestation, of course, is much more than a biological tie. Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis*, 9 DUKE J. GENDER L. & POL'Y 91, 95–112 (2002).

<sup>161</sup> Baker, *Bionormativity and the Construction of Parenthood*, *supra* note 2, at 653–54.

<sup>162</sup> *Id.*

<sup>163</sup> See, e.g., Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1069; Carolyn J. Head, *Comment, Adopting the Right Incentives: Encouraging People to Adopt in the Medical Age*, 9 J.L. ECON. & POL'Y 717, 724–25 (2013).

<sup>164</sup> See, e.g., Radhika Rao, *Hierarchies of Discrimination in Baby Making? A Response to Professor Carroll*, 88 IND. L.J. 1217, 1220–21 (2013).

<sup>165</sup> See sources cited *supra* note 74.

<sup>166</sup> Stephanie Saul, *Building a Baby, With Few Ground Rules*, N.Y. TIMES (Dec. 13, 2009), <http://www.nytimes.com/2009/12/13/us/13surrogacy.html?mcubz=3> [https://perma.cc/E4S9-6UXC].

<sup>167</sup> See *supra* text accompanying note 74.

Lastly, as submitted by Doug NeJaime, biological ties often lead individuals to form parent-child relationships, and thus “provoke commitments of care and support.”<sup>168</sup> Maintaining biology as an additional factor in parentage determination thus shows respect to existing expectations about parentage.<sup>169</sup>

#### V. PRESUMPTIONS: BETWEEN FORM AND DISCRETION

This Article suggests that the interplay between the factors of biology, intent, and relationships provides the most adequate basis for at-birth parentage determination. One of the main disadvantages of this proposal is that it may appear to offer a complex multifactor regime, with two of the factors (relationships and intent) involving significant judicial discretion and potentially requiring case-by-case determination. One might argue that this proposal is contrary to children’s, as well as potential parents’, interests, which are served best by having a legal regime that makes it possible to clearly identify each child’s parents prospectively and thus provide stability and certainty.<sup>170</sup> To achieve these goals, ideally, at-birth parentage should be determined as formally as possible.<sup>171</sup> Such formal parentage determination need not ratify traditional conceptions, which relied exclusively on biology and marriage. Rather, it can be part of what Rebeca Aviel calls the “new formalism” in family law, which rejects the heteronormativity and bionormativity that characterized traditional formalism.<sup>172</sup>

This Part offers the use of presumptions as part of this new formalism and as a way to mitigate judicial discretion in applying the parentage determination regime this Article offers. Providing a complete and detailed analysis of presumptions that should be adopted in determining a child’s parentage is beyond the scope of this Article. It will offer what it perceives to be the main presumptions that should be recognized.<sup>173</sup>

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<sup>168</sup> NeJaime, *supra* note 9, at 2335–36.

<sup>169</sup> *See id.* at 2335; Garrison, *supra* note 1, at 842.

<sup>170</sup> *See, e.g.,* Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2065–66 (2014); Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN’S L.J. 323, 338 (2004); Emily Buss, “Parental” Rights, 88 VA. L. REV. 635, 640–46 (2002); Carbone, *supra* note 45, at 1334.

<sup>171</sup> Laufer-Ukeles & Blecher-Prigat, *supra* note 156, at 435–36.

<sup>172</sup> Aviel, *supra* note 170, at 2066.

<sup>173</sup> This Article does not address contractual relationship as forming the basis for legal parenthood. According to a contract approach, it is the agreement between individuals that forms the basis for legal parenthood. This idea is prominent especially in writing on parenthood through ART. *See, e.g.,* MARTHA M. ERTMAN, *LOVE’S PROMISES: HOW FORMAL & INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* 25–107 (2015). Baker offers quite a unique proposal to extend the application of the contractual framework to parenthood determination in cases of both sex-based reproduction and conception through ART. *See* Baker, *Bargaining or Biology?*, *supra* note 2, at 38–61. This Article does not address this contract approach because contract cannot determine the initial entitlement to parental status, the issue with which this Article is concerned. A contract model in itself does not provide a basis for determination of the initial entitlement. As

First, when prospective parents were involved in a long-term committed relationship (whether or not such a relationship was based on a romantic-sexual bond), the law should presume they are parents. At the other end of the spectrum, when the parties merely hooked up, there should be a presumption against recognizing both conceiving adults as joint parents. As a general rule, none of the parties should be able to impose parenthood on the other against the latter's wishes. At the same time, however, sex that is consensual, involves no fraud, deceit, or abuse, is a relationship. When conception occurs as a result of such good-faith sex, none of the conceiving individuals can exclude the other from parenthood, whether they were involved in a committed relationship, or merely hooked up, or any relationship in between. In other words, while good-faith consensual sex in itself is not a sufficient relationship to serve as a basis for parentage, it should provide an opportunity for each of the conceiving adults to assume parenthood. Last, this Article offers a presumption that excludes rapists from the definition of parenthood.

Although these presumptions are less formal than the traditional presumption of paternity, which rested solely on formal marriage, or alternative proposals that rely on equivalent formalities such as civil unions or domestic partnership, they do limit judicial discretion and decrease the need for a case-by-case evaluation of relationships and intent.

A different possibility for advancing a new formalism in parentage determination is to expand and simplify access to mechanisms to formalize the parental relationships. An example of such a mechanism might be a pre-birth registration procedure.<sup>174</sup> Nonetheless, this Article suggests that access to formalities provides an insufficient solution. As noted by Jessica Clark, formalization risks disadvantaging those without resources, by making their legal claims costly *ex ante* and setting traps for the legally unaware.<sup>175</sup> It is also a discriminatory solution if some individuals (i.e., husbands of the biological mother, or biological parents who conceived through sex) will still be recognized as parents by default and formalities will be required selectively.<sup>176</sup> Parentage based on presumption can advance stability and certainty while avoiding the problems with relying solely on formalities.<sup>177</sup>

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Baker explains: "One can only agree to contract away property that one has. Where do the rights come from for those parents who have not gotten them through exchange with another parent?" *Id.* at 46–47.

<sup>174</sup> See, e.g., Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 289–90 (2006).

<sup>175</sup> Clarke, *supra* note 5, at 807–12; see also Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 694–95 (2014) (providing examples of how formal procedures can negatively affect men who are unaware of their existence).

<sup>176</sup> Clarke, *supra* note 5, at 817–18.

<sup>177</sup> Cf. 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, 207 (2009) (describing through example how a presumption of legal

A. *Long-Term Committed Relationships and a Presumption  
of Joint Parenthood*

The first presumption this Article offers is that when conception of a child occurs in the context of a long-term committed relationship, all the parties to the relationship are presumed to be the child's parents. The most obvious example that comes to mind is that of different or same-sex couples, whether married or not. In this respect, this Article supports the calls made by scholars such as Joslin, Storrow, Polikoff, and Jacobs,<sup>178</sup> to extend the application of intent-based parenthood beyond the marital relationship and take notice of the intent to conceive together that develops in the context of other intimate relationships. This Article's emphasis on relationships, rather than merely on intent as an individual state of mind, highlights that what should matter is the nature of the relationship, and not the formal tie between the prospective parents.

To exemplify how adding relationships to the discussion influences the analysis, consider the case of *K.M. v. E.G.*<sup>179</sup> K.M. and E.G. became involved in a romantic relationship in 1993, moved in together after a year, and in March 1994 were registered as domestic partners.<sup>180</sup> In March 1995, K.M. provided ova to E.G., so that E.G. could bear children by means of in vitro fertilization ("IVF").<sup>181</sup> E.G. had the procedure at the University of California at San Francisco Medical Center ("UCSF"). K.M. signed a four-page form on UCSF letterhead entitled "Consent Form for Ovum Donor (Known)."<sup>182</sup> The form stated that K.M. agrees "to have eggs taken from my ovaries, in order that they may be donated to another woman."<sup>183</sup> After explaining the medical procedures involved, the form also stated:

It is understood that I waive any right and relinquish any claim to the donated eggs or any pregnancy or offspring that might result from them. I agree that the recipient may regard the donated eggs and any offspring resulting therefrom as her own children. . . . I specifically disclaim and waive any right in or any child that may be conceived as a result of the use of any ovum or egg of mine, and I agree not to attempt to discover the identity of the recipient thereof.<sup>184</sup>

E.G. argued that she had insisted that K.M. sign an explicit waiver relinquishing any claim to the child born of her donation because she unequiv-

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parentage at the outset can assist families and provide stability in the contexts of custody, public benefits, and inheritance).

<sup>178</sup> See text accompanying notes 63, 74, 177, 152.

<sup>179</sup> 117 P.3d 673 (Cal. 2005).

<sup>180</sup> *Id.* at 675.

<sup>181</sup> *Id.* at 676.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

ocally did not want to share custodial rights to the child and was concerned about later disputes.<sup>185</sup> K.M., on the other hand, argued that she first saw the ovum donation consent form ten minutes before signing it, and that although she read it, she “thought parts of the form were ‘odd’ and did not pertain to her.”<sup>186</sup> She further argued that she did not intend to relinquish parental rights, and only signed the form so that she and E.G. could have children. She asserted that she “thought [she] was going to be a parent.”<sup>187</sup> Following the egg donation and IVF, E.G. became pregnant with twins. When K.M. and E.G. learned about the pregnancy, they shared the news with K.M.’s father “by announcing that he was going to be a grandfather.”<sup>188</sup> The dispute between E.G. and K.M. arose more than five years after the birth of the twins, and during the time from the birth to their separation, K.M. and E.G. raised the twins together and the children referred to both as their mothers.<sup>189</sup>

For purposes of this Article, we should consider K.M.’s parental status at the time of the twins’ birth.<sup>190</sup> In this regard, the analysis set forth in this Article differs from the majority’s approach in *K.M. v. E.G.*, which considered genetics to be the primary consideration.<sup>191</sup> It also differs from approaches that rely solely on intent, whether that approach interprets intent based on the egg donation form that K.M. signed, or an approach that finds evidence of intent to parent in K.M.’s and E.G.’s relationship.<sup>192</sup> While the egg donation form might be a consideration in making a parentage determination inquiry, it cannot be dispositive or be ascribed significant weight, especially since it was not an agreement to which K.M. and E.G. were the parties. Instead, this Part argues that the length of K.M.’s and E.G.’s relationship, as well as the formalization of the relationship as domestic partnership, should create the presumption that both K.M. and E.G. were the twins’ legal parents from the time of their birth. The parties’ relationship is not merely evidence of their intent to co-parent. Rather, the relationship is a factor that should be considered on its own in deciding K.M.’s claim for parentage.

*K.M. v. E.G.* involved conception that occurred in the context of a romantic relationship. This Part argues, however, that platonic relationships, such as long-term friendship, can also create a presumption of parenthood. Long-term relationships of mutual support, commitment, and care are not

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* (One example might be the part stating that the donor promised not to discover the identity of the recipient).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 677.

<sup>190</sup> Thus, the actual care for the twins should not be taken as a consideration. See Laufer-Ukeles & Blecher-Prigat, *supra* note 156, at 477.

<sup>191</sup> See *K.M.*, 117 P.3d at 680.

<sup>192</sup> The latter approach was the approach adopted by attorney Jill Hersh, who represented K.M. For Hersh, K.M.’s legal parentage did not spring from the relationship K.M. shared with E.G., but rather the couple’s relationship evidenced intent to co-parent. See Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1223–24 (2016).

only sexual-romantic relationships.<sup>193</sup> Thus far, when courts have been called upon to decide an individual's status as a parent outside the context of a romantic-partnership relationship, for instance when conception occurred through ART, genetic fathers were considered as sperm donors and not as legal fathers, absent an explicit agreement stating otherwise.

For example, in *In re K.M.H.*,<sup>194</sup> D.H. provided the semen for the artificial insemination of S.H., which led to the birth of twins.<sup>195</sup> The parties did not enter into any explicit written agreement, but rather orally agreed on arrangements regarding conception and parenthood.<sup>196</sup> Less than two weeks after the twins were born (and in response to S.H.'s petition to have his rights terminated), D.H. filed a "paternity action acknowledging his financial responsibility for the children and claiming parental rights, including joint custody and visitation."<sup>197</sup> D.H. argued that he and S.H. had agreed to co-parent together, and that he otherwise would not have provided his semen to S.H.<sup>198</sup> However, the relevant statute considers men who provide sperm for artificial insemination as (known) sperm donors unless otherwise agreed *in writing* between the parties. The Kansas Supreme Court upheld the statute against D.H.'s constitutional challenge, explaining that the option for an agreement in writing affords men an adequate opportunity for protection of their interests in becoming legal fathers when they provide their semen for artificial insemination.<sup>199</sup> The court held that even if D.H.'s version of the content of the oral agreement with S.H. were true, the requirement for an agreement in writing does not violate his constitutional rights.<sup>200</sup>

This Article suggests that the nature of the relationship between D.H. and S.H. should have played a significant role in deciding the case. D.H. argued that he and S.H. were friends,<sup>201</sup> but no further details are provided in the case regarding the nature, quality, and length of their relationship. The court seemed to consider these issues irrelevant, because it remained confined to the sexual family, where the romantic-sexual bond is the core family relationship.

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<sup>193</sup> See *supra* text accompanying note 26.

<sup>194</sup> 169 P.3d 1025 (Kan. 2007).

<sup>195</sup> *Id.* at 1029.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> See *id.* at 1033; see also *Man Fights for Parental Rights*, KCTV5-KAN. CITY (Nov. 23, 2007), [http://www.ottawamenscentre.com/news/20071123\\_rights.htm](http://www.ottawamenscentre.com/news/20071123_rights.htm), [<https://perma.cc/65S5-2727>] (reporting on the case of a Kansas man who provided sperm to a life-long friend and later discovered he had no parental rights as a sperm donor).

<sup>199</sup> See *In re K.M.H.*, 169 P.3d at 1039–42.

<sup>200</sup> See *id.* at 1038–40.

<sup>201</sup> *Id.* at 1029.

B. *Sex as a(n Insufficient) Relationship*

Although platonic relationships are often deemed irrelevant to the determination of paternity in the context of ART even where a genetic tie exists, a genetic tie to the child will often suffice to determine parentage, at least for purposes of imposing a child support obligation, in the context of sex-based reproduction. Intent, as well as the relationship between the conceiving individuals, whether it was long-term, committed, or not, seems to be irrelevant in the context of sex-based reproduction.<sup>202</sup> This approach takes the manner of conception to be a central differentiating factor for the purpose of parentage determination. It could be argued, however, that such an approach aligns with this Article's proposal, since sex indicates a different relationship between the conceiving adults. Sex, according to such an argument, indicates the existence of an intimate relationship that can (and should) serve as the basis for a joint parenthood relationship, at least when it concerns consensual sex, which involves no abuse, deceit, or fraud.<sup>203</sup>

Support for such an approach can arguably be found in Shari Motro's works "Preglimony"<sup>204</sup> and "The Price of Pleasure,"<sup>205</sup> where she criticizes the existing legal rules, which treat unmarried sexual partners who conceive as legal strangers. Motro convincingly argues that pregnancy should create a unique legal relationship between (unmarried) sexual partners who conceive.<sup>206</sup> She calls for default rules that impose two types of obligations between the man and the woman who conceive: communication obligations regarding conception, and financial obligations to share the costs of pregnancy, childbirth, miscarriage, and abortion.<sup>207</sup>

If one accepts Motro's argument that good-faith consensual sex, and the pregnancy that follows, create a limited relationship between the conceiving adults, then one could argue that even stronger obligations exist between the parties if such pregnancy ends with the birth of a child. Joint parenthood seems to be a stronger basis than pregnancy for imposing obligations between the individuals involved. If pregnancy creates a relationship between a woman and a man who conceive together, and that relationship imposes legal obligations between them, their being joint parents must carry similar, if not stronger, implications. However, such an argument assumes that sex, in itself, together with a genetic tie to a child, serve as a sufficient basis for

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<sup>202</sup> See *supra* text accompanying notes 95–104.

<sup>203</sup> For a thoughtful critique of the legal coupling of sex and intimacy, see, e.g., Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 809–12 (2010).

<sup>204</sup> Shari Motro, *Preglimony*, 63 STAN. L. REV. 647, 653–59 (2011).

<sup>205</sup> Motro, *supra* note 129, at 917–21.

<sup>206</sup> *Id.* at 937–40. Motro focuses her discussion on unmarried sexual partners, since marriage imposes mutual obligations between married partners. Motro, *supra* note 129, at 952–56.

<sup>207</sup> Motro, *supra* note 129, at 957–58.



parentage, so that the conceiving adults are also the legal parents of the resulting child. This is an unwarranted leap.

Indeed, Motro herself recognizes that sex and pregnancy alone can only create a limited legal relationship between the conceiving adults. She limits her argument to the time of pregnancy, and the relationship she envisions between the man and the woman ceases to exist when the pregnancy ends.<sup>208</sup> This Article aligns with Motro's argument that pregnancy that follows good-faith consensual sex creates a relationship between the conceiving adults, though only a limited relationship. Such good-faith consensual sex conceptualized as a relationship is insufficient as a basis for determining parentage if the pregnancy results in the birth of a child.

In fact, as discussed above, under existing laws of parentage, sex together with a genetic tie to a child, is indeed insufficient to confer parental status when it concerns paternal entitlements. Sex and genetics are deemed sufficient only to impose paternal financial obligations.<sup>209</sup> This Article, however, rejects the parceling out of parental rights and duties. At-birth parentage should be understood as creating an all-encompassing inclusive status, conferring upon recognized legal parents all the duties, responsibilities, rights, and entitlements that accompany such status. Sex in itself cannot explain and justify the conferral of the overall rights and duties of parenthood, and so cannot serve as a basis for parentage.

Nonetheless, when conception is the result of sex, and the pregnancy ends with the birth of a child, the conceiving adults are genetically related to the resulting child (and the woman is also related to the child through gestation). In keeping with this Article's respect for the role of biology in parentage determination,<sup>210</sup> it is argued that good-faith consensual sex should provide *an opportunity* for each of the conceiving adults to assume parenthood. This Article, thus, expands the mutual obligations that good-faith consensual sex creates between conceiving individuals. The argument advanced here is that when conception occurs as a result of such good-faith consensual sex, none of the conceiving individuals can exclude the other from assuming full parentage, if the latter wishes to do so. This should be the case even if the parties merely hooked up. It should be emphasized, however, that this mutual obligation arises only after the pregnancy ends with the birth of a child, and is not intended to provide men with legal standing regarding a decision to continue a pregnancy or to abort.

When a pregnancy ends with the birth of a child, good-faith consensual sex should entitle each conceiving adults to express an intent to become a parent, provided that such intent is expressed during the pregnancy or soon

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<sup>208</sup> Motro specifically states that she does not intend to "trigger a type of common-law marriage with robust long-term commitments." Motro, *supra* note 129, at 940.

<sup>209</sup> See *supra* Part III.B.

<sup>210</sup> See *supra* Part IV.B.

after the birth.<sup>211</sup> Parentage determination based on such intent should be an inclusive status, conferring all the obligations, duties, and rights associated with parenthood, including obligations toward the other parent, whether that obligation is to cooperate in co-parenting the child, or to provide financial obligations to share the costs that childrearing exacts.

When a party does not express intent to parent, good-faith consensual sex cannot itself serve as a basis for imposing parenthood on that party where the relationship between the conceiving adults can be characterized as a “hook-up.” It should be emphasized that this Article’s call not to impose parental status on a progenitor in some cases of unplanned pregnancies is not based merely on an individualistic right not to be a parent but rather on a broader relational perspective, which takes the relationship between the conceiving parties into account.

### C. *Rapists are not Parents*

While good-faith consensual sex should entitle each conceiving adult to seek parental status, in cases of rape (including most cases of statutory rape) that result in the birth of a child, there should be a presumption of denying parentage to the rapist.<sup>212</sup> Currently, although some states limit the custody and visitation rights of rapists regarding their children conceived through rape, and others enable the complete termination of rapists’ parental rights, some states allow them to assert parental rights.<sup>213</sup> The framework this Article offers for parentage determination precludes rapists from being recognized as parents. The act of rape stands in sharp contrast to the values that underlie parenthood, in particular the relationship between joint parents.

A non-U.S. case, *A. v. B.*, provides a prime example.<sup>214</sup> The events that gave rise to this case began with a married couple that persistently tried to have children, going through fertility treatments for many years, but with no success. “The desire for a child became the centre of the couple’s lives and caused tension between them.”<sup>215</sup> The wife testified that “after the doctors—who had despaired of treating her—raised the possibility that [her husband] was the infertile one and suggested using a donor’s sperm, [her husband] said to her on several occasions that he ‘will try with someone else to find

<sup>211</sup> See *supra* text accompanying notes 156–159.

<sup>212</sup> See Hill, *supra* note 71, at 384 n.172, 387–88.

<sup>213</sup> See Moriah Silver, *The Second Rape: Legal Options for Rape Survivors to Terminate Parental Rights*, 48 FAM. L.Q. 515, 515–16 (2014); see also Kelly Weill, *All-Male Panel Fails to End Maryland Law that Forces Women to Share Custody with Their Rapists*, DAILY BEAST (Apr. 16, 2017), <http://www.thedailybeast.com/all-male-panel-fails-to-end-maryland-law-that-forces-women-to-share-custody-with-their-rapists> [<https://perma.cc/GF8Q-X7T2>] (describing a Maryland law that compels women to share custody with their rapists).

<sup>214</sup> CA (Jerusalem) 3798/94 *A. v. B.*, 50(3) PD 1 (1996) (Isr.). For an English translation of the case, see *A. v. B.*, CARDOZO SCHOOL OF LAW: VERSA, <http://versa.cardozo.yu.edu/opinions/v-b> [<https://perma.cc/G5YK-FBR6>].

<sup>215</sup> *A. v. B.*, 50(3) PD at 5.

out if he is alright, and should that girl become pregnant, then we will take the child away from her and raise it.’”<sup>216</sup>

The husband seduced a fifteen-year-old neighbor girl, taking advantage of her emotional state following her mother’s recent death due to cancer.<sup>217</sup> The girl found comfort with the husband, who was twenty years older than her; she consented to have sexual intercourse with him, and as a result became pregnant. When the girl told the husband about her pregnancy, he claimed at different times that he would divorce his wife and marry her but also that he and his wife would adopt the child.<sup>218</sup> He did not inform her of the option of terminating the pregnancy through abortion.<sup>219</sup> Following the birth of her son, the girl wanted to place the child up for adoption,<sup>220</sup> and fiercely opposed placing the child with his biological father.<sup>221</sup> The biological father objected to the adoption and filed an application to the court to obtain custody of the child and raise him together with his wife.<sup>222</sup>

The case presented a challenge to the Israeli Supreme Court, as it did not fit squarely with any of the specific grounds enumerated in the Israeli Law of Adoption for making a child adoptable,<sup>223</sup> and the best interest of the child as such cannot constitute a ground for allowing adoption. Indeed, under both traditional genetic parenthood and an individualistic conception

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> In Israel, women do not have the right to abortion; rather, abortion requires prior approval by a special pregnancy termination committee comprised of doctors and a social worker. Any doctor who performs an abortion that was not pre-approved commits a criminal offense. Penal Law, 5737–1977, §§ 312–21, 31 LSI 84 (1976–1978) (Isr.). Nonetheless, the circumstances of the *A. v. B.* case came under two of the grounds that justify an approval to abort by the committee: pregnancy outside of wedlock, and pregnancy of a girl younger than the marriage age (18 under current law). *A. v. B.*, 50(3) PD 5.

<sup>220</sup> On the significance of using the term “place” rather than “relinquish” or “surrender,” see Carol Sanger, *Placing the Adoptive Self*, in *NOMOS XLIV: CHILD, FAMILY, AND STATE* 58, 84 (Stephen Macedo & Iris Marion Young eds., 2003).

<sup>221</sup> *A. v. B.*, 50(3) PD at 6.

<sup>222</sup> *Id.*

<sup>223</sup> Two grounds were relevant for this case. The first is specified in § 13(a)(7) of the Adoption of Children Law, which concerns parents who cannot properly care for their child due to their conduct or situation. *See* Adoption of Children Law, §13(a)(7), 5741-1981, 35 LSI 360 (1980-81). The second is specified in § 13(a)(8), which refers to objections to adoption which are immoral or motivated by illegal purposes. *See* Adoption of Children Law, §13(a)(8), 5741-1981, 35 LSI 360 (1980-81). With regard to the latter ground, while the biological father’s actions toward the mother-girl were illegal and immoral, his objection to adoption was not. Regarding the biological father’s parental capacity, an expert testified that both the biological father and his wife were unable to raise the child, as they would cause him serious damage. The biological father’s attorney, however, argued that the expert’s opinion merely rested on the best interest of the child, rather than on an objective assessment of parenting capacity. A three-justice majority found that capacity to raise a child should be examined with reference to the specific child at issue. Two other justices based their decision on the principle that a slayer cannot inherit from a testator he murdered, extrapolating from this that the father cannot claim a child he illegally conceived. For a discussion of this principle, see Nili Cohen, *The Slayer Rule*, 92 B.U. L. REV. 793, 795–801 (2012).

of intent, the male progenitor is considered the legal father. His primary purpose in seducing his minor neighbor was to get her pregnant so he could become a father. Analyzing his state of mind in isolation reveals that he intended, planned, and acted upon his intentions to become a parent. Nonetheless, in the framework of this Article, genetics and individualistic intent are not the only factors that determine parenthood. Given the deceit, abuse, and rape that led to the conception and birth, the male progenitor should legally be only that, and not fall under the legal definition of a parent. As such, he would have no legal standing in proceedings regarding the placement of the child for adoption.

## VI. SAFEGUARDING CHILDREN'S INTERESTS

This Article's approach to parentage determination might raise concerns regarding its practical implications, which exclude some progenitors (most often men) from legal parenthood in cases of unplanned pregnancies that occurred in the context of a no-strings-attached relationship. Such concerns arguably implicate the superior rights of children. While this Article does not offer a purely child-centered approach to parenthood determination,<sup>224</sup> it does recognize the significance of safeguarding children's interests, as well as the superior place children's interests should receive in family law.

This Part, therefore, responds to three potential concerns about children's interests: the concern for equality between children, the concern for children's financial wellbeing, and the concern for safeguarding children's interests in having at least some relationship with their biological parents. The response offered here does not articulate a detailed proposal, but rather a general line of thinking for future development.

In general, this Article argues that those who do not fall under the definition of parenthood proposed here are not necessarily legal strangers to the pertinent child. While this Article advances a conception of legal parenthood as an all-inclusive status, it does not endorse legal parenthood exclusivity. Legal parenthood should be an "all-or-nothing" status, but it should not be exclusive, and recognition should be given to a rich, complex, and varied family life.

This Article calls for the recognition of "progenitorship" or "birthing parenthood" as a distinct legal category that may impose limited obligations (i.e., support) and provide limited rights (i.e., visitation) to progenitors, with the primary goal of safeguarding children's interests. In keeping with this Article's claim that parenthood should not be disaggregated, the term "par-

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<sup>224</sup> For a purely child-centered analysis of parenthood determination, see James G. Dwyer, *A Child-Centered Approach to Parentage Law*, 14 WM. & MARY BILL RTS. J. 843, 843-50 (2006). For an argument that existing rules for establishing parenthood, and especially paternity, do not conform to children's rights, see James G. Dwyer, *THE RELATIONSHIP RIGHTS OF CHILDREN* 26-40, 254-58 (2006).

ent” should ideally be reserved only for legal parents, and the newly proposed relationship should refer to “progenitors.” Nonetheless, this Article’s influence on the terminology being used is quite limited,<sup>225</sup> and the terminology of “functional parenthood” is widely used to refer to the category of individuals who perform the parental role of care and nurture, though they are not formal legal parents.

Functional parenthood, and as this Article proposes “progenitorship” or “birthing parenthood,” can be recognized for limited purposes and involve the disaggregation of parental obligations and rights to the benefit of children. “Birthing parenthood” as a legal category should be distinguished from legal parentage, with the latter being an “all-or-nothing” status, conferring upon legal parents all the duties, responsibilities, privileges, and rights associated with parenthood. Furthermore, for the benefit of children, a clear and defined hierarchy should be maintained between the different categories of relationship with children, with the legal all-inclusive parenthood maintaining its primacy.<sup>226</sup>

### A. Equality for Children

The first concern that might be raised by a proposal to base parentage determination on relationships and intent, in cases of ART and sex-based reproduction alike, is the fear of regressing to the days of illegitimacy laws, where children born outside of marriage had only one legal parent, that is, their mother.<sup>227</sup> Given the history of illegitimacy, existing laws and dominant scholarship highlight the goal of promoting equality between children born out of wedlock and children born into marriage. As noted by Susan Appleton, this argument evokes “the seductively incontestible [sic] idea that no child should be penalized because of the circumstances of his or her birth.”<sup>228</sup>

Equality between children is undoubtedly an important goal. However, if equality for children means that the law should prohibit children from remaining with only one parent, one might argue that the law should refuse to recognize single motherhood by choice, even in cases of ART (whether artificial insemination or IVF).<sup>229</sup> While some states indeed limit the negation of parental status for sperm donors to cases where the recipient and

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<sup>225</sup> Cf. Jeremy Waldron, *The Role of Rights in Practical Reasoning: “Rights” Versus “Needs”*, 4 J. ETHICS 115, 118–19 (2000) (noting that we only have partial control over the language used in politics, jurisprudence, and the law).

<sup>226</sup> Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 797 (2016).

<sup>227</sup> See, e.g., Appleton, *supra* note 99, at 350–51. A different source of discrimination the law should address is gender-based discrimination, sometimes expressed as gender-bias disinheritance. See, e.g., Shelly Kreiczler-Levy, *Religiously Inspired Gender-Bias Disinheritance—What’s Law Got to Do With It?*, 43 CREIGHTON L. REV. 669, 672 (2010).

<sup>228</sup> Appleton, *supra* note 99, at 376.

<sup>229</sup> *Id.*

intended mother is married, other states do not. The latter states do not consider sperm donors as parents even if the recipient is single, which means that the resulting born child will have only one legal parent.<sup>230</sup> These states, however, consider a man a sperm donor, rather than a “father,” only if he did not provide his semen through sex.<sup>231</sup>

Refusing to recognize single motherhood in cases of coital reproduction while recognizing single mothers in cases of ART, in the states that make such a distinction, suggests that considerations other than children’s interests underlie said policy. Susan Appleton argues that the policy underlying this distinction is grounded in the control of sex.<sup>232</sup> Glenn Cohen raises the possibility of economic considerations, as single women who use ART to procreate tend to be financially better off than single women who conceive through sex.<sup>233</sup> This line of reasoning fits with critical views of family law’s goal of privatizing dependency.<sup>234</sup> Indeed it seems that the potential counterarguments regarding children’s interests, in fact serve to advance the state’s interest in identifying more than one source of private support for children.

Without understating the significance of equality for children, focusing on the number of parents, or specifically on providing each child (born the traditional, sex-based way) with a legal father as well as a mother, does not necessarily advance equality. There is a difference between eradicating children’s stigmatization as “illegitimate” and suggesting that having one legal parent in itself stigmatizes or discriminates against a child. It is also questionable whether taking marital children as the mold and applying the same formal rules to children born outside marriage (having both a legal mother and a legal father, the same custody rules, and similar support obligations) truly serves the interests of children. Perhaps their interests will be better served if family law recognizes the diversity of the parenthood relationship, and designs laws and rules that will best serve children in each family situation.<sup>235</sup>

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<sup>230</sup> *Id.* at 370–71.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 383–84.

<sup>233</sup> I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1128 n.39 (2008).

<sup>234</sup> See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 1–25 (2004); Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL’Y REV. 3, 3–6 (2010).

<sup>235</sup> Cf. Naomi Cahn, *Perfect Substitutes or The Real Thing?*, 52 DUKE L.J. 1077, 1164 (2003) (“Using blood-based, two-parent, marital families as the prototype to which all other families are analogized utterly fails to recognize this complexity of family forms, and it is contrary to the inherent adaptability of the common law.”).

### B. Children's Financial Needs

A primary goal of biology-based paternity rules is to provide children with an additional parent who is under an obligation to pay child support.<sup>236</sup> To suggest that some biological fathers should not be considered as legal fathers and thus be “relieved” of their support obligations might be perceived as potentially denying children financial resources that they need. This line of argument goes beyond a mere theoretical or abstract claim of equality for children and points to an actual harm to children if biology-based paternity is replaced by a parenthood determination based on relationships and intent.

It should be noted that attempts to remedy children's poverty and guarantee children's financial needs through the imposition of child support obligations (mostly on unmarried, poor fathers) have failed thus far.<sup>237</sup> Guaranteeing children an adequate standard of living seems to require a change of perception and the recognition of childrearing as a public responsibility, which requires public funds.

Without challenging the existing perception of financial support for children as a private responsibility, under this Article's proposal, progenitors may still be under some financial obligations toward a child, even if they are not recognized as the child's legal parents.<sup>238</sup> This Part suggests that people might have certain obligations, including some financial obligations, toward children just because they are the “but-for” cause for bringing these children into the world.

Being the “but-for” cause for the birth of a child can impose only a limited financial support obligation to provide for a child's basic needs. This obligation should be different and less expansive from the “child support” obligation that is a parental obligation and imposed on legal parents.<sup>239</sup> This Article suggests establishing a legal framework of “progenitor financial obligation” that is based on and defined by a child's basic needs, rather than a percentage of the progenitor's income, when the child's basic needs require a smaller amount of support.<sup>240</sup> In addition, to maintain the hierarchy between

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<sup>236</sup> See, e.g., Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 157–58 (2011).

<sup>237</sup> *Id.* at 171.

<sup>238</sup> Cf. Dowd, *supra* note 56, at 913 (“I would separate economic responsibility from the privileges and rights of social fatherhood.”); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1818–19 (1993) (“[A child-centered perspective] would view obligation as a corollary of procreation—responsibility assigned to the creator for the consequence of creation.” *Id.* at 1818.).

<sup>239</sup> In some cases, functional parents can also be under an obligation to pay child support. See Laufer-Ukeles & Blecher-Prigat, *supra* note 156, at 475. Imposing such an obligation under defined circumstances does not contradict the argument made in this Article.

<sup>240</sup> This idea has some support in comparative law. Thus, for example, under the Hanafi school of Sharia (Muslim Law), a father's child support obligation is fixed and is

legal parents and progenitors, as a general rule progenitors should pay child support only if the legal parents lack sufficient financial resources to meet the child's needs, as well as their own.

This "progenitor financial obligation" in itself should not give rise to nor support any claim of parental rights or status.<sup>241</sup> Only when a progenitor is recognized as a legal parent under this Article's proposal will the more expansive parental child support obligations follow, as well as all other parental obligations and rights.

### C. *Having Relationships with Biological Progenitors*

A different concern is raised by data indicating that children benefit from having a relationship with their biological parents, and especially that children born to unmarried parents benefit from having a relationship with their biological fathers, even if this relationship is infrequent and amounts to mere involvement. The recent influential "Fragile Families" study by McLanahan and Garfinkel indicates that a father's involvement in the lives of children born outside marriage helps to promote their emotional and financial wellbeing.<sup>242</sup>

Based on that study's findings, Clare Huntington formulates recommendations regarding the desirable laws of parenthood of children born out of wedlock.<sup>243</sup> Huntington argues that the law should aim to strengthen the relationship between biological fathers and their children born out of wedlock.<sup>244</sup>

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not dependent upon the father's income. This fixed obligation is meant to secure a child's basic needs. *See, e.g.*, Moussa Abou Ramadan, *Child Support for Muslim Minors in Family Courts*, in *PERSONAL STATUS AND GENDER: PALESTINIAN WOMEN IN ISRAEL* 225, 232–35 (2017). In Israel, child support is governed by the religious laws of the relevant parties, which for Muslims is the Sharia law, and more specifically the abovementioned Hanafi school. *Id.* at 228. This is so, even when the case is brought before the civil family court. Many Israeli family courts indeed grant only such basic support payment for Muslim children. *See, e.g.*, FamC (Hadera) 1410/06 *V.Z.M. v. M.M.H.* (Jul. 8, 2007), Nevo Legal Database (Isr.); FamC (Be'er Sheva) 32288/04/10 *John Does v. John Doe*, (Nov. 19, 2012) Nevo Legal Database (Isr.). One Israeli family court has held that in a case that involved deceit or misrepresentation concerning the use of contraception, and where the mother concealed the pregnancy and birth from the biological father, the father should pay only minimal child support to guarantee the child's basic needs. The judge held this should be the general rule in such cases, and interpreted the Jewish law that governed that case accordingly. *See* FamC 35431-06-11 *R.G. v. N.H.* (Oct. 31, 2013) Nevo Legal Database (Isr.).

<sup>241</sup> Even in cases concerning parental status and the legal obligations and rights that are associated with it, I reject a "quid pro quo" approach to parental rights: that is, an approach that connects parental rights with parental duties. *See, e.g.*, Bartlett, *supra* note 148, at 297–98; James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1435–36 (1994). Such an approach conceptualizes children as property.

<sup>242</sup> Sara S. McLanahan & Irwin Garfinkel, *Fragile Families: Debates, Facts, and Solutions*, in *MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES* 142, 144 (Marsha Garrison & Elizabeth S. Scott eds., 2012).

<sup>243</sup> Huntington, *supra* note 3, at 223–36.

<sup>244</sup> *Id.* at 223.



To this end, she argues that when the child is born, both biological parents should be considered legal co-parents, and as a default legal rule, both should be assigned legal and physical custody (except for cases with a history of domestic violence and abuse).<sup>245</sup> This would eliminate fathers' need to negotiate custody with mothers or request visitation from courts. Huntington further suggests reducing biological fathers' child support obligations on account of time spent with children.<sup>246</sup> Huntington's goal is to facilitate a better bond between fathers and children, emphasizing the need for co-parenting between unmarried parents and making parenting less of a struggle and more engaging for unwed fathers.

Beyond the general complexity involved in attempting to translate findings of social science research into concrete legal recommendations,<sup>247</sup> Huntington's analysis raises several concerns. First, her proposals perpetuate the view of mothers as draftees and fathers as volunteers.<sup>248</sup> Huntington is undoubtedly right in criticizing and rejecting the existing legal approach, which considers financial contribution to be a father's most important contribution to his children's lives.<sup>249</sup> Nancy Dowd, as well as others, have also called upon the law to go beyond economic fatherhood and redefine fatherhood under the law.<sup>250</sup> However, while looking to facilitate a relationship between fathers and children and emphasizing the formers' caretaking role, Huntington does not suggest that biological fathers should be under an *obligation to care*, let alone to provide day-to-day care, or even have an obligation to be involved in their biological children's lives. Rather, they merely should be

<sup>245</sup> *Id.* at 227.

<sup>246</sup> *Id.* at 233–36.

<sup>247</sup> See generally David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989) (addressing criticisms of the scientific value of social science research in the law); see also Martha L. Fineman, *Custody Determination at Divorce: The Limits of Social Science Research and the Fallacy of the Liberal Ideology of Equality*, 3 CAN. J. WOMEN & L. 88, 91 (1989) (assessing “the use of social science data both to bolster the trend toward an equality model and to resolve individual cases in the new degendered arena”); Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107 (describing misuse of social science data to create custody rules that govern divorce due to generalizations or methodological problems); Christoph Engel, *The Difficult Reception of Rigorous Descriptive Social Science in the Law*, PREPRINTS OF THE MAX PLANCK INSTITUTE FOR RESEARCH ON COLLECTIVE GOODS, Bonn 2006/1 (Jan. 2006), <http://ssrn.com/abstract=875797> [<https://perma.cc/67LN-U9M9>] (examining problems applying social sciences to the legal profession).

<sup>248</sup> See Karen Czapsansky, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415–19 (1991).

<sup>249</sup> See Huntington, *supra* note 3, at 184.

<sup>250</sup> See Dowd, *supra* note 110, at 132–54; see also Michael E. Lamb, *How Do Fathers Influence Children's Development? Let Me Count the Ways*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 1, 3–4 (Michael E. Lamb ed., 2010); Karin Carmit Yefet, *Feminism and Hyper-Masculinity in Israel: A Case Study in Deconstructing Legal Fatherhood*, 27 YALE J.L. & FEMINISM 47, 51 (2015).

enabled to be “involved” in their children’s lives.<sup>251</sup> Such involvement, which is far from providing continuous daily care, would reward fathers with a deduction in their child support duties.<sup>252</sup>

My concern with this aspect of the proposal is less with the financial interests of children that might be harmed as a result.<sup>253</sup> Instead, a greater concern is the perception that male progenitors should be rewarded for being involved in children’s lives, while female progenitors’ assumption of the tedious day-to-day care is taken as given. Huntington’s proposal awards both a man and a woman who conceive together the legal (gender-neutral) title of a “parent,” while creating different rights and obligations for each. The female legal parent is expected to provide the day-to-day care and financial support, but receives no greater recognition of her role under the law. The male legal parent has the right to be involved, with no obligation to do so, let alone to provide day-to-day care, and for such involvement is rewarded with a decrease in financial obligations toward the child. This distinct treatment of mothers and fathers was sharply criticized by Karen Czapanskiy twenty-five years ago:

[F]amily law actively promotes a gendered allocation of household labor. Fathers are given support and reinforcement for being volunteer parents, people whose duties toward their children are limited, but whose autonomy about parenting is broadly protected. Mothers are defined as draftees, people whose duties toward their children are extensive, but whose autonomy about parenting receives little protection.<sup>254</sup>

A second (and related) problematic aspect of Huntington’s proposal is that it has the potential to undermine the child’s relationship with the mother as a primary caretaker. Under Huntington’s analysis, mothers remain the primary caretakers and are under an obligation to care for their children. However, this does not provide them with greater autonomy in their parental role. Huntington is worried that greater autonomy will enable mothers to be gatekeepers of fathers’ relationships with their children.<sup>255</sup> While this concern might be valid, Huntington’s suggestion that mothers and fathers will be equal legal and physical custodians might require mothers to bargain cus-

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<sup>251</sup> Merle Weiner makes the opposite argument that it is the biological fathers’ duty to care for their children as much it is the mothers’. Failure to perform the caretaking duties will require the father to reimburse the mother for assuming the larger share of caretaking. WEINER, *supra* note 3, at 411–51. As I have argued in my earlier work, all parents alike are under a legal duty to either actively care for their children, or reimburse the other parent (when the child has more than one parent) for assuming a greater share of the daily caretaking. Nonetheless, I differ on Merle’s definition of a legal father, and particularly on seeing every male progenitor who conceives through sex as a legal father who is under such a duty to either care or pay.

<sup>252</sup> See Huntington, *supra* note 3, at 233–36.

<sup>253</sup> For this criticism, see, e.g., Laufer-Ukeles, *supra* note 226, at 795–806.

<sup>254</sup> Czapanskiy, *supra* note 248, at 1415–16.

<sup>255</sup> Huntington, *supra* note 3, at 171–72.

tody arrangements with fathers and undermine the stability of the relationship between the child and the primary caretaker, the mother. Numerous studies indicate that while the relationship with a secondary parent is important to the child, the most important relationship for the child is the relationship with the primary caretaker.<sup>256</sup>

Children's interest in having a relationship with their biological parents can be recognized and protected without undermining the relationship the child has with the primary caretaker, diluting the meaning of parenthood, or perpetuating the draftee-mother-volunteer-father distinction.<sup>257</sup> Protecting children's relationship with their biological progenitors does not require bestowing the legal status of parent upon biological progenitors, even in cases where the actual meaning of this status is thin and does not involve a duty of meaningful caretaking, relationship, or financial support. Rather, male progenitors can make a claim for visitation with the child as nonparents.

We are no longer in an era of parental exclusivity, where only legal parents have standing to claim rights concerning the child and nonparents are cast as legal strangers under the law.<sup>258</sup> The idea that visitation can be awarded to nonparents is commonly accepted nowadays, though state laws differ on the terms under which nonparents can make a claim for visitation.<sup>259</sup> This Article suggests that progenitors should be able to make a claim for visitation as nonparents similarly to grandparents or other extended kin. In this respect, it should be noted that nonparents are awarded visitation only if visitation serves the child's interests and due weight is given to the legal parents' position on the issue, in accordance to the rule of *Troxel v. Granville*.<sup>260</sup> The same rule should apply to progenitors. When considering a progenitor's claim for visitation, special weight should be given to the legal parent's position regarding such a claim. Indeed, as noted by Pamela Laufer-Ukeles, clearly defined and hierarchical categories of relationships with children, recognized under the law, will work to the benefit of children.<sup>261</sup>

<sup>256</sup> See, e.g., Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245, 247 (1996); Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 311–12 (1996).

<sup>257</sup> See Laufer-Ukeles, *supra* note 226, at 797–99.

<sup>258</sup> For an article that urges states to develop options that do not presume the exclusivity of parenthood, see 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, 883 (1984).

<sup>259</sup> Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. & POL'Y 1, 8 (2009).

<sup>260</sup> 530 U.S. 57, 65 (2000).

<sup>261</sup> See Laufer-Ukeles, *supra* note 226, at 797–801. Emphasizing the primacy of legal parenthood responds to potential concerns about the “progenitorship” or “birthing parenthood” category working to the detriment of some parents, and especially same-sex couples or single parents. If biological parents may make a claim for visitation based on their genetic tie to a child, single parents and same-sex couples who use ART to conceive may be subject to such claims in ways that heterosexual couples are usually not. Main-

## VII. THE ELEPHANT IN THIS ARTICLE: GENDER

The issue of gender hovers in the background of the debates over biology-based paternity and the obligations and rights that should follow at-birth parentage determination. Although gender-related concerns have been alluded to in the previous Parts of this Article, the discussions thus far have not addressed them directly. This last Part tackles the issue of gender, with a particular focus on two issues in which gender seems to play a significant role. The first is reproductive choice, and the second is the power dynamic between mothers and fathers regarding the parenting of joint children. In addressing these issues, class-related concerns will be addressed as well.

A. *Reproductive Autonomy and Choice*

The debate over biology-based parenthood, and more specifically paternity, is shaped by conflicting views over the respective reproductive choices that men and women have. On one side of the debate is the view that there is an asymmetry between men and women in matters of reproductive choice, in particular regarding the decision whether to take a pregnancy to term or abort it. This view emphasizes existing law, under which a woman has no obligation to inform the man with whom she conceived about the pregnancy, regardless of the nature of their relationship.<sup>262</sup> Men do not have legal standing regarding a decision to continue a pregnancy or abort, so a woman may make such decisions irrespective of the views of the man with whom she conceived.

On the other side of the debate is the view that women and only women become pregnant, and this “fundamental gender imbalance” challenges any argument regarding asymmetry in reproductive choice to the benefit of women.<sup>263</sup> As noted by Motro, providing women with legal reproductive choice does not correct the imbalance, since in practice effective contraception and abortion are inaccessible to many women, and even when accessible they involve significant physical and emotional risk.<sup>264</sup>

Nonetheless, it is argued that the asymmetry persists if the woman decides to carry the pregnancy to term and a child is born, since it is once again the woman’s choice (at least as a practical matter) whether to assume paren-

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taining a hierarchy, and the primacy of legal parents provides safeguards to same-sex and single parents. It also exposes these parents to similar claims as heterosexual married parents, given that extended kin, and nonparent caregivers are a part of most children and families lives.

<sup>262</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 898 (1992); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62–72 (1976); see also Motro, *Price of Pleasure*, *supra* note 129, at 944–45 (“A woman may decide to undergo or forgo an abortion irrespective of her lover’s preferences, and with no obligation to communicate with him regardless of the nature of their relationship, including if they are married.” *Id.* at 944.)

<sup>263</sup> *Id.* at 921.

<sup>264</sup> *Id.* at 917–19, 933–37.

tal status or place the child for adoption. Despite developments in the rights of unwed biological fathers, women may still be able to conceal a pregnancy and place a child for adoption without involving or notifying the man with whom they conceived.<sup>265</sup> Women have no obligation to notify the man with whom they conceived about the birth.<sup>266</sup> Women can also raise a child without the knowledge of the man with whom they conceived,<sup>267</sup> or can impose parenthood upon him. Theoretically, men can also impose parenthood on women after a child is born by objecting to adoption and assuming parental status. However, for men to do so, they need to be aware of the pregnancy and the birth, and “must demonstrate ‘a willingness . . . to assume full custody of the child—not merely to block adoption by others.’”<sup>268</sup>

Referring to this state of affairs, Baker has argued that “we force fatherhood on men in a way we do not force motherhood on women.”<sup>269</sup> Therefore, she has argued against basing legal paternity on biology.<sup>270</sup> Similarly, some men’s rights advocates and activists argue for “financial abortion.”<sup>271</sup> The idea underlying such proposals is that while a man’s right not to be a genetic parent is either waived by engaging in coital sex or trumped by

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<sup>265</sup> Following the Supreme Court’s recognition of the due process rights of unmarried male progenitors as legal fathers, many states have implemented putative father registry statutes with provisions making it the responsibility of the male progenitor to know and protect his status and rights as a father. See Appleton, *supra* note 174, at 289. The Supreme Court upheld the constitutionality of the putative father registry schemes in *Lehr v. Robertson*, 463 U.S. 248 (1983). See *id.* at 263–64. These schemes are likely motivated by the state’s interest in minimizing its own liability for supporting children rather than by fathers’ right to know. See Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 1070 (1995).

<sup>266</sup> Motro, *supra* note 129, at 944–45. Indeed, Motro considers either a default rule requiring women to communicate with the man with whom they conceived about the pregnancy so long as the sex took place “in the context of a good-faith nonviolent relationship” or a more limited notice system modeled on the registry system. *Id.* at 958–59.

<sup>267</sup> Poor women may be required to reveal the identity of the man with whom they conceived as a precondition for receiving public benefits. ANN MARIE SMITH, WELFARE REFORM AND SEXUAL REGULATION 3 (2007). Again, however, this requirement is not grounded in the interests of the male progenitor, but rather in the states’ policy of privatizing dependency. See Estin, *supra* note 265, at 1070; Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2205 (1995); Motro, *supra* note 129, at 945–46.

<sup>268</sup> Adoption of Michael H., 898 P.2d 891, 897 (Cal. 1995).

<sup>269</sup> Baker, *Bargaining or Biology?*, *supra* note 2, at 19.

<sup>270</sup> *Id.* at 69.

<sup>271</sup> Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women’s Sexuality*, 56 EMORY L.J. 1235, 1245 (2007); see also Lisa Lucile Owens, *Coerced Parenthood as Family Policy: Feminism, the Moral Agency of Women, and Men’s “Right to Choose”*, 5 ALA. C.R. & C.L. L. REV. 1, 32–33 (2013) (“In order for women to have meaningful choices, men must also be given choices in becoming a parent.”); Melanie G. McCulley, *The Male Abortion: The Putative Father’s Right to Terminate His Interests In and Obligations to the Unborn Child*, 7 J.L. & POL’Y 1, 39 (1998) (arguing for legislation allowing for a putative father to make the choice to financially support his child instead of imposing the obligation). For a case raising the sex discrimination argument in this context, see, e.g., *Dubay v. Wells*, 506 F.3d 422, 427–29 (6th Cir. 2007).

the woman's right to bodily integrity, this should not necessarily be the case regarding his right not to be a legal father.<sup>272</sup>

While some scholars emphasize the forced imposition of paternity on men, other scholars emphasize how co-parenthood is forced upon women, and more specifically lower-class women. Scholars such as Melanie Jacobs, Karen Czapanskiy, and Daniel Hatcher have argued that only middle-class, educated, and financially-secure women can choose to become single mothers.<sup>273</sup> Lower-class women must assist the state in establishing paternity for their children, or they might risk losing their benefits.<sup>274</sup> Czapanskiy and Jacobs therefore call for the recognition of the right to single parenthood for all women. Czapanskiy proposes recognizing only birth mothers as legal parents at birth, relying on pregnancy and birth for determining parentage.<sup>275</sup> Jacobs, on the other hand, argues that poor women's right to become single legal parents can best be achieved by making intent the basis for parentage determination.<sup>276</sup>

According to Jacobs, parentage determination based on intent in cases of sex-based reproduction will be:

more accepting of single parenthood and will not distinguish between wealthier and poorer single women, nor will different rules apply based on whether a mother received governmental financial assistance. Applying intentional parenthood to all parentage determinations removes class and income distinctions in parentage establishment and gives all women equal access to procreative autonomy, not merely those who can afford it.<sup>277</sup>

Jacobs' suggestion of relying mainly on the concept of intent to establish sole parentage of poor, single birth mothers who conceived through sex raises several concerns. First of all, suggesting that lower-class women

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<sup>272</sup> For the distinction between the right not to be a legal parent and the right not to be a biological (that is, genetic or gestational) parent, see Cohen, *supra* note 233, at 1119. In discussing the right not to be a genetic parent, Cohen draws attention to what he defines as the harm of attributional parenthood, that is, "a harm that stems from the social assignment of the status of parent to the provider of genetic material that persists notwithstanding the fact that the legal system has declared him or her a nonparent." *Id.* at 1115–16. Interestingly, in articulating the harm of attributional parenthood, Cohen addresses only the vertical genetic connection between a parent and child. However, the birth of a child also creates a genetic link to the other parent. Sometimes it is this genetic link (through the child) to the other genetic parents that constitutes the greater harm. This is especially the case if negative feelings exist toward the other genetic parent.

<sup>273</sup> Karen Syma Czapanskiy, To Protect and Defend: Assigning Parental Rights When Parents Are Living in Poverty, 14 *WM. & MARY BILL RTS. JZS.* 943, 943, 949–51 (2006); Daniel L. Hatcher, Don't Forget Dad: Addressing Women's Poverty by Rethinking Forced and Outdated Child Support Policies, 20 *AM. U. J. GENDER, SOC. POL'Y & L.* 775, 782–83 (2012); Jacobs, *supra* note 96, at 468–69, 486–90.

<sup>274</sup> Jacobs, *supra* note 96, at 486–88.

<sup>275</sup> Czapanskiy, *supra* note 273, at 946.

<sup>276</sup> Jacobs, *supra* note 96, at 486–90.

<sup>277</sup> *Id.* at 489.

“choose” single motherhood in a manner similar to wealthy, middle-class, and educated women ignores the reality of limited access to effective contraception and abortion and the lack of a real reproductive choice for poor women.<sup>278</sup> Second, characterizing single motherhood for lower-income women as intended and chosen might provide a justification for economically penalizing these women, as can be inferred from Kricheli-Katz’s research, discussed above.<sup>279</sup> Lastly, while Jacobs allegedly relies on intent, she considers only the birth mother’s intent as relevant, and disregards the biological father’s intent (or rather assumes that all biological fathers who conceived unintentionally do not want to assume parental responsibility upon learning of the pregnancy).<sup>280</sup>

This proposal could have a detrimental effect on lower-income men’s ability to be recognized as legal fathers. Working-class men are already excluded from the marriage market, as thoughtfully explained by June Carbone and Naomi Cahn.<sup>281</sup> In their thought-provoking book, *Marriage Markets*, Carbone and Cahn explain how the postindustrial economy leaves working-class men under- or unemployed and therefore unattractive as marriage partners to their working-class and poor female peers.<sup>282</sup> Consequently, working-class men cannot acquire parentage based on marital status. Recognizing the right of unmarried lower-income women to become legal single mothers when they conceive through good-faith consensual sex suggests that lower-income men might be excluded from parenthood altogether.<sup>283</sup>

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<sup>278</sup> See *supra* text accompanying note 264.

<sup>279</sup> See *supra* text accompany notes 143–147.

<sup>280</sup> Such an assumption is not supported by existing research. See, e.g., KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD AND THE INNER CITY* 62–64, 68–69 (2013).

<sup>281</sup> CARBONE & CAHN, *supra* note 112, at 4.

<sup>282</sup> *Id.*

<sup>283</sup> Czapan-skiy’s proposal avoids this outcome, as she recognizes that in some cases biological fathers can establish their co-parenthood over the mother’s objection. Czapan-skiy, *supra* note 273, at 946. Interestingly, although motivated mainly by the wish to avoid forced paternity being compelled upon men, rather than by recognizing poor women’s right to single parenthood, Baker’s proposed framework for determining parentage leads to the possible exclusion of men from parenthood as well. Baker argues that upon a child’s birth, the law should recognize only the gestational mother’s parental status, and bestow her with all initial rights and obligations regarding the child. Baker, *Bargaining or Biology?*, *supra* note 2, at 46–47. Gestational labor and investment, rather than genetics, is the basis for initial parentage entitlement. *Id.* According to Baker, the gestational mother has the ability to contract away parental rights and obligations as she chooses. If the gestational mother has agreed to share her parental rights and responsibilities, “the person with whom she has so agreed is the other parent. If she has not previously agreed to share, she is the sole parent unless and until she contracts with someone else.” *Id.* at 52. Under Baker’s analysis, a biological father who wishes to assume a full parental role but did not contract ex ante with the mother will be denied parental status. See *id.* at 47, 53–54. This assertion is especially relevant for cases of unplanned pregnancy. Yet Baker’s proposal swings from a justified criticism of the meaning of forced parenthood to denying parenthood to men who did not contract prior to conception with the mother even in cases where, upon learning about the pregnancy, they wholeheartedly wish to assume a parental role.

Addressing the individualistic debate over women's versus men's reproductive choice or their respective rights to become or not become legal parents is not the primary goal of this Article. Nonetheless, it suggests that the framework it offers provides a better balance of the sometimes-conflicting interests of men and women in the context of these issues. By taking intent as a consideration in determining legal parenthood in cases of sex-based reproduction as well as conception through ART, this Article responds to concerns regarding the forced imposition of (mainly financial) fatherhood on men, as well as the interests of lower-income women to be single legal parents. Nevertheless, this Article emphasizes that intent cannot be the primary factor in making parentage determination, especially if understood as an individual's state of mind taken in isolation.<sup>284</sup> Long-term committed relationships may justify the imposition of paternity on men, even if the pregnancy was unplanned, because the reality of limited reproductive choice makes it unfair for women to shoulder the responsibility of parenthood alone. The same relationship should also prevent the birth mother from excluding the biological father from legal parenthood.

### B. Beyond Either "Gatekeepers" or "Suckers"

In many respects, it seems that the gender-centered debate is shaped not only by the theoretical definition of parentage, but also by the legal implications that follow parentage determination. Those who criticize the forced imposition of parenthood on men focus on the financial obligations that come with parentage determination.<sup>285</sup> Those who direct their criticism at depriving lower-income women of the autonomy to parent by themselves, and their being forced to co-parent, focus on parentage determination as providing an entitlement.<sup>286</sup> In fact, as noted above, there is hardly ever any abstract, or "naked" parentage determination, but rather a parentage determination for the purpose of imposing obligations or bestowing rights.<sup>287</sup>

This obligations/entitlements aspect of the gender-based debates also reflects conflicting views regarding the power dynamics between fathers and mothers with respect to parenting their joint children. Some scholars, like Clare Huntington, view mothers as gatekeepers controlling fathers' access to and relationship with their joint children.<sup>288</sup> Huntington therefore focuses on

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<sup>284</sup> In other contexts, scholars have also emphasized that individual intent or consent are not the only grounds for imposing legal interpersonal obligations. See, e.g., Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 826–28 (2005); Weiner, *supra* note 33, at 172.

<sup>285</sup> See *supra* note 33.

<sup>286</sup> See, e.g., Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 474–77 (2017).

<sup>287</sup> Cf. I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1146–48 (2008) (investigating whether there is a right not to be a genetic parent, completely unbundled from any of the other legal implications of parenthood).

<sup>288</sup> Huntington, *supra* note 3, at 171–72, 194–95.



formulating rules of “equal access,” providing fathers with physical and legal custody rights to facilitate their relationship with their children.<sup>289</sup> Merle Weiner, who represents a different view, describes some fathers as moochers or freeloaders who take advantage of mothers’ care-work.<sup>290</sup> Therefore, she calls upon us to recognize fathers’ legal obligation to either assume a fair share of childrearing or financially reimburse mothers for the disproportionate share of care-work they assume.<sup>291</sup>

This debate seems to shift the discussion from the definition of parenthood and parentage determination to the rights and obligations that legal parenthood involves, in particular between joint parents. However, as explained throughout this Article, the issues are inseparably connected, as can be discerned in both Huntington’s and Weiner’s works, even if not explicitly. As both have a special interest in unwed parents, parentage determination at birth is an integral part of their frameworks. Both call for the conferral of the formal legal status of “a parent” on each unmarried biological progenitor: Weiner in order to impose on each progenitor the obligations of care-work, and Huntington in order to confer upon each equal physical and legal custody rights. Indeed, for Huntington, designating biological fathers as parents and recognizing their right to custody at birth are necessary to overcome maternal gatekeeping.<sup>292</sup> For Weiner, assigning legal paternity to biological fathers regardless of the circumstances of conception and birth (even in cases of fraud regarding fertility or the use of contraception) is necessary to avoid male freeloading of maternal care-work.<sup>293</sup>

The “all-or-nothing” framework this Article advances regarding parentage determination at birth responds to concerns on both sides of the debate. It suggests that one cannot be accorded parental entitlements alone or be subject solely to parental (mostly financial) obligations. Particularly regarding the concerns raised by Huntington and Weiner, this Article recognizes that sex-based conception in the context of a good-faith relationship should provide each biological parent with standing to claim legal parenthood. It would therefore support legal rules that facilitate each biological parent’s ability to assume an active parental role and develop a relationship with the child.<sup>294</sup> At the same time, parenthood should be primarily about enduring commitment and obligations.<sup>295</sup> Assumption of legal parental

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<sup>289</sup> *Id.* at 227–29.

<sup>290</sup> Weiner, *supra* note 33, at 140–42.

<sup>291</sup> *See id.* at 136–42.

<sup>292</sup> Huntington, *supra* note 3, at 226–29.

<sup>293</sup> Weiner, *supra* note 33, at 173–75.

<sup>294</sup> Texas, for example, imposes an obligation on mothers to enable the biological father to develop a relationship with the child. June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1220. Carbone and Cahn argue that such a rule incentivizes mothers to lie about paternity. *Id.* However, such a rule has a valuable expressive power and it provides biological fathers who seek to assume a parental status and role with the legal tools to do so.

<sup>295</sup> Bartlett, *supra* note 148, at 294–95.

status should therefore involve an obligation (and not merely a right) to provide day-to-day care.<sup>296</sup> This obligation is not only toward the child, but also toward the other parent when the child has more than one parent.

#### CONCLUSION

This Article has offered a novel comprehensive scheme that addresses both the meaning of legal parenthood and the way it should be determined. Legal parenthood, as envisioned in this Article, is an inclusive, “all-or-nothing,” and indissoluble relationship, so that conferral of legal parenthood involves all the rights, privileges and duties regarding the parent’s children. The Article has further argued that the question of who should be considered a legal parent should be shaped by the scope and nature of the rights and obligations that comprise this status. Thus, first-order parentage determination requires an inquiry regarding the justifications for conferring the overall rights and duties of parenthood.

This Article has suggested that the interplay between the factors of biology, intent, and relationships provides the most adequate basis for understanding parentage determination. While each of these factors cannot provide a sufficient basis for parentage determination standing on its own, each embodies desirable values that contributes to the meaning of parenthood. Maintaining biology as a factor in parentage determination shows respect to existing expectations about parentage. The concept of intent as an aspirational goal embodies desirable and positive values by focusing on those who willingly and lovingly undertake parenthood. This Article’s primary goal has been to introduce the relationship between the conceiving adults as an additional key factor in making parentage determination. Adding relationships as a factor emphasizes reliance, equality, and commitments and mitigates the potential over individualistic implications of intent and choice. In particular, understanding parenthood not only as a vertical but also a horizontal legal connection between joint parents indicates that the relationship between potential joint parents should be a significant factor.

The framework this Article offers also promotes gender, sexual orientation, and class equality in the way parentage is determined. It rejects the existing legal approach, which takes the manner of conception as a central differentiating consideration, and applies different rules for parentage determination in the context of, on the one hand, sex-based reproduction and, on the other, conception through ART. The primary reason for rejecting this distinction emphasizes that the manner of conception is just one aspect of

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<sup>296</sup> It is useful indeed to think of parental rights in this regard with reference to Joel Feinberg’s term “mandatory rights,” that is, as a right to fulfill an obligation. Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 104 (1978). The right element implies that others are under a duty not to interfere and to enable the right holder to fulfill the relevant obligation.

the parties' relationship. However, this Article's approach also advances equality between individuals who must use ART in order to conceive (for instance, same-sex couples) and individuals who can conceive through sex. It also advances equality between those who have the means to use ART and those who do not.

This Article repudiates bionormative and heteronormative models of parenthood, which place the heterosexual married relationship at the center of parentage laws and endeavor to recognize two parents, a mother and a father, for each child. This Article's attentiveness to the relationship between the conceiving individuals emphasizes that what should matter is the nature of the relationship and not the formal tie between the prospective parents. In so doing, this Article advances equality between couples, whether married or unmarried, different or same-sex, who wish to become parents together. This Article also values relationships based on commitment, dependency, and care, rather than on a romantic-sexual bond. It calls to recognize the value of diverse parenthood relationships, including the joint parenthood relationship that platonic friends or extended kin may form. Lastly, this article departs from the ideal of bi-parenting. It allows for the recognition of multiple-parenthood, provided that all legal parents are recognized as all-inclusive parents, and expands the possibility of recognizing single parenthood. This Article's wide-ranging analysis offers a vision that can better serve the interests of children and adults alike.

