

ARTICLES

WHEN A PARENT IS NOT APPARENT

Merle H. Weiner

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2019.629
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-NonCommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program and is cosponsored by the University of Pittsburgh Press.

ARTICLES

WHEN A PARENT IS NOT APPARENT

Merle H. Weiner*

Scholars have debated for a long time the rules by which the law should confer parental status for purposes of establishing parent-child relationships. Recently, the discussion has expanded to consider the appropriate definition of parenthood for purposes of triggering inter se obligations between a child's parents. Such obligations would be imposed as part of a new co-parent, or "parent-partner," status.

This Article contends that current parentage law works well for purposes of a new parent-partner status. For most children, parenthood is undisputed. For these families, the key question is not who the parents are, but what obligations should be triggered between them because they are parents of the same child. In fact, for most families, the existing law of parentage advances well the objectives of the parent-partner status.

Nonetheless, parentage law is sometimes underinclusive for purposes of a parent-partner status. To address the gaps, particularly for LGBTQ families, this Article recommends the adoption of the Uniform Parentage Act 2017 ("UPA 2017") instead of some alternatives. This Article also recommends shortening the two-year cohabitation requirement in the UPA 2017's "holding out" presumption so that

* Philip H. Knight Professor of Law, University of Oregon School of Law. This Article has benefited from the feedback of Ayelet Blecher-Prigat, Naomi Cahn, Dara Purvis, Leslie Harris, Courtney Joslin, Clare Huntington, Pamela Laufer-Ukeles, Tom Lininger, and Douglas NeJaime. It also benefited from the feedback of those participating in the workshop regarding this topic at the International Society of Family Law in Amsterdam in July 2017. I sincerely appreciate the support of the Office of the Vice President for Research and Innovation, University of Oregon, as well as the hard work from my research assistants, Breanna Geiger, Mackenzie Klapp, Ben Malloy, Anna Titus, Kate Dixon, Amanda Reilly, and Jordan Richeson.

some unmarried couples, who lack legal parenthood for both parties but want their parent-partnership to work, can benefit from the parent-partner status.

Finally, this Article considers and rejects the idea that current parentage law is overinclusive for purposes of a parent-partner status. Nonetheless, if such a problem exists, it suggests that the best solution would not be to redefine parenthood. Rather, reformers should adjust the parent-partner obligations themselves or allow parent-partners to opt out of the status by mutual agreement. These alternatives should address the critics' concerns without detracting from the advantages of a broadly applicable parent-partner status.

Table of Contents

Introduction	537
I. Parentage Questions in a New Context.....	541
A. Parentage for Purposes of the Horizontal Axis	541
B. For Most People, the Existing Parentage Regime Works Well as a Trigger for the Parent-Partner Status.....	542
1. The Parentage Regime Described.....	542
2. The Existing Parentage Regime Is an Appropriate Trigger for Most People	551
C. The Existing Parentage Regime Furthers the Goals of the Parent- Partner Status	554
1. Deliberate Reproduction.....	555
2. Encouraging Teamwork	561
3. Deterring Unjust Behavior.....	567
II. The Underinclusion Problem.....	568
A. LGBTQ Families and Friend Families.....	568
B. Comparing Solutions.....	569
1. Simplicity	571
2. Stability	574
3. Familiarity	578
C. Multiparentalism	579
III. The Overinclusion Problem.....	580
A. Unmarried and Uncommitted.....	580
1. Is There a Problem for Women?.....	581
a. Flipping the Problem.....	586
b. A Potential Solution for the Underinclusion	588
c. The Parent-Partner Status as Gap Filler	592
2. Is There a Problem for Men?	594
B. The Disadvantages of Redefining Parenthood to Address Overinclusion	598

C. Addressing Overinclusion Without Redefining Parenthood	605
1. Fine-Tuning the Obligations	605
2. Dissolving the Parent-Partner Status When Both Parties Agree	607
Conclusion.....	610

INTRODUCTION

In *A Parent-Partner Status for American Family Law*, I argued that society should impose legal obligations between people who have a child in common.¹ I posited that such a status would create a social role that could help guide parents' behavior in ways that would be better for their children and fairer for the adults.² The book explored various legal obligations that might automatically arise upon legal parentage but conceded that the list of obligations was only exploratory.³

The book has prompted an interesting conversation about the definition of parenthood for purposes of such a parent-partner status, although the book itself did not address the topic.⁴ Most notably, Professor Ayelet Blecher-Prigat, who generally

¹ MERLE H. WEINER, *A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW* 2 (2015).

² *Id.* at 224–34, 184–219, 263–71.

³ *Id.* at 319–462. For reviews of the book, please see generally *What Others are Saying About the Book (and the Idea)*, PLACE TO LEARN ABOUT PARENT-PARTNERS, <https://www.parent-partner.com/others-responses.html> (last visited May 17, 2017) (referencing reviews or comments by Helen Alvaré, Richard Banks, Brian Bix, Naomi Cahn, June Carbone, Frances E. Chapman, Peggy Cooper Davis, Greg Forster, Leigh Goodmark, Don Gordon, John Gottman, Harvard Law Review, Clare Huntington, Vicki Larson, Jane Murphy, Dara E. Purvis, Isabel Sawhill, Stacy Steinberg, and Laura VanderDrift).

⁴ The book hardly addressed who is a “parent” for purposes of triggering the parent-partner obligations, in large part because the book’s length made it unwise to tackle another issue. Instead, it assumed the existing law of parentage would trigger the obligations. WEINER, *supra* note 1, at 142–43. However, I noted that I did not necessarily agree with the way the law presently defines parenthood, nor did I think the law should remain unchanged. *Id.*

Others have similarly side-stepped the issue when proposing new co-parental regimes. See, e.g., Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 226 n.315 (2015) (proposing a co-parent status and stating, without addressing the definition of parenthood further, “[t]he coparent designation would follow the parentage designation, and thus the sometimes-contested question of *who* is a parent would be determined before the rights and obligations of co-parentage status attach”). Cf. June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1295 (2005) (tackling the topic of who is a parent after confessing that she did not address the legal definition of parenthood in her book, *From Partners to Parents: The Second Revolution in Family Law*, because “[she] was so confident that parenthood was a settled category”).

agrees that co-parents⁵ should have legal obligations to each other,⁶ recently argued in the *Harvard Journal of Law and Gender* that society should change who is a “parent” if it is to impose obligations between parents.⁷ Professor Frederick Swennen also sees merit in “introducing a parent status between co-parents” but argued that “the first, necessary step” is to alter access to legal parenthood.⁸

These scholars’ reactions reflect their concern that the existing law of parenthood would obligate the wrong people to each other if there were a parent-partner status. In fact, two types of misalignment are possible. On the one hand, the current definitions of parenthood may fail to impose the parent-partner status on some couples who ought to have it, and therefore be “underinclusive.” On the other hand, the current law of parenthood may impose parent-partner obligations on “parents” who should not have obligations to each other, and therefore be “overinclusive.”

This Article addresses these two possibilities. I argue that current law is generally adequate, and in fact appropriate, for purposes of developing a parent-partner status. In the first part, I observe that parentage is known and undisputed in the vast majority of families. For these families, the question is not who should be a parent, but what obligations should exist between the parents as part of the parent-partner status. In fact, in most cases, current parentage law adequately advances the goals of the parent-partner status. Those goals are to encourage the following: deliberate reproduction, teamwork between people who have interest in the child, and fair treatment by each parent of the other.

⁵ “Co-parents” is an unfortunate term because it often connotes only parents who are not married and not in a romantic relationship. See, e.g., Haim Abraham, *A Family Is What You Make It? Legal Recognition and Regulation of Multiple Parents*, 25 AM. U. J. GENDER SOC. POL’Y & L. 405, 418 (2017) (“The term ‘co-parenting’ describes a situation in which individuals jointly raise children without being in a romantic or legally recognized relationship.”). See also WEINER, *supra* note 1, at 3, 199. Because of its connotation, and because it lacks a strong normative message, I prefer the term “parent-partners” to describe people who are parents of the same child. When I occasionally employ the term “co-parents,” I mean people who are parents of the same child regardless of their existing romantic relationship or marital status.

⁶ Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. J.L. & GENDER 119, 135 (2018) [hereinafter Blecher-Prigat, *Conceiving Parents*]. See also Ayelet Blecher-Prigat, *The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents*, 13 THEORETICAL INQUIRIES LAW 179, 180, 190 (2012) [hereinafter Blecher-Prigat, *Costs of Raising Children*]. Blecher-Prigat has focused mostly on how the law might allocate the costs of childrearing for live-apart joint parents. *Id.*

⁷ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 125.

⁸ Frederik Swennen, *Should the Law Channel Parents Toward Coupledom?*, in THE PUBLIC IN PRIVATE LAW 19 (Crépeau Centre for Private & Comparative Law ed. 2017).

However, in a minority of cases, the critics are right that parenthood law is inadequate because it is underinclusive. Most obviously, the law sometimes discriminates against LGBTQ families by failing to recognize the parentage of people who have engaged in reproductive acts, typically by using artificial reproductive technology (ART), with the intent of forming a family.⁹ Laws with heteronormative assumptions should be modified so that the intended parents are the legal parents in these families. Not only would this change afford children a second parent, but it would also further the goals of the parent-partner status.

Several proposals exist to address this discrimination. From the perspective of advancing the goals of a parent-partner status, the Uniform Parentage Act 2017 (UPA 2017) represents a better fix than a proposal offered by Professor Ayelet Blecher-Prigat. Professor Blecher-Prigat's proposal would treat children conceived by sex and ART similarly by employing a fact-intensive approach to determine parenthood in all cases. This approach would add uncertainty to parenthood determinations for which the answers are already clear. In contrast, the UPA 2017 makes incremental changes to the law, and thereby maintains simplicity and clarity in most instances. Simply, the UPA 2017 would make the identity of the legal parents more apparent prior to conception or adoption, thereby enhancing the ability of the parent-partner legal obligations (and related social role) to influence the parties' reproductive decisions,¹⁰ as well as shape their behavior during pregnancy, at birth, and after birth.¹¹ Additionally, because the UPA 2017 is a less radical way to fix the underinclusion problem than is Blecher-Prigat's proposal, the promotion of the UPA 2017 is less likely to threaten the adoption of a parent-partner status.

After addressing the problem of underinclusion, the Article addresses the potential problem of "overinclusion." Some claim that the parent-partner status would impose legal obligations between parents who should not be legally connected to each other. Critics are largely concerned with imposing legal obligations between

⁹ Many scholars have criticized parentage law for being underinclusive. *See, e.g.*, Katherine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2064 (2016); Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 482–84 (2017); Courtney G. Joslin, *Leaving No (Nonmarital) Children Behind*, 48 FAM. L.Q. 495, 495–98, 509 (2014); Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 104–08 (2004); Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 138–39; Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2291 (2017); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1242–53 (2016) [hereinafter NeJaime, *Marriage Equality*].

¹⁰ *See infra* text accompanying notes 96–111.

¹¹ *See infra* text accompanying note 135.

unmarried biological parents who have only a brief romantic relationship. This Article disagrees with these critics' concern and argues that there is instead an underinclusion problem for this same population.

Unmarried couples experience the underinclusion problem because unmarried biological fathers are not legal parents until they jump through some hoops, such as filing a joint acknowledgement of paternity or prevailing in a paternity action. These steps are required in some states even if the father behaves like a supportive parent-partner, including by living with the child and the mother. Because the parent-partner status could help fragile families succeed, this Article suggests that biological fathers should be presumed to be parents when they take certain action indicative of their interest in a supportive parent-partnership, particularly by living with the mother and child. Unfortunately, the UPA 2017 requires that such cohabitation occur for two years before a presumption of paternity arises.¹² That period should be reduced to afford more couples the benefits of the parent-partner status. Until this problem is corrected, a parent-partner status might itself help minimize the harmful effect of the two-year requirement. That is, a parent-partner status might work as a gap filler by encouraging couples to act like parent-partners even if they do not technically qualify.

In the third part of this Article, I assume, for purposes of analysis, that the critics are right—*i.e.*, that the current law of parenthood is overinclusive for purposes of a parent-partner status. However, I argue that a redefinition of parenthood is the wrong solution. Instead, reform should focus on a more careful selection of the parent-partner obligations and/or the development of a mechanism to allow parents to dissolve the status at the back end.

The Article concludes by recognizing that the current law of parentage is largely adequate and appropriate for achieving the goals of the parent-partner project. The limited changes the Article recommends to the law of parentage are not a necessary prerequisite to the adoption of a parent-partner status. Nonetheless, the changes are worth adopting because they would extend the benefits of a parent-partner status to more families. Coupled with solutions for potential overinclusion (apart from redefining parenthood), these reforms would result in the application of the parent-partner status to couples that have a lot to gain from it, but not to couples for whom it has failed to achieve its purpose.

¹² UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017).

I. PARENTAGE QUESTIONS IN A NEW CONTEXT

To date, parentage law has largely been used to establish legal relationships along the vertical axis. The vertical axis governs the parent-child relationship. Along this axis, parenthood is typically determined by biology, but a person's relationship to the birth mother, function, and intent can also be relevant. A person's status as a parent often arises automatically, although that is not true in cases of adoption, ART (for nonbiological intended parents), and nonmarital fathers.

The vertical axis is one of two axes along which legal obligations arise between nuclear family members. The horizontal axis is the other, and it governs the adults' relationship. Typically, adults choose to have *inter se* rights and obligations with each other, often by marriage or contract, although sometimes courts will use equitable remedies to impose obligations on cohabitants after their romantic relationship ends. Typically, obligations between adults along the horizontal axis are not affected by whether the parties are parents of the same child; joint parenthood creates virtually no legal obligations between the parents.

A. Parentage for Purposes of the Horizontal Axis

My book, *A Parent-Partner Status for American Family Law*, argued that "parents" should have legal obligations to each other that arise automatically.¹³ The recognition of a "parent-partner status" would change how the two axes typically influence each other. Currently, the parents' relationship along the horizontal axis can affect the designation of "parent" along the vertical axis, as is evident with the marital presumption of paternity. But the designation of "parent" along the vertical axis virtually never affects the parents' legal relationship to each other along the horizontal axis. I argued it should.

A parent-partner status would be comprised of legal obligations between the parents that are triggered by parenthood. Grounded in parenthood, these obligations would exist regardless of the parents' marital status or romantic relationship. Consequently, the obligations would survive the demise of the parents' marriage or romantic relationship.

The parent-partner status is intended to help create and shape the social role of "parent-partner," just like the legal institution of marriage helps create and shape the social role of spouse. The parent-partner social role, and the related social norms, would guide parents' behavior in a prosocial manner.¹⁴ Specifically, the legal remedies, coupled with the social role, could help deter ill-advised reproductive

¹³ See WEINER, *supra* note 1, at 133.

¹⁴ *Id.* at 224–32.

behavior, encourage couples to act like a supportive team for their child's benefit, and remedy (and deter) unjust behavior between the parties.

A parent-partner status presents an enormous opportunity to shape behavior between parents. Presently no legal norms or remedies attach to joint parenthood, no social role exists, and no term even describes the relationship between parents who share a child in common. Most ambitiously, the parent-partner status might even foster love between the parties and encourage civic virtue.¹⁵

The legal obligations proposed to comprise the status grew out of social science research that identified norms that make people successful co-parents: flexibility, fairness, acceptance, togetherness, and empathy.¹⁶ Because the parent-partner status is supposed to encourage those qualities, I chose legal obligations for the parent-partner status that conveyed those norms: an obligation not to abuse the other party; an obligation to render reasonable aid when the other is physically imperiled; an obligation to engage in relationship work at the transition to parenthood and at the demise of the parties' romantic relationship; an obligation to act fairly when contracting about an aspect of the family relationship; and an obligation to compensate the other party for any unfairly disproportionate caregiving.¹⁷

The book assumed that the parent-partner status would apply to those people who society currently identifies as parents.¹⁸ The remainder of the Article explores whether that assumption was wise. As described next, for most couples, current parenthood law in fact is a good trigger and promotes well the objectives of the status.

B. For Most People, the Existing Parentage Regime Works Well as a Trigger for the Parent-Partner Status

1. The Parentage Regime Described

At present, at-birth parentage determinations result from an amalgam of rules that give significance to biology, intent, or the parties' relationship, although each consideration receives different weight depending upon the context. Summarizing the rules invites oversimplification, but the following generalizations are nonetheless

¹⁵ *Id.* at 275–318.

¹⁶ *Id.* at 136–39.

¹⁷ *Id.* at 3. The status would not impose obligations on third parties or the government, nor obligate people to third parties or the government, but that might occur in the future.

¹⁸ *See supra* note 4.

necessary in order to analyze whether the rules support the purpose of the parent-partner status. Because the rules differ for sex-based reproduction and for reproduction using ART, the rules are described separately.

For sex-based reproduction,¹⁹ maternity is usually governed by *mater semper certa est* for married and unmarried women.²⁰ Married men typically become legal fathers of their wives' children so long as a presumption of paternity remains un rebutted.²¹ The presumption is typically rebuttable, at least for a period of time, if the husband is not the biological father.²² Unmarried men who are biological fathers usually become legal fathers either through a voluntary acknowledgement of paternity,²³ the holding out presumption,²⁴ or a paternity action.²⁵ Notable exceptions to these rules exist when the child's conception is the product of rape,²⁶ or when a child is adopted. Adoption confers legal parenthood on the adoptive parents and removes it from the biological parents.

¹⁹ For purposes of categorization, I consider sex-based reproduction to be reproduction between opposite-sex parties who do not intend either one of them to serve merely as a donor or surrogate.

²⁰ UNIF. PARENTAGE ACT § 201(a)(1) (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT § 201(1) (UNIF. LAW COMM'N 2017).

²¹ UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT § 204(a)(1)(A) (UNIF. LAW COMM'N 2017). *See also* Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 223 (2012) [hereinafter Purvis, *Intended Parents*] ("About twenty states currently apply some form of the marital presumption, although the majority allow rebuttal of the presumption if it is in the child's best interests."); Dara E. Purvis, *Book Review—A Parent-partner Status for American Family Law*, 31 BERKELEY J. GENDER L. & JUST. 378, 392 (2016) [hereinafter Purvis, *Book Review*] ("[A]lthough the strength of the marital presumption has waned considerably, it remains a common starting point for parentage determinations."). The UPA 2017 extends the marital presumption to same-sex couples. UNIF. PARENTAGE ACT § 204 cmt.

²² UNIF. PARENTAGE ACT §§ 204(b), 607 (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT §§ 204(b), 608 (UNIF. LAW COMM'N 2017).

²³ UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM'N 2017).

²⁴ UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017).

²⁵ UNIF. PARENTAGE ACT § 603(2) (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT § 602(4) (UNIF. LAW COMM'N 2017).

²⁶ *See* UNIF. PARENTAGE ACT § 614 (f)(1) (UNIF. LAW COMM'N 2017). According to the commentary, "(1) approximately 30 states have statutes that permit a court to terminate the parental rights of the perpetrator; (2) approximately 20 states permit courts to restrict the custodial or visitation rights of the perpetrator." *Id.* at cmt.

The law addressing the parentage of children conceived with artificial reproductive technology is more complex. States have a range of approaches depending on the type of technology (e.g., states treat surrogacy in various ways),²⁷ and states typically use different rules for different types of technology (such as surrogacy and sperm donation).²⁸ While the UPA 2002 included provisions addressing parentage for those who use reproductive technology, some of its rules have not been widely followed.²⁹ The UPA 2017 also includes provisions to govern different types of ART; it is unclear to what extent states will adopt these parts of the model Act.³⁰ Because a state's statutes may not cover all forms of ART or all issues, common law principles often fill the gaps.³¹

Others have described in more detail the law of parentage for children conceived with ART.³² In the most general sense, in the absence of a specific statute on point, the results can turn on a case-specific application of rules about intent,³³

²⁷ See generally UNIF. PARENTAGE ACT Prefatory Note (UNIF. LAW COMM'N 2017) (identifying five of eleven states that adopted versions of the UPA (2002) but with surrogacy provisions that differed from that recommended by the UPA (2002)); see also NeJaime, *The Nature of Parenthood*, *supra* note 9, at 2376–81 (identifying “statutes and appellate cases regarding parentage in gestational surrogacy”).

²⁸ See generally NeJaime, *The Nature of Parenthood*, *supra* note 9, at 2367–69 (identifying “marital status in donor-insemination statutes”); *id.* at 2373–75 (identifying “statutes expressly regulating donor status and intended-parent status in the context of egg and embryo donation”); *id.* at 2376–81 (identifying “statutes and appellate cases regarding parentage in gestational surrogacy”).

²⁹ UNIF. PARENTAGE ACT Prefatory Note (UNIF. LAW COMM'N 2017) (indicating “[s]tates have been particularly slow to enact Article 8 of the UPA (2002) [that addressed surrogacy]”). See also *supra* note 27.

³⁰ The Uniform Parentage Act was adopted initially in 1973 and enacted by 14 states. See *Parentage Act (1973)*, UNIF. LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=10720858-ebe1-4e85-a275-40210e3f3f87> (last visited Apr. 2, 2019). It was then revised and adopted again in 2002. Eleven states enacted this version. See *Parentage Act (2002)*, UNIF. LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=5d5c48d6-623f-4d01-9994-6933ca8af315> (last visited Apr. 2, 2019). As of April 2, 2019, three states have adopted the UPA 2017, and four states have introduced it. See UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017), Enactment Map, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> (last visited Apr. 2, 2019).

³¹ Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 599 (2002).

³² See, e.g., KAREN MOULDING, NATIONAL LAWYERS GUILD, SEXUAL ORIENTATION AND THE LAW §§ 1:33, 1:34 (2018). See also JESSICA ARONS, FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE LAW 20–32 (2007).

³³ See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (“We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child

biology,³⁴ and the contestant's relationship with the "parent."³⁵ Intent tends to matter much more in these cases than in cases of sex-based reproduction,³⁶ although, as Professor Blecher-Prigat points out, intent is "hardly ever a standalone factor determining parenthood."³⁷

Despite the variety of rules governing sex-based and ART-based reproduction, and the inconsistencies that can sometimes exist within a jurisdiction,³⁸ biology lurks

relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.") (holding genetic mother was legal mother).

³⁴ *In re C.K.G.*, 173 S.W.3d 714, 733 (Tenn. 2005) (holding unmarried gestational mother was legal mother when she gave birth to child using donated eggs, in part because she carried the children and in part because that was the parties' intent).

³⁵ *Elisa B. v. Superior Court*, 117 P.3d 660, 667 (Cal. 2005) (holding unmarried woman with no biological connection to children was legal parent along with gestational mother, in part because she lived with and held the children out as her own for almost two years after their births).

³⁶ The rules regarding sperm donation reflect the importance of intent over biology. A donor is not a parent. UNIF. PARENTAGE ACT § 702 (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT § 702 (UNIF. LAW COMM'N 2017). Apart from the woman giving birth, the intended parent is typically the parent. UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM'N 2002) (limiting rule to a "man"); UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM'N 2017) (designating the rule applies to "an individual"). Consent of the intended parent must generally be in writing, but the UPA 2017 allows any express agreement to be determinative. UNIF. PARENTAGE ACT § 704(a), (b)(1) (UNIF. LAW COMM'N 2017).

The cases on surrogacy are more complicated in terms of the relevance of intent, but the UPA 2017 clearly makes the intended parents the legal parents of the child born of gestational surrogacy, rather than the surrogate, the surrogate's spouse, or the surrogate's former spouses. UNIF. PARENTAGE ACT § 809(a), (b) (UNIF. LAW COMM'N 2017). Some case law is aligned. *See, e.g., In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 285–86 (Cal. Ct. App. 1998) (deeming a husband and wife the legal parents after a surrogate gave birth to a "biologically unrelated child on their behalf"); *Raftopol v. Ramey*, 12 A.3d 783, 793 (Conn. 2011) (declaring biological father and his male partner legal parents when they entered a valid gestational surrogacy agreement).

Doug NeJaime points out that same-sex marriage has increased the importance of intent and function over biology for cases in which the marital presumption is invoked. *See NeJaime, Marriage Equality, supra* note 9, at 1242. This understanding may affect opposite-sex couples too. *See id.* at 1247–49 (discussing Iowa Supreme Court case and paternity disestablishment cases).

Certainly, cases exist where intent was not determinative of the outcome. *See, e.g., J.F. v. D.B.*, 897 A.2d 1261 (Pa. Super. Ct. 2006) (finding intent relevant for the man who had given his sperm along with a donated egg to a gestational surrogate, but irrelevant for his partner who was not related by genetics or gestation to the children).

³⁷ Blecher-Prigat, *Conceiving Parents, supra* note 6, at 137.

³⁸ *See Susan Ayres, Paternity Un(Certainty): How the Law Surrounding Paternity Challenges Negatively Impacts Family Relationships and Women's Sexuality*, 20 J. GENDER RACE & JUST. 237, 244–54 (2017).

in the background as an extremely important consideration for parentage determinations of children conceived by sex.³⁹ This is true for both marital and nonmarital children.⁴⁰ Jessica Hendricks labelled this reality “genetic essentialism.”⁴¹

My claim that “biology lurks” as a relevant and often important factor in determining parentage for cases of sex-based reproduction does not mean that biology necessarily determines parentage for all cases. For instance, when presumptions of parenthood rest on non-biological factors (such as marriage to the mother or living with and holding out the child as one’s own),⁴² these presumptions are generally rebuttable only for a period of time if the presumed father is not the biological father.⁴³ After a deadline of typically two years, the presumption is not rebuttable even if the challenger is the genetic parent.⁴⁴ Even within the two-year period, the genetic parent will not always win.⁴⁵ A court is to consider various factors

³⁹ Biology is less determinative for same-sex couples because often one party is not biologically related to the child. The new UPA 2017 provides additional ways to ensure parentage for people whose partner, married or not, uses ART to conceive. Consent provides a way to establish parentage that will not be rebuttable. UNIF. PARENTAGE ACT §§ 703, 705 (UNIF. LAW COMM’N 2017). Consent is important because the marital presumption is not necessarily determinative of parentage. *See id.* §§ 204(a)(1), (b), 607(c), 613.

⁴⁰ *See* Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 461 UTAH L. REV. 461, 465 (1996) (“[B]iological relationship has become the principal basis for imposing paternal duties . . . and for recognizing paternal rights.”). *See also* Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 140–41 (calling biology “the decisive factor” in cases of sex-based reproduction, noting some exceptions, such as existed in *Lehr v. Robertson*).

⁴¹ Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 490 (2017).

⁴² *See* UNIF. PARENTAGE ACT § 204(a)(1), (5) (UNIF. LAW COMM’N 2002); UNIF. PARENTAGE ACT § 204(a)(1)(A), (a)(2) (UNIF. LAW COMM’N 2017).

⁴³ *See, e.g.*, UNIF. PARENTAGE ACT § 204(b) (UNIF. LAW COMM’N 2002); UNIF. PARENTAGE ACT § 204(b) (UNIF. LAW COMM’N 2017). *See also* UNIF. PARENTAGE ACT § 607(a) (UNIF. LAW COMM’N 2002) (setting a two-year time limit to challenge a presumption when a child has a presumed father); UNIF. PARENTAGE ACT § 608(b) (UNIF. LAW COMM’N 2017). There may be an exception if there are two presumed parents, *see* UNIF. PARENTAGE ACT § 608(b)(2) (UNIF. LAW COMM’N 2017), or if the presumed parent is not a genetic parent, never lived with the child, and never held out the child as his or her own. UNIF. PARENTAGE ACT § 608(b)(1) (UNIF. LAW COMM’N 2017).

⁴⁴ *See* UNIF. PARENTAGE ACT § 607(a) (UNIF. LAW COMM’N 2002); UNIF. PARENTAGE ACT § 608(b) (UNIF. LAW COMM’N 2017).

⁴⁵ Competing claims of parentage have traditionally been resolved by considering “policy and logic.” *See* UNIF. PARENTAGE ACT § 4(b) (UNIF. LAW COMM’N 1973). A court often considers the “best interest of

when deciding whether the presumption is rebutted,⁴⁶ such as “the harm to the child if the relationship between the child and each individual is not recognized.”⁴⁷ Nonetheless biology *is* a relevant factor in most cases involving sex-based reproduction. In fact, states that receive federal funding must permit genetic testing in certain contested cases,⁴⁸ and they must make genetics either the conclusive or rebuttable determination of paternity.⁴⁹

Biology is also an important consideration when parentage is determined by a voluntary acknowledgement of paternity (“VAP”).⁵⁰ Prior to the UPA 2017, VAPs largely reinforced the idea that legal parentage rested on biological parentage. The 2002 UPA requires consistency between the VAP and any genetic testing that was done;⁵¹ if no test exists, the VAP must be signed by “a man claiming to be the genetic

the child” when deciding to order genetic testing if the child has a presumed or acknowledged father. *See* UNIF. PARENTAGE ACT § 608(b) (UNIF. LAW COMM’N 2002).

Under provisions like these, courts have stated that biology is not conclusive. *See, e.g.*, N.A.H. v. S.L.S., 9 P.3d 354, 362, 366 (Colo. 2000) (“[W]hen presumptions of paternity arise in more than one potential father, trial courts must take the best interests of the child into account as part of policy and logic in resolving competing presumptions.”); *Doe v. Doe*, 52 P.3d 255, 262 (Haw. 2002) (“[T]he genetic testing presumption is not more important than the other presumptions; it is one of several that must be considered.”); *Witso v. Overby*, 627 N.W.2d 63, 69 (Minn. 2001) (holding courts must “weigh the conflicting presumptions, and ‘the presumption which on the facts is founded on the weightier considerations of policy and logic controls’”); *In re Welfare of C.M.G.*, 516 N.W.2d 555, 560 (Minn. Ct. App. 1994) (“Where competing presumptions of paternity exists, the determination of paternity is no longer solely an issue of biological fact.”). Biology is not necessarily determinative under the 2017 UPA either. *See, e.g.*, UNIF. PARENTAGE ACT § 506 cmt. (UNIF. LAW COMM’N 2017) (“Identification as a child’s genetic parent does not, in and of itself, establish the child’s legal parentage. The standards for adjudicating parentage of a child are addressed in Article 6.”).

⁴⁶ *See* UNIF. PARENTAGE ACT § 608(b) (UNIF. LAW COMM’N 2002) (listing factors a judge is to consider in deciding whether to allow genetic testing); *see* UNIF. PARENTAGE ACT § 613(a) (UNIF. LAW COMM’N 2017) (listing factors a judge is to consider when there are competing claims of parentage). *See also In re Marriage of Worcester*, 960 P.2d 624 (Ariz. 1998) (refusing challenge to marital presumption in non-UPA state).

⁴⁷ UNIF. PARENTAGE ACT § 613(a)(4) (UNIF. LAW COMM’N 2017); *see* UNIF. PARENTAGE ACT § 608(b)(6) (UNIF. LAW COMM’N 2002).

⁴⁸ *See* 42 U.S.C. § 666(a)(5)(B) (2016).

⁴⁹ *See id.* § 666(a)(5)(G).

⁵⁰ *See* UNIF. PARENTAGE ACT § 302(a)(4) (UNIF. LAW COMM’N 2002).

⁵¹ *See id.* This provision has been removed from the UPA 2017. The UPA 2017 permits parentage to be established by a VAP for a same-sex partner who is not the biological parent of the child if the person is a presumed parent or an intended parent under Article 7. *See* UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM’N 2017).

father of the child.”⁵² “Some states” have forms or instructions that make it clear that “only biological fathers should sign.”⁵³ Courts have sometimes held that an acknowledgment is fraudulent and invalid if the man signed it while aware that he was not the biological father.⁵⁴ Most states allow paternity to be disestablished when the VAP is signed by a man who is not the biological father, even without evidence of fraud, duress, or mistake.⁵⁵

Again, the fact that VAPs largely reflect biological paternity does not mean that a non-biological signatory cannot become the legal parent. For example, if a VAP is not challenged within two years,⁵⁶ a non-biological parent may become the legal father indefinitely. Eighteen states consider estoppel or the child’s best interests in deciding whether to set aside a VAP.⁵⁷ In addition, the 2017 UPA loosened the rules about who can sign a VAP, allowing both intended parents who use ART as well as

⁵² UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM’N 2002).

⁵³ Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents’ Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOKLYN L. REV. 55, 83 (2017).

⁵⁴ See, e.g., *McGee v. Gonyo*, 140 A.3d 162 (Vt. 2016) (affirming entry of non-parentage order when unmarried mother and putative father signed a voluntary acknowledgement of paternity knowing putative father was not biological father). Other states, however, have locked men who sign the VAP into parenthood even though they are not the biological father. *State ex rel. Hickman v. Dodd*, No. W2008-00534-COA-R3-CV, 2008 WL 4963508, at *5 (Tenn. Ct. App. Nov. 21, 2008) (refusing to allow non-biological father to set aside VAP when fraud was not sufficiently alleged and time-period for setting it aside passed); *State ex rel. Sec’y of Dep’t for Children & Families v. Smith*, 392 P.3d 68 (Kan. 2017) (refusing to allow voluntary acknowledgement of paternity to be set aside although mother and man knew man was not the biological father and man claimed he did not understand its terms). Some states allow a father to “challenge paternity adjudications and VAPs for almost unlimited time frames under disestablishment statutes that allow a father to vacate paternity based on the results of a DNA test, without consideration of the best interests of the child or estoppel.” Ayres, *supra* note 38, at 248. Under the UPA, there is a time limit to challenge the VAP. See UNIF. PARENTAGE ACT § 308(a) (UNIF. LAW COMM’N 2002) (setting a two-year limit for challenges to VAP on the basis of fraud, duress, or material mistake of fact); UNIF. PARENTAGE ACT § 309(a) (UNIF. LAW COMM’N 2017) (same).

⁵⁵ Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequity*, 2013 MICH. ST. L. REV. 1295, 1327 (identifying statutory provisions in “more than half the states”).

⁵⁶ See UNIF. PARENTAGE ACT §§ 309(a), 610(b) (UNIF. LAW COMM’N 2017).

⁵⁷ Harris, *supra* note 55, at 1327. See also *supra* note 54.

presumed parents to sign.⁵⁸ Nonetheless, most unmarried men who sign a VAP are the biological father and others generally expect as much.⁵⁹

My claim about biology's lingering relevance should not be misunderstood as a claim that biology should be more determinative than it is, or that genetic parentage should be determined at birth. In fact, assessing biological parentage at birth could create real problems. Consider, briefly, a proposal by June Carbone that "biological identity should be determined at birth."⁶⁰ She describes "a hospital scenario where the proud parents of every newborn compare their DNA profiles with the child's looking for similarities and differences."⁶¹ If biological congruence does not exist, then a party could walk away. However, if the party assumes the parental role despite the absence of a biological connection, then his or her decision would be "irrebuttable."⁶² After the adults know they are, or decide to be, the child's parents, the couple would publicly "commit[] themselves to the child's future" at a ceremony.⁶³ Carbone claims that this system would rest parenthood and co-parenthood on informed consent about the biological facts and presumably strengthen the couple's commitment to parent together.

While Carbone's proposal would be desirable when the facts align with expectations, such as when the parties are the biological parents or when a person is not surprised by the fact that biological congruence is absent, cases that would involve surprise are a concern. A surprise could destroy the couple's relationship, affecting not just the newborn but also any other children living in the couple's household. A very real risk of violence would exist for women engaged in infidelity. Pregnancy is already a time when domestic violence can start or intensify.⁶⁴ The U.S. Supreme Court recognized the danger when it held that states could not require

⁵⁸ See UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM'N 2017).

⁵⁹ See *infra* text accompanying notes 86–88.

⁶⁰ Carbone, *supra* note 4, at 1336. See also June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1067–68 (2003) (recommending biological testing be encouraged at birth, allowing waiver of the testing, and requiring a VAP signed by parties to be irrefutable).

⁶¹ Carbone, *supra* note 4, at 1336–37.

⁶² *Id.* at 1337.

⁶³ *Id.* at 1344. I have also proposed a commitment ceremony. See WEINER, *supra* note 1, at 179–82.

⁶⁴ Gillian C. Mezey & Susan Bewley, *Domestic Violence and Pregnancy*, 104 BRIT. J. OBSTETRICS & GYNAECOLOGY 528, 528 (1997) (citing studies on domestic violence during pregnancy).

spousal notification before a woman obtains an abortion.⁶⁵ Studies reveal that women often do not tell their partners about their infidelity because they fear violence.⁶⁶ Under Carbone's proposal, mothers—and only mothers—would have their privacy and safety threatened by at-birth paternity tests, raising questions about the constitutionality of such a proposal.⁶⁷

The current regime—one in which biology is frequently assumed to be present but not confirmed, and is sometimes, but not always, preferred by courts when people have conflicting claims to parentage—represents a nuanced approach to accommodate conflicting policy objectives. Parentage is determined as it is, *i.e.*, by elevating biology, intent, or relationship in particular contexts, because of these various policy choices. Some scholars have questioned whether these policy choices are outdated,⁶⁸ but the fact that the UPA 2017 embodies the same policy choices as the UPA 2002 suggests that they are not.

While a fuller explanation of the policy choices could be had, some explanations rise to the top. Biology reveals the “truth” about paternity, it “encourage[es] fathers to take responsibility for their children,” and it provides a bright-line rule for providing children with a second parent.⁶⁹ The marital presumption of paternity, developed at a time when genetic testing was unavailable,⁷⁰ persists because it locks a social father into the role of legal father and it decreases the chance that outsiders will interfere in the marital relationship by challenging the

⁶⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887–94 (1992) (mentioning physical abuse, psychological abuse, and child abuse among the reasons women do not tell their husbands about their pregnancies).

⁶⁶ Lyn Turney, *Paternity Secrets: Why Women Don't Tell*, 11 J. FAM. STUD. 227, 240 (2005).

⁶⁷ Carbone is convinced that bad things will eventually happen to the parties' relationship if the child's parentage involves deception, see Carbone, *supra* note 4, at 1336–37, but that may not be true. The woman and man signing the VAP must have had sex, otherwise the duped party would never believe he was the father. The mother herself is unlikely to know the true parentage of her child. Consequently, the misattribution may never come to light. This alternative possibility is the one that undergirds the status quo's marital presumption of paternity and its VAP system.

⁶⁸ Purvis, *Intended Parents*, *supra* note 21, at 218 (“[R]esponsibility in parenting . . . is currently underserved by existing laws.”).

⁶⁹ *Callender v. Skiles*, 591 N.W.2d 182, 191–92 (Iowa 1999); Abraham, *supra* note 5, at 414–15.

⁷⁰ See Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 317 (1990) (noting “[t]he best available method of determining factual biological paternity [was to identify the] . . . most likely candidate . . . having sexual intercourse with the mother”).

husband's paternity.⁷¹ VAPs are important because they provide an easy, inexpensive, and uniform process for unmarried couples to lock-in legal parenthood.⁷² Intent in the context of ART is important because parents who are purposeful about procreation are likely to be better parents,⁷³ private ordering is generally a social good,⁷⁴ and children born within non-marital families are afforded two legal parents.⁷⁵ The rape exception protects the victim and child, and stops the wrongdoer from profiting from his wrong.⁷⁶

These reasons for the particular rules have merit, at least for the majority of cases to which the rules apply. While the law's application in a particular case does not always further the law's purpose, that result is inevitable. The law of parentage is comprised of a variety of crude rules that are meant to get the right results for most people most of the time, despite individuals very different situations. This "good-enough" regime works just fine for most people and for purposes of a parent-partner status.

2. The Existing Parentage Regime Is an Appropriate Trigger for Most People

Despite the rather sloppy amalgam of rules, most people today know the identity of the child's parents at the child's birth. Parentage determinations are relatively straightforward, although they have become more complicated over time.⁷⁷

⁷¹ See Harris, *supra* note 55, at 1300.

⁷² Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 478–79 (2012). See also Kerry Abrams & Brandon L. Garrett, *DNA and Distrust*, 91 NOTRE DAME L. REV. 757, 793–94, 798 (2015) (allowing Congress to "ensnare fathers" to reduce the welfare rolls with a "binding means of locking men into legal paternity").

⁷³ Shultz, *supra* note 70, at 323.

⁷⁴ *Id.* at 328.

⁷⁵ Courtney G. Joslin, *Protecting Children?: Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1223 (2010) (arguing, as well, that people should be able to rely on the promises of those who made them).

⁷⁶ UNIF. PARENTAGE ACT § 614 (UNIF. LAW COMM'N 2017); Katherine E. Wendt, Comment, *How States Reward Rape: An Agenda to Protect the Rape-Conceived Child Through the Termination of Parental Rights*, 2013 MICH. ST. L. REV. 1763, 1765–66, 1781.

⁷⁷ David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857, 859 (2006) ("For most of its history, American law proceeded on the assumption that parents were persons who created a child through sexual reproduction or who assumed the legal obligations of parenthood through formal adoption."); Jeffrey A. Parness, *Challenges in Handling Imprecise Parentage Matters*, 28 J. AM. ACAD. MATRIM. LAW. 139, 139–40 (2015) (noting the law is "significantly and rapidly evolving" and "increasingly imprecise"); Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's*

As Dara Purvis notes, “whatever the substance of the parentage rules, regimes have historically been reasonably clear so that parentage determinations are not made on a case-by-case basis.”⁷⁸ In fact, “most of the time parental status seems self-evident through biological connection.”⁷⁹

In the vast majority of cases, the woman who gives birth will be the child’s mother.⁸⁰ Most children are still born to married heterosexual women,⁸¹ and their husbands are typically the biological fathers.⁸² Challenges to a husband’s paternity are relatively rare,⁸³ although perhaps not as “extraordinary” as Justice Scalia hoped

Promise, 64 U. BUFF. L. REV. 465, 469–70 (2016) [hereinafter Jacobs, *Parental Parity*] (“Parentage law has become unwieldy in recent decades, and there is no one clear explanation of when a parent-child relationship will be recognized.”). Bi-paternalism makes the task more complicated. See Heather Kolinsky, *The Intended Parent: The Power and Problems Inherent in Designating and Determining Intent in the Context of Parental Rights*, 119 PENN. ST. L. REV. 801, 803, 806 (2015).

⁷⁸ Purvis, *Intended Parents*, *supra* note 21, at 218.

⁷⁹ *Id.* at 215.

⁸⁰ Maternity is usually governed by *mater semper certa est* for married and unmarried women. See UNIF. PARENTAGE ACT § 204(a)(1)(A) (UNIF LAW COMM’N 2017).

⁸¹ Approximately 60% of children are born into marriage. JOYCE A. MARTIN ET AL., NAT’L VITAL STATISTICS REPORTS, VOL. 66, NO. 1, BIRTHS: FINAL DATA FOR 2015, at 8 (2017), https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_01.pdf. It is unclear how many children born into marriage have different-sex or same-sex married parents. However, same-sex married couples are just a fraction of all married couples. There are 64 million opposite-sex couple households, of which 57 million are married opposite-sex couples. There are approximately 1 million same-sex couple households, although the number who are married is unspecified. *Characteristics of Same-Sex Couple Households: 2005 to Present*, U.S. CENSUS BUREAU (2017), <https://www.census.gov/data/tables/time-series/demo/same-sex-couples/ssc-house-characteristics.html>. It is estimated that there are 547,000 same-sex married households. Family Equality Council, *LGBTQ Family Fact Sheet* (Aug. 2017), at 1, <https://www2.census.gov/cac/nac/meetings/2017-11/LGBTQ-families-factsheet.pdf?#>. Approximately 37% of LGBT individuals have had a child. GARY J. GATES, THE WILLIAMS INSTITUTE, LGBT PARENTING IN THE UNITED STATES I (2013). Some of the children are raised by a different-sex couple where one of the parents is bisexual and some of the children live in a same-sex couple household but were conceived in a different-sex relationship. See Family Equality Council, *supra*, at 1.

⁸² Some children’s fathers are not their mothers’ husbands, but the numbers are still low as a percentage of total births. 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. CIV. RTS. & CIV. LIB. 201, 213 (2009) (“Every year, tens of thousands of children are born to married mothers who have conceived through sexual intercourse with men other than their husbands. Many thousands are born after insemination of the mother with donor semen.”). Yet every year, approximately 3,946,000 babies are born. See JOYCE A. MARTIN ET AL., NAT’L VITAL STATISTICS REPORTS, VOL. 67, NO. 1, BIRTHS: FINAL DATA FOR 2016, at 2 (2018), https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_01.pdf.

⁸³ This conclusion is based on the author’s personal observations. *But see* Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 60 (2003)

they would be.⁸⁴ If the mother is unmarried, the biological father is typically the legal father because he has signed the VAP.⁸⁵ While some estimate that as many as 30% of the men who sign VAPs may not in fact be the biological fathers,⁸⁶ these estimates have been questioned.⁸⁷ Others suggest that paternity is very rarely attributed to someone who is not the genetic parent.⁸⁸ Even when the legal parent is not the genetic parent, legal parenthood is not necessarily disturbed, either because of ignorance or choice.⁸⁹

(“There are now a substantial number of cases in which husbands, wives, and paramours seek to disestablish the paternity of a child.”). Roberts cites to Appendix D for support, see *id.* at 60 n.16, but Appendix D hardly supports the claim. It simply lists twenty “major cases involving the post-divorce disestablishment of paternity” that were decided between 1997 and 2002. *Id.* at 92.

⁸⁴ Michael H. v. Gerald D., 491 U.S. 110, 113 (1989) (“The facts of this case are, we must hope, extraordinary.”).

⁸⁵ Approximately 70% of nonmarital children have legal fathers; the overwhelming majority of these legal fathers (approximately 84%) are established through voluntary acknowledgements of paternity. WEINER, *supra* note 1, at 142. See also NeJaime, *The Nature of Parenthood*, *supra* note 9, at 2279 (citing Office of Child Support Enf’t, Preliminary Report: FY 2015, at 77 (2016), http://www.acf.hhs.gov/sites/default/files/programs/css/fy2015_preliminary.pdf [<http://perma.cc/X8YL-RBFW>]) (in 2015, 1,186,223 of 1,512,329 nonmarital children had parentage established by VAP (78.4%)).

⁸⁶ See Ruth Padawer, *Who Knew I Was Not the Father?*, N.Y. TIMES MAG. (Nov. 17, 2009), https://www.nytimes.com/2009/11/22/magazine/22Paternity-t.html?_r=0 (estimating that 30% of those who sign VAPs are not the biological father).

⁸⁷ Ayres, *supra* note 38, at 241 (suggesting that high rates of false paternity are a legend and that studies suggest the rate is likely less than 4%).

⁸⁸ See Rachael Rettner, *Wrong Baby Daddy? It’s Not Likely, Science Says*, LIVE SCIENCE (Apr. 5, 2016 01:57 PM, ET), <https://www.livescience.com/54305-wrong-father-children.html> (“Studies suggest that the rate of misattributed fatherhood has remained low—at around [one] to [two] percent—for hundreds of years.”) (citing studies in Belgium, South Africa, Italy, Spain and Mali). See also Ayres, *supra* note 38; Mary Welstead, *The Influence of Human Rights and Cultural Issues*, 2003 INT’L SURV. FAM. L. 143, 151–52 (noting that “[s]cientific authorities vary in their estimates of misattributed fatherhood but it is generally accepted to be between 5% and 10% depending on wealth and status.”). But see Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 222 (2002) (citing studies that found between 5% and 30% of children born to married women have fathers who are not their mothers’ husbands); ROBERT WRIGHT, *THE MORAL ANIMAL: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* 70 (1994) (estimating that in some urban areas more than one-fourth of the children may not be biologically related to the father of record).

⁸⁹ Padawer, *supra* note 86 (noting “many men don’t sue because it is expensive or because they suspect they will lose anyway. And then there are those who never even discover the biological truth Some other number of men discover they are not biological fathers, but choose to soldier on rather than go to court, unwilling to upset their children or the relationships they have established.”).

While most children's parentage is settled under existing law without incident, some scholars have called parentage "a deeply contested legal category."⁹⁰ To the extent it is, the contests occur at the margins among a subset of parents who litigate. These cases often involve ART, an area of the law that is still evolving. Importantly, cases involving ART are just a small fraction of all parentage determinations, as less than 2% of the almost four million children who are born every year are conceived using reproductive technology.⁹¹ Further, most children conceived with ART never experience a dispute about their parentage.⁹²

Among academics, however, parentage is a "deeply contested legal category."⁹³ Scholars thrive on finding the gaps, pointing out the complexities, and arguing about legal reform.⁹⁴ The academic literature, not the law as it is experienced by most people, underpins statements like the following: "The complexity of parentage law creates many possibilities for uncertainty about the identity of a child's legal parents."⁹⁵ For most children, however, that is not their reality.

C. *The Existing Parentage Regime Furthers the Goals of the Parent-Partner Status*

The current parentage regime is appropriate for furthering the goals of the parent-partner status. Again, the goals of the status are to encourage the following: deliberate reproduction, teamwork for the child's benefit, and each parent's fair treatment of the other. The existing regime furthers these goals because biology lurks as a relevant fact for parenthood determinations after sex-based reproduction despite

⁹⁰ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 120–21, 126, 133. That is not the same as saying states have different rules, which they do. *See* Harris, *supra* note 55, at 1335 (mentioning "significant variation in state paternity law, especially regarding rebuttal of the marital presumption of paternity and setting aside VAPs and paternity judgments").

⁹¹ MARTIN ET AL., *supra* note 82, at 13. *See* UNIF. PARENTAGE ACT Prefatory Note 3 (UNIF. LAW COMM'N 2017) ("Based on data from 2015, the CDC reports that 'approximately 1.6 percent of all infants born in the United States every year are conceived using ART.'") (quoting *ART Success Rates*, CDC, <http://www.cdc.gov/art/reports/> (last updated May 4, 2017)).

⁹² *Cf. As Demand for Surrogacy Soars, More Countries are Trying to Ban It*, *ECONOMIST* (May 13, 2017), <https://www.economist.com/international/2017/05/13/as-demand-for-surrogacy-soars-more-countries-are-trying-to-ban-it> (noting "recent studies show that it is extremely rare for a surrogate to change her mind and seek to keep the baby"). *Pavin v. Smith*, 137 S. Ct. 2075 (2017), makes such disputes even more unlikely.

⁹³ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 120–21.

⁹⁴ *See, e.g.*, articles cited in note 9, *supra*.

⁹⁵ LESLIE HARRIS ET AL., *FAMILY LAW* 845 (6th ed. 2018).

an array of other rules. Appropriately, the other rules temper the importance of biology in some cases, thereby recognizing that strong relationships need not rest on biology and that good reasons exist to recognize parenthood for adults who are not genetically related to the child.

1. Deliberate Reproduction

Before two people bring children into their lives, they should deliberate about the timing of the conception (or adoption) and assess whether they can work together over the long-term as co-parents. They should feel confident that they are both ready, willing, and able to cooperate to advance their child's best interests for the next 18 years. They should envision themselves as a supportive team.⁹⁶

Deliberation has a host of benefits. Marjorie Maguire Shultz noted, "[P]eople perform major and responsible tasks better when they feel a desire, exercise a choice, and make a commitment. It is thus preferable for people to be more rather than less purposeful about their procreational and parenting intentions."⁹⁷ In fact, "new evidence" suggests that a man's intention to have a child "is associated with a range of father involvement behaviors and attitudes."⁹⁸ A couple's decision to have a child together is also associated with a range of positive behaviors and attitudes that benefit their relationship.⁹⁹

Too often deliberation is absent, *i.e.*, people do not select a reproductive partner who will be a good parent-partner nor do they plan the pregnancy. Kathy Edin and Tim Nelson, in their book *Doing the Best I Can*, described how many couples in the inner city move from "hooking up" to "togetherness" and relax their contraception

⁹⁶ In a review of my book, Dara Purvis focuses on the status's effort to control the sexual behavior of heterosexuals. She calls this my "responsible procreation" argument and critiques it primarily for tying men to women. Purvis, *Book Review*, *supra* note 21, at 389–92. While the book does emphasize the importance of responsible procreation, its importance is not limited to heterosexuals.

⁹⁷ Shultz, *supra* note 70, at 323. *See also* Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 150 (acknowledging that people should be intentional about having children).

⁹⁸ Laura Duberstein Lindberg, Kathryn Kost, & Isaac Maddow-Zimet, *The Role of Men's Childbearing Intentions in Father Involvement*, 79 J. MARRIAGE & FAM. 44, 54 (2017) ("Men were less likely to live with a young child from a mistimed than an intended pregnancy; this in turn was associated with reduced father involvement because resident fathers reported more engagement in caregiving and play with their child and rated themselves better as fathers than did nonresident fathers."); *id.* (noting that regardless of residence status, negative effects from unintended childbearing were "concentrated among men with mistimed births").

⁹⁹ *See* WEINER, *supra* note 1, at 17 (citing research discussing how an unplanned pregnancy can affect the quality of the parents' relationship).

use as the relationship shifts.¹⁰⁰ Of the pregnancies that resulted, only 15% were planned; most were neither “actively avoided or explicitly planned.”¹⁰¹ These conceptions occurred in relationships that had a “haphazard, almost random quality,”¹⁰² with some couples just having “got with” each other without much deliberation. There was “little evidence” of any attempt to choose a partner “based on who they felt would be the most suitable mother to their child.”¹⁰³ Similarly, Joanna Reed’s research on the Fragile Families population found that only 20% of those interviewed wanted a child at the time of the conception.¹⁰⁴ Pregnancies often happened fairly early in the parties’ relationship. Over one-third of the pregnancies began within three months of the relationship’s beginning, and 60% began within nine months of the relationship’s start. The pregnancies were largely unplanned.¹⁰⁵

The parent-partner status is intended to influence reproductive behavior.¹⁰⁶ While there is no guarantee it would,¹⁰⁷ it might. Legal obligations and social roles can affect sexual conduct. For example, strengthening child support enforcement decreases the number of young men’s sex partners.¹⁰⁸ Relatedly, the image of a good

¹⁰⁰ KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 47, 50–53, 221 (2013).

¹⁰¹ *Id.* at 69–70. Approximately 45% of births were unintended in 2011. Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008–2011*, 374 *NEW ENG. J. MED.* 843, 843 (2016). See also *Unintended Pregnancy in the United States*, GUTTMACHER (Sept. 2016), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states> (“The proportion of births that fathers report as unintended—about four in ten . . . is similar to that reported by mothers.”); *id.* (reporting that overall 27% of pregnancies are mistimed and 18% are unwanted, but the rate is higher for single men, and 58% of all unintended pregnancies result in birth, not abortion).

¹⁰² EDIN & NELSON, *supra* note 100, at 50–51.

¹⁰³ *Id.* at 51.

¹⁰⁴ Joanna M. Reed, *Not Crossing the “Extra Line”*: *How Cohabitants With Children View Their Unions*, 68 *J. MARRIAGE & FAM.* 1117, 1122 (2006).

¹⁰⁵ *Id.*

¹⁰⁶ WEINER, *supra* note 1, at 136–37 (arguing a parent-partner status might help women choose partners who had characteristics that were more appropriate for a parent-partner, for example, someone who is not violent, exhibited fondness, flexibility, acceptance, togetherness, and empathy, and wanted to be part of a friendly, cooperative team—in other words, a supportive partner).

¹⁰⁷ See *id.* at 260–63.

¹⁰⁸ *Id.* at 259 (citing studies).

spouse affects partner selection and the timing of marriage.¹⁰⁹ Therefore, the automatic imposition of *inter se* obligations and the accompanying parent-partner social role should encourage couples to delay or defer childbearing if they are not ready for the obligations or the social role, or if they think the other person is not ready, willing, or able. The parent-partner status would tell couples *prior* to conception what society expects of their relationship and should thereby channel reproductive activity in a prosocial direction.¹¹⁰ Dara Purvis recognized a similar role for the law along the vertical axis: “[t]he laws that identify legal parents . . . embody what parenting should be.”¹¹¹

If deliberate and discerning reproduction should be the law’s objective, then lawmakers should attach legal significance to the act that brings a child into the adults’ lives. That requires differentiating between ART and adoption on the one hand and sex-based reproduction on the other.¹¹² ART and adoption already involve acts that encourage deliberation,¹¹³ unlike sex-based reproduction. Sex has a purpose apart from reproduction and occurs without procedures that focus, at least in part, on the parties’ resulting relationship. Intercourse requires no contract (like typically exists for surrogacy),¹¹⁴ or writing (like often exists for the husband of a married woman who uses donated sperm),¹¹⁵ or court appearance (like occurs with adoption).¹¹⁶ By making *biology* at least potentially determinative of parentage for

¹⁰⁹ *Id.* at 254–55 (citing studies). See generally Sean E. Brotherson & Jeffrey B. Teichert, *Value of the Law in Shaping Social Perspectives on Marriage*, 3 J.L. & FAM. STUD. 23 (2001) (arguing that the law plays a part in shaping perspectives on marriage).

¹¹⁰ A parent-partner status might channel people into coupledness, but only because the parties themselves might become convinced that coupledness offers some advantage to their child. This is different than channeling by tying “rights to financial and social support” to marriage. June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 15 (2017).

¹¹¹ Purvis, *Intended Parents*, *supra* note 21, at 218.

¹¹² See Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 123, 152 (arguing to the contrary, that the same law should apply to all couples for at-birth parentage determinations whether or not they use ART).

¹¹³ See Purvis, *Intended Parents*, *supra* note 21, at 227 (noting ART is “the only regime that facilitates advance planning for a child” and thereby “facilitate[s] responsible parenting”); Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 150 (citing Purvis, *Intended Parents*, *supra* note 21, at 222).

¹¹⁴ See, e.g., FLA. STAT. ANN. § 742.15(1) (LexisNexis 2018).

¹¹⁵ See, e.g., UNIF. PARENTAGE ACT §§ 803(3)–(6), (9) (UNIF. LAW COMM’N 2017).

¹¹⁶ See, e.g., UNIF. ADOPTION ACT § 3-302 (UNIF. LAW COMM’N 1994).

those who engage in sex, the law gives copulating couples an incentive to be more deliberate about their actions.¹¹⁷

The use of the law to foster deliberate reproduction is not new. Susan Appleton explained, “the regulation of sex remains an important function of family law, and the policy of personal responsibility, with its connection to heterosexual intercourse, represents a modern instantiation of this longstanding legal enterprise.”¹¹⁸ What *is* new, however, is the recognition that obligations imposed between the parents might shape their decisions about with whom to reproduce, when to reproduce, and how to act after reproduction.

The existing law of parentage is adequate for deterring ill-advised reproduction, one of the purposes of the parent-partner status. The law need not tie legal parentage exclusively to biology to encourage responsible procreation. Rather, it is sufficient for the law to threaten that genetics might result in legal parenthood. Because the possibility of legal parenthood (with the resulting parent-partner obligations) should itself deter, the law need not force legal parenthood on every genetic parent. In fact, there are good reasons not to do so, as the discussion of June Carbone’s proposal suggested.¹¹⁹ Nor is it necessary in order to achieve loving families: strong parent-child relationships and strong parent-partner relationships do not require that the legal parents are in fact the biological parents of the child.

Replacing the status quo with a new parentage regime that would make biology less important for parentage determinations after sex would undermine preconception deliberation. Ayelet Blecher-Prigat proposed such a “novel comprehensive scheme” for parentage determinations along both the horizontal and vertical axes.¹²⁰ She proposed that two types of parenthood should exist at a child’s birth. One type of parent (who she denominates “parent”) would acquire the full rights and obligations of parenthood as currently understood, as well as the new

¹¹⁷ Tying parental status to biological connection can also facilitate advance planning. Purvis, who is concerned with “assist[ing] adults who seek to prospectively establish legal responsibilities as parents,” notes society should try to facilitate “planning pre-conception” if society “value[s] responsibility.” Purvis, *Intended Parents*, *supra* note 21, at 221–22 (“Planning for parenthood should be neither necessary nor sufficient to generate parental status, but it should not be irrelevant to normative discussions of parentage regimes.”).

¹¹⁸ Susan Frelich Appleton, *Revisiting Why Parentage Should not Depend on Marriage: Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL’Y & L. 347, 376–77 (2012) (noting that this explains the difference between the treatment of children conceived by ART and sex-based reproduction).

¹¹⁹ See *supra* text accompanying notes 60–67.

¹²⁰ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 176. See *infra* text accompanying notes 179–89.

parent-partner obligations.¹²¹ The other type of parent (who she denominates “progenitor”) would have minimal rights and obligations, both to the child and to the other parent.¹²² Whether a person is a “parent” or a “progenitor” would be determined on a case-by-case basis, considering intent, biology, and relationship status, with guidance provided by a series of presumptions and subrules. Blecher-Prigat wants “the relationship between potential joint parents” to become the “central factor in determining a child’s parentage.”¹²³ The qualifying relationship is not limited to a romantic relationship but could include friendship.

Blecher-Prigat’s bifurcated and flexible approach to at-birth parenthood would make at-birth determinations of parental status much more contestable for most people than at present. It would also send the message that biology has less importance for determining legal parenthood than at present. In every case, biology would only be one of three relevant factors, and a less significant factor than the relationship between the adults.

Problematically, Blecher-Prigat’s proposal would make biology much less relevant for those people who should be the most deliberate, *i.e.*, those who conceive during a one-night stand (or potentially during other short relationships of longer duration¹²⁴). Under Blecher-Prigat’s proposal, a person who conceives during a one-night stand can decline legal parentage if he or she so chooses.¹²⁵ That option encourages ill-advised reproduction.

If the law should foster deliberate reproduction (an objective that was not discredited by the majority in *Obergefell*¹²⁶), then some of the inconsistencies that emerge under current parentage law make sense. For example, it makes sense that

¹²¹ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 126.

¹²² *Id.* at 124, 162.

¹²³ *Id.* at 122.

¹²⁴ Blecher-Prigat provides rules for one-night stands and ongoing committed relationships, but not for cases in the middle. It is unclear if a man who had dated his partner for only a month could become a progenitor.

¹²⁵ See Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 142.

¹²⁶ Although the majority in *Obergefell* appropriately rejected the “responsible procreation” argument as a reason to keep marriage limited to opposite-sex couples, see NeJaime, *Marriage Equality*, *supra* note 9, at 1239–40, the state’s interest in fostering responsible procreation was not itself discredited. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599–601 (2015).

people can become Single Parents by Choice (“SPC”) using ART,¹²⁷ but not with sex-based reproduction.¹²⁸ A person using ART is more likely to have considered the task of raising a child alone *before* conception. The same is also true when a single person adopts. Yet the same deliberation cannot be assured before sex-based reproduction. While that same sort of deliberation could occur, the absence of a procedure encouraging such deliberation makes it more likely that people decide to become SPC only *after* conception, perhaps after an unplanned pregnancy or after the other party indicates an unwillingness to raise the child. If society wants women and men to be thoughtful about the timing of conception and their choice of a reproductive partner, then the law should impose relational consequences to people who produce a child by sex, even if that means children conceived by ART are more likely to have one legal parent than children conceived by sex.

Although the existing parentage regime can be defended, the regime is not necessarily fair for adults in all instances. For example, some individuals may want to be a SPC but may lack the financial means to use reproductive technology.¹²⁹ The UPA 2002 and the UPA 2017, unlike the UPA 1973, reduce some financial barriers: a doctor’s involvement is no longer required to divest the sperm donor of parental status, for example.¹³⁰ Nonetheless, some people will still find becoming a SPC through ART financially unattainable. They may want a doctor’s or lawyer’s involvement, or need reproductive technology that requires a doctor’s involvement (like gestational surrogacy or embryo donation). The economic barriers to single parenthood may seem unfair, but the market arguably provides an important function: a party who cannot afford ART may also have insufficient economic resources to raise a child alone.¹³¹ If the financial inability to afford ART is a poor

¹²⁷ See UNIF. PARENTAGE ACT § 702 (UNIF. LAW COMM’N 2017) (“A donor is not a parent of a child conceived by assisted reproduction.”).

¹²⁸ See *id.* § 701 (“This [article] does not apply to the birth of a child conceived by sexual intercourse.”).

¹²⁹ Jacobs, *Parental Parity*, *supra* note 77, at 467–68 (claiming the inability of lower-income women to access ART to become a Single Mother by Choice means they are forced into “required co-parenthood”). Jacobs cites the requirement in Temporary Assistance to Need Families (“TANF”) that women must assist the state with establishing paternity to keep their benefits. *Id.* at 468. See *infra* note 326.

¹³⁰ Compare UNIF. PARENTAGE ACT § 702 (UNIF. LAW COMM’N 2017) and UNIF. PARENTAGE ACT § 702 (UNIF. LAW COMM’N 2002), with UNIF. PARENTAGE ACT (UNIF. LAW COMM’N 1973) § 5(b). See also UNIF. PARENTAGE ACT § 702 cmt. (UNIF. PARENTAGE ACT 2002).

¹³¹ See Harris, *supra* note 40, at 479–80 (noting women who use ART to become SPC are largely well off and can “simply hire another adult or adults to care for their children,” and thereby offset some of the negative social capital implications of having only one parent). See also WEINER, *supra* note 1, at 510–13.

proxy for a person's financial capacity to raise a child, then society could address the economic barriers to becoming a SPC directly by subsidizing ART. Society need not allow single parenthood to become a choice following sex-based reproduction, as it is with ART-based reproduction.

Admittedly, the law will be more successful shaping reproductive behavior if people have unimpeded access to birth control and abortion.¹³² Research suggests, however, that it is not the unavailability of contraceptives that causes ill-advised reproduction, but rather the choice not to use them.¹³³ Long-acting reversible contraceptives ("LARCs") are the most effective contraceptives because they do not require episodic deployment, but unfortunately their availability is the most income sensitive.¹³⁴ Society should reduce or eliminate the economic barriers to LARCs. The parent-partner status would give people a reason to seek out LARCs if they were affordable. If LARCs remain unaffordable, the parent-partner status might provide a greater incentive for more consistent use of other contraceptives or for noncoital sexual behavior until the parties decide to become parents together.

2. Encouraging Teamwork

The second reason the current law of parenthood is appropriate for the parent-partner status is because it often affixes the label "parent" to people who are involved in the child's life at birth, and potentially over time. Since these individuals are likely to encounter each other around the time of the child's birth, the law should channel and coordinate their behavior in ways that would benefit their child. This goal reflects what Pamela Laufer-Ukeles has called the relational perspective.¹³⁵

¹³² Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 172–73 (attributing unplanned children to the unavailability of contraceptives and abortion for low-income women).

¹³³ See WEINER, *supra* note 1, at 249–50. See also EDIN & NELSON, *supra* note 100, at 221 n.5 ("From 2006 to 2010, 86 percent of female teens and 93 percent of their male counterparts reported using contraceptives—condoms are by far the most common—at last sex.").

¹³⁴ See WEINER, *supra* note 1, at 262–63.

¹³⁵ See Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 781 (2016) ("The relational perspective shifts the focus of rights from the prevention of state interference with individual freedoms to the placement of positive duties on the state to set preconditions for healthy, beneficial relationships. The goal of the relational approach is to consider what kind of laws and norms help structure relationships that work. Viewing rights not as the right to be left alone, but as rights to state support for interdependent relationships is a dramatic shift."); *id.* at 787 ("There are concrete steps that the law can take to promote relationships in advance and thereby avoid the need for interference later on."); *id.* at 809 (promoting policies "to educate, inform, and encourage parents in a non-coercive manner that advances children's interests and would inflict less harm on ongoing relationships"). While Pamela Laufer-Ukeles

A parent's involvement in the child's life will often be a natural consequence of the child's creation and will occur regardless of the parent's legal status.¹³⁶ Biological parents have a socio-biological basis for becoming involved.¹³⁷ Samuel von Pufendorf once wrote: "Nature works on parents to 'stir up their Diligence, wisely implant[ing] in them almost tender Affection towards these little Pictures of themselves.'" ¹³⁸ Nancy Dowd, who proposed that the law improve its recognition of social fathers ("birthfathers"), also suggested "a presumption that biological dads will be birthfathers" because of "empirical evidence of men's strong connection to the children they help create, thereby linking genetic and social fatherhood based on powerful social norms."¹³⁹ A similar impetus for involvement undoubtedly exists for

was focused on relationships along the vertical axis (she proposes four parenthood categories, see *id.* at 798, 799, 801, 804), her analysis supports the creation of a parent-partner status for parents.

¹³⁶ Cf. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS Ch. 1 § I(c) (AM. LAW INST. 2002) (discussing parents as defined under the status quo for purposes of the vertical axis) ("The degree of confidence placed in parents is not based on the certainty that all parents will do best for their children; some children would undoubtedly be better off if they had been assigned to someone other than their parents, or if their parents were more heavily supervised. It is assumed, however, that children on the whole will be better off, because (1) parents are the adults most likely to love their children; (2) love inspires parents to act responsibly toward their children; and (3) parental autonomy not only makes parents able to care for their children but more committed to doing so. Society, in turn, benefits from the diverse social fabric that is created by the decentralized manner in which their care is provided.").

¹³⁷ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 153 (citing NeJaime, *The Nature of Parenthood*, *supra* note 9, at 2260, 2335–36, for the proposition that "biological ties often lead individuals to form parent-child relationships, and thus 'provoke commitments of care and support'").

¹³⁸ Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 U. VA. L. REV. 879, 889 (1984) (quoting 2 S. PUFENDORF, ON THE LAW OF NATURE AND NATIONS, ch. 2, § 4, at 915 (C. Oldfather & W. Oldfather trans., 1934)).

¹³⁹ Nancy E. Dowd, *Parentage At Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL OF RTS. J. 909, 923 (noting, *inter alia*, that half of the unintended pregnancies are not terminated in abortion, suggesting that the father has probably made some sort of commitment to the mother). See *id.* at 913 (making a persuasive case for the recognition of a "birthfather"). Dowd proposed a presumption that the birthfather is "the man who is present at birth, who has been committed to the mother and the child during the pregnancy, and who voluntarily acknowledges, indeed embraces, his ongoing role as father." *Id.* at 919. Dowd's proposal does not forsake the importance of biology, but sought to align biological fatherhood and social fatherhood. She states, "we should assume that biological fatherhood will lead to social fatherhood, and express that expectation. In the absence of conduct that defeats the assumption, the unity is presumed and supported, at least at birth. Attached to that presumption, however, would be a demonstration and an expectation of social parenting." *Id.* at 922. Yet biology cannot trump the social father when the two are not aligned. *Id.* at 926. Consequently, a social father's paternity cannot be disestablished if the biological connection is ultimately found lacking. *Id.* at 927. In addition, if a biological father fails to establish any factor that is required for the presumption, without good cause, the

parents of children who are adopted or conceived with ART, although it has a socio-intentional basis.¹⁴⁰

People's inclination to participate in their children's lives, whether because of biology, socialization, or intention, results in actual contact with their children, at least at the outset. The Fragile Family study documented that most low-income parents in the study had contact with their children at the outset of their children's lives.¹⁴¹ That contact usually took place within the physical proximity of the other parent and within coupledom. At the time of birth, only 9% of the unwed couples had little or no contact; most couples were cohabiting, romantically involved, or friends.¹⁴² In fact, many couples start cohabiting because of the pregnancy, and plan marriage within a few months of childbirth.¹⁴³ Even couples who do not go down this path frequently have some contact with each other. Because the child's existence creates a relationship between the parents independent of the law, the law should help parents use their relationship to further their child's best interests.¹⁴⁴

Some people have criticized my emphasis on encouraging "teamwork" and my reliance on the status quo's law of parentage as a trigger because, in the critics' view,

biological father would be obligated for economic support, but not entitled to social rights. *Id.* at 925. This would include by engaging in conduct that harms the mother pre- or post-birth. *Id.* See also Harris, *supra* note 40, at 481 n.73 (recommending a presumption of paternal rights based upon biology for at-birth determinations, but making it rebuttable by the father's failure to provide for the mother during pregnancy or the father's unwillingness to assume responsibility for the child after the child's birth).

¹⁴⁰ Cf. Anna Leddy, Nanette Gartrell & Henny Bos, *Growing Up in a Lesbian Family: The Life Experiences of the Adult Daughters and Sons of Lesbian Mothers*, 8 J. GLBT FAM. STUD. 243, 248, 252 (2012) ("A majority of participants reported that their favorite part of having lesbian parents was that they grew up in an environment of acceptance and love," and that they experienced "a lot of love" from their mothers; these findings are congruent with literature that shows "adolescents with lesbian mothers report positive familial relationships with high levels of parental warmth and love.").

¹⁴¹ Sara McLanahan, Irwin Garfinkel & Ronald Mincy, *Fragile Families, Welfare Reform and Marriage*, 10 BROOKINGS INST. 1, 2 (2001).

¹⁴² WEINER, *supra* note 1, at 26 (citing McLanahan et al., *supra* note 141).

¹⁴³ See Reed, *supra* note 104, at 1128 (noting the couples' cohabitation "shows that shared children are very important in how these same couples define their relationships"); *id.* (explaining "shotgun cohabitation suggests that the two-parent family is still valued . . . [T]here is a strong cultural script at work here as well.").

¹⁴⁴ Cf. Anne C. Daily, *Holmes and the Romantic Mind*, 48 DUKE L.J. 431, 445, 455 (1998) (describing Holmes' view that "[l]egal rules must accommodate the instinctual needs as matter of good, even necessary public policy").

the result is a troubling commitment to biparentalism.¹⁴⁵ I will not repeat what my book says about the benefits of having two cooperating adults involved in a child's life,¹⁴⁶ or preempt my later discussion of multiparentalism,¹⁴⁷ or repeat my observations about the ways in which people can be SPC under existing parentage law.¹⁴⁸ Instead, here I will only say that a parent-partner status is still appropriately imposed on two legal parents, as currently defined,¹⁴⁹ even if single- or multiple-party parenting is preferable for some children. A parent's departure from a child's life and a third party's involvement in a child's life are best accomplished by adults who cooperate and place the child's interest first. Expecting the legal parents to cooperate and compromise is different from expecting the legal parents to replicate the Cleavers on *Leave it to Beaver* or be romantically coupled.¹⁵⁰

Admittedly, the parent-partner social role might make some people try harder to make their relationships work. Dara Purvis, in fact, identified several negative implications of using the current definition of parenthood for the parent-partner status. Purvis worries that the status might send the following problematic message: “[I]f you want to be a good father, you would still be in a romantic relationship with the mother.”¹⁵¹ Her criticism suggests that parties may misinterpret the parent-

¹⁴⁵ Biparenting means that “for each child the law should assign no fewer (and no more) than two parents.” Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 131. Blecher-Prigat claims that I “endorse biparenting as the ideal,” *id.* at 132, but my position is more nuanced. In the book, I merely assume that biparenting exists as a background fact because that is the reality. WEINER, *supra* note 1, at 142. It is part of the “exclusive family model,” which also makes the adults “full legal parents or . . . strangers.” See Kavanagh, *supra* note 9, at 88–89. It is all that the law currently allows in most instances. Kolinsky, *supra* note 77, at 834 (“At this point, the state requires that [rights] be assigned in a two-parent package as a bundle of rights with little variation.”); Yehezkel Margalit et al., *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J.L. & GENDER 107, 132 (2014). *But see* text accompanying note 248, *infra*. I am open to the recognition of more than two parents when failure to do so would be detrimental for the child. *See infra* text accompanying notes 239–48.

¹⁴⁶ *See generally* WEINER, *supra* note 1, at 193–224.

¹⁴⁷ *See infra* text accompanying notes 239–48, 395.

¹⁴⁸ *See generally* WEINER, *supra* note 1, at 510–12 (noting that single women and men can generally become SPC by using ART). *See supra* text accompanying notes 127–30.

¹⁴⁹ *See supra* note 145 (noting biparentalism is the norm in American family law).

¹⁵⁰ *See Leave it to Beaver* (Gomalco Productions 1957).

¹⁵¹ Purvis, *Book Review*, *supra* note 21, at 396. Purvis admits that this message goes beyond what I said, but I must have been unclear because Purvis thinks that I believe parent-partners should love each other passionately. Purvis notes: “[C]ooperation, respect, and platonic love can be present even if the parents are no longer in passionate love.” *Id.* at 395–96. I absolutely agree and do not think coupledness is a necessary component of a good parent-partnership or even preferred. Although passionate love is not a

partner status as an endorsement of coupledness and even coupledness at all costs. Professor Swennen shares this fear and warns that he would not support the status if it were meant to channel people into coupledness.¹⁵²

The parent-partner status is not, however, meant to be an endorsement of marriage or coupledness. After all, divorced parents today are expected to, and often can, work cooperatively as a “team” to advance their children’s best interests.¹⁵³ Nonetheless, the parent-partner status ideally would prompt people to consider whether their child would benefit if they entered or remained in a coupled relationship with the other parent. Married couples sometimes divorce even though divorce is not in their child’s best interests,¹⁵⁴ and many people later regret their decision.¹⁵⁵ The children of some unmarried parents might be benefitted if their parents married each other or cohabited, thereby realizing at least the economic benefits of a shared residence. Yet, a particular couple might need to terminate their romantic relationship, especially if one parent treats the other parent poorly or the parents’ unhappiness negatively and severely impacts their children.¹⁵⁶ These types of decisions are incredibly personal and individualized, and the law cannot, and should not, determine the future of parents’ romantic relationships. However, the law can encourage parents to consider the effects of their choices on their child. It can

prerequisite to good co-parenting, it is arguably a potential side benefit of a parent-partner status. *See generally* WEINER, *supra* note 1, at 275–98. Purvis also noted that the status “underlines the relational nature of paternity,” and a father “must bind himself through legal obligation directly to the mother for the duration of the child’s minority.” Purvis, *Book Review*, *supra* note 21, at 394. She posits that the parent-partner obligations might cause more fathers, especially low-income fathers, to shy away from legal parenthood and low-income mothers might acquiesce in that outcome. *Id.* at 394–95. That, in fact, is the intended outcome for all individuals who are reluctant to assume the obligations, although it is intended to have this effect *prior* to reproduction. The book addresses whether the parent-partner status would deter men from becoming legal fathers after conception and the conclusion was it should not. *See* WEINER, *supra* note 1, at 516–18.

¹⁵² Swennen, *supra* note 8, at 18.

¹⁵³ *See* WEINER, *supra* note 1, at 354 (“[F]orty-six states have parenting classes for divorcing couples . . . [and they] try to teach parents to co-parent successfully after divorce.”).

¹⁵⁴ *Id.* at 197 (citing PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* 238 (1997); Paul R. Amato et al., *Parental Divorce, Marital Conflict, and Offspring Well-being During Early Adulthood*, 73 *SOC. FORCES* 895, 911–12 (1995)).

¹⁵⁵ WEINER, *supra* note 1, at 374 (citing *Men + Divorce: By the Numbers*, 25 *MEN’S HEALTH*, Dec. 2010, at 164–65; then citing Heather Flory, “I Promise to Love, Honor, Obey . . . and Not Divorce You”: *Covenant Marriage and the Backlash Against No-Fault Divorce*, 34 *FAM. L.Q.* 133, 145 n.71 (2000)).

¹⁵⁶ *See id.* at 197, 223.

convey the expectation that parents will cooperate after their breakup to ensure that their child obtains all possible advantages.¹⁵⁷

If anything, the existence of a parent-partner status might make it more likely that the law would recognize unmarried friends as co-parents if they wanted that legal designation, even if one or both lacked a biological connection to the child. NeJaime notes that biology and relationship have become less relevant to parentage determinations since the 1960s, and intent and function have become more relevant.¹⁵⁸ The legal recognition of “both unmarried, biological fathers and married, nonbiological parents” eventually led to the legal recognition of unmarried, nonbiological parents in same-sex couples.¹⁵⁹ He predicts that marriage equality may accelerate this trend for same-sex couples, and for opposite-sex couples too.¹⁶⁰

His prediction seems most likely if some legal structure exists that would encourage the unmarried, nonbiological parents to cooperate for their child’s benefit. After all, the advances in parenthood law that NeJaime identified were always grounded in a sense that the advances were consistent with the interests of children in those families. At times, the law moved forward because courts saw a commitment between the parents, as evidenced by a marital-like relationship,¹⁶¹ which implied a shared commitment to the child. At other times, the law moved forward because expanding parenthood to intentional and functional parents furthered the “protection of children’s best interests.”¹⁶² If parenthood created a legal relationship between the parents, and a related social role, then the law would provide a structure that supported the parents’ commitment to their co-parent relationship and their child. This structure would exist for all who elected to become co-parents—whether inside or outside of marriage, whether same-sex or different-sex couples, whether friends

¹⁵⁷ To be clear, the parent-partner status would not change the law of custody; sole custody may be appropriate to achieve what is best for the child. See Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody*, 2016 U. ILL. L. REV. 1535, 1575–79 (2016).

¹⁵⁸ NeJaime, *Marriage Equality*, *supra* note 9, at 1188.

¹⁵⁹ *Id.* at 1197.

¹⁶⁰ *Id.* at 1230, 1250, 1255, 1259, 1262–65. NeJaime also notes that some have argued the opposite: “[A]ccess to marriage may limit other paths to parental recognition and may reduce incentives to achieve laws that recognize unmarried, nonbiological parents.” *Id.* at 1252.

¹⁶¹ *Id.* at 1237.

¹⁶² See, e.g., *id.* at 1261 (discussing *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 3d 26 (Cal. Ct. App. 2009)). Advancements have also rested on “sexual-orientation equality.” *Id.* at 1261.

or lovers. Courts and legislatures might then further expand the opportunities for parenthood to rest on intention and function.

3. Deterring Unjust Behavior

The third purpose of the status—to provide remedies for unjust behavior and thereby deter it—is also facilitated by using the current definitions of parenthood to trigger both parenthood and the parent-partner status. By piggybacking on the existing parentage regime, the parent-partner status would impose the *inter se* obligations on people who *should* bear responsibility for their morally problematic behavior toward each other (such as abusing the other parent physically or emotionally, taking advantage of the other parent’s caregiving labor, or negotiating an unfair prenuptial or cohabitation agreement).

In this sense, the identification of the parent for purposes of the parent-partner status is similar to the identification of the parent for purposes of the parent-child relationship. The determination of parenthood along the vertical axis identifies not only which willing person *can* be a parent,¹⁶³ but also which unwilling person *must* assume parental responsibilities.¹⁶⁴ The rationale for imposing the parental obligations on parents, as currently defined, is usually dependency causation or consent.¹⁶⁵ Those same theories support imposing the parent-partner obligations on those we currently define as a parents, including those who become parents after a one-night stand. In addition, utilitarian and deontological reasons also suggest that

¹⁶³ There is an expressive effect of being labeled a parent. See NeJaime, *The Nature of Parenthood*, *supra* note 9, at 2322 (“The harms of nonrecognition are not only practical but expressive. Courts routinely term those who serve as parents but lack biological ties ‘nonparents’—casting them as third parties who are otherwise strangers to the family.”).

¹⁶⁴ See, e.g., OR. REV. STAT. § 163.555 (2018) (criminal nonsupport). See generally J.B. Glen, Annotation, *Criminal Responsibility of Parent Under Desertion or Nonsupport Statutes, as Affected by Child’s Possession of Independent Means, or By Fact Other Persons Supply His Needs or Are Able to Do So*, 131 A.L.R. 482 (originally published in 1941).

¹⁶⁵ WEINER, *supra* note 1, at 161–79. In the context of the parent-child relationship, dependency causation means that parents are allocated rights and responsibilities vis-à-vis the child because the parent caused the child’s dependency. In the context of parent-partners, it means parent-partners have rights and responsibilities to each other because “the parent-partner relationship causes the parents to be mutually dependent or interdependent” as well as “vulnerable to dependency.” *Id.* at 164. Blecher-Prigat has proposed a more radical scheme for determining parentage for purposes of a parent-partner status, see *supra* text accompanying notes 120–23 and *infra* notes 179–89, 315–18, but she seems to rely on these same justifications for legal obligations. For example, she proposes that a progenitor should have a limited child support obligation to contribute subsistence level financial assistance when no one else can. See Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 165–66. This obligation presumably rests on some moral obligation to bear it, either for reasons of dependency causation or consent.

detering and remedying unjust behavior between “parents,” as currently defined, is warranted.¹⁶⁶

In sum, parenthood law along the vertical axis generally identifies the right people for purposes of imposing parent-partner rights and obligations.

II. THE UNDERINCLUSION PROBLEM

Nonetheless, current parenthood law is sometimes underinclusive for purposes of a parent-partner status. It would not impose the parent-partner status on some people who should be parent-partners. This problem, however, can be addressed without radically changing the definition of parent.

A. LGBTQ Families and Friend Families

Parentage law has lagged behind changes in social attitudes and family forms, and created unwarranted hardship.¹⁶⁷ Its emphasis on biology, for example, has denied some gay men and lesbians parental recognition when they should have it.¹⁶⁸ The law has also insufficiently recognized the parenthood claims of unmarried heterosexuals who use ART and intend to co-parent, sometimes as friends.¹⁶⁹ For example, an unmarried man whose female partner, with his consent, uses donor sperm to start their family might be displaced by a sperm donor who contests paternity.¹⁷⁰ Ayelet Blecher-Prigat discussed the underinclusion problem in her article in the *Harvard Journal of Law and Gender*,¹⁷¹ and correctly noted that the inconsistencies and underinclusiveness reflect “bionormative and heteronormative models of parenthood.”¹⁷²

¹⁶⁶ WEINER, *supra* note 1, at 162 (citing Chapters 6–8).

¹⁶⁷ See generally Harris, *supra* note 55, at 1308; NeJaime, *The Nature of Parenthood*, *supra* note 9.

¹⁶⁸ See *supra* note 9.

¹⁶⁹ NeJaime, *Marriage Equality*, *supra* note 9, at 1257.

¹⁷⁰ NeJaime, *The Nature of Parenthood*, *supra* note 9, at 2296 (“Spouses, not unmarried partners, are recognized as legal parents of children conceived with donor sperm. Further, under the original UPA and the laws of many states, sperm donors are divested of rights and responsibilities only if they donate sperm for use by a married woman.”).

¹⁷¹ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 140–41 (discussing marital presumption); *id.* at 143–45 (describing, *inter alia*, adoption cases).

¹⁷² *Id.* at 177.

These failures of parentage law along the vertical axis are also failures for purposes of the parent-partner status. If people intend to be parents and engage in reproductive acts but are not recognized as parents, then they are not put into the social roles of parent and parent-partner, nor given relevant legal obligations and remedies. Those roles, obligations, and remedies can guide their interactions with the child and other parent in positive ways.

B. Comparing Solutions

Proposals exist to fix the gaps. Two recent and notable proposals are the UPA 2017 and one by Blecher-Prigat (appearing in the *Harvard Journal of Law and Gender*).¹⁷³ A comparison reveals the UPA 2017 is preferable for establishing parentage for purposes of the parent-partner status because of its relative simplicity, certainty, and familiarity. The UPA 2017 would fix the underinclusion problem by making relatively modest adjustments to the status quo.

The new UPA 2017 does not fundamentally change the law of parenthood, but rather helps courts better respect intentional family formation by same-sex couples, opposite-sex couples, and functional parents. The UPA's most important changes include the following: allowing VAPs to be used by a presumed parent or an intended parent using ART;¹⁷⁴ using gender-neutral language so same-sex couples can take advantage of provisions related to the presumptions of parenthood, acknowledgments, genetic testing, and ART;¹⁷⁵ recognizing *de facto* parenthood as legal parenthood;¹⁷⁶ and allowing states to recognize three parents if not doing so

¹⁷³ Blecher-Prigat, *Conceiving Parents*, *supra* note 6.

¹⁷⁴ An acknowledgment can be signed by the birth mother, the alleged genetic father, the intended parent using ART, or a presumed parent (*e.g.*, one who is married to the birth mother or lived with the child for the first two years of its life and openly held the child out as his or her own), and only these people. *See* UNIF. PARENTAGE ACT §§ 301, 204(a)(1)(A), 204(a)(2) (UNIF. LAW COMM'N 2017).

¹⁷⁵ *See id.* Prefatory Note 1–2; *id.* § 201 cmt. (“UPA (2017) updates the UPA so that it applies equally to children born to same-sex couples. Most of the mechanisms for establishing parentage apply equally without regard to gender.”).

¹⁷⁶ *See id.* § 609 (requiring that the applicant prove the following: “(1) the individual resided with the child as a regular member of the child’s household for a significant period; (2) the individual engaged in consistent caretaking of the child; (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation; (4) the individual held out the child as the individual’s child; (5) the individual established a bonded and dependent relationship with the child which is parental in nature; (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and (7) continuing the relationship between the individual and the child is in the best interest of the child”).

would be detrimental to the child.¹⁷⁷ The UPA 2017 has been adopted by three states (California, Washington, and Vermont) and introduced in four others (Pennsylvania, Rhode Island, Connecticut, Massachusetts).¹⁷⁸ It will hopefully be adopted by these four states and others.

Blecher-Prigat's quite different proposal was briefly introduced above.¹⁷⁹ She would create two categories into which parents, as presently understood, could fall. The first category is called "parent;" a "parent" would have "comprehensive duties and rights," both to the child and to the other parent.¹⁸⁰ The second category is called "progenitor," or "birthing parent."¹⁸¹ A "progenitor" would have limited obligations to the child (*e.g.*, a minimal child support obligation that would be due only if the "parents" cannot meet the child's basic needs) and limited rights (*e.g.*, third-party visitation rights).¹⁸² While the "progenitor" category is subordinate to "parenthood,"¹⁸³ it is obviously closely related.

The test for determining who is a "parent" is comprised of three factors: biology, intent, and the nature of the adults' relationship. These factors would be used to determine parenthood no matter how a child was conceived, that is, whether by sex or ART.¹⁸⁴ Each factor has its own subrules. For example, "intent" does not only refer to preconception intent, but also includes intent "established at the time of birth or soon thereafter" for unplanned pregnancies.¹⁸⁵ The parties' "ongoing

¹⁷⁷ See *id.* § 613 Alt. B. Other changes include the inability of a perpetrator of rape to acquire a legal status for a child conceived by rape (without the other parent's consent), new surrogacy provisions, and the rights of children conceived by reproductive technology to access information about their gamete provider. See *id.* Prefatory Note.

¹⁷⁸ See UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017), Enactment Map, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> (last visited Apr. 3, 2019).

¹⁷⁹ See *supra* text accompanying notes 120–23.

¹⁸⁰ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 122.

¹⁸¹ *Id.* at 125.

¹⁸² *Id.* at 169.

¹⁸³ *Id.* at 124.

¹⁸⁴ Blecher-Prigat cares about equality, and she is to be commended for her effort to eliminate distinctions for determining the parentage of children conceived by ART and sex-based reproduction. *Id.* at 125. Susan Appleton called those differences a new type of illegitimacy. See Appleton, *supra* note 118.

¹⁸⁵ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 151. Intent is not the same as functioning as a parent. *Id.*

committed relationship,” which weighs in favor of a parenthood designation, is not limited to a marital or marital-like relationship but can include platonic friends.¹⁸⁶

The multifactor test is buttressed by some presumptions that are designed to provide “stability and certainty.”¹⁸⁷ On the one hand, all parties to a “long-term committed relationship . . . are presumed to be the child’s parents” if a pregnancy occurs.¹⁸⁸ On the other hand, if the conception occurs by virtue of a one-night stand, then the father will not be a parent unless he demonstrates his intent to be a parent during the pregnancy or shortly thereafter.¹⁸⁹

1. Simplicity

For the parent-partner status to be effective, and the parent-partner status was designed to be impactful, *i.e.*, to influence parental behavior,¹⁹⁰ its trigger must not be so complicated that the identity of a child’s parents is ambiguous.

Laurence Friedman’s book, with the aptonym *Impact*, reveals the importance of a clear trigger for maximizing the status’s impact. He discusses the many factors that can determine whether a legal change will affect behavior. He rightly calls it a “complicated social process,”¹⁹¹ but then identifies three main factors: legal rewards and punishments, peer pressure, and a moral sense of right and wrong.¹⁹² He warns: “[I]mpact will be minimal, or downright negative, where deterrence is weak, peer pressure is absent, and people have no qualms about the behavior in question.”¹⁹³

Friedman’s description of the three aspects of impact all depend upon the law’s clarity. As Friedman says, “The clearer the message, the more likely it is to have significant impact.”¹⁹⁴ For example, deterrence requires that people know the law and that it applies to them. Friedman explains that it is “common . . . for people . . .

¹⁸⁶ *Id.* at 135.

¹⁸⁷ *Id.* at 154.

¹⁸⁸ *Id.* at 155.

¹⁸⁹ *Id.* at 160.

¹⁹⁰ *See, e.g.*, WEINER, *supra* note 1, at 179–80, 232, 394.

¹⁹¹ LAWRENCE FRIEDMAN, *IMPACT* 246 (2016).

¹⁹² *Id.* at 220, 241.

¹⁹³ *Id.* at 220.

¹⁹⁴ *Id.* at 32.

to get things wrong.”¹⁹⁵ He blames the law for many of the “gaps in legal knowledge Laws can be vague and cloudy, or technical and complicated.”¹⁹⁶ The other factors Friedman identifies that affect impact—peer pressure and a moral sense of right and wrong—work best when the law creates a social role.¹⁹⁷ Friedman does not discuss social roles explicitly,¹⁹⁸ but recognizes that the law can help create them and that they in turn can shape behavior in conformance with the law.¹⁹⁹ The law is most likely to create a social role when the corresponding legal category is straightforward.

Parentage scholars have already noted the importance of clarity for parentage determinations along the vertical axis. For example, Elizabeth Bartholet, when discussing how to foster parental nurturing, noted, “[m]ore important than the weight given to particular substantive factors is for the system to have clear rules establishing permanent parenthood early.”²⁰⁰

Blecher-Prigat’s proposal threatens to undo the clarity that presently, and actually, exists. The creation of the categories of “parent” and “progenitor” would splinter parenthood and confound the creation of a social role. Melissa Murray

¹⁹⁵ *Id.* at 17; *id.* at 19 (“Ignorance of the law is common, ubiquitous.”).

¹⁹⁶ *Id.* at 18.

¹⁹⁷ Shahar Lifshitz, *Neither Nature nor Contract: Toward an Institutional Perspective on Parenthood, Essay*, 8 *LAW & ETHICS HUM. RTS.* 297, 315 (2014) (“[T]he law is an important tool for designing social institutions. The role of the law becomes especially important in cases of modern, relatively novel institutions, not yet fully developed in extra-legal culture.”).

¹⁹⁸ Friedman does mention how people “like to conform They model the behavior of others; they want to do what is normal or common among their peers Behavior can be influenced simply by an awareness of what other people do or don’t do, think or don’t think.” FRIEDMAN, *supra* note 191, at 182. *Cf. id.* at 140 (“Rules of law, in general, channel behavior along certain lines.”).

¹⁹⁹ *Id.* at 217 (“To be sure, law is . . . ‘constitutive.’ It plays a role in the social construction of reality; it affects the way we think (and behave) by helping frame notions of basic facts and institutions: such institutions as marriage and divorce, employer and employee, what it means to ‘own’ something, and whether ‘a slip of paper is legal tender.’ In this way, but indirectly, law does have an ‘impact,’ but subtly and unconsciously. Unthinking behavior, then, would be part of the ripple effects of law.”). *See also* Cass R. Sunstein, *Social Norms and Social Roles*, 96 *COLUM. L. REV.* 903, 923 (1996).

²⁰⁰ Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 *HARV. WOMEN’S L.J.* 323, 338 (2004).

warned: “[c]reating a status that approaches parenthood, but is not parenthood, would undoubtedly create confusion in the legal understanding of both statuses.”²⁰¹

Blecher-Prigat’s specific test for determining whether someone is a “parent” or a “progenitor” would add to the confusion. Despite the test’s subrules, it is highly fact-dependent and relies on very contestable factors. For example, Blecher-Prigat acknowledges that intent has an “indeterminant” quality.²⁰² She says, “intent to become a parent does not emerge as a momentary event, but rather is a process that evolves and develops over time.”²⁰³ This fluidity contributes to the unpredictability of the outcome. Similarly, the parties may dispute whether they had a “long-term committed relationship” at the time of birth, especially if they are fighting about one party’s parental status. Such a dispute suggests a commitment was actually absent.

The promised certainty from the presumptions is illusory. Disputes will arise about whether a presumption applies at all (*i.e.*, did the parties have a “long-term committed” relationship).²⁰⁴ Disputes will arise because many relationships fall outside of the scope of the presumptions. They are neither “long-term committed” nor “one-night stands.” Disputes will arise because it is unclear what weight the three factors (biology, intent, and relationship) should have once the presumption is rebutted or when a presumption does not apply. In fact, Blecher-Prigat admits that she “does not offer a formula for weighing the different factors of relationship, biology, and intent in each case.”²⁰⁵ While her reason for the omission is understandable,²⁰⁶ her choice to leave this aspect unaddressed, especially when she provides so many other rules, invites concern.

Case law may develop a set of rules over time to guide judicial discretion along the lines of Blecher-Prigat’s preferences, whatever those are. But maybe not. She

²⁰¹ Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 U. VA. L. REV. 385, 448 (2008) (referring to subordinate alternative statuses for functional parents and nonbiological caregivers that would coexist with parenthood).

²⁰² Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 150.

²⁰³ *Id.* at 151.

²⁰⁴ *Id.* at 155. Blecher-Prigat uses both the term “long-term” and “committed.” *Id.* These terms differ in meaning. For example, a couple may elope after a brief period of dating. Their relationship would be “committed,” but not “long term.” In contrast, a couple may be together for a very long time, but both parties may lack a commitment to sustain the relationship going forward.

²⁰⁵ *Id.* at 145.

²⁰⁶ *Id.* She says that her article merely seeks to start a conversation about the significance of relationships to the determination of parenthood. *Id.*

admits, “[o]ne 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.”²⁰⁷ Even if case law would one day narrow judicial discretion, the average person would not know those court decisions,²⁰⁸ nor feel the certainty that Blecher-Prigat imagines.

The multiple types of parenthood and the multifactored test within Blecher-Prigat’s proposal produce a vagueness and flexibility that would undercut the effectiveness of the parent-partner status. Laurence Friedman reminds us that “[s]tandards are fuzzy messages, and they can confuse the audience.”²⁰⁹ Ambiguity increases the likelihood of disputes and litigation.²¹⁰ At the child’s birth, the law should be nudging couples to work together for their child’s benefit, not encouraging them or others to gear up for litigation because the law’s attribution of parenthood is debatable. In prior writings, Blecher-Prigat herself noted, “[F]ormal parenthood should be as clear as possible and be denoted *ex ante* through registration and through statutes such as the Unified [sic] Parentage Act.”²¹¹

2. Stability

Blecher-Prigat’s multifactored test also has the potential to undercut the procedural requirements for parenthood that exist in the context of ART.²¹² Such

²⁰⁷ *Id.* at 153.

²⁰⁸ FRIEDMAN, *supra* note 191, at 20 (stating people know “little or nothing” about court decisions).

²⁰⁹ *Id.* at 28. This observation is less true when it comes to a rule. *Id.*

²¹⁰ American Law Institute, *Introductory Materials to Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & SOC. POL’Y 1, 1–2 (2001) (noting in the context of custodial rule-making that “[t]he predictability of outcomes helps to reduce litigation, as well as strategic and manipulative behavior by parents”). See also Carbone, *supra* note 4, at 1297 (“[U]ncertainty at the core of the definition of family produces . . . legally contentious cases.”). See generally Harris, *supra* note 40, at 473 (noting other disadvantages).

²¹¹ Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 467 (2013).

²¹² Similar concerns exist about the effect of Blecher-Prigat’s proposal on putative father registries, as existed in *Lehr v. Robertson*, 463 U.S. 248 (1983). After all, Mr. Lehr, the biological father, had a five-year relationship with the mother prior to birth, and they had lived together for the last two years before the child’s birth. *Lehr*, 463 U.S. at 268–69 (White, J., dissenting). He also stepped up to be father, at least according to the dissent. *Id.* Putative father registries no longer produce effects as draconian as seen in *Lehr* because the National Conference of Commissioners on Uniform State Laws changed the UPA’s notice provisions after *Lehr* so that people in Mr. Lehr’s position are given notice. See UNIF. PARENTAGE ACT § 402(b)(2) (UNIF. LAW COMM’N 2002) (requiring notice if father commenced paternity action even

requirements can help clarify intentions and bring order to parentage determinations, although admittedly they can sometimes trap the unwary.

The provisions in the UPA 2017 that address ART are well-coordinated with the other provisions, and reflect a reasonable balance between stability and flexibility. For example, the Act requires compliance with certain procedures before a non-biological parent can be considered the legal parent of a child conceived by ART, but the Act has exceptions in the event a formality is missed and the parties' intent is clear. For example, section 704(a) requires a person to consent in writing to the use of assisted reproduction by a woman if that person is to be a legal parent of the resulting child.²¹³ However, section 704(b) allows a court to find parentage in the absence of written consent if either party provides "clear-and convincing evidence" of "an express agreement entered into before conception that the individual and the woman intended they both would be parents of the child."²¹⁴ Similarly, the gestational surrogacy provisions in article 8 emphasize the importance of a written agreement attested to by the parties,²¹⁵ but the Act allows the court to adjudicate the dispute "consistent with the intent of the parties at the time of execution of the agreement" when the agreement falls short of the statutory requirements.²¹⁶ Likewise, a genetic surrogacy agreement must be validated by a court,²¹⁷ but if it is not, the court can still enforce it when the parties continue to agree to its terms.²¹⁸

if he did not register); *see also id.* § 405 (requiring notice for alleged fathers of children age one year and older, whether or not the person registered). A failure to register has the greatest effect on biological fathers with children under one year of age. *Id.* § 404 (permitting termination of parental rights of child under one year old without notice if father did not register and is not exempt). As such, registries primarily facilitate the adoption of newborns. *See generally* Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1038 (2002). The UPA 2017 continues to make registries an integral part of its parentage framework, UNIF. PARENTAGE ACT art. 4 (UNIF. LAW COMM'N 2017), as they have been since the UPA 2002. UNIF. PARENTAGE ACT art. 4 cmt. (UNIF. LAW COMM'N 2017). Blecher-Prigat's proposal might undermine registries as well as the prerequisites to parental status in the context of ART.

²¹³ *See* UNIF. PARENTAGE ACT § 704(a) (UNIF. LAW COMM'N 2017).

²¹⁴ *Id.* § 704(b).

²¹⁵ *See id.* § 803(4), (6).

²¹⁶ *Id.* § 812(b).

²¹⁷ *Id.* § 813(a).

²¹⁸ *Id.* § 816(b).

The difference between the UPA 2017 and Blecher-Prigat's multifactor approach is evident if one considers the case of *In re K.M.H.*²¹⁹ There the parties were unmarried and friends.²²⁰ DH provided his sperm to SH.²²¹ He claimed that the parties agreed to co-parent; SH disagreed and moved to have his rights terminated the day after the children's birth.²²² No writing existed that memorialized the parties' agreement.²²³ The Kansas Supreme Court found for SH and cited the statute that said men like DH are sperm donors unless a writing says otherwise.²²⁴ The court did not think the statute violated the constitution.²²⁵

If this case had been decided under Blecher-Prigat's fluid approach to determining parenthood, then the nature of the parties' relationship would have been relevant, and the statutory requirement of a writing would have been rendered meaningless (except, perhaps, as evidence of intent). Blecher-Prigat never says that she intends to eliminate statutory prerequisites to legal parenthood, but her analysis implies it. Blecher-Prigat discusses *In re K.M.H.*, and argues that the nature of the parties' relationship should have played "a significant role" in deciding the case.²²⁶ Yet making their relationship matter to the outcome would undermine the statutory requirement of a writing. Moreover, it would introduce an issue that was likely to be hotly contested. The parties were friends, but the quality and depth of that friendship was unclear. SH claimed that she sought out fertility tests and treatment on her own.²²⁷ While DH accompanied her to the first insemination, he did not accompany her to the second insemination.²²⁸ SH claimed, "he did not provide emotional support

²¹⁹ *In re K.M.H.*, 169 P.3d 1025 (Kan. 2007).

²²⁰ *Id.* at 1029.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 1040.

²²⁴ *Id.* at 1045.

²²⁵ *Id.* at 1040–41.

²²⁶ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 156–57. Although she does not clearly indicate if the parties' relationship would have established or disestablished DH's paternal status, it appears to be the former because Blecher-Prigat expressly says friendship should be sufficient. *Id.*

²²⁷ *In re K.M.H.*, 169 P.3d at 1030.

²²⁸ *Id.*

or financial assistance during the pregnancy or after the twins' birth."²²⁹ She also argued that he was morally, financially, and emotionally unfit to be a father.²³⁰

The UPA 2017 is similar to the Kansas statute that was determinative in *In re K.M.H.* The Kansas statute did not require SH to use an anonymous sperm donor, but it did require the parties to memorialize their intent if DH would have rights.²³¹ Similarly, the UPA 2017 would not require SH to use an anonymous sperm donor, but it would require the parties to sign an agreement if DH were to be a parent.²³² If the written agreement did not exist, the UPA 2017, unlike Kansas law, would permit DH to prove "by clear-and-convincing evidence the existence of an express agreement entered into before conception that the individual and the woman intended they both would be parents of the child."²³³ It is unknown whether DH could have proven that such a verbal agreement existed, although the court assumed the existence of such an agreement for purposes of its constitutional analysis of the statute.²³⁴ The UPA 2017, like Kansas law, makes the quality of their friendship largely irrelevant.

The approach in the UPA 2017 is better than Blecher-Prigat's. It is good policy for the state to require parties using ART to memorialize their intent formally, and then provide a default rule if they fail to do so.²³⁵ Procedural requirements are useful. They protect those who want responsibility, those who do not, and those who do but want to parent alone. They can also be written to minimize unfairness, such as the UPA 2017's provision that permits a party to show by clear and convincing evidence that the parties had an oral agreement before conception that both would be parents of the child.²³⁶

Procedural requirements create bright lines so people can know ahead of time the implications of their actions. In fact, the statutory requirement in *In re K.M.H.* protected SH's desire to be the only legal parent. DH could have made his sperm donation contingent on a writing that said he would have parental rights, but he did not. Had he insisted on a writing setting out his parental rights, SH may have found

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ KAN. STAT. ANN. § 38-1114(f) (2006).

²³² UNIF. PARENTAGE ACT § 704(a) (UNIF. LAW COMM'N 2017).

²³³ *Id.* § 704(b)(1).

²³⁴ *In re K.M.H.*, 169 P.3d at 1040.

²³⁵ UNIF. PARENTAGE ACT § 704 (UNIF. LAW COMM'N 2017).

²³⁶ *See supra* text accompanying note 233.

another donor. Similarly, SH may have found another donor if the UPA 2017 were the governing law and DH could have invoked the exception successfully. Given DH's failure to follow the Kansas statute, it was right that SH's intent, instead of DH's intent, was determinative. The expansion of rights and responsibilities for DH would come at the expense of SH's autonomy.

Moreover, the UPA 2017's requirements support the objectives of the parent-partner status. The requirements encourage people using ART to be deliberate about reproducing together; they also minimize disputes. Courts will not be determining parental status after the fact by considering the nature and quality of the parties' relationship.

3. Familiarity

Apart from embodying a better, simpler, and more certain standard for determining parentage, the UPA 2017 is preferable to Blecher-Prigat's recommendation because it represents, relatively speaking, incremental change. Blecher-Prigat's recommendation is much more far reaching. Melissa Murray described the humongous legal impact such a redefinition project would have:

[T]he legal structure of parenthood is deeply embedded in almost every aspect of family law, and indeed, in other areas of the law that implicate families. Accordingly, dismantling parenthood as a legal category would fundamentally disrupt the operation of family law, as well as immigration law and policy, tax law and policy, administrative law, and the like.²³⁷

The breadth of its effects would make Blecher-Prigat's proposal less likely to become law and, in turn, more likely to threaten the adoption of a parent-partner status.²³⁸

For all of these reasons, the UPA 2017 is a preferable way to address the law's underinclusiveness for LGBTQ families and unwed couples who use ART to become co-parents. It will extend parentage to those who should have it, but without the need to upset existing parentage law and introduce ambiguity into every parenthood contest.

²³⁷ Murray, *supra* note 201, at 453.

²³⁸ See WEINER, *supra* note 1, at 143 (discussing status quo bias).

C. *Multiparentalism*

The other way that current parentage law is arguably underinclusive for purposes of a parent-partner status is through its commitment to biparentalism. In some instances, three or more individuals should all have the label “parent.”²³⁹

There is nothing about the parent-partner status that requires a child have only two parents, and in some ways a parent-partner status seems particularly advantageous when more than two people see themselves as parents to the same child. The book discussed some of the status’s benefits in the context of repartnering, and comparable benefits exist when a child has more than two legal parents. For example, in the context of repartnering the status could “help minimize . . . negative effects,” including the strains on the co-parenting relationship and stress for children, by embodying the norm that good parent-partners exhibit “acceptance,”²⁴⁰ and by conveying to third parties (including new partners) that “it is okay for the parent-partners to be involved in each other’s lives after parents repartner.”²⁴¹

If a child has more than two legal parents, the parent-partner status might similarly help those parties (and others) navigate what is likely to be a more complicated array of adult relationships. Susan Appleton has noted, “[a]s the parental community expands, . . . the possibilities for such disputes increase.”²⁴² The parent-parenthood norms, such as acceptance and flexibility,²⁴³ and its obligations, such as relationship work at the transition to parenthood and at the relationship’s demise, should be very helpful. There is no reason that the parent-partner obligations should not apply to all of the parents, and thereby promote support and fairness between them.

Currently, most children have, at most, two legal parents. Therefore, it is unnecessary to resolve the desirability of multiparentalism before adopting a parent-partner status. That is fortunate because the advantages and disadvantages of

²³⁹ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 132.

²⁴⁰ WEINER, *supra* note 1, at 204.

²⁴¹ *Id.* at 205.

²⁴² *Cf.* Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 41 (2008). *But see* Abraham, *supra* note 5, at 421.

²⁴³ WEINER, *supra* note 1, at 204–05.

multiparentalism deserve further exploration.²⁴⁴ In the meantime, a parent-partner status would advantage children who have no more than two legal parents.

If multiparentalism is to be recognized, the UPA 2017's conservative approach is superior to Blecher-Prigat's framework. The UPA 2017 gives states a choice about whether to recognize more than two parents. If a state adopts alternative B to section 613, its courts are allowed to recognize three parents when "failure to recognize more than two parents would be detrimental to the child."²⁴⁵

In contrast, Blecher-Prigat's framework has no additional filters before the law would recognize multiple parents. Because her proposal has a presumption that long-term friends in a "committed relationship" are parents of a child,²⁴⁶ many people might have standing to claim legal parenthood. Without an additional filter to resolve claims of multiple parenthood, a child might end up with a large number of legal parents, even if the child would suffer no detriment from having fewer parents, and even if the child would suffer harm from having all the adults as parents.²⁴⁷

Finally, the UPA 2017 is preferable to Blecher-Prigat's proposal for addressing multiparentalism for the same reasons it was preferable for addressing the underinclusion problem with respect to LGBTQ and heterosexual nonmarital couples. Most obviously, Blecher-Prigat's proposal is too novel. While some states have expanded the number of parents that children can have, those states are still in the minority.²⁴⁸ The novelty itself may garner opposition.

III. THE OVERINCLUSION PROBLEM

A. *Unmarried and Uncommitted*

Some believe that existing parentage law is inapt for a parent-partner status because it is overinclusive, that is, it would impose parent-partner legal obligations on the wrong people. Two strands of criticism exist. One strand focuses on unmarried low-income women who would have parent-partner obligations with the biological

²⁴⁴ NeJaime, *The Nature of Parenthood*, *supra* note 9, at 2362 ("Of course, this approach is not without costs. In facilitating additional claims, law might change the very meaning of parenthood—divesting the power to exclude that has historically been central to parental status. Moreover, it is not clear when exactly recognition of multiple parents serves, and when it undermines, children's interests."). *See also supra* text accompanying note 394.

²⁴⁵ UNIF. PARENTAGE ACT § 613(c) Alt. B (UNIF. LAW COMM'N 2017).

²⁴⁶ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 155.

²⁴⁷ Blecher-Prigat acknowledges the potential problems of multiparentalism, but suggests they are no different than problems faced by two parents. *Id.* at 132 n.50.

²⁴⁸ *See* HARRIS ET AL., *supra* note 95, at 909 (noting this is a possibility in twelve states).

fathers of their children. The other stand focuses on biological fathers who never had the intention to become a parent, let alone a parent-partner.

It is not clear that a problem of overinclusion exists when one recalls the purposes of the parent-partner status. Imagine two people who do not treat each other well or two people who share a child who is unwanted by one of them. These are the types of couples that should never have had a child together. If the existence of a parent-partner status would have deterred their ill-advised reproduction, then the status would be doing its job. If the parent-partner status would improve the parties' ability to work together for their child's benefit, either through its related social role or its specific legal obligations, then there is not an overinclusion problem. Finally, if the parent-partner status would provide a remedy for one party's wrongful treatment of the other, then it is also fulfilling its purpose.

1. Is There a Problem for Women?

Scholars who have articulated the first strand of concern include Blecher-Prigat, June Carbone, and Naomi Cahn.²⁴⁹ They believe that poor women would be better off not having any relationship with the fathers of their children because these men have little if anything to offer.²⁵⁰ They argue that a parent-partner status would

²⁴⁹ Cahn has championed single parenthood for a long time. See, e.g., Naomi Cahn, *Perfect Substitutes or the Real Thing*, 52 DUKE L.J. 1077, 1161 (2003) (footnotes omitted) ("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. Although the two-parent model generally is beneficial for children, forcing all families into that model does not benefit children. Indeed, when parents are forced to marry each other, or when a single parent marries someone else, children do not necessarily thrive. Recognizing that single parents form families, and providing them with the legal support to do so, is in accord with changing historical circumstances in which increasing numbers of women and men are creating these families with increasing amounts of social acceptance. . . . Simply saying that single-parent families should be coerced into looking like two parent families does not take into account the changing historical circumstances, nor does it account for the differing reasons underlying the formation of one- or two-parent families. Children benefit from increased resources, not from coerced parenthood. . . . Rather than forcing change, the law can instead adapt by offering single parents the same protections as other families. Again, interpretation by recognition of differences allows respect for the family."). Cf. Karen Czapanskiy, *To Protect and Defend: Assigning Parental Rights When Parents are Living In Poverty*, 14 WM. & MARY BILL RTS. J. 943, 943, 949–51 (2006) (proposing a system whereby the birth mother can choose the parent partner); Jacobs, *Parental Parity*, *supra* note 77, at 477 ("Relying on voluntariness—rather than status—will provide greater procreative autonomy to fathers and mothers without harming children.").

²⁵⁰ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 132 ("[U]nmarried 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."); June Carbone & Naomi Cahn, *Jane the Virgin and Other Stories of Unintentional Parenthood*, 7 U.C. IRVINE L. REV. 511, 537–39 (2017) (noting low-income

undermine these women's autonomy and disadvantage them by tying them to nefarious, poor men.²⁵¹ Blecher-Prigat goes so far as to tout the benefits to low-income mothers of her proposed regime: a biological father would acquire no parental or parent-partner rights by virtue of genetics²⁵² and would have a narrow timeframe in which to claim parental rights (*i.e.*, during the pregnancy or soon after the birth).²⁵³

Is the imposition of a parent-partner status on low-income unmarried mothers unwarranted? I do not believe so, as suggested by the introduction to this Part. Four additional observations support this conclusion. First, low-income men are not necessarily the ne'er-do-wells that they are made out to be. Even incarcerated fathers are frequently important people in their children's lives.²⁵⁴ Low-income men often support the mother during her pregnancy.²⁵⁵ Some men provide more day-to-day care than researchers have captured.²⁵⁶ For most, their involvement only changes over

women often do not have "a man worth marrying" and that regimes that impose a two-parent model are problematic when the couples have "chosen a somewhat different set of terms").

²⁵¹ See Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 129–30 (citing Naomi Cahn, June Carbone, Solangel Maldonado, and Jane Murphy).

²⁵² See *id.* at 130–31.

²⁵³ See Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 159–60. Cf. Jacobs, *Parental Parity*, *supra* note 77, at 477, 488–89 (proposing a similar rule).

²⁵⁴ Erika London Bocknek & Jessica Sanderson, *Ambiguous Loss and Posttraumatic Stress in School-Age Children of Prisoners*, 18 J. CHILD FAM. STUD. 323, 330 (2009) ("Many children reported that their incarcerated parent was just as helpful as their non-incarcerated caregivers, suggesting that the children in this sample perceive their incarcerated parent to be an important person in their social support network.").

²⁵⁵ See Sara McLanahan et al., *Fragile Families & Child Wellbeing Study Fact Sheet*, PRINCETON, http://fragilefamilies.princeton.edu/sites/fragilefamilies/files/ff_fact_sheet.pdf (last visited Apr. 3, 2019) ("Most unmarried fathers are very involved during pregnancy and immediately after the birth, especially fathers in cohabiting and visiting unions. Over 80 percent provide support to the mother during the pregnancy and over 70 percent visit the mother and baby at the hospital. In addition, the vast majority of unmarried fathers say they want to help raise their child."). See Dowd, *supra* note 139 (noting that many fathers must commit to the mother during pregnancy because half of the unintended pregnancies are not terminated in abortion).

²⁵⁶ See Natasha J. Cabrera & Ron Mincy, *Papa's Not a Rolling Stone: Low-Income Men and Their Children*, AM. PROSPECT (Aug. 19, 2016), <http://prospect.org/article/papa%E2%80%99s-not-rolling-stone-low-income-men-and-their-children> ("A burgeoning body of social science research on how poor men engage with their children presents a much more nuanced story. This research finds that many poor men are very much involved in their children's lives, including reading and playing activities that help children gain the social and cognitive skills they need to do well in school and beyond and that more fathers want to be more engaged with their kids.").

time as their relationships to the mothers strain.²⁵⁷ While some of these relationships are troubled and even dangerous for the mothers,²⁵⁸ most other fathers have the potential to step up and do better for themselves, their children, and the other parent. These men can love their children deeply, provide their children with physical care, and act as good parent-partners, even if they are poor or have other deficits in their lives.

Second, the pessimistic view about the desirability of parent-partnerships for low-income parents is paternalistic. Most low-income women desire a stable relationship with the fathers of their children. The Fragile Families and Child Wellbeing study found that 99% of women who were in a romantic relationship with the father (both cohabiting and visiting) said they wanted the father involved; 74% of women who were not in a romantic relationship with the father at birth said they wanted the father involved.²⁵⁹ Jennifer Barber's research found similar results. Barber studied young women who had experienced domestic violence during their pregnancies. She found that the "majority of the pregnancies occurred in serious, cohabiting, and engaged relationships,"²⁶⁰ and that "women who became pregnant valued motherhood highly and recognized the limitations of their partners, but nevertheless hoped that the relationships would work out and wanted to hold on to their partners."²⁶¹

In fact, the imposition of a parent-partner status might make it *more* likely that co-parenthood would be a positive experience for those involved. People who have unwanted pregnancies, even after a one-night stand, are often glad they will be a parent.²⁶² The value society places on the parental role helps transform the

²⁵⁷ See McLanahan et al., *supra* note 255 ("Father involvement declines over time. By age five, only 50 percent of non-resident fathers have seen their child in the past month. While formal child support from non-resident fathers increases over time, informal cash support and in-kind support (such as buying toys or clothes) declines.").

²⁵⁸ See Reed, *supra* note 104, at 1123. See also Jennifer Barber et al., *The Relationship Context of Young Pregnancies*, 35 L. & INEQ. 175, 193 tbl.4 (2017) (indicating that 16% of women in relationships that produced pregnancies in study experienced physical violence at time of birth and 17% experienced violence after the birth).

²⁵⁹ See McLanahan et al., *supra* note 255.

²⁶⁰ Barber et al., *supra* note 258, at 194.

²⁶¹ Leslie J. Harris, *Family Policy After Fragile Families and Relationship Dynamics Studies*, 35 L. & INEQ. 223, 231 (2017) (citing presentation by Jennifer Barber).

²⁶² See, e.g., EDIN & NELSON, *supra* note 100, at 72–73 (reporting that men whose partners have unplanned pregnancies "still respond positively—with either happiness or acceptance—more than six times out of

experience into something positive. Parent-partner obligations and the accompanying social role would similarly signal the value society places on the co-parent relationship. The new social role might affect feelings and behavior,²⁶³ fostering a positive outcome even for those for whom the consequences were initially unwanted.²⁶⁴ Particular obligations, such as an obligation of “relationship work” at the transition to parenthood, could help shape behavior and attitudes in a valuable way by providing tools and skills to help the couple’s relationship stay on track.²⁶⁵ In addition, the status may produce better decision making *prior* to conception so that fewer people would feel that parenthood was foisted on them.²⁶⁶

Today the law itself contributes to the couples’ relationship problems and instability, a fact that pessimists seem to ignore. The absence of a legal status and social role for parent-partners leaves couples more prone to conceive during make-up sex or within abusive relationships.²⁶⁷ Co-parenthood in a world with a parent-partner status could look much different from co-parenthood today. Children would be the product of deliberate conception by people who commit at the outset to work together for their child’s benefit, and then those people would work to achieve that goal, supported by obligations and social norms that would help their relationship succeed.²⁶⁸

ten” and “about a third of those who had been explicitly opposed to having children and were taking measures to prevent conception were either happy or accepting when the pregnancy was announced”).

²⁶³ WEINER, *supra* note 1, at 224–34, 287–92.

²⁶⁴ *Id.* at 223–32, 275–98.

²⁶⁵ *Id.* at 347–93. *Cf.* Elaine A. Anderson et al., *Low-Income Fathers and “Responsible Fatherhood” Programs: A Qualitative Investigation of Participant’s Experiences*, 52 FAM. REL. 148, 152 (2002) (explaining that responsible fathering programs might be able to help fathers who never wanted to become fathers if the programs are tailored to their particular needs). The same may be true for relationship work in the parent-partner context.

²⁶⁶ *See supra* text accompanying notes 96–119.

²⁶⁷ William J. Doherty, *Commentary: Jennifer Barber’s Landmark Research on the Connection Between Intimate Partner Violence and the Onset of Pregnancy*, 35 L. & INEQ. 217, 218 (2017) (discussing how young women get pregnant as a result of make-up sex or in relationship’s with common couple violence). *See also* Joan S. Meier, *Johnson’s Differentiation Theory: Is It Really Empirically Supported?*, 12 J. CHILD CUSTODY 4, 6–7 (2015) (critiquing the line drawn between common-couple violence and intimate terrorism).

²⁶⁸ *See* Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 133 n.57 (noting the law has an expressive function). But Blecher-Prigat gives insufficient attention in this context to the expressive function, and the real prospect that a social role would matter to the outcome.

Third, the critics' case for single parenthood is responding to a parent-partner status that is different than what has actually been proposed. Critics who laud single parenthood instead of a parent-partnership frequently skip the critical step of examining the proposed obligations.²⁶⁹ Such an examination reveals that people would not be tied to each other as they might be if they were married. The parent-partner status would not punish someone, criminally or civilly, for abandoning or ignoring his or her parent-partner. The parent-partner status would not change the rules of custody, nor stop someone from obtaining a new partner or leaving.²⁷⁰

A close examination of the proposed obligations reveals that they are not oppressive. They reflect conventional morality and would mostly affect a person's autonomy minimally. For example, the obligation to be fair when contracting with a parent-partner,²⁷¹ or the obligation to render reasonable aid when the other parent is in physical peril,²⁷² should not cause someone to feel trapped. Others might generate some resentment, but they are arguably necessary to ensure fairness between the parties. For example, a parent who takes advantage of the other parent's caregiving labor may resent paying caregiver compensation. Yet the absence of compensation may contribute to the caregiver's own feeling of resentment because he or she is offered, and is legally entitled, to nothing in return for the caregiving labor.²⁷³ Of course, some of the proposed obligations, such as caregiver compensation, would generally benefit women because of gendered patterns of activity.

Fourth, there is an issue of justice that transcends gender. It is very problematic that a parent must first agree to be legally responsible for his or her morally problematic behavior before the law provides the other parent a remedy for it.²⁷⁴

²⁶⁹ See, e.g., Naomi Cahn & June Carbone, *Women's Autonomy and the Parent-Partner Status*, CONCURRING OPINIONS (Oct. 26, 2015), <https://web.archive.org/web/20171011234112/http://concurringopinions.com/archives/2015/10/womens-autonomy-and-the-parent-partner-status.html>.

²⁷⁰ Rather, the parent-partner status, as proposed, merely requires the following: that parents not emotionally or physically abuse each other; that they aid each other if one is physically imperiled and it is reasonable to do so; that they behave honorably when contracting with each other; that they not take advantage of the caregiving acts of the other; and, that they engage in relationship work at the transition to parenthood and at the demise of the romantic relationship. Not one legal obligation prevents a person from living life as a single person.

²⁷¹ See WEINER, *supra* note 1, at 395–410.

²⁷² See *id.* at 319–27.

²⁷³ See Merle H. Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 VILL. L. REV. 135, 140–45, 184 (2014).

²⁷⁴ See WEINER, *supra* note 1, at 156–57, 177–79.

Remedies between parents typically necessitate marriage or a contract, both of which require an agreement between the parties. Yet often there is no agreement. Research by Cho and colleagues indicates that cohabiting couples with children frequently have plans to marry (80% of the sample had plans to marry), but “not many cohabiting parents actually realized their marriage plans over time.”²⁷⁵ It is unclear whether men or women are mainly to blame,²⁷⁶ but some research suggests that men in cohabiting couples hold the power with respect to whether the couple weds. This is true even if the woman has more education or earnings than her partner and wants to wed.²⁷⁷ Putting aside the gender implications, predicating remedies for problematic behavior on dual consent does not deter the problematic behavior or send the right message about the relationship between co-parents. Parent-partners should automatically have basic levels of legal protection regardless of the other person’s agreement, just like exists for many others, including employees, consumers, and children.

a. Flipping the Problem

For these reasons, I disagree with the critics who worry about low-income unmarried women. Instead, I believe that existing parentage law has an *underinclusion* problem when it comes to unmarried couples. If couples are acting like supportive parent-partners, then the law should recognize them as such automatically and as soon as possible so that they can benefit from the status.

Unfortunately, most unwed biological fathers must take affirmative steps to establish paternity. An unwed father will not be considered a parent or a parent-partner unless he signs the VAP, brings a paternity action, or, in many states, lives for two years with the child and holds the child out as his own.²⁷⁸ These steps can become obstacles to parenthood. As Katharine Bartlett pointed out, “The modern

²⁷⁵ Sung-Bong Cho, Ming Cui & Amy M. Claridge, *Cohabiting Parents’ Marriage Plans and Marriage Realization: Gender Differences, Couple Agreement and Longitudinal Effects*, 35 J. SOC. & PERS. RELATIONSHIPS 137, 151 (2018).

²⁷⁶ *Compare id.* at 151, with Maureen Waller & Sara McLanahan, “His” and “Her” Marriage Expectations: Determinants and Consequences, 67 J. MARRIAGE & FAM. 53, 53–54 (2005).

²⁷⁷ Sharon Sassler & Amanda J. Miller, *Waiting to Be Asked: Gender, Power and Relationship Progression Among Cohabiting Couples*, 32 J. FAM. ISSUES 482, 500 (2011).

²⁷⁸ UNIF. PARENTAGE ACT § 204(a)–(b) (UNIF. LAW COMM’N 2017). See also *infra* text accompanying note 291.

response to the unwed father has been to erect a series of barriers that he must overcome before he will be granted any status as a parent.”²⁷⁹

The unwed biological father’s access to legal parenthood will largely depend on the quality of his relationship with the other parent. This is because the VAP and cohabitation require the cooperation of the mother,²⁸⁰ and a court action may be too inconvenient, expensive, and intimidating.²⁸¹ If the parties’ relationship has changed from one of cooperation to noncooperation before paternity is established, the parties will not have a parent-partner legal structure to help them maintain (and possibly improve) their relationship.

Couples who fall into this category undoubtedly have a variety of stories. But all have in common an unsigned VAP and an effort to make their families work. Some fathers refuse to sign the VAP because they fear the economic implications of establishing fatherhood, such as child support²⁸² or medical support.²⁸³ Studies show that a father’s ability to pay child support can affect his willingness to sign the VAP.²⁸⁴ A father might be reluctant to have a child support order entered even though he has an ongoing romantic relationship with the mother and is providing in-kind or financial support. His response may be a rational reaction to the government’s collection efforts if the mother is receiving TANF. In short, his response may have nothing to do with the couple’s willingness to make their parent-partnership succeed.

For others, a VAP may not be signed because of uncertainty. One or both parties may equivocate about the future of the parties’ romantic relationship. While a high percentage of unmarried couples sign the VAP to establish themselves as

²⁷⁹ Bartlett, *supra* note 138, at 920–21. *Cf.* Huntington, *supra* note 4, at 171, 181–84 (discussing the difficulties low-income fathers face getting custody orders).

²⁸⁰ See Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 46–47 (2004) (describing mother’s power to decide whether to parent alone or with a partner).

²⁸¹ See Polikoff, *supra* note 82, at 220 (noting that “the fact-specific nature of the parentage determination” will cost a parent time and money to get a court to establish parentage).

²⁸² See *Boyfriend won’t sign VAP?! With?!*, BABYCENTER (Aug. 2010), https://community.babycenter.com/post/a22993233/boyfriend_wont_sign_vap_wth_voluntary_acknowledgement_of_paternity_need_to_vent.

²⁸³ *In re Adoption of R.E.S.*, No. 4–15–0720, 2015 IL App (4th) 150720-U, ¶ 19 (refusing to sign VAP because he feared collection for the child’s outstanding medical bills).

²⁸⁴ Ronald Mincy et al., *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 J. MARRIAGE & FAM. 611, 617, 623 (2005).

family,²⁸⁵ their willingness to do so is largely related to the quality of their relationship and the father's commitment to the birth.²⁸⁶ Yet these same couples may still try to make the relationship work and may even succeed for awhile. Alternatively, a VAP may not be signed because the father's identity is unclear until sometime later, even though he and the mother suspect he is the father and try to make their relationship work. In yet other situations, a mother may initially want to raise the child on her own, but later the father helps at the mother's request. In all of these situations, the biological father should be the legal father because he assumes the role of father, the mother is willing to have him parent, and the parent-partner status might help their relationship.

b. A Potential Solution for the Underinclusion

Research is needed to figure out the exact number of people who fall into this category as well as the best way to address it. Clare Huntington correctly called for reform with regard to unwed fathers, although her proposal—to recognize men as fathers after they sign the birth certificate—is too risky for mothers in many ways.²⁸⁷ A better solution might be to return to the holding out provision in the UPA 1973, at least for biological fathers: a man is presumed to be the father if he lives with a child for any amount of time and holds the child out as his own.²⁸⁸

The UPA 2002 added a two-year cohabitation requirement.²⁸⁹ This addition aimed to reduce uncertainty “about whether the presumption could arise if the receipt of the child into the man's home occurred for a short time or took place long after the child's birth.”²⁹⁰ As of 2013, nineteen states allow paternity to be established

²⁸⁵ See Harris, *supra* note 55, at 1340.

²⁸⁶ See Kermyt G. Anderson, *Establishment of Legal Paternity for Children of Unmarried American Women Trade-Offs in Male Commitment to Paternal Investment*, 28 HUM. NAT. 168, 191–92 (2017).

²⁸⁷ See WEINER, *supra* note 1, at 122.

²⁸⁸ The Uniform Parentage Act of 1973 contained a presumption of parentage for the man who “receives the child into his home and openly holds out the child as his natural child.” UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. LAW COMM'N 1973). This presumption might also make sense for intended parents who use ART and then cohabit with the child.

²⁸⁹ UNIF. PARENTAGE ACT § 204(b) (UNIF. LAW COMM'N 2002).

²⁹⁰ *Id.* § 204 cmt. A draft eliminated the holding out provision altogether, but it was brought back when its absence appeared to disadvantage nonmarital children compared to the treatment of marital children. See Appleton, *supra* note 118, at 381–82.

with a holding out provision, and seven of these states required two years of cohabitation.²⁹¹ The two-year cohabitation requirement exists in the UPA 2017.²⁹²

The addition of a two-year cohabitation requirement for all those subject to the presumption was unfortunate. The uncertainty could have been reduced in other ways, especially when the cohabitant is the genetic father because the drafters' concerns are less relevant in that context. Two years is a very long time to wait before the presumption is triggered.²⁹³ While it is unclear exactly how many biological fathers move out before the two-year mark, the Fragile Family study indicated that 49% of unmarried fathers who were cohabiting with the mother at the time of birth had separated by the time the child was three years old.²⁹⁴ Research by Jennifer Barber indicated that the relationships in her sample that produced pregnancies "lasted a mean of 22.43 months."²⁹⁵

Ironically, the drafters added the two-year cohabitation requirement "to more fully serve the goal of treating nonmarital and marital children equally."²⁹⁶ A marital father has two years during which he can challenge his paternity.²⁹⁷ However, the two timeframes operate differently and actually produce inequality. Unmarried

²⁹¹ Harris, *supra* note 55, at 1318–19.

²⁹² The UPA 2017 only modestly improves the provision. UNIF. PARENTAGE ACT § 204 cmt. (UNIF. LAW COMM'N 2017) (explaining that temporary absences are not subtracted from the two-year time period). While the UPA 2017 also introduced *de facto* parenthood, which is triggered by cohabitation with the child for a "significant period," that provision does not afford the cohabiting biological father any real benefit. The *de facto* provision does not create a presumption of paternity; rather, the person seeking legal parenthood must bring a court action to establish paternity. If the unwed father could bring a court action, he could just establish paternity with a blood test and would not need the *de facto* parentage provision.

²⁹³ The advantage of a shorter period of cohabitation for triggering the presumption is evident in cases where intended parents without biological connections tried to invoke it. *See, e.g.,* Smith v. Gordon, 968 A.2d 1, 7 (Del. 2009) (holding that the holding out provision of UPA did not apply because party only lived with child for 13 months despite considerable evidence suggesting that party intended to be, and acted as, parent of child), *superseded by statute*, 13 Del. C. § 8-201 (2010) (recognizing *de facto* parenthood). *Cf.* Charisma R. v. Kristina S., 96 Cal. Rptr. 3d 26 (Cal. Ct. App. 2009) (permitting application of holding out presumption after same-sex partner lived with child for approximately three months), *abrogated by* Reid v. Google, Inc., 235 P.3d 988 (Cal. 2010) (disapproving to the extent that litigants must raise written objections orally at the hearing to preserve an issue for appeal).

²⁹⁴ Wendy D. Manning et al., *Married and Cohabiting Parents' Relationship Stability: A Focus on Race and Ethnicity*, 69 J. MARRIAGE & FAM. 1345, 1354 (2007).

²⁹⁵ Barber et al., *supra* note 258, at 191.

²⁹⁶ UNIF. PARENTAGE ACT § 204 cmt. (UNIF. LAW COMM'N 2002).

²⁹⁷ *Id.* § 607(a).

fathers have to live with a child for two years *before* they get the legal presumption of fatherhood. Married fathers get their presumption *immediately* and have two years to dispute it.²⁹⁸

Reformers could make the two presumptions more equivalent without introducing too much uncertainty. That is, legal parenthood could be presumed for the nonmarital biological father who lives with the mother and the child, or just the child, after a much shorter amount of time (perhaps as little as a month) during the first two years of the child's life. The presumption would then be rebuttable, but for only two years.²⁹⁹

What would be the legal significance of this change? Legal parentage would be established without the need for court action and without the need for the other parent to sign the VAP when the biological parent, in fact, exhibits a commitment to the child and/or the parent-partner through cohabitation. Along the vertical axis, legal parentage could have significance for purposes of inheritance or benefits, notice of

²⁹⁸ UNIF. PARENTAGE ACT §§ 204(a)(1), 607(a) (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT §§ 204(a)(1)(A), 608(b) (UNIF. LAW COMM'N 2017).

²⁹⁹ The presumption might be subject to special rules of disestablishment. *Cf.* Harris, *supra* note 55, at 1339–40 (proposing four rules relating to VAP that could apply to the proposed presumption including: (1) “Deny standing to alleged fathers and other third parties to challenge a legal father’s paternity so long as the relationship between the mother and the legal father is intact, *i.e.*, so long as neither joins the challenge”; (2) “If an unmarried mother and a man sign a VAP, both knowing or suspecting that he is not the biological father, allow the VAP to be set aside at any time if both agree. If they do not agree, set aside the VAP only upon proof that continuing the relationship will substantially endanger the child, such as those that justify a nonconsensual adoption in the jurisdiction”; (3) “If neither or only one of the parties to a VAP knows or suspects that the man is not the biological father and one later learns that he is not and wants to terminate the legal father relationship, treat the VAP as having been procured by mistake, but provide that the judge should not set it aside unless consistent with the child’s best interests”; (4) “If paternity was established without genetic testing having been done by adjudication, either judicial or administrative, or by a VAP, allow both the legal father and the mother to petition for testing for up to one year after the judgment is entered or the VAP filed. If the test shows that the man is not the biological father, the court should find that the judgment or VAP was based on a material mistake and set it aside at the request of the petitioner.”). Some states bar an action by an alleged father, but only if the presumed father persists in his claim of parentage. *See, e.g., Ex Parte T.M.*, 210 So. 3d 614, 616 (Ala. Civ. App. 2016).

an adoption,³⁰⁰ consent for an adoption,³⁰¹ and the determination of legal fatherhood when multiple claimants exist.³⁰²

Apart from the presumption's legal significance along the vertical axis, it would also be important for fostering the parent-partner relationship. The presumption

³⁰⁰ Under the UPA, an alleged genetic father who lives with a newborn is not entitled to notice of the newborn's adoption unless he registers, has established a parent-child relationship under the act, or has commenced a proceeding to adjudicate his paternity. UNIF. PARENTAGE ACT §§ 402, 404 (UNIF. LAW COMM'N 2002). *Lehr v. Robertson*, 463 U.S. 248 (1983), suggested that such a provision might be unconstitutional if the father and child resided with each other. However, *Lehr* did not indicate exactly how long the parent and child had to reside together for the constitutional requirement of notice to be triggered. It was clear from the facts in *Lehr* that a relationship between the parents prior to the birth of the child does not trigger a constitutional due process right to notification. There, the Supreme Court upheld the notice provision in the New York statute even though the biological father had a five-year relationship with the mother prior to birth and they had lived together for the last two years before the child's birth. *Id.* at 268–69 (White, J., dissenting). Under the UPA, every alleged father of a child at least one year old, regardless of registration, must be given notice. UNIF. PARENTAGE ACT § 405 (UNIF. LAW COMM'N 2002).

³⁰¹ In some states, an unwed parent must be a legal father or engage in certain actions in order to have the right to withhold consent to the adoption. *See, e.g.*, ARK. CODE ANN. § 9-9-207 (West 2018); OHIO REV. CODE ANN. § 3107.07 (West 2015); *Watkins v. Dudgeon*, 606 S.W.2d 78 (Ark. Ct. App. 1980); *In re Adoption of A.W.P.*, No. 16CA011037 (Ohio Ct. App. 2017).

³⁰² For example, it could be harder to displace the biological father if there were a competing claim. Under the UPA 2017, a challenge could be brought if there were another presumed parent (for example the mother's husband), and section 613 would guide the adjudication. *See* UNIF. PARENTAGE ACT § 608(d) (UNIF. LAW COMM'N 2017). The court might recognize two fathers, as is permissible under Alternative B in section 613 of the UPA 2017, or select the one that was in the "best interest of the child."

Although beyond the scope of this Article, it is worth mentioning that courts selecting a parent from among contestants should consider the nature of the contestants' relationship to the legal parent. *In re Jesusa V*, 85 P.3d 2 (Cal. 2004), provides a good example of the importance of this factor. If nothing else, this factor should encourage and reward good parent-partner behavior. Moreover, it would also allow courts to consider who would have a successful parent-partnership. Recognizing the relevance of the parents' relationship would be consistent with the trend to recognize its relevance to matters traditionally falling along the vertical axis. *See, e.g.*, Merle H. Weiner, *Domestic Violence and Custody: Importing the American Law Institute's Principles of the Law of Family Dissolution into Oregon Law*, 35 WILLAMETTE L. REV. 643, 650 (1999) (noting that every state has either statutes or case law requiring courts to consider evidence of domestic violence in custody cases); Weiner, *supra* note 157, at 1544 nn.55–56 (identifying states that prohibit joint legal custody when the parents cannot cooperate); UNIF. PARENTAGE ACT § 614 (UNIF. LAW COMM'N 2017) (recognizing that a rapist should not be considered a parent when the child was conceived by an act of violence between the parents). Of course, acknowledging the relevance of this factor is different from determining its weight. Some states already consider this factor. *See, e.g.*, KAN. STAT. ANN. § 23-2208 (West 2018) (making relevant "the nature of the mother's relationships with the presumed and alleged fathers" in resolving competing presumptions of paternity). *See also Greer ex rel. Farbo v. Greer*, 324 P.3d 310, 320 (Kan. Ct. App. 2014). Unfortunately, however, the UPA 2017 appears to exclude its consideration. UNIF. PARENTAGE ACT § 613(a) (UNIF. LAW COMM'N 2017).

would have the effect of conferring a social role and social norms on two individuals who are connected to the child, who are trying to make their relationship work, and who may need some help ensuring the success of their relationship.

Some might criticize the proposed presumption for failing to be broad enough, that is, for not applying to unmarried fathers who are supportive but do not cohabit with the child and the mother.³⁰³ Of course, the revised presumption would not supplant the other ways a biological father could establish parentage. The reason cohabitation was chosen as the indicia of a supportive partnership is because cohabitation is already relevant to the UPA's holding out presumption and has been since 1973.³⁰⁴ In addition, research by Guzzo suggests that cohabiting fathers are "more likely to have been involved throughout the pregnancy and to play an active father role."³⁰⁵ Of course, these fathers may need the presumption the least because they are the "most likely to visit the mother and baby in the hospital and thus to come into contact with hospital staff who may encourage them to establish paternity."³⁰⁶ Nonetheless, the change would confer legal parenthood, and a parent-partner status, on some individuals for whom a VAP is not filed. It would also signal that the law supports, and does not impose obstacles to, parents' supportive parent-partnerships.³⁰⁷

c. The Parent-Partner Status as Gap Filler

More debate is likely about whether the present law of parenthood is overinclusive or underinclusive for purposes of imposing a parent-partner status on unmarried biological parents. Fortunately, until a resolution is reached, the parent-

³⁰³ For instance, perhaps the presumption should arise when two people go through a parent-partner commitment ceremony. WEINER, *supra* note 1, at 170–82.

³⁰⁴ UNIF. PARENTAGE ACT §§ 204(a)(1), 607(a) (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT §§ 204(a)(5) (UNIF. LAW COMM'N 2017).

³⁰⁵ Karen Benjamin Guzzo, *Paternity Establishment for Men's Nonmarital Births*, 2009 POPULATION RES. POL'Y REV. 853, 868 (noting "cohabiting fathers are . . . in families at the time of birth").

³⁰⁶ *Id.*

³⁰⁷ There is a risk that fewer couples would sign the VAP if there were a more liberal presumption of parenthood based upon cohabitation. Yet this risk seems small because unmarried couples tend to want to sign the VAP to signal their family status, see Harris, *supra* note 72, at 476, and presumably that would remain true for cohabiting couples. In addition, the risk would be further reduced if couples started having celebration ceremonies when they became parent-partners. See WEINER, *supra* note 1, at 179–82. The parties would likely sign the VAP then, if they had not previously.

partner status might help minimize the negative effects of any gap that exists for unmarried couples.³⁰⁸

How would this work? People who create a child through sex may see themselves as “parents” even if they technically lack the legal label. Once the parent-partner status exists, they may act as if they were parent-partners regardless of the legal label, *i.e.*, by treating each other supportively. This, in turn, may lead more couples to sign VAPs. They might sign one immediately, or perhaps as a child ages. Research suggests that a VAP is more likely to be signed when the couple’s relationship is better,³⁰⁹ and performing the role of parent-partner should improve the relationship. In addition, a parent-partner status should lead to better mate selection, thereby producing parents who would be more inclined to sign the VAP at birth.³¹⁰

A parent-partner status may also lead to more supportive behavior so that fewer parentage disputes arise. After all, parentage disputes are mostly sad tales of failed adult relationships.³¹¹ A parent-partner status should help reduce relationship failure, at least the type that ends in litigation. Its strong social norms will remind adults that their child will benefit if they exhibit fondness, acceptance, togetherness, empathy, and flexibility.³¹²

This section started by addressing the critics’ claim that parentage law was overinclusive for purposes of a parent-partner status because it would tie low-income women to unworthy men and thereby harm the women. That claim was refuted. It was then flipped: unmarried women, in fact, are harmed by the law’s failure to recognize biological fathers as legal parents when those men act like supportive parent-partners. In a world with a parent-partner status, the failure to recognize these men as legal parents would deny women a legal structure that could help them

³⁰⁸ *Cf.* Weiner, *supra* note 157, at 1565 (“If the mother and father are supportive co-parents, then a court need not order a particular parenting arrangement because the parents can agree to share custody themselves. They need never go to court.”).

³⁰⁹ Ronald Mincy, Irwin Garfinkel & Lenna Nepomnyaschy, *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 J. MARRIAGE & FAM. 612 (2005).

³¹⁰ *See* WEINER, *supra* note 1, at 517.

³¹¹ *See, e.g., In re L.C.B.*, No. M2003-02560-COA-R3-CV, 2005 WL 280747 (Tenn. Ct. App. Feb. 4, 2005); *H.S. v. Superior Court*, 183 Cal. App. 4th 1502 (2010).

³¹² *See* WEINER, *supra* note 1, at 135 (citing John Dewar for the proposition that most people “self-apply the normative framework” of family law and therefore it has a “wide reach and low intensity”).

achieve their own goals: to have their relationships with the biological fathers succeed (or, at least, be fair and supportive).

2. Is There a Problem for Men?

This section examines a related claim: parentage law is overinclusive for purposes of a parent-partner status because it would result in the imposition of obligations on unwed fathers that are at odds with what those fathers' desire. Blecher-Prigat, in particular, believes parenthood should be a positive experience³¹³ (*i.e.*, one that is not foisted upon people who never had that intent).³¹⁴ Consequently, she worries that existing methods for imposing parenthood, such as biological connection, might obligate a child's parents to each other in a way that is unwarranted. As a result, Blecher-Prigat proposed that biology alone should be insufficient for imposing legal parenthood, especially after a one-night stand, if parenthood would also result in parent-partner obligations.³¹⁵ Rather, she argues that the biological father who lacks a significant relationship to the mother should only be a "progenitor" unless he opts in to parenthood and the related parent-partner obligations.³¹⁶ A "progenitor" would have no obligations to the child (except a very low and contingent child support obligation),³¹⁷ and would have no obligations to the other parent. This structure reflects Blecher-Prigat's belief that "[a]s a general rule, none of the parents should be able to impose parenthood on the other against the latter's wishes."³¹⁸

My book explains why biology is an appropriate, adequate, and necessary basis for imposing a parent-partner status. The reasons relate to dependency causation,

³¹³ Blecher-Prigat wants to avoid the "negativity" that can come with the imposition of unwanted legal responsibility because the negativity tarnishes the efforts of those who take on the responsibility "willingly and lovingly." See Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 150.

³¹⁴ *Id.* at 174; Blecher-Prigat, *Costs of Raising Children*, *supra* note 6, at 207.

³¹⁵ See Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 159–60.

³¹⁶ *Id.* at 160; *id.* at 154 ("[W]hen 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."). Blecher-Prigat acknowledges that good-faith sex could give rise to a "limited relationship" sufficient, perhaps, for payment of expenses related to pregnancy, but it would be insufficient to give rise to all the rights and obligations of parenthood. *Id.* at 158–60 (citing Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010)).

³¹⁷ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 165. Child support would not include a percentage of the progenitor's income. *Id.*

³¹⁸ *Id.* at 154.

consent, and the purposes of the parent-partner status.³¹⁹ Consequently, I do not agree that a parent-partner status is unfair to someone who had a one-night stand and did not want to become a parent or parent-partner. Here, I will suggest that allowing a party to opt out of parenthood and the parent-partner relationship, as Blecher-Prigat advocates for couples with insufficiently committed relationships,³²⁰ would be very unfair to women and harmful for children.

While Blecher-Prigat's proposal is theoretically gender-neutral and would permit a woman or a man to refuse legal parenthood despite a genetic connection,³²¹ in reality the man would be the one most likely to opt out. The woman would likely want to be a parent because she already decided not to abort or relinquish the child for adoption.³²² While a woman could elect to become a "progenitor," social norms make it far more likely that the father would be the one to take this option.³²³ It is unknown how many men would be eligible to opt out,³²⁴ and how many men would

³¹⁹ See WEINER, *supra* note 1, at 161–72.

³²⁰ Blecher-Prigat would elevate the importance of the parties' relationship for parentage determinations. She would impose legal parenthood even when biology or intent is absent if the parents have the required relationship; she would also shield someone from legal parenthood when biology or intent exists but the required relationship is absent. This symmetry is not required. Dara Purvis once made the convincing argument that intent can operate in only one direction (to expand but not contract who is a parent) when she recommended pre-birth parenting orders in the reproductive technology context. Purvis, *Intended Parents*, *supra* note 21, at 251–52. See also Bartholet, *supra* note 200 (arguing that biology can be important in establishing relationships but its absence need not be a basis to disestablish relationships). Similarly, the significance of the parties' relationship should operate in only one direction: to expand, not contract, parental responsibility. A different rule might be appropriate if two people are fighting each other for recognition as the second legal parent. See *supra* note 302.

³²¹ Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 159–60.

³²² Many burdened parents would not take advantage of the more-theoretical-than-real option of placing the child for adoption as a way to avoid these burdens. At present, only 4% of women place an unwanted child for adoption. *Adoption Statistics*, ADOPTION NETWORK L. CTR., <https://adoptionnetwork.com/adoption-statistics> (last visited Apr. 11, 2019). Yet a refusal to relinquish a child for adoption does not mean one necessarily agrees to bear the costs and burdens of raising the child alone.

³²³ Cf. Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2015*, U.S. CENSUS BUREAU, at 3 (2018), <https://census.gov/content/dam/Census/library/publications/2018/demo/P60-262.pdf> (noting that 80.4% of the 13.6 million custodial parents were mothers in 2016, while 19.6% were fathers). Single-mother households are largely comprised of never-married mothers (42.6%), whereas single-father households are comprised largely of divorced and separated fathers (49.9%). *Id.* at 4.

³²⁴ It is not clear if only total strangers would have this option, or if it would also extend to men in relationships that were not "ongoing committed."

choose that option,³²⁵ but a vast number of children might end up with a “progenitor” instead of a legal father.

This framework is problematic because it would reduce women’s control over whether fathers have legal obligations. A man is currently able to forego his parental obligations, but only if the other parent agrees; it is currently a joint decision. That is, a man can abdicate his role as a father, but only so long as the mother elects not to pursue him or helps him by terminating his parental rights.³²⁶

A mother should be involved in deciding whether the father gets to opt out of parenthood. As the child’s caregiver, she likely has the child’s best interest in mind. She will know if it is better to have the father involved in their lives or not.³²⁷ Also, she is the one who will bear the brunt of being the sole parent.³²⁸

In addition, the law would not benefit children as a group if ill-advised conception were relatively cost-free. Elizabeth Bartholet has noted, albeit in another context, the potential effects:

³²⁵ The number of unwanted, unintended, or mistimed births is high. See *Unintended Pregnancy in the United States*, *supra* note 101.

³²⁶ I recognize that the state can establish paternity contrary to the mother’s wishes when the mother receives TANF. This is regrettable. Merle Weiner, *Weiner’s Response to Comments About the Parent-Partner Status*, CONCURRING OPINIONS (Nov. 1, 2015), <https://web.archive.org/web/20160718185805/http://concurringopinions.com/archives/2015/11/weiners-response-to-comments-about-the-parent-partner-status.html> (“It would be unfortunate if the government conditioned benefits on the enforcement or assignment of any of the proposed inter se obligations. The government’s action is highly invasive in such a situation: it removes from parents the decision whether or not to enforce their own inter se legal obligations [arising from the parent-partner status]. It is a clear and direct assault on the parents’ autonomy . . . [I]t seems sensible to include in any legislation establishing the parent-partner status an express provision . . . prohibit[ing] the government from conditioning the receipt of benefits on a parent’s agreement to enforce a status obligation or on that parent’s assignment of the obligation to the government.”).

³²⁷ Some readers may wonder why the mother should be able to control whether the father can opt out of parenthood, but not whether he can opt in. The biological father’s rights explain the difference. Even Blecher-Prigat agrees that “[w]hen 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.” Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 154. Under Blecher-Prigat’s proposal, an unmarried woman could not impose legal parenthood on the biological father after a one-night-stand, but neither could she exclude him if he wanted to opt in. *Id.*

³²⁸ Blecher-Prigat acknowledges that women can suffer when men opt out of their responsibilities, but she limits her concern to parties who had a long-term committed relationship. Consequently, men in long-term committed relationships could not avoid the financial implications of reproduction, even if they did not intend to procreate. *Id.* at 174. In contrast, a man who impregnates a woman after a one-night stand has virtually no responsibility for addressing the financial implications of reproduction.

[I]t will be better for parents and children as a general matter if we encourage adults to conceive children with the intention of raising [them] . . . [T]reating the creation of a new life as a relative nonevent for the creator, an act that does not necessarily entail any long-term responsibility for the life created [or the other parent], seems unlikely to encourage in society generally the kind of committed nurturing that children need.³²⁹

Just as parenthood should be seen as a “total and unconditional matter,”³³⁰ the co-parental relationship should be seen as an ascriptive, long-term, and important matter. That orientation would give parties an incentive to invest in the relationship, as opposed to pursue their own short-term interests, and that investment would redound to the benefit of their children.³³¹

Moreover, the law would unfairly discriminate against nonmarital children if an unmarried biological parent, but not a married biological parent, could opt out of parentage and parent-partner obligations. Those who desire this option for nonmarital parents think that nonmarital children’s interests would 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.”³³² This position occupies the same intellectual space as Jim Dwyer’s proposal to deny legal parenthood at birth to parents who are not presumptively suitable. Both reflect a belief that children would be better off if their unsuitable biological parents were never recognized as parents to begin with.³³³ Yet categorically denying a child a second parent for utilitarian reasons risks harmful outcomes.

Reformers should reject a discriminatory solution to a problem if a nondiscriminatory option exists. Thus, it seems premature, and even dangerous, for reformers to argue that nonmarital and marital children should have different sets of

³²⁹ Bartholet, *supra* note 200, at 334–35 (arguing that biology should be one factor in the determination of parentage).

³³⁰ See Lifshitz, *supra* note 197, at 317 (arguing an “opt out” provision would have “far reaching consequences for the ethos according to which parental obligation is a total and unconditional matter”).

³³¹ WEINER, *supra* note 1, at 140 (citing Margaret Brinig).

³³² Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 164.

³³³ Jim Dwyer’s Orwellian proposal to deny parenthood at birth would strip parenthood from, among others, mothers in prison. JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 260 (2006). The proposal would also impact anyone who has a history or trait that social scientists correlate with poor outcomes for children. That would include, for example, younger parents, immigrant parents without status, and parents with drug issues. See, e.g., Laufer-Ukeles, *supra* note 135, at 794 (citing DWYER, *supra*, at 259–63). Laufer-Ukeles convincingly argues that Dwyer’s proposal is the opposite of what the state should do. *Id.* at 794–95.

core laws regulating their parents' roles. The state should first try to impose the same new family structure (*i.e.*, a parent-partner status) on all parents with joint children. Otherwise, legislators will have permission to treat the parents of nonmarital children differently in ways that might harm those children. Instead, a commitment to equality requires legislators to apply the same rules to all, including their own families. This lowers the risk that any group of children would be treated unfairly.

B. The Disadvantages of Redefining Parenthood to Address Overinclusion

Assume for purposes of discussion that the current approach to parentage is overinclusive for the purposes of a parent-partner status (that is, many unmarried genetic parents should not have parent-partner obligations to each other). The next question is how to address that problem. There are several options. For example, lawmakers could redefine parentage to achieve a better fit with the parent-partner status. Lawmakers might even define "parent" differently for the "parent-partner" and "parent-child" statuses. This Part argues that redefining "parent" is not the best approach. Part C offers some other options.

For pragmatic and political reasons, it is not a good idea to redefine parentage along the vertical axis as a way to tailor the parent-partner obligations to an appropriate group of people. First, pragmatically, it is difficult to imagine how redefining parenthood could succeed in generating the perfect fit for each of the parent-partner obligations. The parent-partner status is not a single obligation.³³⁴ A different definition of parenthood for each and every obligation might produce a perfect fit, but such a fractured understanding of parenthood, and the obligations triggered by it, would produce confusion and undermine the status's normative message about the nature of co-parenthood.

Yet arriving at one new definition of parenthood—one that would be perfectly tailored for all obligations—is impossible too. The parent-partner status has not yet been adopted anywhere, and a few obligations have only been tentatively suggested. Disagreement already exists about to whom one of those obligations should apply.³³⁵ Additionally, reformers are not clairvoyant and cannot ensure that a new definition of parenthood would produce the optimal result for all future obligations.

³³⁴ WEINER, *supra* note 1, at 133 ("If one's object is to impact social consciousness by creating a new social role, then the transformative power of the status is likely to be greater the more obligations that are attached to it. In fact, the need for at least several legal consequences is implied everywhere.")

³³⁵ See text accompanying notes 341–44, *infra*.

Moreover, redefining “parent” for purposes of a parent-partner status will not foster consensus on the selection of *inter se* obligations for the parent-partner status.³³⁶ Debates that currently surround the selection of parent-partner obligations will simply shift to discussions about the definition of parenthood for purposes of those obligations.³³⁷ A redefinition project will also prompt new debates unrelated to the parent-partner obligations, but relevant to “parenthood” more generally. For example, should traditional surrogacy be permissible,³³⁸ what procedural prerequisites or protections are appropriate for the establishment of legal parenthood,³³⁹ and what parental rights and obligations should exist along the vertical axis.³⁴⁰

Consider, for example, whether the redefinition of parenthood would eliminate the debates about the obligation of caregiver compensation. This particular obligation is favored by several scholars,³⁴¹ but they disagree about the population

³³⁶ *But see* Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 125 (expressing the view that disagreements regarding what legal obligations should attach to co-parenthood are really debates about who should be a co-parent).

³³⁷ Blecher-Prigat acknowledges that debates about parentage relate to the obligations that are imposed. *See* Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 174 (“In fact, . . . there is hardly ever any abstract, or ‘naked’ parentage determination, but rather a parentage determination for the purposes of imposing obligations or bestowing rights.”).

³³⁸ Melissa Ruth, *Enforcing Surrogacy Agreements in the Courts: Pushing for an Intent-Based Standard*, 63 VILL. L. REV. TOLLE LEGE 1 (2018) (describing variation in state laws).

³³⁹ For instance, scholars have questioned the fairness of requiring biological fathers to register with a putative father registry in order to get notice of an impending adoption. *See, e.g.*, Margaret Ryznar, *Two to Tango, On in Limbo: A Comparative Analysis of Fathers’ Rights in Infant Adoptions*, 47 DUQ. L. REV. 89, 96–97 (2009) (“Many men have never heard of the registries . . . The registries are also state-specific and thus easily circumvented by mothers.”). *See also* Ivy Waisbord, Note, *Amending State Putative Father Registries: Affording More Rights and Protections to America’s Unwed Fathers*, 44 HOFSTRA L. REV. 565 (2015). Scholars have also questioned the appropriateness of various procedural requirements related to sperm donation. *See, e.g.*, Yehezkel Margalit, *Artificial Insemination From Donor (AID)—From Status to Contract and Back Again?*, 21 B.U. J. SCI. & TECH. L. 69, 91–92 (2015).

³⁴⁰ *Compare* Huntington, *supra* note 4, at 173–74 (recommending that family law “ensure that [unmarried] fathers have custody orders in place so that their ability to maintain relationships with their children is secure”), *with* Carbone & Cahn, *supra* note 250, at 528–29, 539 (criticizing Huntington’s desire to treat married and unmarried couples similarly, because a framework of equal parenting would impose “elite” norms on those who are not elite); *id.* at 543 (recommending “proportional custody” instead of assumptions of “a coequal role or the same presumption that the children’s interests necessarily lie in the continuation of the relationship”).

³⁴¹ *See, e.g.*, CYNTHIA LEE STARNES, THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW 147–68 (2014) [hereinafter STARNES, THE MARRIAGE BUYOUT]; Blecher-Prigat, *Costs of Raising Children*, *supra* note 6; Laufer-Ukeles, *supra* note 135, at 793; Cynthia Lee Starnes, *Lovers*,

to whom the obligation should apply. I, for one, want all legal parents (as currently defined) to have to pay for the value of any unfairly disproportionate caregiving performed by the other parent.³⁴² Cynthia Starnes, in contrast, wants a similar remedy, but limits it to married parents and parents in marital-like relationships.³⁴³ Pamela Laufer-Ukeles favors caregiver compensation, but only when a couple experiences “joint parenting.” Laufer-Ukeles believes that such a couple would have negotiated their roles, and a “primary earner and primary caregiver can be identified.”³⁴⁴

Resolving the question “to whom should an obligation apply” requires consideration of the same factors that justify an obligation at all. For example, when assessing whether caregiver compensation should apply to unmarried couples, one must consider whether the cost of unfairly disproportionate caregiving should fall on the caregiver alone, whether an obligation of compensation would be too burdensome for the obligor, whether the obligation would affect the parties’ behavior, and whether it would be administrable to apply the obligation to parties who only “hooked up.”³⁴⁵ A definitional slight-of-hand does not eliminate the underlying policy choice nor provide the only solution to administrability concerns.

Parents, and Partners: Disentangling Spousal and Co-parenting Commitments, 54 ARIZ. L. REV. 197, 199 (2012) [hereinafter Starnes, *Lovers, Parents, and Partners*]; Weiner, *supra* note 273.

³⁴² WEINER, *supra* note 1, at 411, 421 (proposing caregiver payments for “any unfairly disproportionate caregiving that the other parent has provided to their child, regardless of whether the parties are married, unmarried, separated, or divorced”).

³⁴³ See STARNES, *THE MARRIAGE BUYOUT*, *supra* note 341, at 180; see also Starnes, *Lovers, Parents, and Partners*, *supra* note 341, at 237 (suggesting that future research would “identify relationships other than marriage that evidence commitment,” such as express contracts, domestic partnerships, and civil unions). Cf. Blecher-Prigat, *Costs of Raising Children*, *supra* note 6, at 207 (arguing that only people who engage in “planned shared parenthood” should have this obligation).

³⁴⁴ See Laufer-Ukeles, *supra* note 135, at 793 (noting caregiver compensation is appropriate when the “relationship demonstrates a commitment to co-parenting”).

³⁴⁵ In terms of administrability, the state could develop a default rule that would apply absent an agreement by the parents. In the book, I suggest that a non-cohabitating, unmarried parent pay “the fair market value of the [disproportionate caregiving] labor as compensation.” WEINER, *supra* note 1, at 442. “Fair market value” should be presumed to be “either 1) half of the amount of the market worker’s income that was earned during the time of disproportionate caregiving or 2) the market value of the caregiving.” The latter would probably be most appropriate for the couple who had a one-night stand. *Id.* at 450–52. In an earlier article, I addressed how a court might resolve parental disputes about unfair disproportionality, including the appropriate amount of parental caregiving. I noted:

Excessive caregiving would undermine a claim that the level of sharing is unfair. A court would probably consider any agreement the parties had about

Second, there are political obstacles to redefining parenthood, even if a particular proposal would better advance the objectives of the parent-partner status. For instance, consider a proposal by Karen Czapanskiy. It would lead to clear results, have the support of those concerned about single mothers, and further some of the objectives of the parent-partner status. Yet, Czapanskiy's proposal is so radical that it has little chance of adoption.

Czapanskiy proposes that the birth mother would be a legal parent and that she would be able to designate her "parental partner."³⁴⁶ Czapanskiy limits the people eligible for selection to the biological father (not including a sperm donor), the mother's partner (from a marital or civil union), or "any natural person who has provided the mother with significant material and nonmarital support during the pregnancy and after the birth of the child."³⁴⁷ The mother could change her mind and revoke the designation within the first month of the child's life.³⁴⁸ She would not have to name a parental partner.³⁴⁹ She could make her child available for adoption by declining her own legal parenthood and failing to designate a parent-partner who

the appropriate level of caregiving, or, absent an agreement, use other tools to assess the argument's merit, such as the work requirements found in TANF or demographic data that specifies the average amount of parental caregiving children receive in a particular socio-economic class. Courts could also look to information about the availability of safe and affordable child care in an area. In short, courts have ways to determine if caregivers are [trying to] freeload[], assuming that the concept of excessive caregiving does not violate public policy.

Weiner, *supra* note 273, at 212–13. Of course, excessive caregiving is never precluded in a system of caregiver compensation; only a court order for its compensation is precluded.

³⁴⁶ Czapanskiy, *supra* note 249, at 943. Jessica Hendricks has a similar proposal. Hendricks suggested making all parenthood determinations for unwed fathers by VAPs, which require the mother's consent. See Hendricks, *supra* note 41, at 517–18. She believes this is constitutional; she reads *Lehr v. Robertson* as only protecting established parent-child relationships, not the mere opportunity to form such a relationship. *Id.* at 479–82. See also Jacobs, *Parental Parity*, *supra* note 77, at 477 (recommending that all parents must sign an "intentional acknowledgement of parenthood" within a specific period, such as six or twelve months, and that thereafter, others can sign so long as they are also functional parents).

³⁴⁷ Czapanskiy, *supra* note 249, at 944.

³⁴⁸ *Id.* at 946.

³⁴⁹ *Id.*

might override her choice.³⁵⁰ Whoever the mother designates as a parental partner would be able to decline the designation.³⁵¹

Czapanskiy's proposal includes rules to guide courts in resolving disputes. For example, if the mother refuses to designate someone, or if someone not preferred by the mother seeks the designation, the court could override the mother's choice. However, the court could only do so if the following conditions existed:

- i. Petitioner provided the mother with substantial material or non-martial support during the mother's pregnancy and after the birth of the child;
- ii. Petitioner has demonstrated a capacity to co-parent the child with the mother;
- iii. Petitioner has no history of using force or engaging in other unduly coercive conduct with respect to the mother; and,
- iv. Petitioner agrees to such conditions as the court deems necessary for the child's interests.³⁵²

Czapanskiy's commentary suggests that this standard is very exacting. For example, a petitioner must not only satisfy subpoint (iii) above (requiring the absence of prior force or unduly coercive conduct toward the mother), but must also show "that he or she has acted respectfully toward the mother, is capable of resolving conflicts in a cooperative manner, and is willing to consult fully about important parenting tasks and decisions."³⁵³ The court can impose various conditions on the petitioner, including "parental education and training."³⁵⁴

Czapanskiy's well-designed proposal anticipates, and addresses, a number of issues. Enough has been said, however, to show that it would be compatible with a parent-partner status. Her proposal is clear in terms of who would be the other parent. In most cases, it is whomever the mother so designates unless the invitation is declined. Moreover, the proposal would advance some of the purposes of the parent-partner status, such as encouraging the parties to work as a team for the child's benefit. Czapanskiy's proposal implicitly acknowledges the importance of a

³⁵⁰ *Id.* at 963–64.

³⁵¹ *Id.* at 945.

³⁵² *Id.*

³⁵³ *Id.* at 947.

³⁵⁴ *Id.* at 945.

supportive and respectful relationship between the parties. The person eligible to pay (or receive) caregiver compensation would be someone who agreed to co-parent either by accepting the mother's designation or petitioning to override the mother's choice. It is a telling coincidence that Czapanskiy uses the term "parental partner" to describe the person who would be the child's other parent.³⁵⁵

The main weakness of Czapanskiy's proposal is its political infeasibility.³⁵⁶ Czapanskiy herself says, "[T]he proposal is a radical one even though it is likely to affect the reality of few children. It is radical because it empowers single mothers."³⁵⁷ Fathers' rights groups, who have been so active in the legislative arena around custody,³⁵⁸ would undoubtedly find new members and reasons for activism if mothers alone might receive the legal power to choose the child's second parent. These groups would rightly ask why mothers, as opposed to biological fathers, get to pick the other parent. Others would probably join them in opposition, complaining that her proposal unfairly absolves men from responsibility,³⁵⁹ inadequately protects children's best interests,³⁶⁰ or insufficiently achieves all of the goals of a parent-partner status.³⁶¹ In light of the anticipated resistance, it is highly unlikely that birth mothers would be given the power to pick the child's other parent.

The drawback of advancing Czapanskiy's proposal, apart from the time and expense involved in what is likely to be a futile effort, is that it may threaten the

³⁵⁵ *Id.* at 946.

³⁵⁶ There are arguably some other weaknesses. For example, Czapanskiy is wedded to a two-parent model. *Id.* at 945. *See also* note 361, *infra*.

³⁵⁷ *Id.* at 966.

³⁵⁸ *See generally* Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 U. VA. L. REV. 79 (2016); Jocelyn Elise Crowley, *Organizational Responses to the Fatherhood Crisis: The Case of Fathers' Rights Groups in the United States*, 39 MARRIAGE & FAM. REV. 99 (2006).

³⁵⁹ *Cf.* Polikoff, *supra* note 82, at 232 ("While Quebec's 'parental project' laws make legal status entirely dependent upon the intent of those participating in the project, regardless of method of conception, such an approach would find no support in U.S. state legislatures. No state will want to open its courts to men arguing they should not have to support their biological children because sexual intercourse occurred with the intent that only the woman would be the parent of the resulting child.").

³⁶⁰ James Dwyer, *A Child-Centered Approach to Parentage*, 14 WM. & MARY BILL RTS. J. 843, 852 (2006) (arguing that the mother might be pressured to select a partner, or may elect to choose a person, for personal reasons, who is not the best for the child).

³⁶¹ Czapanskiy's proposal does not necessarily achieve all the purposes of a parent-partner status. It may not adequately deter ill-advised reproduction because the person who is not chosen as the legal parent has no financial or other obligations to the child or parent. Czapanskiy, *supra* note 249, at 955.

adoption of the parent-partner status. A “radical” parentage proposal may make the parent-partner status appear radical too, by association. Moreover, lawmakers could use the defeat of Czpankiy’s proposal as the reason to reject the parent-partner status. After all, legislators would have been told that the parent-partner status requires a new method for determining parenthood.

Another possibility for fixing the overinclusion problem, if a problem exists, is that the law could define a parent differently for purposes of the parent-partner status and the parent-child relationship. This might make sense, for example, if a jurisdiction recognizes *de facto* parents. A *de facto* parent is someone who has cared for a child, sometimes at the express request of a parent who is facing parenting challenges.³⁶² The law would not want to discourage these activities by attaching parent-partner obligations to *de facto* parenthood. A state that adopts both the UPA 2017, which recognizes *de facto* parenthood,³⁶³ and a parent-partner status would not face this particular problem because the UPA 2017 only permits the putative *de facto* parent to apply for this status.³⁶⁴ However, the wrong incentives could exist in jurisdictions that allow courts to designate someone as a *de facto* parent without the person’s consent and also attach parent-partner obligations to *de facto* parenthood.³⁶⁵

Other than in cases of *de facto* parenthood, parenthood should probably be defined similarly for purposes of the vertical and horizontal axes. As described previously, clear and simple rules are best for parentage attribution; splintered meanings and multiple tests for parenthood can create confusion.³⁶⁶ The same definition of parenthood should trigger obligations along both the vertical and

³⁶² UNIF. PARENTAGE ACT § 609(d)(2), § 609 cmt. (UNIF. LAW COMM’N 2017).

³⁶³ *Id.* § 609. A court has to weigh various factors in deciding whether to recognize a party as a *de facto* parent. *Id.* § 609(d)(1)–(7). If these factors are satisfied and there is only one other individual who is a parent or has a claim to parentage, the court should adjudicate the person a *de facto* parent. *Id.* § 609(d). However, if the child already has two or more legal parents (or persons with claims to parentage), then the court should decide parentage under section 613, which requires the court to make a decision in the “best interest of the child” based on enumerated factors. *Id.* § 613.

³⁶⁴ *Id.* § 609(a)(2). This asymmetry was motivated by the fear that “stepparents might be held responsible for child support under this theory of parentage.” *Id.* § 609 cmt.

³⁶⁵ *Cf.* *Monmouth Cty. Div. of Soc. Servs. v. R.K.*, 757 A.2d 319, 323–32 (N.J. Ch. 2000). *See* WEINER, *supra* note 1, at 142–43.

³⁶⁶ *See supra* text accompanying notes 200–01. *See also* Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 159 (advocating for the same definition of “parent” for all purposes because legal parenthood should be “all inclusive”).

horizontal axes. If that causes some couples to have *inter se* legal obligations who should not, the overinclusiveness could be addressed in other ways.

C. Addressing Overinclusion Without Redefining Parenthood

If there is a problem of overinclusion, it might be addressed in ways other than redefining parenthood. One option is to fine-tune the obligations themselves. Another option is to permit parents to dissolve the parent-partner status if it later seems inappropriate. The first option is certainly preferable to redefining parenthood. The second option has disadvantages and might not be appropriate, but it is worth considering.

1. Fine-Tuning the Obligations

Overinclusion can be addressed by fine-tuning the obligations themselves. That is, if we assume the parent-partner status would apply to parents as presently determined, we could select obligations that seem appropriate in light of existing parentage law. I once suggested that people's nervousness about an indissoluble parent-partner status would decrease "if the status had the right set of obligations attached to it," or if there were defenses to "soften some of the obligations."³⁶⁷ Similarly, nervousness about to whom the parent-partner status would apply will decrease if parents were subject to an appropriate set of parent-partner obligations.

For many obligations, no debate should exist about their desirability. They are either a good idea, or bad idea, no matter how parenthood is determined. This was evident in some scholars' response to my proposal for the obligation of "relationship work."³⁶⁸ Clare Huntington, in particular, raised concerns about the "financial implications" of the legal obligation and the "imposition of mainstream values on all families."³⁶⁹ Other obligations I proposed garnered no opposition and seem beneficial for all parents, however defined, such as the duty not to abuse the other

³⁶⁷ WEINER, *supra* note 1, at 160.

³⁶⁸ *Id.* at 347. "Relationship work" refers to efforts to maintain and/or improve the parties' relationship. *Id.* At the transition to parenthood, it would consist of classes devoted to relationship skills. *Id.* at 347–48, 365–66. At breakup, it would consist of reconciliation counseling and friendship counseling (*i.e.*, parenting classes). *Id.* at 372.

³⁶⁹ Clare Huntington, *The Limits of Relationship Work*, CONCURRING OPINIONS (Oct. 26, 2015), <https://web.archive.org/web/20160424064521/http://concurringopinions.com/archives/2015/10/the-limits-of-relationship-work.html> (criticizing the proposal that parent-partners should have a "legally enforceable obligation to engage in 'relationship work'—counseling, education, and so on"). My response to Huntington's critique can be found on Concurring Opinions. *See* Weiner, *supra* note 326.

parent or the obligation to render reasonable aid when the other parent is physically imperiled.³⁷⁰

Moreover, legislators could make exceptions to particular obligations for certain subgroups if adjustments were necessary.³⁷¹ By applying the status to all parents as currently defined but permitting limited exceptions, the status should still have a strong normative message despite the exceptions. An exception is considered an anomaly, and does not easily undercut the message of the general rule.³⁷² For example, the law prohibits speeding on the highway but makes an exception for emergency service vehicles like ambulances. The dominant message remains “no speeding.” Similarly, the law says that the parent-child relationship is important and should be protected at divorce with parenting time. That message is not undermined by an exception for parents who abuse their children.

Exceptions need to be justified by policy considerations, just like the obligations themselves. In crafting exceptions, the focus remains on the obligation and the reasons for it. A particular population’s differences are relevant only with respect to that specific obligation and its possible exception. For example, the obligation of caregiver compensation may or may not be appropriate for unmarried parents who conceived during a one-night stand. But reaching a conclusion requires one to consider, for that particular population, the injustice of uncompensated caregiving, the changes in behavior such an obligation might afford, and the extent that obligees’ or obligors’ autonomy would be infringed. One must also consider the impact such an exception would have on the overall effectiveness of the obligation and the status as a whole. If the proposed exception has merit but would undermine

³⁷⁰ See WEINER, *supra* note 1, at 327–45 (discussing duty not to abuse the other parent); *id.* at 320–27 (discussing obligation to aid the other parent when he or she is physically imperiled).

³⁷¹ Relationship work provides a good example of how an exception would work. Some critics correctly noted that relationship work should not occur when there are allegations of domestic violence. See Jane Murphy, *The Potential Harm to Low Income Families from the Parent-Partner Status*, CONCURRING OPINIONS (Oct. 26, 2015), <https://web.archive.org/web/20171011234428/https://concurringopinions.com/archives/2015/10/the-potential-harm-to-low-income-families-from-the-parent-partner-status.html>; Leigh Goodmark, *Parent-Partner and Intimate Partner Violence*, CONCURRING OPINIONS (Oct. 27, 2015), <https://web.archive.org/web/20160826053735/http://concurringopinions.com/archives/2015/10/parent-partners-and-intimate-partner-violence.html>. I responded by proposing an exception. See Weiner, *supra* note 326 (“While I tried to suggest ways to minimize the potential that domestic violence survivors would be coerced into relationship work or forced to remain in the relationship because of relationship work, a better solution might be to permit domestic violence survivors to opt out of relationship work.”).

³⁷² See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1093–95 (2003) (noting that at some point exceptions can undermine a rule’s message, but not necessarily if the exceptions are limited in number and justified).

the obligation or the status to an unacceptable degree, then the particular obligation probably should be jettisoned altogether or the exception rejected.

In sum, when the inevitable policy debates arise about the parent-partner status and its obligations, the focus should be on the obligations instead of the definition of parenthood for purposes of imposing the obligations. That focus will promote a much cleaner and clearer analysis, as well as a much cleaner and clearer parent-partner status.

2. Dissolving the Parent-Partner Status When Both Parties Agree

If there are potential misalignments between the current definition of parent and those who should be subject to a parent-partner status, perhaps the parties should be able to dissolve the parent-partnership at some point down the line. In the book, I resist this possibility and identified the disadvantages of such an approach. It would undercut the status's expressive message, foster a divorce-like atmosphere,³⁷³ and be unfair to some children.³⁷⁴ Nonetheless, I also acknowledged that the termination of a person's parental status should simultaneously terminate the parent-partner status.³⁷⁵

Should parties be able to terminate the parent-partnership? If two people cannot work as a team for their child's benefit and both want to terminate the parent-partnership, what interest does the state have in continuing that status? Perhaps the parent-partner status should be able to be disconnected from parenthood at the back end; perhaps the parties should be able to forego being parent-partners without foregoing parenthood. More radically, perhaps the parties should be able to terminate, by agreement, the parent-partner status along the horizontal axis and a person's parental status along the vertical axis.

It is worth briefly considering the case of *In Interest of A.B.*,³⁷⁶ for it gives some context to these possibilities. There the parties asked the court to terminate the father's parenthood status. The parties knew each other for only several months

³⁷³ WEINER, *supra* note 1, at 160 ("The ability to opt out after the child's birth would drastically undercut the status's expressive message. Opting out might also become akin to a divorce action, and replicate all of the harms to children that divorce can cause.").

³⁷⁴ *Id.* at 159.

³⁷⁵ *Id.* at 224.

³⁷⁶ *In Interest of A.B.*, 444 N.W.2d 415 (Wis. Ct. App. 1989).

before the mother, an unmarried woman, got pregnant.³⁷⁷ The father initially denied paternity, but was later adjudicated to be the father and ordered to pay support.³⁷⁸ When the child was about twenty months old, the mother tried to terminate the father's rights.³⁷⁹ The father had very limited contact with the child, mostly because the mother did not think more contact was best for the daughter.³⁸⁰ The mother had found a "disturbing" picture of the father taken after the child's birth, although it was insufficient to show unfitness.³⁸¹ Also, the parents were having difficulties "coping with their strained relationship" and the mother wanted the father "out of her life."³⁸² The father agreed that his parental rights should be terminated.³⁸³

While the trial court granted the petition, the court of appeals reversed.³⁸⁴ It found that "it is generally better for children to have two parents" and that the termination of the father's parental status would "cut an actual financial support line" and "sever the potential for future emotional succor."³⁸⁵ The court was troubled that "alternatives to termination" were not discussed or explored.³⁸⁶

Although the appellate court identified some of the relevant policy considerations, the court also seemed to ignore others. The appellate court saw the case as one in which the parties were merely trying to advance their own "convenience and interests."³⁸⁷ While the court focused on the child's best interest,³⁸⁸ it equated the child's best interest with a need to be protected from harm: there was "no showing that the parents' relationship adversely affects their daughter to the

³⁷⁷ *Id.* at 416.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 416–17.

³⁸¹ *Id.* at 419 n.6.

³⁸² *Id.* at 419.

³⁸³ *Id.* at 417.

³⁸⁴ *Id.* at 416.

³⁸⁵ *Id.* at 419.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.* ("Only if termination is still in the child's best interest after consideration but rejection of these alternatives, is termination permitted. Simply put, no parent may blithely walk away from his or her parental responsibilities.").

extent that termination is warranted—or that it threatens to do so.”³⁸⁹ The court focused on harm instead of whether it would *benefit* the child to be raised by her mother alone. In addition, the court implied that the outcome might have differed if the mother were married and her husband wanted to adopt the child.³⁹⁰ This response illustrates the court’s attachment to biparentalism, even though the absence of another man still left intact a situation that was potentially toxic for the child, unwanted by the parents, and inferior in many respects to single parenthood.

Is the facilitation of single parenthood more acceptable after the parents have given co-parenting a try than at birth? I am not sure. It is possible that for some couples the reasons for the parent-partner status would dissipate after some amount of time, especially if the parties are mutually willing to waive the parent-partner remedies and they agree that their parent-partnership has failed. Assuming the parent-partner status were terminable at the request of both parties, should parenthood along the vertical axis remain for both parties? In a world with a parent-partner status, would parenthood be “indissoluble” if the parent-partner status were dissoluble?³⁹¹ Or would parenthood and the parent-partner status become so intertwined that one could not, or should not, have one without the other?

The court in *In Interest of A.B.* said one thing that bears emphasis. The court was right to suggest that alternatives to termination might have existed and should have been explored. If parents ever are able to terminate a failed parent-partner relationship, they should certainly be encouraged, if not required, to engage in “relationship work” to ensure that ending the parent-partnership, and perhaps a party’s parental status, is the only and best option.

As the termination option is considered, it is useful to recall that the law can set up a structure to advance the interests of parent-partners generally (*i.e.*, the parent-partner status), but also develop a mechanism to meet individual family’s needs. Susan Appleton observed the tension in the context of custody law: “Family law’s aspirations and channeling function look to the future and thus to children’s wellbeing in general, including future generations of children. Yet, particular applications of best interests claim to be highly individualized and exquisitely fact-

³⁸⁹ *Id.*

³⁹⁰ *Id.* (noting “[t]his case is not one where termination would advance the prospects of a proposed adoption and a child’s resulting passage from instability to stability”).

³⁹¹ Patrick Parkinson, *When Is Parenthood Dissoluble?*, 26 BYU J. PUB. L. 147, 147 (2012) (“Whereas once family law was premised on the indissolubility of marriage, now a defining feature of family law in Western societies is the notion that parenthood is indissoluble.”).

sensitive.”³⁹² Similarly, by imposing a parent-partner status and prescriptive obligations on all legal parents as currently defined, the law can set out its aspirations and employ its channeling function. However, the law might also provide a safety valve at the back end that focuses on particular parent-partners.

CONCLUSION

In the book, I recommended that society “move incrementally and cautiously when extending the status’s reach” beyond parents as currently defined.³⁹³ I suggested that any expansion of the parent-partner status to more types of “parents” should occur only “after the parent-partner status has taken hold” and only if an expansion is “warranted by empirical evidence.”³⁹⁴ After writing this Article, I still stand by that advice. But because parenthood law is already undergoing some important changes, including the recognition of *de facto* parents and multiparentalism, the policy questions must be considered now.³⁹⁵ In addition, because ART and marriage equality may “accelerate . . . wide-ranging shifts in regulation of the family,”³⁹⁶ it is appropriate to think today about how the parent-partner status might be affected by, and affect, those shifts.

This Article considered how a parent-partner status should intersect with the law of parenthood. While parenthood scholars have been thinking for a long time about who should be a parent for purposes of the parent-child relationship, scholars working on a parent-partner status have only just begun to think about who should be a parent for purposes of a parent-partnership.

In this Article, I argued that parentage law, as it presently exists, is adequate, and in some ways ideal, for purposes of triggering legal obligations between parents. For most children, the identity of their parents is not in dispute and the issue is what

³⁹² Appleton, *supra* note 242, at 41.

³⁹³ WEINER, *supra* note 1, at 142. The book noted that the status would “typically” impose obligations between only two people because of the law’s commitment to biparenting, although the status could apply to more than two people if the law allowed legal parenthood to exist for three or more. *Id.* at 143. *See also supra* text accompanying notes 145–50, 239–48.

³⁹⁴ WEINER, *supra* note 1, at 143.

³⁹⁵ *See* text accompanying notes 362–65 *supra* (discussing *de facto* parenthood). *See also* Murray, *supra* note 201, at 450, 453 (“While many nonparental caregivers happily assist parents with caregiving, they might be less willing to do so if their actions affirmatively engendered legal obligations to the child and family.”) (advocating for the extension of public benefits to those in caregiving networks, but requiring mutual consent as a precondition for this new status). Regarding multiparentalism, *see* text accompanying notes 244–45, 248, *supra*.

³⁹⁶ NeJaime, *Marriage Equality*, *supra* note 9, at 1192.

legal obligations should be part of the parent-partner status, not to whom the status should apply. Because legal parenthood rests on an amalgam of rules, with biology lurking as a relevant factor for sex-based reproduction, current parentage law supports well the purposes of the parent-partner status.

Nonetheless, I acknowledged that parentage law is underinclusive to the extent that it discriminates against LGBTQ families and unmarried heterosexual couples who use ART to create a child to be jointly raised by them. Reform is needed, although reform should not become a case of the tail wagging the dog. That is, the benefits of a more nuanced definition of parenthood for some individuals should not come at the expense of status simplicity for most. Simplicity is important because it best deters ill-advised reproduction, and it facilitates the socialization process that the parent-partner status is supposed to foster. Fortunately, the UPA 2017 contains some relatively straightforward adjustments to parentage law that should allow the law to operate with less discrimination, while furthering the same basic policy choices found in earlier versions.

The Article also addressed the concern that parentage law is overinclusive for purposes of a parent-partner status. In particular, I disputed that conclusion with respect to unwed couples who conceive a child through sex. I then suggested that the law is instead underinclusive for some unmarried couples. Of particular concern is the fact that in some states an unwed biological father must jump through hoops to be recognized as a legal parent even when he lives with the mother and child. I suggested that states reject the two-year cohabitation requirement that triggers the “holding out” presumption for legal parenthood in the UPA 2002 and 2017. A shorter period is warranted because it would help those relationships flourish by putting both parents into the parent-partner role.

In the final part of the Article, I proposed ways of addressing the overinclusion problem if, in fact, such a problem exists. Instead of an impractical and impolitic redefinition project, the Article proposed that reformers choose better obligations to comprise a parent-partner status and make exceptions to those obligations when warranted. I also raised the possibility of allowing parents to dissolve the parent-partnership jointly, although I resisted making a recommendation because there are unresolved theoretical questions and potential disadvantages.

My analysis convinced me that scholars and policymakers can now begin to draft legislation for a parent-partner status. There is no need to revamp parentage law for such a project. However, scholars and policy makers working on parenthood issues and the parent-partner status need to be aware of the others’ projects. These two avenues of related, but independent, law reform can and should develop in a symbiotic fashion, each informed by the other.

