ARTICLES

PROTECTING CHILDREN(?): MARRIAGE, GENDER, AND ASSISTED REPRODUCTIVE TECHNOLOGY

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ABSTRACT

The Supreme Court has declared that children should not be penalized based on the circumstances of their birth. In the context of assisted reproductive technology ("ART"), however, parentage provisions that apply only to children born to heterosexual married couples continue to be the rule rather than the exception. Many of the policymakers resisting the calls for reform have been influenced by the debate currently playing out in the same-sex marriage context regarding the causal connection (or lack thereof) between marriage and gender, on the one hand, and positive child welfare outcomes, on the other.

This Article approaches this increasingly contentious debate in a novel way by focusing on an issue on which both sides converge—the desire to protect the well-being of children. Using this lens, the Article accomplishes two things. First, this Article offers a doctrinal analysis of an

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issue that, until now, has remained almost entirely unexplored. Specifically, the Article demonstrates that, contrary to the asserted child welfare goals of marriage-preference proponents, marriage-only ART rules harm the financial and, in turn, the overall well-being of nonmarital children. Second, the Article considers how to reform the inadequacies of the current regime. After assessing a range of potential normative solutions, the Article concludes by proposing a new theoretical framework for determining the legal parentage of all children—both marital and nonmarital—born through ART.

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I. INTRODUCTION

Recent reports suggest that up to one-third of women using assisted reproductive technologies ("ART") are unmarried.[1] Despite these data

1. *See, e.g.*, Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES MAG., Mar. 19, 2006, at 46 ("The California Cryobank, the largest sperm bank in the country, owed a third of its business to single women in 2005 . . . ."). *See also* Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 147 (2000) (noting that increasing numbers of gay and lesbian couples are

indicating that increasing numbers of unmarried women—both gay and straight—are having children through ART, the relevant parentage statutes in the vast majority of states address only children born to heterosexual married couples.[2] This Article considers why the law has been so resistant to change in this area, what impact marriage-only ART rules have on the financial and, in turn, the overall well-being of nonmarital children, and how the law should be reformed to best protect the well-being of all children.

For heterosexual married couples, the existing rules provide that a husband is the legal parent of a child born to his wife through alternative insemination[3] so long as he consented to the insemination.[4] I call this the "consent = legal parent rule." By contrast, in 2010 only four states and the District of Columbia have statutory ART provisions that extend the consent = legal parent rule to *nonmarital* children.[5] Moreover, three of these five jurisdictions have provisions that, by their literal terms, are limited to heterosexual couples.[6]

Two hypotheticals illustrate the most immediate consequence of marriage-only ART rules. The first hypothetical involves a heterosexual married couple, Ann and Bob. Ann gets pregnant through alternative insemination. Even though Bob is genetically unrelated to the resulting child, by statute or common law in all or almost all of the states, Bob is

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having children through ART); Kyle C. Velte, *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization*, 7 AM. U. J. GENDER SOC. POL'Y & L. 431, 436 (1999) (noting that increasing numbers of unmarried couples, including lesbian and gay couples, have been using ART to create families).

2. Throughout this Article, I refer to these exclusionary parentage rules as "marriage-only ART rules."

3. Alternative insemination, also referred to as artificial insemination, is defined as "the introduction of semen into the vagina other than by coitus." STEDMAN'S MEDICAL DICTIONARY 906 (27th ed. 2000).

The analysis in this Article focuses on alternative insemination because the vast majority of state statutes and most of the published cases concern this form of ART. The theoretical model proffered in Part VI, however, would apply to all nonsurrogacy forms of ART. Although some of the analysis in this Article is relevant to children born through surrogacy, surrogacy is not addressed in this Article because the law regarding surrogacy is significantly more complex and varied, irrespective of the marital status of the intended parents. *See, e.g.*, Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563, 607–09 (2009) (discussing the wide variation among state responses to surrogacy).

4. *See infra* notes 23–26 and accompanying text.

5. *See infra* notes 33–37 and accompanying text. *See also* COURTNEY G. JOSLIN & SHANNON P. MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 3:3, at 144–45 (2009 ed.) (noting that, as of early 2009, three states had adopted the 2002 assisted reproduction provisions of the Uniform Parentage Act that apply equally to married and unmarried couples).

6. *See infra* notes 39–40 and accompanying text.

treated in law as the child's legal parent because he consented to his wife Ann's insemination.[7]

The second hypothetical involves an unmarried,[8] same-sex couple, Ann and Betty. After being together for fifteen years, Ann and Betty have a child together through alternative insemination. Betty pays for Ann's insemination, Betty attends all of Ann's prenatal appointments, Betty is present at the child's birth. Together the couple brings the child into the home that they share, and they both think of themselves and hold themselves out as the child's parents. Because they are unmarried, however, under existing law in almost all states when the child is born only Ann will be considered the child's legal parent.

Both couples engaged in deliberate and intentional procreative acts. All of the parties intended to function as parents to the resulting children. Yet, the child in the first hypothetical has two legal parents, while the child in the second example has only one legal parent at the moment of birth. As this Article demonstrates, this legal distinction often has dramatic effects on an individual child. In the absence of a legally recognized parent-child relationship, children are denied a host of critical financial rights and protections through their intended but nonlegal parents.

The calls to reform the rules governing the parentage of children born through ART are not new. Twenty years ago, scholars began advocating for the adoption of intention-based ART rules that apply equally to all children, without regard to the gender, sexual orientation, or marital status of the intended parents.[9] As the calls for reform have increased, so has the number of children impacted by these exclusionary rules.[10] Why, then, has

7. No state has law holding to the contrary. There are, however, a number of states that do not specifically address this situation either through statute or case law. *See infra* notes 23–30 and accompanying text.

8. Throughout this Article, when a couple is described as being unmarried, I mean that the couple is not married or in some other comprehensive legal relationship, such as a civil union or registered domestic partnership.

9. *See, e.g.*, John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 358 (1991) ("[T]he parental rights of the intended parents should be legally recognized from the time of conception."); Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking* AID *in the Law*, 44 DUKE L.J. 524, 527 (1994) (urging, in the context of alternative insemination, a parentage rule "predicated on enforcing the pre-conception intentions of the parties"); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 398 (arguing that in the context of ART, parentage should be based on "intentional agreements"). *But see* JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE 178–81 (1997) (raising concerns about an intent-based model in the context of ART).

10. *See supra* note 1 and accompanying text.

the law been so resistant to keeping up with these developments?

In adhering to marriage-only ART rules, many policymakers have been influenced by the debate raging in the context of the same-sex marriage litigation regarding the connection (or lack thereof) between marriage and gender, on the one hand, and positive child welfare outcomes, on the other. On one side of the debate some scholars and advocates argue strongly in favor of parentage rules that are limited to or that grant preference to children born to heterosexual married couples. Such rules are necessary and appropriate because, the advocates claim, the evidence suggests that children do better on a number of developmental inquiries when their parents are a man and a woman united by marriage.[11] Therefore, the argument continues, the law should provide incentives to persons who have children in the context of this allegedly "ideal" family structure (that is, parentage rules should provide special protections for these families) and disincentives to those who have children in other family forms (that is, parentage rules should not "reward" or provide protections for these families). This type of argument was made recently in the *Perry v. Schwarzenegger*[12] case challenging Proposition 8[13]—California's constitutional gay marriage ban. The proponents of Proposition 8 argued that the State should not permit same-sex couples to marry because to do so would result in the extension of additional legal protections to these couples and their children. This, they claimed, would result in fewer children being raised in the allegedly ideal structure of a home consisting of a married man and woman and their biological children.[14]

A number of scholars have challenged the factual or causal basis for such claims. Vivian Hamilton, for example, examined the underlying social science data and concluded that once other factors are controlled for, it is "far from clear" that marriage itself results in any positive developmental outcomes for children.[15] Looking at the issue from a child welfare

11. For example, Lynn Wardle recently argued that "marital parenting by a child's mother and father . . . should be . . . specially protected because it provides children with optimal opportunities for healthy development and a happy childhood." Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL RTS. J. 203, 222 (2006).

12. Perry v. Schwarzenegger, No. 3:09-CV-02292, 2010 U.S. Dist. LEXIS 78817 (N.D. Cal. Aug. 4, 2010).

13. Proposition 8 amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5.

14. Defendant-Intervenors' Trial Memorandum at 9, Perry v. Schwarzenegger, No. 3:09-CV-02292 (N.D. Cal. Dec. 7, 2009), *available at* http://www.scribd.com/doc/23892014/Trial-Brief-of-Prop-8-Proponents-Filed-12-07-09.

15. Vivian E. Hamilton, *Family Structure, Children, and Law*, 24 WASH. U. J.L. & POL'Y 9, 21 (2007).

perspective, Michael Wald and others have criticized parenting rules that are based on the gender and sexual orientation of a child's parents.[16] Another group of scholars, including Cynthia Grant Bowman, have questioned the underlying premise that providing such legal incentives and disincentives actually influences people's behavior.[17]

This Article approaches this increasingly contentious debate in a novel way by focusing on an issue on which both sides converge—the desire to protect the well-being of children.[18] Prior scholarship by Nancy Polikoff and Melanie Jacobs, among others, has demonstrated that marriage-only ART rules often harm the *emotional* well-being of nonmarital children by inadequately protecting their right to maintain relationships with their functional but nonlegal parents.[19] This Article explores a related but, to date, almost entirely unexplored issue, which is how marriage-only ART rules harm the *financial* stability and security of nonmarital children.

Using this lens of child well-being, the Article accomplishes two things. The first contribution of this Article is to provide a careful doctrinal analysis of the eligibility of nonmarital children born through ART to two specific financial protections: child support and children's Social Security benefits. This innovative examination reveals that many of these children are denied crucial financial benefits—benefits that are intended to protect them in times of family crisis. Furthermore, the available social science data show that the denial of these and other financial protections is harmful to the overall welfare and well-being of children. Specifically, inadequate financial support impedes children's educational attainment and cognitive development, among other things.[20] Through this analysis, I demonstrate that if one is truly concerned with the well-being of children, then one should support parentage rules that ensure that *all children* are provided with adequate financial protections by and through the people who intentionally brought them into the world.

16. *See, e.g.*, Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381, 400 (2006) (describing studies that found no "significant differences in children's development related to their parent's sexual orientation").

17. *See, e.g.*, Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 38 (2007).

18. Thus, the argument in this Article does not depend on who is correct with respect to the causal relationship between marriage and positive child welfare outcomes.

19. *See, e.g.*, Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 573 (1990); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 345–46 (2002).

20. *See infra* Part IV.

Second, having illustrated the need for and importance of inclusive ART rules, the Article then considers how best to accomplish this end by examining a number of potential normative solutions. After assessing a range of possibilities, I offer a new theoretical framework for responding to the current legal inadequacies. Ultimately, I argue that the most appropriate solution is to apply the consent = legal parent rule to all children born through alternative insemination, regardless of the marital status, gender, or sexual orientation of the participants. While a consent- or intent-based model is not a new concept in and of itself, this Article offers important contributions to this area of law by offering a framework that is more detailed than earlier proposals. In particular, I address a number of nagging questions and issues that received little attention in the past.

This Article proceeds in five parts. Part II, which is primarily descriptive, provides an overview of the existing legal rules governing the parentage of children born through alternative insemination. As noted above, children born to unmarried couples are largely excluded from the protections provided by these rules. Part III considers why it is that so many states continue to apply exclusionary marriage-based assisted reproduction rules. Specifically, this part surveys the arguments both in support of and critiquing marriage-based parenting rules. This part highlights that parties on both sides of this debate claim that they arrive at their positions based on consideration of what rules best further the well-being of children. That being the case, Part IV explores the existing social science data that show that when children are denied important financial protections, their overall well-being is diminished.

Part V then considers whether equitable doctrines that are used to fill in the gaps created by exclusionary parentage rules do in fact ensure that nonmarital children are provided with adequate financial protections. Part V approaches this question by examining whether and under what circumstances children born to unmarried couples through alternative insemination are entitled to child support and children's Social Security benefits through their functional but nonlegal parents. A close doctrinal examination of the existing case law reveals that equitable doctrines leave many children without adequate financial protections—protections that are essential to their well-being.

Having illustrated that the current regime harms the well-being of children, this Article in Part VI assesses a number of potential normative responses to this reality. Part VI concludes by positing an alternative theoretical framework. Specifically, I argue that the consent = legal parent rule should be applied equally to all children born through ART, without

regard to the marital status, gender, or sexual orientation of the intended parents. In this discussion, I consider and address a series of issues related to the implementation of such a framework.

II. ART AND PARENTAGE: AN OVERVIEW

This part examines the existing parentage rules that apply to children born through alternative insemination.[21] As discussed in more detail below, in the vast majority of states, the existing statutory provisions or common law address only the legal parentage of children born to married couples through alternative insemination.[22] Stated another way, in the vast majority of states, children born to unmarried couples through alternative insemination are excluded from these parentage rules.

Generally speaking, when a married heterosexual couple has a child through alternative insemination, the husband is considered to be the child's legal parent.[23] This result is true even if he is not genetically connected to the child.[24] In thirty-four states and the District of Columbia,

21. This Article focuses on the rules that establish the parentage of persons who consented to alternative insemination with the intention of parenting the resulting child but who are not genetically related to the resulting child. In situations in which the unmarried male partner is a contributor of genetic material (semen), it would be more likely (although not necessarily certain) that he would be recognized as the legal parent of the resulting child. His legal status may not be certain because in many states, an unmarried man who provides sperm to a physician for use in the insemination of a woman not his wife is treated as a legal stranger to the resulting child. *See, e.g.*, CAL. FAM. CODE § 7613(b) (West Supp. 2010) ("The donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in artificial insemination or in vitro fertilization of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.").

22. As a matter of statutory construction, these marriage-only provisions should be applied equally to same-sex couples who are in a recognized comprehensive relationship, such as a marriage, civil union, or in California, Nevada, Oregon, or Washington, a domestic partnership. *See, e.g.*, CAL. FAM. CODE § 297.5(d) (West Supp. 2010) (providing that "[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses"). *See also* Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 970 (Vt. 2006) ("If Janet had been Lisa's husband, these factors would make Janet the parent of the child born from the artificial insemination. Because of the equality of treatment of partners in civil unions, the same result applies to Lisa." (citation omitted)); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 240 (2006) (noting that Vermont's civil union law "includes what amounts to a presumption of legitimacy, making both parties to a civil union the legal parents of the child that either one of them has during the union").

23. *See* Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1097 (1997) (citing HARRY D. KRAUSE, FAMILY LAW 884 (3d ed. 1990)).

24. *See, e.g.*, UNIF. PARENTAGE ACT § 5(a), 9B U.L.A. 407 (2001) [hereinafter 1973 UPA] (providing that a husband who consents to his wife's insemination "is treated in law as if he were the natural father of a child thereby conceived").

this result is provided for by legislation.[25] These statutes generally provide that the husband will be considered the child's legal parent if he consented to his wife's insemination. For example, Illinois's statute provides, "If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband shall be treated in law as if he were the natural father of a child thereby conceived."[26] The literal text of this provision, like the overwhelming majority of statutes in other states, applies only to married couples who have children through alternative insemination. Moreover, by referring to husbands and wives, the language of the provision contemplates that these married couples will be heterosexual.[27] While the relevant provisions vary somewhat state to state, the statutes in most other states likewise use the gendered terms of husband and wife.[28] In a number of other jurisdictions, courts have reached similar conclusions through case law.[29] As is true with respect to the statutory provisions, almost all of the published appellate case law addresses only the parentage of children born to heterosexual married couples through

25. ALA. CODE § 26-17-703 (LexisNexis Supp. 2009); ALASKA STAT. § 25.20.045 (2008); ARIZ. REV. STAT. ANN. § 25-501(B) (2007); ARK. CODE ANN. § 9-10-201(a) (Supp. 2005); CAL. FAM. CODE § 7613(a) (West Supp. 2010); COLO. REV. STAT. § 19-4-106(1) (2002); CONN. GEN. STAT. ANN. § 45a-774 (West 2005); DEL. CODE ANN. tit. 13, § 8-703 (Supp. 2009); D.C. CODE § 16-909(a) (2010); FLA. STAT. ANN. § 741.11(1) (West 2005); GA. CODE ANN. § 19-7-21 (2004); IDAHO CODE ANN. § 39-5405(3) (Supp. 2009); 750 ILL. COMP. STAT. ANN. 40/3(a) (West 2009); KAN. STAT. ANN. § 23-129 (2007); LA. CIV. CODE ANN. art. 188 (Supp. 2010); MASS. GEN. LAWS ANN. ch. 46, § 4B (West 2009); MICH. COMP. LAWS ANN. § 333.2824(6) (West 2001); MINN. STAT. § 257.56 (2000); MO. ANN. STAT. § 210.824 (West 2004); MONT. CODE ANN. § 40-6-106 (2009); NEV. REV. STAT. ANN. § 126.061 (LexisNexis 2004); N.J. STAT. ANN. § 9:17-44 (West 2002); N.M. STAT. ANN. § 40-11A-703 (Supp. 2009); N.Y. DOM. REL. LAW § 73(1) (McKinney Supp. 2010); N.C. GEN. STAT. § 49A-1 (2009); N.D. CENT. CODE § 14-20-61 (Supp. 2009); OHIO REV. CODE ANN. § 3111.95(A) (LexisNexis 2008); OKLA. STAT. ANN. tit. 10, § 552 (West 2009); OR. REV. STAT. § 109.243 (2009); TENN. CODE ANN. § 68-3-306 (2001); TEX. FAM. CODE ANN. § 160.703 (Vernon Supp. 2008); UTAH CODE ANN. § 78B-15-703 (Supp. 2008); WASH. REV. CODE ANN. § 26.26.710 (West 2005); WIS. STAT. ANN. § 891.40 (West 1997); WYO. STAT. ANN. § 14-2-903 (2009).

26. 750 ILL. COMP. STAT. ANN. 40/3(a).

27. *See id.*

28. *See, e.g.*, LA. CIV. CODE ANN. art. 188 ("The husband of the mother may not disavow a child born to his wife as a result of an assisted conception to which he consented."); MASS. GEN. LAWS ANN. ch. 46, § 4B ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.").

29. *See, e.g.*, Brown v. Brown, 125 S.W.3d 840, 844 (Ark. Ct. App. 2003); *In re* Marriage of Adams, 528 N.E.2d 1075 (Ill. App. Ct. 1988), *rev'd*, 551 N.E.2d 635, 640 (Ill. 1990); Levin v. Levin, 645 N.E.2d 601, 605 (Ind. 1994); R.S. v. R.S., 670 P.2d 923 (Kan. Ct. App. 1983); K.S. v. G.S., 440 A.2d 64, 68 (N.J. Super. Ct. Ch. Div. 1981); Anonymous v. Anonymous, 246 N.Y.S.2d 835 (Sup. Ct. 1964); Gursky v. Gursky, 242 N.Y.S.2d 406 (Sup. Ct. 1963); Jackson v. Jackson, 739 N.E.2d 1203 (Ohio Ct. App. 2000); *In re* Doe, 353 S.E.2d 877, 878 (S.C. 1987); K.B. v. N.B., 811 S.W.2d 634, 649 (Tex. App. 1991).

alternative insemination.[30] In fact, only one appellate decision has held that the consent = legal parent rule should be applied equally to a same-sex or different-sex couple that was not in some form of a comprehensive legal relationship.[31]

Despite the fact that the evidence suggests that a significant number of women making use of alternative insemination are unmarried,[32] only four states—Delaware,[33] New Mexico,[34] North Dakota,[35] and Wyoming[36]—and the District of Columbia[37] have statutes that by their literal terms apply to children born to unmarried couples.[38] Moreover, the statutes in most of these jurisdictions, at least by their literal terms, cover only children born to heterosexual couples, whether married or unmarried. For example, the relevant Delaware statute provides: "A *man* who provides sperm for, or consents to, assisted reproduction by a woman . . . with intent to be the parent of her child, is a parent of the resulting child."[39] The provisions in

30. For example, all of the cases cited *supra* note 29 involve heterosexual couples. By contrast, as noted *infra* note 31 and the accompanying text, only one final appellate decision has held that the consent = legal parent rule should be applied equally to a same-sex couple who were not in a comprehensive legal relationship.

31. Shineovich v. Kemp, 214 P.3d 29, 39–40 (Or. Ct. App. 2009) (holding that the Oregon Constitution requires marriage-based alternative insemination be applied equally to same-sex couples). *Cf.* Dunkin v. Boskey, 98 Cal. Rptr. 2d 44, 54–55 (Ct. App. 2000) (noting in dicta that an unmarried man who had a child with his female partner through assisted reproduction should be considered the legal parent of the resulting child); *In re* Parentage of M.J., 787 N.E.2d 144, 152 (Ill. 2003) (holding that the relevant state marriage-based statutory provision did not preclude the unmarried woman's claims for child support "based on common law theories of oral contract or promissory estoppel"); *In re* A.B., 818 N.E.2d 126, 131–32 (Ind. Ct. App. 2004) (applying the consent = legal parent rule to an unmarried same-sex couple), *vacated on procedural grounds sub nom.* King v. S.B., 837 N.E.2d 965 (Ind. 2005).

32. *See supra* note 1.

33. DEL. CODE ANN. tit. 13, § 8-703 (Supp. 2009).

34. N.M. STAT. ANN. § 40-11A-703 (Supp. 2009).

35. N.D. CENT. CODE § 14-20-61 (Supp. 2009).

36. WYO. STAT. ANN. § 14-2-903 (2009).

37. D.C. CODE § 16-909(e)(1) (Supp. 2010).

38. While there are constitutional, statutory, and policy arguments that can be made as to why these marriage-based statutes should be applied equally to unmarried couples, at best it remains unclear whether a court would reach that conclusion in any particular case. Only one published decision has held that these marriage-based alternative insemination statutes must be applied equally to unmarried couples who have children through alternative insemination. Shineovich v. Kemp, 214 P.3d 29, 39–40 (Or. Ct. App. 2009).

39. DEL. CODE ANN. tit. 13, § 8-703 (Supp. 2009) (emphasis added). Again, while there are strong statutory, constitutional, and public policy arguments as to why even this gendered provision, as well as similar provisions in other states, should be applied equally to same-sex couples, *see, e.g.*, JOSLIN & MINTER, *supra* note 5, at 156–58, to date, there is no published case law addressing whether such provisions must be applied equally without regard to the sex or sexual orientation of the intended parents.

North Dakota and Wyoming are virtually identical.[40] Only New Mexico and the District of Columbia have eliminated this gendered terminology.[41]

In sum, children born to unmarried couples through alternative insemination remain excluded from the statutory and common law provisions in the vast majority of states. As noted above, in the simplest terms this result means that most of these children will have a legal parent-child relationship with only one of their intended parents.[42]

III. MARRIAGE, GENDER, AND THE WELL-BEING OF CHILDREN

A. THE TRADITIONAL ASSUMPTIONS

When the first uniform act addressing the legal parentage of children born through alternative insemination was promulgated in 1973, the most common form of assisted reproduction was alternative insemination by

40. N.D. CENT. CODE § 14-20-61 ("A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in section 14-20-62 with the intent to be the parent of her child, is a parent of the resulting child. Parentage of a child born to a gestational carrier is governed by chapter 14-18."); WYO. STAT. ANN. § 14-2-903 ("A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in W.S. 14-2-904, with the intent to be the parent of her child, is the parent of the resulting child.").

41. N.M. STAT. ANN. § 40-11A-703 (Supp. 2009) ("A *person* who provides eggs, sperm or embryos for or consents to assisted reproduction as provided in Section 7-704 [40-11A-704 NMSA 1978] of the New Mexico Uniform Parentage Act with the intent to be the parent of a child is a parent of the resulting child." (emphasis added)); D.C. CODE § 16-909(e)(1) (Supp. 2010) ("A *person* who consents to the artificial insemination of a woman as provided in subparagraph (A) or (B) of this paragraph with the intent to be the parent of her child, is conclusively established as a parent of the resulting child." (emphasis added)).

42. This result is true despite the fact that there are very few states that expressly limit unmarried women's access to reproductive technologies. *See* Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1457 (2008) (noting that there is virtually no regulation of ART in the United States); Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 311 & n. 20 (2006) ("Some states specifically ban the use of artificial insemination by all but married couples, a more restrictive position than even that taken by the 1973 UPA."). There may, however, be numerous practical barriers to single women's ability to access ART. *See, e.g.*, Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 43 (2008) ("[S]ingle women and same-sex couples face reduced access from at least two additional sources: provider discrimination against single and lesbian women, and legislative efforts to ban access to unmarried individuals."); Andrea D. Gurmankin, Arthur L. Caplan & Andrea M. Braverman, *Screening Practices and Beliefs of Assisted Reproductive Technology Programs*, 83 FERTILITY & STERILITY 61, 66 (2005) (finding that 10 percent of alternative reproductive programs would be "very or extremely likely to turn away" single women). Thus, states generally permit these families to be formed, but then, for the most part, exclude children born into these families from the relevant parentage provisions.

heterosexual married couples.[43] Given this reality, the drafters chose to address only this form of assisted reproductive technology in their uniform act—the 1973 Uniform Parentage Act ("UPA"). Since that time, however, numerous scholars and commentators have called for more inclusive ART rules. For example, in 1990, Marjorie Shultz proposed that "[w]ithin the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."[44] In response to these calls and to evidence suggesting that a significant number of women making use of assisted reproduction today are unmarried,[45] in 2002 the Uniform Law Commissioners promulgated a version of the UPA that applies equally to children born to marital and nonmarital couples through alternative insemination and other forms of assisted reproduction.[46]

Despite these demographic changes and the calls for more inclusive rules, the vast majority of states have declined to adopt marriage-neutral ART provisions. In fact, a number of states that enacted or revised their parentage provisions since 2002[47] chose to enact marriage-only rather than marriage-neutral provisions.[48] Moreover, not only are most statutes limited to marital children, but the language of almost all of the statutes contemplates only children born to heterosexual married couples. Many

43. *See* 1973 UPA, *supra* note 24, § 5 cmt., 9B U.L.A. 408 (2001) (explaining the use of the terms "husband" and "wife" in section 5 of the 1973 UPA as follows: "This Act does not deal with many complex and serious legal problems raised by the practice of artificial insemination. It was though useful, however, to single out and cover in this Act at least one fact situation that occurs frequently").

44. Shultz, *supra* note 9, at 323. Since Shultz's groundbreaking article was published almost two decades ago, other scholars have made similar calls. *See, e.g.*, Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 602 (2002) (arguing that "the privilege of intentional parenthood should be extended, as a matter of sound family law policy, to the unmarried").

45. *See supra* note 1.

46. UNIF. PARENTAGE ACT § 703 cmt. (amended 2002), 9B U.L.A. 70 (Supp. 2010) [hereinafter 2002 UPA] (noting that the provision addressing assisted reproduction applies to marital and nonmarital children). Although they are marital-status neutral, the assisted reproduction provisions of the 2002 UPA continue to be written in gendered terms. *See, e.g., id.* (referring to a "man" and a "woman").

47. As noted above, 2002 was the year that a marriage-neutral uniform law on the subject became available for adoption by the states.

48. For example, Alabama and Utah both adopted versions of the revised 2002 UPA after 2002, and both adopted exclusionary marriage-based ART rules, rather than the marriage-neutral versions of the 2002 UPA. H.B. 39, Art. 7, 2008 Leg., Reg. Sess. (Ala. 2008) (enacting a version of the UPA in which the assisted reproductive provisions apply only to children born to married couples); S.B. 14, Part 7, 2005 Gen. Sess. (Utah 2005) (same). In addition, two other states—Texas and Colorado—made amendments to their UPA provisions after 2002, but did not adopt the provisions of the 2002 UPA that make the assisted reproduction provisions applicable without regard to marital status. S.B. 1807, 2003 Leg., Reg. Sess. (Tex. 2003) (amending portions of the Texas Parentage Act); S.B. 03-079, 2003 Gen. Assemb., Reg. Sess. (Colo. 2003) (amending portions of the Colorado Parentage Act).

policymakers who have been resistant to attempts to enact inclusive ART provisions have been influenced by the strong debates that have been raging particularly in the context of same-sex marriage about the connection (or lack thereof) between marriage and gender, and positive child welfare outcomes. Supporters of parenting rules that grant preference for or apply only to heterosexual married couples often argue that the rules do so based on child welfare concerns.[49] Essentially, the argument posits that children do better when their parents are married because married parents are more likely to be in and stay in a committed, stable relationship, and this is good for children.[50] Moreover, not only should parents be married, but this marital unit should consist of one man and one woman. As the State of Florida argued in defending its exclusion of same-sex couples from the right to adopt, it is important that the child be raised by persons of both genders because in such homes "children have the best chance to develop optimally, due to the vital role dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling."[51] To channel or incentivize people to have children in this "optimal" family structure, the argument continues, the law should be limited to or grant preference to heterosexual married couples.

One prominent advocate of this position is Lynn Wardle. Wardle recently wrote, for example, that "marital parenting by a child's mother and father . . . should be . . . specially protected because it provides children with optimal opportunities for healthy development and a happy childhood."[52] Similar arguments have been made in the debate over whether same-sex couples should be permitted to marry. For example, in

49. Alternative insemination statutes that exclude children born to unmarried couples arguably impermissibly discriminate on the bases of marital status, sex, and sexual orientation, and raise due process concerns. *Cf.* Rao, *supra* note 42, at 1475–76 (arguing that laws limiting ART to married persons discriminate on the bases of marital status and sexual orientation); John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 330 (2004) ("Once it is recognized that both married and unmarried persons have a liberty right to reproduce, including the right to use different ART combinations when infertile or when necessary to ensure a healthy offspring, there is no compelling reason for denying that right to persons because of their sexual orientation."). The goal of this Article, however, is not to assess the constitutionality of such statutory distinctions. Rather, the goal is to assess the practical impact of these exclusionary statutes on the financial well-being of nonmarital children born through assisted reproduction.

50. *See, e.g.*, Hamilton, *supra* note 15, at 24 (noting that one justification for preferential treatment of marital families is the interest in "encouraging stable relationships"). Not all couples who are in committed, stable relationships are married, of course. Some stable couples—including most same-sex couples—are prohibited from marrying. Other couples in stable relationships may have other reasons for choosing not to marry.

51. Brief of Appellees, Lofton v. Kearney, No. 01-16723-DD (11th Cir. July 1, 2002), 2002 WL 32868748, at *16.

52. Wardle, *supra* note 11, at 222.

the California marriage cases, the Church of Latter Day Saints argued that the state should extend special legal protections to heterosexual married couples because "[t]he male-female norm/ideal in marriage and parenting provides irreplaceable benefits to children."[53]

Not only should the law provide special protections for married couples, but, at the same time, the law should deny legal protections to people who bring children into other types of family forms.[54] Otherwise, Wardle argues, the law would be permitting "free-riders" who "tak[e] the benefits of a relationship or opportunity without undertaking any of the correlative responsibilities," and this "[f]ree-riding . . . can produce harmful consequences."[55] Accordingly, Wardle contends, not only is it better for children to be raised by a married mother and father, but also "[t]he increasing use of ART to produce children to be raised deliberately without a mother and a father raises serious concerns for all persons interested in child welfare and public policy."[56] Similarly, William Duncan argues that "[t]he social science evidence suggesting increased potential for harm to children living in these [nonmarital] arrangements would tend to provide an argument for disfavoring the grant of legal rights to a non-parent."[57]

These arguments continue to play out in the context of same-sex marriage litigation. For example, the proponents of California's constitutional gay marriage ban—Proposition 8[58]—made a similar argument in their briefing to the federal district court in the *Perry v. Schwarzenegger* case. Specifically, the Proposition 8 proponents argued that permitting same-sex couples to marry would

53. Application for Permission to File Amici Curiae Brief and Amici Curiae Brief of the Church of Jesus Christ of Latter-Day Saints, California Catholic Conference, National Association of Evangelicals, and Union of Orthodox Jewish Congregations of America in Support of Respondent State of California at 37, *In re* Marriage Cases, No. S147999 (Cal. Sept. 26, 2007), *available at* http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/calcathconfamicus.pdf.

54. *See* Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279, 301 (2005) ("[M]any of this generation are more concerned with rejecting the institution of marriage than they are with establishing the strongest foundations for their own commitment to a companion and providing the best setting for raising their own children (which, ironically, is traditional marriage).").

55. *Id.* at 308.

56. Lynn D. Wardle, *Global Perspective on Procreation and Parentage by Assisted Reproduction*, 35 CAP. U. L. REV. 413, 453 (2006).

57. William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001, 1025 (2003). There may be others who support marriage-only parentage rules for different reasons. For example, some may support marriage-only assisted reproduction rules on the ground that they want to discourage people who are not in stable relationships from having children through ART.

58. *See supra* note 13.

> [e]radicate in law, and weaken further in culture the idea that what society favors—that what is typically best for the child, the parents, and the community—is the natural mother married to the natural father, together raising their children, likely resulting over time in smaller proportions of children being raised by their own, married mothers and fathers.[59]

Accordingly, the argument continues, to guard against such a result, the state should not extend legal protections to same-sex couples.

B. CHALLENGES TO THE TRADITIONAL ASSUMPTIONS

A number of scholars have responded to Wardle and others by challenging the link between marriage or marriage-based parenting rules and positive child welfare outcomes. For example, Vivian Hamilton recently reviewed the social science literature on family structure and child well-being and concluded that, once other factors are accounted for, it is "far from clear" that marriage itself results in better outcomes for children.[60] Specifically, Hamilton found that while it is true that "children growing up with continuously married parents enjoy material well-being and developmental outcomes superior to those of children raised in non-marital families," the causal relationship between marriage and superior outcomes remains unproven.[61] To the contrary, she explains, "recent work suggests that advantages enjoyed by children living with married rather than cohabiting parents are almost entirely accounted for by other factors; the most significant are parents' education, race, and ethnicity."[62] In the end, the existing data suggest that "the preexisting characteristics of some individuals make them more likely to marry, and their marital families are relatively more successful than are other families. But it is arguably the individuals' characteristics—rather than marriage itself—that are primarily responsible for their families' relative success."[63]

Another group of scholars has examined the social science evidence

59. Defendant-Intervenors' Trial Memorandum at 9, Perry v. Schwarzenegger, No. 3:09-CV-02292 (N.D. Cal. Dec. 7, 2009), *available at* http://www.scribd.com/doc/23892014/Trial-Brief-of-Prop-8-Proponents-Filed-12-07-09.

60. Hamilton, *supra* note 15, at 21. *See also* Sara McLanahan, Fragile Families and the Reproduction of Poverty (2008) (working paper), *available at* http://crcw.princeton.edu/workingpapers/WP08-04-FF.pdf ("[C]hildren who live with parents who are stably cohabiting do not differ from children raised by married parents.").

61. Hamilton, *supra* note 15, at 12.

62. *Id.*

63. *Id.* at 19. *Cf.* Storrow, *supra* note 42, at 309 (arguing that "favoritism toward marriage in adoption and assisted reproduction relates neither to the purposes of marriage nor to child welfare").

and concluded that sexual orientation is not relevant to a person's parenting ability and, therefore, should not be relevant to parenting decisions.[64] Still others have argued that even if the evidence does establish that marriage itself benefits children's well-being, such evidence would not necessarily support the adoption of exclusionary parentage rules. For example, Cynthia Grant Bowman has questioned the underlying assumption that denying legal protections to nonmarital couples actually encourages more people to marry.[65]

Another group of scholars has shifted the debate from a focus on the causal connection between marriage and the well-being of *marital* children to a focus on the impact of marriage-based rules on *nonmarital* children. Specifically, a number of commentators have examined how exclusionary, marriage-only parentage rules impose serious *emotional* harms on nonmarital children. As noted above, in the most basic terms, the fact that nonmarital children are excluded from the consent = legal parent rule means that in the vast majority of states, children born to unmarried couples through ART will have a legal relationship with only one of the two people who intentionally brought them into the world. While it may be possible for the nonbirth partner to establish a legal parent-child relationship after the child has been born through a process known as a second-parent or coparent adoption,[66] second-parent adoptions are not an option for a large number of nonmarital families. Although there are no accurate statistics about different-sex nonmarital families, as of 2004, only one-third of children being raised by same-sex couples lived in states in which the right to complete a second-parent adoption was available statewide.[67] In addition, even when second-parent adoptions are legally available, adoptions may be out of reach for a variety of reasons. The couple may not be able to find an attorney able or willing to assist them with the adoption. Many families may not be able to afford to complete a

64. *See, e.g.*, Wald, *supra* note 16, at 400.

65. Bowman, *supra* note 17, at 38 ("The argument that to give legal status to cohabitants will harm the ideal embodied in marriage assumes that refusal to recognize cohabitation will lead people to marry instead . . . . Arguments to this effect are seriously flawed . . . .").

66. In a second-parent or coparent adoption, the court permits a second person to become a child's second legal parent without terminating or affecting the rights of the existing legal parent. *See, e.g.*, Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoptions*, 75 CHI.-KENT L. REV. 933, 934 (2000) ("In the last several years, courts in at least twenty-one states have authorized [second-parent] adoption.").

67. *See* LISA BENNETT & GARY J. GATES, HUMAN RIGHTS CAMPAIGN FOUND., THE COST OF MARRIAGE INEQUALITY TO CHILDREN AND THEIR SAME-SEX PARENTS 7 (2004), http://www.hrc.org/documents/costkids.pdf.

second-parent adoption.[68] The result of these legal, practical, and financial hurdles associated with second-parent adoption is that in many same-sex parent families, only one of the partners will be considered the child's legal parent.

As Nancy Polikoff noted in her groundbreaking 1990 article, without a legally recognized parental relationship, a person "may even be found without standing to challenge parental custody."[69] Under such circumstances, a child may be abruptly and permanently cut off from one of the only two parents he or she has ever known.[70] In response to the work of Polikoff and others, a growing number of states have applied a variety of equitable doctrines to mitigate the harshness of such a rule.[71] Under these doctrines, people who have functioned as a parent to a child for a time with the consent and encouragement of the legal parent may be entitled to seek visitation and, in some states, custody, even over the objection of the legal parent.[72]

While there has been significant evolution of the law in this area,[73] almost twenty years later, there are still a number of states—including New York,[74] Illinois,[75] and Michigan[76]—in which functional but nonlegal

68. In California, the home study alone for an independent adoption costs $4500. *See* CAL. FAM. CODE § 8810 (West 2008); Cal. Dep't of Soc. Servs., Adoption FAQs, http://www.childsworld.ca.gov/PG1302.htm (last visited Aug. 20, 2010) (noting costs including fingerprinting, medical examinations, court filings, and investigations of independent adoption petitions). This figure does not include other expenditures, such as attorney's fees.

69. Polikoff, *supra* note 19, at 472. *Cf.* Jacobs, *supra* note 19, at 346 ("[T]he consequences for a child who is separated from his lesbian coparent can be absolutely devastating."). A few states have statutory provisions that permit someone who is not a legal parent to seek custody or visitation over the objection of the legal parent in certain delineated circumstances. *See, e.g.*, COLO. REV. STAT. § 14-10-123(c) (2002) (permitting a person who had physical care of a child for six months or more to commence an action for allocation of parental responsibilities); D.C. CODE §§ 16-831.01, 16-831.03 (2010) (permitting "de facto" parents, as defined by statute, to seek custody or visitation); MINN. STAT. § 257C.08 subd. 4 (2006) (permitting a person who has lived with a child for two years or more to seek visitation rights); TEX. FAM. CODE ANN. § 102.003(a)(9) (Vernon Supp. 2009) (giving a person who had "actual care, control, and possession of [a] child for at least six months ending not more than 90 days preceding the date of the filing to the petition" standing to file an original action).

70. *See* Polikoff, *supra* note 19, at 573.

71. *See, e.g.*, Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 FAM. L.Q. 23, 25–26 (2006) (noting that courts have exercised equitable discretion to grant custody and visitation rights to same-sex coparents as third parties "in approximately a dozen states").

72. *Id.* at 27–30 (discussing cases in which courts applied various equitable doctrines to permit a woman to seek custody or visitation with a child she previously coparented with her former same-sex partner).

73. *See supra* text accompanying notes 31–41.

74. *See, e.g.*, Alison D. v. Virginia M., 77 N.Y.2d 651, 657 (N.Y. 1991) (declining "to read the term parent in [state law] to include categories of nonparents who have developed a relationship with a

coparents have no right to seek custody or visitation with the children that they raised with former nonmarital partners.[77]

IV. FINANCIAL SUPPORT AND THE WELL-BEING OF CHILDREN

This Article considers an impact of marriage-only ART rules that, to date, has received little attention. Specifically, this Article examines the effect of exclusionary, marriage-only ART rules on the *financial* well-being of nonmarital children. To do so, this piece considers whether and under what circumstances children born through alternative insemination to unmarried couples will be entitled to a variety of financial benefits by and through their functional but nonlegal parents. The answers to these inquiries should be of concern to all people who care about children, regardless of their position on the political spectrum, in light of the persuasive evidence demonstrating that the provision of adequate family income and financial support "is essential to child wellbeing."[78] Because the focus of this Article is on the impact of marriage-only ART rules on the financial well-being of nonmarital children, it does not depend or turn on which side is correct about the causal relationship between marriage and gender, and positive child welfare outcomes. Even assuming for sake of argument that Wardle and others are correct that having heterosexual married parents causes positive developmental outcomes for children and that providing special protections to the children born to married couples actually encourages more people to marry, all people who truly care about the welfare and well-being of children should be concerned with and seek

child or who have had prior relationships with a child's parents and who wish to continue visitation with the child"); Behrens v. Rimland, 822 N.Y.S.2d 285, 286 (App. Div. 2006) (affirming a family court finding that a former same-sex partner lacked standing to seek visitation with the child that she coparented for five years); Janis C. v. Christine T., 742 N.Y.S.2d 381, 382–83 (App. Div. 2002) (holding that a former same-sex partner lacked standing under equitable estoppel to seek visitation with the child that she coparented with her former partner).

75. *See, e.g.*, *In re* C.B.L., 723 N.E.2d 316, 317, 320–21 (Ill. Ct. App. 1999) (holding that a former same-sex partner lacked standing to seek visitation with the child that she had coparented with her former partner).

76. *See, e.g.*, McGuffin v. Overton, 542 N.W.2d 288, 289, 292 (Mich. Ct. App. 1995) (holding that a former same-sex partner lacked standing to seek custody of the children she coparented with her former partner after her former partner's death).

77. *See, e.g.*, Kazmierazak v. Query, 736 So.2d 106, 110 (Fla. Ct. App. 1999) (holding that a psychological but nonlegal parent lacks standing to seek custody or visitation rights); Janice M. v. Margaret K., 948 A.2d 73, 74 (Md. 2008) ("We shall hold that de facto parenthood is not recognized in Maryland."); Jones v. Barlow, 154 P.3d 808, 816 (Utah 2007) (declining to apply equitable parenting doctrines to a former same-sex partner).

78. *See, e.g.*, Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 LAW & POL'Y 87, 94 (2004).

to reform parentage rules that deny children critical financial protections and benefits.

The amount of income and financial resources that a family has (or, conversely, lacks) directly and substantially impacts outcomes for children. "[P]oor children suffer higher incidences of adverse health, developmental, and other outcomes than non-poor children."[79] In particular, poor children tend to have lower cognitive abilities,[80] lower school achievement,[81] and more emotional and behavioral problems[82] as compared to nonpoor children. Studies suggest that outcomes for children are improved when the family's income increases.[83]

Moreover, a number of studies have found that some sources of income—in particular child support—have significantly more positive impacts on children than other sources of support.[84] Overall, studies have found that "life in families that receive more child support is more

79. Jeanne Brooks-Gunn & Greg J. Duncan, *The Effects of Poverty on Children*, FUTURE OF CHILD., Summer–Fall 1997, at 55, 57. *See also* Thomas L. Hanson, Sara McLanahan & Elizabeth Thomson, *Economic Resources, Parental Practices, and Children's Well-Being*, *in* CONSEQUENCES OF GROWING UP POOR 190, 190 (Greg J. Duncan & Jeanne Brooks-Gunn eds., 1997) (reviewing literature and concluding that "[c]hildren from economically disadvantaged families exhibit lower levels of physical development, cognitive functioning, academic achievement, self-esteem, social development, and self-control than do children from more advantaged families").

80. Brooks-Gunn & Duncan, *supra* note 79, at 61 ("The poorer children scored between 6 and 13 points lower on various standardized tests of IQ, verbal ability, and achievement.").

81. *See* Nazli Baydar & Jeanne Brooks-Gunn, *The Dynamics of Child Support and its Consequences for Children*, *in* CHILD SUPPORT AND CHILD WELL-BEING 257, 279 (Irwin Garfinkel, Sara S. McLanahan & Philip K. Robins eds., 1994) ("[P]er capita family income and changes in per capita family income have significant positive effects on reading achievement . . . ."); John W. Graham, Andrea H. Beller & Pedro M. Hernandez, *The Effects of Child Support on Educational Attainment*, *in* CHILD SUPPORT AND CHILD WELL-BEING, *supra*, at 317, 328 ("As might be expected, total family income is also strongly related to child's education.").

82. Brooks-Gunn & Duncan, *supra* note 79, at 62 ("[P]oor children suffer from emotional and behavior problems more frequently than do nonpoor children.").

83. Virginia W. Knox, *The Effects of Child Support Payments on Developmental Outcomes for Elementary School-Age Children*, 31 J. HUM. RESOURCES 816, 833 (1996) ("[I]ncreases in overall family income appear to add to the level of cognitive stimulation available in children's homes . . . ."); H. Elizabeth Peters & Natalie C. Mullis, *The Role of Family Income and Sources of Income in Adolescent Achievement*, *in* CONSEQUENCES OF GROWING UP POOR, *supra* note 79, at 340, 376 ("[I]ncreases in income at all levels of socioeconomic status will improve outcomes.").

84. *See, e.g.*, Laura M. Argys et al., *The Impact of Child Support on Cognitive Outcomes of Young Children*, 35 DEMOGRAPHY 159, 159 (1998) ("Some recent empirical studies have found that child-support income is more beneficial to children than other sources of family income."); Graham, Beller & Hernandez, *supra* note 81, at 343 ("[W]e have found that increases in child support payments appear to have stronger effects than equal increases in other sources of income."); Knox, *supra* note 83, at 833 ("While other types of family income may have positive effects as well [on achievement test scores of elementary school children], the effects of child support appear to be particularly positive, and remain statistically significant after using several methods to address the problem of unmeasured differences among families and among states.").

developmentally positive than life in families that receive less child support."[85] More specifically, social scientists have found positive correlations between the receipt of child support and achievement in school.[86] For example, even after controlling for "income level and receipt of welfare," "child support was positively related to more years in school."[87] Another study found that "a $1,000 change in average child support was associated with a 5 percentage point increase in the likelihood of graduation and a 3 percentage point increase in the likelihood of college entry."[88] Others have reported that "child support eliminates nearly all of the negative impact on education of living in a nonintact family."[89] In addition to having positive impacts on educational attainment, even after controlling for family income and other family characteristics, "child-support receipt has additional positive effects on some measures of children's cognitive outcomes."[90] Conversely, "Inadequate child support greatly increases the risks associated with familial separation."[91]

Thus, whether children have adequate financial support, and particularly whether they have access to child support, directly impacts their overall development and well-being. This information is particularly important to note given the fact that children born to unmarried couples—both same-sex and different-sex—tend to have fewer financial resources available to them as compared to children born to heterosexual married parents. While there are no statistics singling out unmarried parents who have children through alternative insemination, the available data suggest that, generally speaking, lesbian and gay parents (the vast majority of whom are unmarried) have substantially fewer financial resources than their heterosexual married peers. Nationally, the median annual household income of same-sex couples with children is 22.5 percent lower (or $13,400 less per year) than that of heterosexual married parents.[92] Same-

85. Virginia W. Knox & Mary Jo Bane, *Child Support and Schooling, in* CHILD SUPPORT AND CHILD WELL-BEING, *supra* note 81, at 285, 308.

86. Knox, *supra* note 83, at 833 ("[T]he results from this study suggest that child support payments received in single-parent years improve the achievement test scores of elementary children.").

87. Argys et al., *supra* note 84, at 159.

88. Knox & Bane, *supra* note 85, at 303. *See also* Graham, Beller & Hernandez, *supra* note 81, at 329 ("Among children eligible for child support, those who receive some support almost uniformly face a smaller overall disadvantage in their educational attainment compared to children in intact two-parent families than those who receive none.").

89. Graham, Beller & Hernandez, *supra* note 81, at 329.

90. Argys et al., *supra* note 84, at 171.

91. Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 33 FAM. L.Q. 157, 158 (1999).

92. ADAM P. ROMERO ET AL., WILLIAMS INST., CENSUS SNAPSHOT: UNITED STATES 3 (2007), http://www.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf [hereinafter WILLIAMS

sex parent families also tend to have a lower rate of home ownership. For example, while almost 77 percent of heterosexual married parents own their homes, only about half (51.1 percent) of same-sex parents own their homes.[93] Moreover, the homes that same-sex parents own tend to be less valuable.[94]

With regard to unmarried mothers with children, the Fragile Families and Child Wellbeing Study[95] found that more than one-half of the unmarried women with children in the study had household incomes that were below the poverty line at each interview.[96] The study also found that "[a]bout 28 percent of mothers were near poor at the time of the follow-up interview, with household incomes just above the poverty line. Only about 20 percent of mothers were comfortably above the poverty line at each interview, with household incomes over 200 percent of the poverty threshold."[97] A more recent report also noted that, in addition to having lower incomes, "unmarried mothers have less access to social support in

INST., CENSUS SNAPSHOT]. At the time the census was done in 2000, no state in the United States permitted same-sex couples to marry. While the legal landscape has changed somewhat in the last decade, even today, most same-sex couples with children cannot marry in their home states. Moreover, even those couples who are recognized as married by their home states are not considered married by the federal government or by the vast majority of other states. *See, e.g.*, 1 U.S.C. § 7 (2006); HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (2010), http://www.hrc.org/documents/marriage_prohibitions_2009.pdf (noting that, as of January 13, 2010, forty-one states had statutory or constitutional provisions, or both, providing that the state would not recognize or enforce marriages between two people of the same sex). While a number of recent decisions have held that 1 U.S.C. § 7 is unconstitutional, *see, e.g.*, *In re* Levinson, 587, F.3d 925 (9th Cir. 2009); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 396 (D. Mass. 2010) (holding section 3 of the Defense of Marriage Act unconstitutional as applied to the plaintiffs); Massacussetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 248–49 (D. Mass. 2010) (holding section 3 of the Defense of Marriage Act unconstitutional), validly married same-sex couples continue to be denied federal marital rights and obligations.

93. WILLIAMS INST., CENSUS SNAPSHOT, *supra* note 92, at 3.

94. *See, e.g.*, R. BRADLEY SEARS & M.V. LEE BADGETT, WILLIAMS INST., SAME-SEX COUPLES AND SAME-SEX COUPLES RAISING CHILDREN IN CALIFORNIA: DATA FROM CENSUS 2000, at 15 (2004), http://www.law.ucla.edu/williamsinstitute/publications/CaliforniaCouplesReport.pdf [hereinafter WILLIAMS INST., SAME-SEX COUPLES IN CALIFORNIA] (finding that the homes that same-sex couples with children in California own tend to be less valuable than the homes owned by married heterosexual parents).

95. The Fragile Families and Child Wellbeing Study ("Fragile Families Study") is a longitudinal study following almost 5000 children in regular intervals after birth. For more information about the Fragile Families Study, see Fragile Families Home Page, http://www.fragilefamilies.princeton.edu/index.asp (last visited Sept. 6, 2010).

96. FRAGILE FAMILIES AND CHILD WELLBEING STUDY, FRAGILE FAMILIES RESEARCH BRIEF: MOTHERS' AND CHILDREN'S POVERTY AND MATERIAL HARDSHIP IN THE YEARS FOLLOWING A NON-MARITAL BIRTH 2 (2008), http://www.fragilefamilies.princeton.edu/briefs/ResearchBrief41.pdf.

97. *Id.*

the form of housing and cash assistance than married mothers."[98]

V. GAP-FILLING EQUITABLE DOCTRINES: DO THEY ENSURE ADEQUATE FINANCIAL SUPPORT?

Courts in a growing number of states have applied equitable doctrines in a variety of areas of law to ensure that children are not denied important protections simply because they lack a legally recognized parent-child relationship with their functional parents. Accordingly, in order to assess adequately the impact of exclusionary parentage rules on children born to unmarried couples, it is necessary to examine whether and to what extent these equitable rules do in fact fill the gaps. While most children born to unmarried couples through assisted reproduction fall outside the scope of the relevant parentage rules, are these children nonetheless protected by other theories including equitable and common law doctrines?

This part will probe this question by considering a number of specific financial protections that are crucial for children particularly in times of family crisis, including the dissolution of the family or upon the death or disability of a parent. While there are many benefits that one could consider, two benefits are especially important to children in times of crisis: the right to child support and the right to children's Social Security benefits.[99]

A. CHILD SUPPORT

Child support is a benefit that is important to a large number of children in this country. At some point in their lives, a majority of all children will live in a single parent household, in need of child support.[100] Studies consistently demonstrate that inadequate child support payments negatively impact the well-being of both the child and the child's family.[101] In recognition of this reality, over the years, both the states and the federal government have taken steps to facilitate the collection of child support from legal parents. Today, in all fifty states, all legal parents—including

98. McLanahan, *supra* note 60 (manuscript at 23).

99. The fact that most of the cases described in this section involve children born to same-sex couples through alternative insemination is a reflection of the current published case law in this area; it is not intended to suggest that the analysis is relevant only to such families.

100. *See, e.g.*, Garrison, *supra* note 91, at 157 ("Close to 50 percent of families receiving federal welfare benefits become eligible for benefits as a result of marital separation or divorce."); *id.* at 157 n.1 ("Researchers currently estimate that half to three-quarters of children born in the late 1970s or 1980s will spend some portion of their childhood years in a single-parent household.").

101. *See supra* notes 79–91 and accompanying text.

nonmarital parents[102]—are required to provide financial support for their children.[103] The question considered here is whether and to what extent children have a right to child support from their functional but nonlegal parents.

In most states, only legal parents (and, in most states, a limited number of other legal relatives) have standing under the relevant statutes to seek custody or visitation with a child. To protect children from the emotional harm of being abruptly cut off from one of the only two parents they have ever known, courts in a growing number of states have heeded the call of Nancy Polikoff[104] and others, and have applied a variety of judge-made equitable and common law doctrines to fill in the gaps and to ensure that children are provided with at least a minimal level of protection for their emotional and caregiving relationships with their functional but nonlegal parents.[105]

In the context of actions seeking visitation or custody, of the states that apply equitable doctrines to protect children's relationships with their functional parents, different states use different terms to describe these theories. Some states apply the doctrine of de facto parentage,[106] while others use the doctrine of *in loco parentis*,[107] or psychological

102. *See* Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 660 (2008) ("The 1984 Child Support Enforcement Amendments required all states to allow children to sue their biological father for paternity until the child's eighteenth birthday and to promulgate child support guidelines that imposed child support payments commensurate with a biological parent's income." (footnote omitted)). Historically, nonmarital parents' obligation to support their children varied greatly from state to state. *Id.* at 659.

103. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 4.4 (2d ed. 1988).

104. Polikoff, *supra* note 19 (advocating that courts must "develop a new definition of legal parent to solve [the] inconsistencies and uncertainties").

105. *See, e.g.*, Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 392 (2007) (noting that of the twenty states that, at that time, had considered whether the same-sex partner of a lesbian mother can petition for custody or visitation rights, "[a]t least thirteen of those states have awarded some degree of parental rights to non-biological lesbian mothers, relying on a variety of theories including psychological parenthood, de facto parenthood, *in loco parentis*, and equitable parenthood"). *See also* Forman, *supra* note 71, at 25–26 ("Advocates made some headway through other theories or by convincing the court to move beyond the statutory framework to exercise its equitable powers. Courts in approximately a dozen states have allowed partners to seek custody or visitation as third parties."); Jacobs, *supra* note 19, at 354 ("In the last decade, however, several state courts have permitted lesbian coparents ongoing visitation with their nonbiological children. . . . These cases have relied upon general third party equitable principles to provide standing for the petitioning lesbian coparent.").

106. *See, e.g.*, C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005).

107. *See, e.g.*, T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001); Jones v. Jones, 884 A.2d 915 (Pa. Super.

parenthood.[108] The elements of these three equitable doctrines vary to some degree, but the core principle is consistent. For a person to be entitled to some parental rights or obligations under these equitable theories, the person must demonstrate that he or she has formed an actual parent-child bond with the child with the consent and encouragement of the existing legal parent.[109] For example, an equitable parenting test that has been adopted by courts in a number of states requires, among other things, "that the biological or adoptive parent consented to, and fostered, the [equitable parent's] formation and establishment of a parent-like relationship with the child,"[110] and that the equitable parent "has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature."[111] As noted above, while not true in all states, a growing number of states have applied these equitable doctrines to permit a functional but nonlegal parent to seek visitation or possibly custody, even over the objection of the legal parent.[112]

Although there is a trend in favor of extending at least limited *parental rights* to equitable parents, to date there is very little published case law explicitly addressing the converse question—whether a de facto or *in loco* parent has any legal *obligation* to support a child that she or he jointly brought into the world through ART.[113]

Ct. 2005).

108. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000).

109. To be clear, in the states that recognize these doctrines, the relevant question is whether the functional parent formed a parent-child relationship with the child and whether, *at the time the relationship was formed*, it was consented to and encouraged by the genetic parent. *See, e.g.*, *id.* at 552. The fact that the legal parent may no longer consent at some point in the future is irrelevant. *See id.*

110. *In re* Custody of H.S.H.-K. (*Holtzman*), 533 N.W.2d 419, 435 (Wis. 1995).

111. *Id.* at 421. *See also* L.M.S. v. C.M.G., No. CN04-08601, 2006 Del. Fam. Ct. LEXIS 298, at *60 (Fam. Ct. June 27, 2006) (agreeing with the reasoning of a case relying on the *Holtzman* test); *V.C.*, 748 A.2d at 551–52 (adopting the *Holtzman* test); Marquez v. Caudill, 656 S.E.2d 737, 743–44 (S.C. 2008) (approving the court of appeal's reliance on the *Holtzman* test).

112. As others have noted, even where these doctrines are applied in the context of custody and visitation actions, these doctrines leave serious gaps in the level and scope of protection provided. For example, Melanie Jacobs has explained that in the context of custody and visitation actions, these doctrines generally do not "establish legal parity between the [nonbiological] coparent and her former partner." Jacobs, *supra* note 19, at 366–67. *See also* Forman, *supra* note 71, at 31 (noting that most states recognizing equitable parenting theories in the context of custody and visitation actions "treat[] same-sex coparents as third parties with limited rights and/or heavier burdens to establish those rights"); E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 127–28 (2006) ("In most cases, the functional parent will be at a substantive legal disadvantage when competing with the former partner or other legal family members of the former partner for custody and visitation rights with respect to the functional child.").

113. *See, e.g.*, Caroline P. Blair, Note, *It's More than a One Night Stand: Why a Promise to Parent Should Obligate a Former Lesbian Partner to Pay Child Support in the Absence of a Statutory*

One of the only cases clearly establishing the principle that an equitable but nonlegal parent has an obligation to support the children that she brought into the world through assisted reproduction is *L.S.K. v. H.A.N.*, a Pennsylvania case.[114] The case involved a same-sex couple who had five children together through assisted reproduction—a singlet followed by quadruplets.[115] When the children were seven and four years old, respectively, the couple ended their relationship.[116] Initially, the nonbiological partner, H.A.N., sought and was awarded joint custody of the children based on her status as an equitable parent.[117] Later, the biological mother, L.S.K., sought an award of child support. The court agreed with this request, holding that under both the doctrine of *in loco parentis*[118] and under the doctrine of equitable estoppel,[119] H.A.N. was responsible for supporting the children. The Illinois Supreme Court recently suggested, although it did not formally hold, that a similar result should apply with regard to a man who had twins through alternative insemination with his nonmarital female partner.[120]

Since these two decisions, dated 2002 and 2003, there has been little additional movement in this direction.[121] Moreover, during this time, a

Requirement, 39 SUFFOLK U. L. REV. 465, 466 (2006) ("There are many cases involving non-biological gay litigants seeking custody and/or visitation of children to whom they consider themselves a parent, but few address the liability of a non-biological gay parent to pay child support.").

114. L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. Ct. 2002).

115. *Id.* at 874–75.

116. *Id.* at 875.

117. *Id.*

118. *Id.* at 878 ("[E]quity mandates that H.A.N. cannot maintain the status of *in loco parentis* to pursue an action as to the children, alleging she has acquired rights in relation to them, and at the same time deny any obligation for support merely because there was no agreement to do so.").

119. *Id.* at 877–78.

120. *In re* Parentage of M.J., 787 N.E.2d 144, 152 (Ill. 2003) (holding that the relevant state statutory provision did not preclude the unmarried woman's claims for child support "based on common law theories of oral contract or promissory estoppel" and remanding the claim for further proceedings).

There are a few additional non-ART cases in which courts held that men were responsible to support children born to their nonmarital female partners despite the men's lack of genetic connection to the children. *See, e.g.*, Wright v. Newman, 467 S.E.2d 533, 535 (Ga. 1996) (requiring an unmarried man to support a child born to his former nonmarital female partner where he had promised he would assume all of the rights and obligations of parenthood and, based on that promise, the mother had refrained from seeking support from the child's biological parent); Shondel J. v. Mark D., 853 N.E.2d 610, 611 (N.Y. 2006) (holding that "a man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment"). Again, however, such holdings are rare.

121. A Delaware trial court reached a similar conclusion, although it did so in an unpublished decision. Chambers v. Chambers, No. CN99-09493, 00-09295, 2005 Del. Fam. Ct. LEXIS 1, at *22 (Fam. Ct. Jan. 12, 2005) (holding that a woman was responsible to provide support for a child she had

number of courts have gone the other way—holding that a nonmarital partner has no legal obligation to support a child born to her former partner through alternative insemination.[122]

Because few courts have explicitly addressed the question and even fewer have explicitly held that nonmarital functional but nonlegal parents have an obligation to support the child or children that they jointly parented, it remains almost entirely uncertain whether these children have a right to support from both of the people who intentionally brought them into the world. This uncertainty is true regardless of the length of the parties' relationship and the level of joint participation in the procreative endeavor.

Moreover, even where recognized and applied in the context of child support, these equitable doctrines leave many children unprotected. One element that has proven to be a significant hurdle is the common requirement that to be a de facto or *in loco* parent, one must demonstrate that he or she has formed an actual parent-child bond with the child.[123] This requirement obviously presents a substantial obstacle if the adults end their relationship prior to the birth of the child. In the two cases that dealt with this issue, both courts held that the nonbiological partner was not obligated to support the resulting child because the partner had no established bond with the child. Both courts reached this conclusion despite the fact that the nonbiological partners jointly participated in a deliberate and intentional course of conduct to bring children into the world through alternative insemination.

One of the two cases,[124] *State ex rel. D.R.M.*, presented a particularly

with her former same-sex partner through alternative insemination because she was a psychological parent and because her actions "both pre-conception and post-birth caused [her former partner] to form a reasonable expectation that [the child] would be supported by [her]"). *See also* Smith v. Smith, 893 A.2d 934, 935 (Del. 2006) (noting that the trial court had ordered the equitable parent to pay child support; this order was not appealed).

122. *See infra* notes 124–31 and accompanying text.

123. *See supra* notes 109–11 and accompanying text. *See also* June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U. L. REV. 341, 361 n.131 (2006) ("[C]ategories such as 'psychological parent,' 'de facto parenthood,' 'in loco parentis,' parenthood by estoppel, and second-parent adoption generally depend on a relationship established over time and provide no security to partners who would like their status recognized at the child's birth.").

124. The other case is *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004). On appeal, the Massachusetts high court held that even assuming a de facto parent has a responsibility to support the child she parented (an issue the court declined to decide), *id.* at 1253 n.12, the nonbirth partner could not be ordered to support the child born to her former partner through assisted reproduction because the nonbirth partner did not have a "long-term relationship with the child," *id.* at 1253.

compelling fact pattern.[125] In the case, a same-sex couple, Tracy Ann Wood and Kelly Marie McDonald, jointly decided to have children together through assisted reproduction.[126] At the time they made this decision, the two women were living together, had pooled their financial resources, and maintained joint banking accounts.[127] Unfortunately, the women's relationship broke down shortly after the parties learned that the insemination was successful.[128] After the birth of the child, the biological parent found herself in a difficult financial situation. She had been counting on her former partner's income to help support herself and the child.[129] Without this additional income, she eventually was forced to seek assistance from the state.[130] Despite the fact that the parties had jointly made the decision to bring the child into the world and despite the obvious financial needs of the child and the biological parent, the court held that at least where the same-sex partner had no "custodial relationship with the child," the court would not hold her responsible for child support.[131]

While the above case involved a situation in which the couple ended their relationship *prior to* the birth of the child, the decision suggests that the result might have been the same had the couple ended their relationship shortly after instead of shortly before the birth of the child. This is true because it still would be difficult to demonstrate the existence of a developed parent-child bond with an infant.[132] Thus, because the current equitable parenting theories (even where applied)[133] generally require a

125. State *ex rel.* D.R.M., 34 P.3d 887 (Wash. Ct. App. 2001).

126. *Id.* at 890.

127. *Id.*

128. *Id.*

129. *Id.* at 895 (noting that the biological parent "relied on [her former partner's] statements, acts, and financial support when making her decision to become pregnant").

130. *Id.* at 890.

131. *Id.* at 894. *See also id.* at 897 ("The child did not reside with Wood and was not held out as her own. . . . [T]he facts before us do not support a conclusion that Wood is estopped from denying a promise to adopt or to support the child.").

132. Richard Storrow has noted the possibility that under equitable parentage theories, courts could look to parenting activities prior to the birth of the child, including the planning for and joint participation in conception, in assessing whether a particular person is an equitable parent. *See, e.g.*, Storrow, *supra* note 44, at 640 ("It would be reasonable . . . to read the doctrine of intentional parenthood as included within the scope of functional parenthood. . . . To effect this reading will require an understanding of the concept of functional parenthood as inclusive of expressions of intention made before the child's birth."). While it is true that some courts have looked to prebirth conduct as additional support for the conclusion that the person is an equitable parent, the practical reality is that no court has found that a person was an equitable parent based solely on prebirth conduct, without the formation of a postbirth parent-child relationship.

133. As noted above, very few jurisdictions have addressed this issue and even fewer have reached this conclusion.

showing of an established parent-child bond, these doctrines generally fail to provide the right to child support where the relationship between the adults ended prior to and, likely, even if it ended shortly after, the child's birth.

A related problem is presented by the statutory theory applied in the *Elisa B. v. Superior Court* case.[134] In *Elisa B.*, the California Supreme Court held that a same-sex partner may be considered a legal parent[135] of children born to her former nonmarital partner through alternative insemination under California's statutory "holding out" presumption.[136] Unlike the equitable theories discussed above, at least according to one California appellate court, the "holding out" provision "does not require that cohabitation or coparenting continue for any particular period of time"[137] or, presumably, proof of a bonded parent-child relationship. The holding out presumption, however, does require reception of the child into the person's home and evidence that the person held the child out as his or her own.[138] Therefore, a person likely cannot establish a presumption of parentage under the holding out presumption prior to the birth of the child.[139]

134. Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

135. Because the decision in *Elisa B.* was premised on a statutory parentage provision, it is not an "equitable parenting" decision. The case is discussed here, however, because the basis for the statutory parenting presumption is similar (though not identical) to the equitable *in loco*, de facto, and psychological parenting theories discussed above. The *Elisa B.* court declined the invitation of the parties to apply the consent = legal parent rule to children born to unmarried couples.

136. *Elisa B.*, 117 P.3d at 670 ("We conclude, therefore, that [the same-sex partner] is a presumed mother of the twins under section 7611, subdivision (d), because she received the children into her home and openly held them out as her natural children."). The holding out presumption is found in CAL. FAM. CODE § 7611(d) (West Supp. 2010), which creates a presumption of parentage where a man "receives the child into his home and openly holds out the child as his natural child." Based on established California case law and consistent with the California parentage provisions, the court held that the holding out presumption must be applied equally to women. *Elisa B.*, 117 P.3d at 667.

137. Charisma R. v. Kristina S., 96 Cal. Rptr. 3d 26, 39 (Ct. App. 2009). Thus, unlike the equitable doctrines described above, it may be possible for a person to establish a presumption of parentage under the holding out presumption even in cases in which the child is very, very young. *See, e.g., id.* at 31 (holding that a woman was entitled to the presumption under the holding out provision even though she only lived with and parented the child for three months).

138. CAL. FAM. CODE § 7611(d).

139. *Cf.* Adoption of Michael H., 898 P.2d 891, 895 (Cal. 1995) ("[T]o become a presumed father, a man who has neither married nor attempted to marry his child's biological mother must not only openly and publicly admit paternity, but must also *physically* bring the child into his home.").

Moreover, the 2002 UPA adds a new two-year requirement to the holding out provision. 2002 UPA, *supra* note 46, § 204(a)(5), 9B U.L.A. 22 (Supp. 2010) (providing that a man is entitled to a presumption of paternity if he has lived with the child and openly held the child out as his own "for the first two years of the child's life"). Accordingly, the holding out provision of the 2002 UPA likely would not protect a child where the nongenetic, intended parent never lived with or established a relationship with the child.

A similar hurdle exists under the American Law Institute's Principles of the Law of Family Dissolution ("ALI Principles"). Under the ALI Principles, the nonbiological, nonmarital partner would not be considered a parent by estoppel[140] if the couple ended their relationship prior to the birth of the child. To be a parent by estoppel based on a prior coparenting agreement, an essential element is that the parent by estoppel has "lived with the child since the child's birth, holding out and accepting full and permanent responsibilities."[141]

The impact of these limitations can be particularly harsh in situations such as that presented in *State ex rel. D.R.M.*, in which the couple planned that the birth parent would stop or cut back on wage work to be the primary caretaker and that the nonbirth partner would be the primary wage earner for the family.[142] The available data suggest that there are a significant number of nonmarital couples in which only one partner is employed or in the labor force. For example, according to the 2000 census,[143] in 29 percent of same-sex couples in California and in 24 percent of different-sex

140. Under the ALI Principles, a parent by estoppel is entitled to all of the "privileges of a legal parent" with respect to "allocation of decisionmaking responsibilities" and "custodial responsibility." AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. b, at 121 (2002) [hereinafter ALI PRINCIPLES].

141. *Id.* § 2.03(1)(b)(iii), at 117. *See also* Storrow, *supra* note 44, at 674 ("[S]ince the Principles do not recognize non-biologically-linked parentage rights arising solely from events occurring before the birth of a child, they provide rather infertile ground upon which to extend the privilege of intentional parenthood to the unmarried." (emphasis omitted)).

Moreover, as discussed in more detail below, under the ALI Principles, while a parent by estoppel has all of the custodial rights of a legal parent, a parent by estoppel is not necessarily responsible for supporting the child. *See, e.g.*, Katharine K. Baker, *Asymmetric Parenthood, in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 121, 126–27 (Robin Fretwell Wilson ed., 2006) ("A person who has a right to estop a legal parent from contesting his parental status receives custodial rights under the Principles equal to a legal parent, but that same person is not necessarily himself stopped from denying a support obligation in chapter 3." (footnote omitted)).

The District of Columbia has a statutory provision that is very similar to the ALI parent-by-estoppel principle. D.C. CODE § 16-831.01(1)(A) (2009). Like the ALI Principles, the D.C. provision requires the person to have lived with the child at some point after birth.

142. *See supra* text accompanying notes 125–31. This was also the situation faced by the biological parent in *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005). Because one of the women earned substantially more than the other, the couple—Emily and Elisa—decided that the lower wage earner—Emily—"'would be the stay-at-home mother' and Elisa[—the higher wage earner—]'would be the primary breadwinner for the family.'" *Id.* at 663. After the birth of the couple's three children, Elisa did provide the primary financial support for the family for a time. *Id.* When this support ended, however, Emily was forced to seek support from the state. *Id.*

143. In 2000, no U.S. state permitted same-sex couples to marry. *Cf.* HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY & OTHER RELATIONSHIP RECOGNITION LAWS (2010), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (listing states that permit same-sex couples to marry or to enter into some other type of comprehensive legal relationship).

unmarried couples in California, one partner was employed while the other was out of the paid workforce.[144] In addition, as is true for heterosexual married couples, there is often a significant income disparity between partners in unmarried couples—both same-sex and different-sex. According to the 2000 census, the average income disparity for same-sex couples in California was $37,034; the average income disparity for unmarried heterosexual couples in California was $24,502.[145] Where there is a significant disparity in the income of the two nonmarital partners, it is even more likely that the parties may decide that the lower wage earner will be the primary caretaker after birth and that the family will rely on the other partner's wages to support the family. Under these circumstances, the child will be left in extremely difficult financial circumstances if the nonbirth partner has no legal obligation to support the family she created.

By contrast, in cases involving heterosexual married couples, courts have refused to allow husbands to walk away from their responsibilities to children they agreed to bring into the world through assisted reproduction.[146] This is true even in cases in which the child was born after the couple ended their relationship. For example, in a recent New York case, an appellate court rejected a husband's attempt to avoid child support obligations for a child born to his wife through alternative insemination. In the case, *Laura WW v. Peter WW*, a heterosexual married couple separated a few months after the wife became pregnant through alternative insemination.[147] At the time the parties separated, they entered into an agreement that provided "that the husband would not be financially responsible for the child."[148] Notwithstanding the parties' agreement and the fact that the husband never lived with or parented the child, the court held that the husband was the child's legal father because he consented to his wife's insemination.[149] A number of other courts have reached similar

144. Todd Brower, *It's Not Just Shopping, Urban Lofts, and the Lesbian Gay-By Boom: How Sexual Orientation Demographics Can Inform Family Courts*, 17 AM. U. J. GENDER SOC. POL'Y & L. 1, 30 (2009). The percent was slightly higher—34 percent—for different-sex married couples. *Id. See also* WILLIAMS INST., SAME-SEX COUPLES IN CALIFORNIA, *supra* note 94, at 9.

145. Brower, *supra* note 144, at 30. The income disparity was slightly higher—$42,497—for different-sex married couples. *Id.*

146. *See, e.g.*, Storrow, *supra* note 44, at 640 ("The [equitable parentage] concept focuses on the actions taken by the functional parent after the child is born. By contrast, the doctrine of intentional parenthood allows married couples to be declared parents at the moment of their child's birth though absent any evidence that they have 'functioned' as parents through genetic or gestational contributions to the child.").

147. Laura WW v. Peter WW, 856 N.Y.S.2d 258, 260 (App. Div. 2008).

148. *Id.*

149. *Id.* at 264 ("This evidence fully supports Supreme Court's conclusion that the husband consented to his wife's decision to create the child and that he is, therefore, the child's legal father.").

conclusions.[150] The inquiry in cases involving the parentage of children born to heterosexual married couples through alternative insemination is not whether the husband formed a bonded relationship with the child. Rather, the question is simply whether he engaged in an intentional procreative act by consenting to his wife's insemination with the intent to parent the resulting child. If he consented, he is a parent and is responsible for supporting the child.[151]

As noted above, to be an equitable parent, a person generally is required to demonstrate that he has formed an actual parent-child relationship with the child.[152] In addition, although less consistently applied, in some states, in order to establish one's status as an equitable parent, one must demonstrate that he or she performed at least as much of the day-to-day caretaking responsibilities as that of the child's legal parent.[153] Several recent decisions illustrate how this requirement also

150. *See, e.g.*, K.S. v. G.S., 440 A.2d 64, 66, 68 (N.J. Super. Ct. Ch. Div. 1981) (holding that the husband was the legal parent of a child born to his wife through alternative insemination, even though the parties separated two months after conception and even though the husband had never seen the child and had not contributed to the child's support in any way); Jackson v. Jackson, 739 N.E.2d 1203, 1209, 1214 (Ohio Ct. App. 2000) (holding that the husband was the legal father of twin children born to his wife through alternative insemination even though the parties separated approximately three months before the children were born); *In re* Baby Doe, 353 S.E.2d 877, 878 (S.C. 1987) (holding that the husband was a legal father of and obligated to support the child born to his wife through alternative insemination even though the parties separated shortly after conception).

151. *See supra* text accompanying notes 23–28. In the few cases in which courts held that unmarried same-sex partners were responsible for supporting children born to their former partners through alternative insemination, there was extensive evidence of an actual parent-child relationship. *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 662–63 (Cal. 2005) (ordering child support after almost two years of coparenting); Chambers v. Chambers, No. CN99-09493, 00-09295, 2005 Del. Fam. Ct. LEXIS 1, at *18, *24 (Fam. Ct. Jan. 12, 2005) (ordering a former same-sex partner to pay child support in a case in which the parties had coparented the child for almost two years); L.S.K. v. H.A.N., 813 A.2d 872, 874–75 (Pa. Super. Ct. 2002) (ordering a former same-sex partner to pay child support in a case in which the parties ended their relationship when their five children were between the ages of four and seven).

152. As noted above, one could urge a court to disregard this requirement and to instead place exclusive weight on facts demonstrating prebirth intent to coparent the child. To date, however, no court has held that a person was an equitable parent with respect to a child with whom the person had no actual parent-child relationship. *See supra* note 132 and accompanying text.

153. This requirement is an element of the de facto parent test of the ALI Principles. *See* ALI PRINCIPLES, *supra* note 140, § 2.03(1)(c), at 118 (providing that to be a de facto parent, a person must have, among other things, "regularly performed a majority of the caretaking functions for the child, or . . . a share of caretaking functions at least as great as that of the parent with whom the child primarily lived").

A decade ago, Julie Shapiro correctly predicted that this requirement could prove to be a problem for same-sex parent families. Julie Shapiro, Essay, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLAMETTE L. REV. 769, 779 (1999) ("This requirement will systematically and dramatically disadvantage many nonlegal parents."). *See also id.* at 781 ("[I]n families where the

results in many children being left unprotected.

One such case, *A.H. v. M.P.*, involved a same-sex couple who had a child together through in vitro fertilization after being together for eight years.[154] Both women participated in the pregnancy. The women listed themselves as "parent 1" and "parent 2" on the consent forms from the fertility clinic and they both attended prenatal appointments and parenting classes together.[155] The nonbiological parent, A.H., was present at the child's birth and was authorized to make medical decisions for the child.[156] After the child's birth, the parties presented themselves publicly as a family. The women decided to give the child A.H.'s surname as a middle name, and they decided that the child would call M.P. "Mommy" and A.H. "Mama."[157] When the child was almost two years old, the couple ended their relationship.[158] After their relationship ended, A.H. filed an action seeking joint legal and physical custody and asking that she be ordered to pay child support.[159] Despite the very high level of joint planning and despite the fact that the couple remained together for almost two years after the child's birth, the court concluded that A.H. did not qualify as an equitable parent because her primary contributions to the family had been financial rather than day-to-day caretaking.[160]

While this requirement that the functional parent demonstrate that he or she has performed an equal or greater amount of the caretaking functions as that of the child's legal parent is not an element that is applied in all or even most states, Massachusetts courts are not alone in mandating such a finding. For example, in a recent case, a Kentucky appellate court held that a woman was not a de facto parent to a child she had parented with her former same-sex partner because she failed to prove she had performed the

homemaker is the legal parent, the breadwinner will be left without legal recognition by virtue of the majority share requirement.").

154. A.H. v. M.P., 857 N.E.2d 1061, 1065 (Mass. 2006).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 1067.

159. *Id.* at 1067–68.

160. *Id.* at 1071–72. Specifically, the trial judge found that while the nonbiological parent's "financial contributions benefited the child," the child's "primary bond" was to the biological parent, and that the relationship between the nonbiological parent and the child, "however salutary to the child, did not rise[] to that of a parental relationship." *Id.* at 1072 (alteration in original) (internal quotation marks omitted). The *A.H.* court specifically declined to accept the nonbiological parent's argument that a nonmarital partner who consents to be a parent of a child born through alternative insemination should be held to be a legal parent of the resulting child. *Id.* at 1074 ("[E]vidence of an agreement [to have a child] is not and cannot be dispositive on the issue whether the plaintiff is the child's legal parent.").

majority of the caretaking responsibilities for the child.[161]

In practice, these decisions mean that, at least in some states, a child born to a nonmarital couple may actually be less likely to be entitled to support from the nonbirth partner if that person were the one to whom the child primarily or solely looked for financial support. The same would not be true for a child born to a married couple; the husband would not be able to walk away from his child support obligations simply by pleading that his primary family responsibilities were financial rather than day-to-day caretaking. In fact, in many states, a husband's claim that he previously provided little in the way of day-to-day caretaking likely would simply mean that he would have relatively little custodial time which, in turn, could result in a greater (not a lesser or nonexistent) child support obligation.[162]

B. SOCIAL SECURITY BENEFITS

Another financial protection that is particularly crucial for children in times of family crisis is Social Security survivor benefits. Social Security benefits provide a financial safety net or income substitute for people and their families at times of disability, retirement, and death.[163] Although Social Security benefits initially went to only the wage earner, benefits are now also provided to the wage earner's child or children.[164] As the Social Security Administration explains, "The loss of the family wage earner can be devastating, both emotionally and financially. Social Security helps by providing income for the families of workers who die"[165] as well as in

161. B.F. v. T.D., 194 S.W.3d 310, 311 (Ky. 2006) (affirming the trial court's ruling that the nonadoptive parent was not a de facto parent despite evidence indicating that she had been the primary financial provider for the child because she had not been the child's primary caregiver). *See also* Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 28 (2008) (discussing the *A.H. v. M.P.* and *B.F. v. T.D.* cases and noting that in these cases the courts limited what constituted cognizable caretaking functions for purposes of conferring de facto parent status).

162. Gaia Bernstein & Zvi Triger, *Over-Parenting*, U.C. DAVIS L. REV. (forthcoming 2011) (manuscript at 26), *available at* http://ssrn.com/abstract=1588246 ("[T]he general principle is that the more time a parent spends with a child the less he or she will be required to pay in child support."). *See also id.* (manuscript at 26 n.114) (listing citations to statutes and cases supporting the proposition that the more time a parent spends with a child, the less that parent will have to pay in child support).

163. Mary Ann Mason & David W. Simon, *The Ambiguous Stepparent: Federal Legislation in Search of a Model*, 29 FAM. L.Q. 445, 457 (1995).

164. SOCIAL SECURITY LAW AND PRACTICE § 1:36 (Colleen R. Courtade & Michael Flaherty eds., perm. ed., rev. vol. 2000) ("The dependent children of a deceased, retired, or disabled worker are entitled to receive benefits.").

165. SOC. SEC. ADMIN., SURVIVORS BENEFITS 4 (2009), *available at* http://www.ssa.gov/pubs/10084.pdf.

cases in which the wage earner has become disabled.[166] The amount of money that a child receives from the Social Security Administration upon the death of a parent can be substantial. While the amount varies depending on the circumstances, "[e]ach family member may be eligible for a monthly benefit that is up to half of [the wage earner's] retirement or disability benefit amount."[167] For example, if a wage earner was born in 1960 and was making $80,000 per year at the time of his or her death, the wage earner's child would receive $1474 per month.[168] Particularly where the deceased or disabled parent was the primary wage earner for the family, Social Security benefits provide a needed source of funds to ensure that the child receives the necessities of life, including food, clothing, and rent or mortgage payments, and to stabilize the family financially in the wake of the death or disability of a parent.[169]

To be eligible for benefits through an insured parent, a child must demonstrate that he or she is a child within the meaning of the Social Security Act.[170] A person can do this in a number of different ways. For example, a person can demonstrate that the wage earner had been decreed by a court to be the parent of the child, that the wage earner had been ordered by a court to provide support for the child, or that the child could inherit from the wage earner under the relevant state's intestacy laws.[171] In situations in which the wage earner had not been decreed by a court to be the child's parent, it may be possible to demonstrate that the child is entitled to benefits if the wage earner had been ordered by a court to provide support for the child. As demonstrated above, however, under existing equitable doctrines many children born to unmarried couples through alternative insemination would not be entitled to an order of support through his or her functional but nonlegal parent.

166. SOC. SEC. ADMIN., DISABILITY BENEFITS 13 (2009), *available at* http://www.ssa.gov/pubs/10029.pdf.

167. SOC. SEC. ADMIN., UNDERSTANDING THE BENEFITS 13 (2010), *available at* http://www.socialsecurity.gov/pubs/10024.pdf.

168. Social Security Online Benefit Calculators, http://www.ssa.gov/OACT/quickcalc (last visited Aug. 22, 2010).

169. SOC. SEC. ADMIN., BENEFITS FOR CHILDREN (2004), *available at* http://www.socialsecurity.gov/pubs/10085.pdf.

170. 42 U.S.C. § 416(e) (2006) (defining "child" to mean, among other things, "the child or legally adopted child of an individual"). *See also* SOCIAL SECURITY LAW AND PRACTICE § 16:10 (Michael Flaherty & Wendy S. Sigillo eds., perm. ed., rev. vol. 2004) ("In order to be entitled to child's insurance benefits, an individual must be the insured person's child. Depending upon the circumstances, the term 'child' can include (1) the natural child or legally adopted child of an individual, (2) a stepchild, and (3) a grandchild or stepgrandchild." (footnote omitted)).

171. *See, e.g.*, 20 C.F.R. § 404.355(a) (2009) (describing numerous ways in which a child can be recognized as a natural child of the insured and be eligible for benefits).

With respect to the last route—based on the child's right to inherit intestate through the insured—a review of the current law addressing intestacy rights reveals that this option also leaves many children unprotected. For the most part, a child is not entitled to intestate succession unless he or she has a legally recognized parent-child relationship with the decedent.[172] As is true in the context of custody and visitation actions, however, a number of states apply an equitable doctrine—in this context the doctrine of equitable adoption[173]—to protect children from a rigid rule that limits intestacy rights to the legal children of the decedent. Currently, about half the states apply the doctrine of equitable adoption in the intestacy context.[174] The doctrine of equitable adoption is intended to "give effect to the intent of the decedent" by treating the child as an adopted child for purposes of intestate succession where the decedent intended but "failed to undertake the legal steps necessary to formally accomplish the adoption."[175] The Social Security regulations specifically provide that to the extent the doctrine of equitable adoption is recognized by the relevant state for purposes of intestate succession, the doctrine is also relevant to determine whether the child is a child within the meaning of the Act.[176] In other words, where applicable, if the child would be entitled to inherit intestate through the decedent under the doctrine of equitable adoption, the

172. *See, e.g.*, UNIF. PROBATE CODE § 2-114(a) (9th ed. 1990) (providing that "[t]he parent and child relationship may be established under" the applicable state parentage law); Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 654 (2002) ("Intestacy statutes typically define the parent-child relationship by reference to the state's parentage statute.").

There is a revised version of the Uniform Probate Code that has its own independent provisions governing the intestacy rights of children born through ART. These provisions are similar, although not identical, to the provisions of the 2002 UPA. Susan N. Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC J. 171, 177 (2008).

173. This doctrine is also sometimes referred to as "virtual adoption" or "adoption by estoppel." Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 767 (1984).

174. R. Brent Drake, Note, *Status or Contract? A Comparative Analysis of Inheritance Rights Under Equitable Adoption and Domestic Partnership Doctrines*, 39 GA. L. REV. 675, 681 (2005) (noting that, as of 1997, "twenty-seven jurisdictions have clearly recognized the doctrine").

175. Gardner v. Hancock, 924 S.W.2d 857, 859 (Mo. Ct. App. 1996). It is important to note that while the doctrine of equitable adoption may entitle the child to a number of important financial benefits—including, possibly, the right to intestate succession and the right to children's Social Security benefits—it does not "create the legal relationship of parent and child, with all of the legal consequences of such a relationship." Lankford v. Wright, 489 S.E.2d 604, 606 (N.C. 1997). Thus, even a child who has been "equitably adopted" may be denied other crucial protections, such as worker's compensation or the right to sue for the wrongful death of the functional parent.

176. 20 C.F.R. § 404.359 (providing that if the relevant state permits an equitably adopted child to inherit intestate, the child "may be eligible for benefits as an equitably adopted child if the insured had agreed to adopt [the child] as his or her child but the adoption did not occur").

child is also entitled to children's Social Security benefits through the decedent.

As is true with regard to the equitable doctrines applied in the context of child support, however, there are a number of significant limitations to the protections afforded by this equitable doctrine. As a preliminary matter, not all states recognize the doctrine of equitable adoption in the context of intestate succession. While a narrow majority of jurisdictions do recognize the doctrine,[177] a significant number of courts have rejected it.[178]

In addition, even if the doctrine were more widely applied, generally speaking, the standard for establishing an equitable adoption is quite high. In almost all of the relevant jurisdictions, to take advantage of the doctrine, evidence that the decedent had developed an actual parent-child relationship with the child (with or without the consent of the legal parent) is not sufficient.[179] Rather, in all but one jurisdiction,[180] to be able to take advantage of this equitable doctrine, the child (or person filing the action on behalf of the child) must present evidence that the functional parent either attempted to adopt the child or entered into a contract with the child's birth parents to adopt the child.[181] And, in fact, some states have required the parties to present proof not only as to the "existence of a contract to adopt, but also [as to] the terms and conditions of the

177. Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1, 6 (2006). *See also Lankford*, 489 S.E.2d at 606 ("Thirty-eight jurisdictions have considered equitable adoption; at least twenty-seven have recognized and applied the doctrine."); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 cmt. k (Tentative Draft No. 2, 1998) ("Courts in over half the states have recognized such a doctrine . . . .").

178. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 cmt. k (noting that courts in at least eight states had rejected application of the equitable adoption doctrine). *See also* Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 261 (2008) ("[T]he doctrine has been explicitly rejected by almost a third of the courts who have even considered it.").

179. *See, e.g.*, Higdon, *supra* note 178, at 264 ("Furthermore, the courts have also held that proof of a family relationship alone is insufficient to prove an equitable adoption . . . ."); Knaplund, *supra* note 177, at 8 ("Thus, equitable adoption is frequently denied due to lack of proof of a contract to adopt, even though the child took the parents' last name, called the parents 'mom' and 'dad,' and undertook many of the responsibilities of the traditional parent-child relationship.").

180. The one exception is West Virginia. *See* Knaplund, *supra* note 177, at 6. *See also* Wheeling Dollar Savs. & Trust, Co. v. Singer, 250 S.E.2d 369, 374 (W. Va. 1979) (holding that equitable adoption can be established even "*without proof of an adoption contract*" (emphasis added)).

181. *See* Higdon, *supra* note 178, at 225; Knaplund, *supra* note 177, at 6. *See also, e.g.*, Coon v. Am. Compressed Steel, Inc., 207 S.W.3d 629, 634 (Mo. Ct. App. 2006) (holding, in a wrongful death action, that "[t]o prove an equitable adoption, the plaintiff must show that a promise to adopt was made, but the adoption had not occurred prior to the promisor's death").

agreement."[182] As Jan Ellen Rein has noted, a review of the case law reveals that unless the functional parent "has made a substantial attempt to comply with formal adoption proceedings, a court will almost invariably condition the granting of relief on a showing that the foster parent agreed to formally adopt the foster child."[183]

A review of the case law addressing the applicability of the doctrine of equitable adoption in the context of intestate succession reveals how the doctrine may fail to protect children even where the children had a long-standing and deep relationship with the functional parent. An example of such a situation is illustrated in *Chambers v. Chambers*.[184] In *Chambers*, a child named Pete Carlton Chambers was born to a woman who, at the time of the child's birth, was in a mental health facility.[185] Shortly after the child's birth, Pete was placed with the decedent, Ethel Louise Chambers. Ethel raised Pete from infancy and referred to Pete by her own surname, rather than by the child's given last name.[186] Later, Ethel filed an action to have the child's surname officially changed to "Chambers."[187] Despite the fact that Pete had never known his biological mother and that Ethel was the only parent he had ever known, the Georgia Supreme Court affirmed the trial court's conclusion that there was insufficient evidence of an equitable adoption because the claimant "failed to show that there was an agreement between his natural mother and the deceased."[188]

Similar results are seen in cases specifically regarding a child's right to Social Security benefits. These cases reveal that even where the evidence demonstrated that an actual parent-child relationship existed between the child and the insured, benefits have been denied based on the lack of evidence that the parties specifically discussed or attempted an adoption.[189]

182. Higdon, *supra* note 178, at 261.

183. Rein, *supra* note 173, at 767.

184. Chambers v. Chambers, 398 S.E.2d 200 (Ga. 1990).

185. *Id.* at 201.

186. *Id.*

187. *Id.*

188. *Id. See also In re* Estate of Fox, 328 N.E.2d 224, 225 (Ind. Ct. App. 1975) (holding that, despite the "ample proof" that the "Foxes treated and reared Louise as they would have their own daughter, and that Louise treated them as a daughter should treat her parents," there was no evidence of "an intent of the Foxes to adopt Louise").

189. For example, in *Shaffer ex rel. Shaffer v. Apfel*, No. 99-1732, 2000 U.S. App. LEXIS 21046, at *2 (6th Cir. Aug. 11, 2000), Social Security benefits were sought on behalf of a twelve-year-old child after the disability of her functional parent, her biological grandfather. The child had lived with Carolyn and George Shaffer, her grandparents, most of her life but continued to have some contact with her birth mother. *Id.* The court denied benefits, finding no equitable adoption. *Id.* at *5. The court explained that "[t]here was no indication that [the functional parent] discussed adoption or attempted adoption during the twelve years that he cared for and supported [the child]." *Id. See also* Reutter *ex rel.* Reutter v.

As is true in the context of intestate succession, courts have been most likely to grant benefits where the parties attempted but did not complete formal adoption procedures.[190]

A recent New Jersey case provides a useful illustration of how this doctrine, like the other equitable doctrines, leaves many children born to unmarried couples through assisted reproduction unprotected. In the case, a lesbian couple—Eva Kadrey and Camille Caracappa—had a child together through alternative insemination, after being together for six years.[191] Because Camille had a higher income, the couple decided that Eva would be the birth parent and primary caretaker.[192] Shortly after their child was born in March 1998, the couple took steps—including contacting a lawyer—to have Camille adopt the child through a second-parent adoption.[193] Before the adoption could be completed, however, Camille died of an unexpected brain aneurysm.[194] Eva sought children's Social Security survivor benefits on behalf of the child, but the claim was denied by the Social Security Administration and this ruling was affirmed by an administrative law judge.[195] The claim was denied despite the fact that New Jersey recognizes the doctrine of equitable adoption for purposes of intestate succession.[196] The administrative law judge stated that even though "Ms. Caracappa had begun the process of adoption, the process had not progressed to the stage of constituting an 'equitable adoption'" within the meaning of the Social Security regulations.[197]

In addition to the general difficulties that all functional families face in trying to fulfill this very high evidentiary burden, there are a number of additional reasons why this doctrine creates particular hurdles for many

Barnhart, 372 F.3d 946, 952 (8th Cir. 2004) (denying a child Social Security benefits where, despite the existence of a loving parent-child relationship, "[n]o formal adoption proceedings were ever initiated for [the child], and no steps were taken to terminate the parental rights of [the child's] birth mother").

190. *See, e.g.*, D'Accardi v. Chater, 96 F.3d 97, 98 (4th Cir. 1996) (awarding benefits where the deceased husband initiated but did not complete adoption proceedings prior to his death).

191. *In re* Caracappa, Social Security Administration, Office of Hearings and Appeals (Mar. 30, 2004) [hereinafter *In re* Caracappa decision] (on file with author). *See also* Press Release, ACLU Urges Social Security Administration to Grant Survivor Benefits to Son of Lesbian (Oct. 15, 2003), http://www.aclu.org/lgbt/relationships/12362prs20031015.html [hereinafter "ACLU Press Release"].

192. *In re* Caracappa decision, *supra* note 191; ACLU Press Release, *supra* note 191.

193. *In re* Caracappa decision, *supra* note 191; ACLU Press Release, *supra* note 191.

194. *In re* Caracappa decision, *supra* note 191; ACLU Press Release, *supra* note 191.

195. *In re* Caracappa decision, *supra* note 191.

196. *See, e.g.*, D'Accardi v. Chater, 96 F.3d 97, 100 (4th Cir. 1996) (applying New Jersey law and noting that "New Jersey recognizes the doctrine of equitable adoption as a theory of inheritance under intestacy"). Under New Jersey law, "Proof of the existence of an agreement to adopt and accompanying consideration is sufficient to support a finding of equitable adoption." *Id.*

197. *In re* Caracappa decision, *supra* note 191.

nonmarital families created through ART. First, these families are ones that were jointly and intentionally created by the parties. Because of the high level of planning and the joint nature of the venture, many couples incorrectly think that both of them are legal parents of the resulting child from the moment of birth. For couples under this impression, it is likely that they will never discuss adoption, much less enter into an agreement or contract to adopt. Even for those parties who understand the necessity of completing an adoption, many nonmarital families live in states in which they are not guaranteed the right to complete an adoption establishing the parental rights of the second parent through a second-parent adoption.[198] If second-parent adoptions are not available in their jurisdiction, couples may never seriously discuss and certainly may make little progress toward completing adoptions.

Finally, the doctrine may be of limited assistance where the nonlegal parent died prior to the birth of the child. Under the doctrine, the court is, in essence, completing in equity what the parties failed to complete as a matter of law. Because an adoption proceeding cannot even be initiated until after the birth of the child, it would be difficult to demonstrate that a subsequently resulting child has been equitably adopted in cases in which the functional parent passed away prior to the birth of the child.

By contrast, if the child were born to a married couple through alternative insemination, the child would be considered the legal child of the deceased husband so long as the husband consented to his wife's insemination. Accordingly, the child would be entitled to inherit intestate through the husband and, as a result, would be entitled to children's Social Security benefits.[199] There would be no need to prove an established parent-child relationship between the husband and the resulting child or to prove the existence of an agreement to adopt the child.[200]

For example, the Social Security Administration recently held that a child born through alternative insemination was a child of the former husband and therefore was entitled to Social Security benefits through the former husband even though the parties had separated "long before [the wife] became pregnant," the former wife "filed a restraining order against

198. *See supra* note 67 and accompanying text.

199. *See, e.g.*, Soc. Sec. Admin., Program Operations Manual System § GN 00306.525 (2001), 2001 WL 1926947 (providing that under Michigan law a "child is considered the child of the husband" if the child was "conceived following artificial insemination of a married woman with the consent of her husband").

200. *See, e.g., id.* (stating that the only requirement is the husband's consent and not proof of a relationship or agreement to adopt).

[the former husband] and began preparing divorce papers" the month she became pregnant, and the former husband "never had any contact" with the resulting child.[201] Despite this evidence, the Administration concluded that the child was entitled to the benefits because the record did not contain clear and convincing evidence that the former husband had withdrawn his prior consent to his former wife's insemination.[202]

As discussed above, without a legally recognized parent-child relationship, many nonmarital children born through alternative insemination have no right to crucial financial protections—such as child support and children's Social Security benefits—from and through their functional parents. Similar results can be seen with regard to other protections and benefits. For example, in the vast majority of states, unless a child has a legally cognizable parent-child relationship, he or she is not entitled to sue for the wrongful death of a functional parent.[203] Wrongful death damages are an important safety net for children in the event of the death of a parent, compensating the surviving child for the loss of parental financial support, as well as for loss of parental nurturing, and pain and suffering.[204] Children often are denied health insurance through their functional but nonlegal parents[205] as most employer-sponsored plans that

201. Soc. Sec. Admin., Program Operations Manual Systems § PR 01105.006 (2004), 2004 WL 700709.

202. *Id.* ("A wage earner who consents to have a child conceived through artificial insemination of his wife will be considered the father of the child thus conceived unless clear and convincing evidence shows that the initial consent had been withdrawn prior to conception. Since the current record does not contain clear and convincing evidence of withdrawn consent, the wage earner would be treated as the legal father under California law."). *See also* Soc. Sec. Admin., Program Operations Manual System § PR 01115.047 (2002), 2002 WL 1879413 (holding that the resulting child was entitled to Social Security benefits through the husband even though the couple were no longer married at the time of the birth of the child, and despite the fact that the child "never lived with [the husband]").

203. *See, e.g.*, JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 3:48 (3d ed. 2008) ("The parent of a legally adopted child is entitled to recover for the wrongful death of a child, but not one who merely stands in the position of a parent of a child who has been 'equitably adopted.'").

A small number of courts have held that the equitable doctrines can be applied in the context of wrongful death. *See, e.g.*, Coon v. Am. Compressed Steel, Inc., 207 S.W.3d 629, 636 (Mo. Ct. App. 2006) (finding that an equitably adopted child could prosecute a wrongful death claim on behalf of the deceased adoptive parent); Holt v. Burlington N. R.R., 685 S.W.2d 851, 859 (Mo. Ct. App. 1984) (holding that an equitably adopted child was entitled to sue for the wrongful death of his adoptive parent). Most courts, however, have held to the contrary. *See, e.g.*, Herrera v. Glau, 772 P.2d 682, 684 (Colo. App. 1989) ("[A]n equitably adopted child, while an heir for purposes of intestate succession, is not an heir for wrongful death Act purposes . . . ."); Jolley v. Seamco Laboratories, Inc., 828 So. 2d 1050, 1051 (Fla. Dist. Ct. App. 2002) ("An equitably adopted child does not have all of the legal rights of a legally adopted child and this court will not create such rights within the context of the Florida Wrongful Death Act.").

204. *See, e.g.*, Talcott J. Franklin, Note, *Calculating Damages for Loss of Parental Nurture Through Multiple Regression Analysis*, 52 WASH. & LEE L. REV. 271, 271–72 (1995).

205. For example, beneficiaries of lump-sum benefits only include "natural" and adopted children

cover dependents cover only children with whom the employee has a legally recognized parent-child relationship.[206] Similarly, children who are not considered legal children also may be denied workers' compensation benefits in the event of the death of the nonbirth parent.[207] As noted above, the denial of these benefits can have a particularly acute impact on the children where the functional but nonlegal parent is or was the primary wage earner for the family, which is often the case.[208]

VI. PROTECTING THE WELL-BEING OF ALL CHILDREN: POSSIBILITIES AND SOLUTIONS

Part V illustrated how the law currently fails to ensure that nonmarital children born through ART are provided with adequate financial protections. As noted in Part IV, according to the available social science data, inadequate financial support directly and substantially harms the welfare and well-being of children by limiting their educational attainment and cognitive and behavioral development. What is the best way to ensure that nonmarital children born through ART are entitled to the support that is essential to their overall well-being? This part assesses a number of potential normative responses and concludes by proposing an alternative theoretical framework for addressing the current legal inadequacies.

A. EXPANDING EQUITABLE PARENTING THEORIES

One potential solution is to expand the scope of and protections extended under equitable parenting theories. For example, courts could treat equitable parents on a legal par with biological or adoptive parents, as the Washington Supreme Court did in *In re Parentage of L.B.*[209] One could also urge courts to require less in the way of postbirth parenting in order to

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of the federal employee. 5 U.S.C. § 8424(d) (2006).

206. *See, e.g.*, BENNETT & GATES, *supra* note 67, at 9; Univ. of Wash., Dependent Insurance Coverage: Adding a Dependent/Child, http://www.washington.edu/admin/hr/roles/ee/life-events/insure/add-child.html (last visited Sept. 6, 2010) (providing that dependent children can be added and defining "dependent children" to include children through the age of 19 "[w]ho are naturally born, legally adopted, or a stepchild; or, [f]or whom you have legal responsibility for supporting in anticipation of adoption; or, [w]hom you support under a court order or divorce decree").

207. *See* JOHN E. SANCHEZ & ROBERT D. KLAUSNER, STATE & LOCAL GOVERNMENT EMPLOYMENT LIABILITY § 10:12 (2007) ("The class of individuals entitled to [workers' compensation] death benefits is commonly spelled out in state law with surviving spouses and dependent children presumptively deemed dependents.").

208. *See supra* text accompanying notes 142–45.

209. *In re* Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005) ("We thus hold that henceforth in Washington, a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise.").

establish an equitable parenting relationship. The ALI Principles attempt to do both of these things under the parent-by-estoppel principle. Parents by estoppel are treated equally to legal parents for all custody allocation related purposes.[210] Moreover, to be a parent by estoppel one does not need to establish the formation of an actual parent-child bond.[211]

While I support broadening equitable parenting theories, it is my position that this response is not an appropriate or adequate solution to the identified problem. Even the broader and more protective ALI parent-by-estoppel doctrine, for example, still leaves many children without adequate financial and emotional protections. Under the ALI parent-by-estoppel doctrine, for example, while an actual parent-child bond is not required, a person still cannot be a parent by estoppel unless the person has lived with the child for at least some time.[212] This means that the child will lose out on important protections if the couple breaks up or the nonbiological parent passes away prior to the birth of the child. Furthermore, different doctrines may be relevant for different benefits. Therefore, the fact that a child is entitled to one benefit under one equitable doctrine generally does not ensure that the child is entitled to some other benefit under some other equitable doctrine. For example, again using the broader ALI Principles, even assuming a person was found to be a parent by estoppel, it remains unclear what this equitable status means outside the context of child custody, and to what other benefits the child might be entitled.[213] In fact, as Katharine Baker has pointed out, under the ALI Principles, parents by estoppel are not necessarily obligated to provide child support.[214] This fact has two important negative consequences for the child and his or her family. First, even under more expansive equitable doctrines, the child would still be forced to litigate his or her rights to various important financial benefits individually, on a case-by-case basis. This litigation is time-consuming, expensive, stressful, and invasive, and often occurs during

210. ALI PRINCIPLES, *supra* note 140, § 2.0 cmt. b, at 121 ("A parent by estoppel is afforded all of the privileges of a legal parent under this Chapter . . . .").

211. *Id.* § 2.03(1)(b)(iii) (providing that one way a person can establish she is a parent by estoppel is by demonstrating that she "lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests").

212. *Id.* (providing that the person must "have lived with the child").

213. The ALI Principles address only the allocation of parental rights and the obligation to provide support; they do not purport to establish rules governing the child's entitlement to government or private benefits.

214. Baker, *supra* note 141, at 124.

a time when the family is already in crisis. Moreover, relying on equitable principles means that the child and the child's family do not know or have assurance that these benefits will be paid out in the event of the death or disability of the functional parent until the particular issue is litigated after the fact.[215]

B. BROADENING MARRIAGE

Another potential solution is to permit all same-sex couples to marry.[216] Assuming these marriages were available in all fifty states and recognized by the federal government (which of course is not the case today),[217] the existing marriage-only consent = legal parent rule would apply equally to all children born to married same-sex couples.[218] This is currently the situation, for example, in Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont.[219] While I support permitting same-sex couples to marry, extending marriage rights to same-sex couples is not the proper means of addressing the problems identified above. Such a solution would still continue to leave many children without the protections they need and deserve. Children born to same-sex or to different-sex couples who, for whatever reason, did not marry would still fall outside the protection of the consent = legal parent rule. Retaining a marriage-only ART rule, albeit one that is not limited based on gender or sexual

215. Sally F. Goldfarb, *Disasters, Families, and the Law*, 28 WOMEN'S RTS. L. REP. 35, 42 (2007) ("The functional approach also interjects a great deal of discretion and unpredictability into the process of identifying families."); Martha L. Minow, *Redefining Families: Who's in and Who's Out?*, 62 U. COLO. L. REV. 269, 276 (1991) ("[A] functional approach can be messy. That's law talk for unpredictable."); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 226 (2009) ("All of these states seem to require case-by-case determinations. None provides the clear and simple establishment of parenthood—without court intervention—that constitutes the norm for heterosexual couples.").

216. Other commentators have proffered such a solution. *See, e.g.*, Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2372, 2375 (2007) ("Although certain legal devices such as wills, medical proxies, and second-parent adoptions can help fill some of the vacuum left by the unavailability of marriage to same-sex couples and their children, these remedies cannot provide the security that only marriage can deliver." (footnote omitted)).

217. For further discussion of issues related to interstate recognition of parentage, see, for example, Joslin, *supra* note 3.

218. *See, e.g.*, Michele Granda & Jennifer L. Levi, *Will Marriage Be an Option?*, *in* REPRESENTING NONTRADITIONAL FAMILIES § 8.3.6(b) (Katherine Triantafillou ed., 2006) ("In Massachusetts, a child born . . . to a married woman with the use of donor sperm . . . [is] presumed to be the child of the 'husband,' and therefore of the female spouse in the case of a lesbian couple."); *supra* note 22.

219. *See, e.g.*, HUMAN RIGHTS CAMPAIGN, *supra* note 143.

orientation, would mean that children's financial and emotional security would continue to depend on whether their parents took the affirmative step of formalizing their relationship to each other. This result would be true despite the fact that when unmarried couples have children together through alternative insemination, they engage in a procreative process that is just as deliberate and intentional as the process engaged in by married couples. Moreover, the resulting child is no less in need of the protections afforded to marital children by virtue of the consent = legal parent rule.[220]

C. LIBERALIZING ADOPTION

Another possible solution is to make second-parent adoptions available in all fifty states, regardless of the gender, sexual orientation, or marital status of the prospective adoptive parent. As noted above, currently, many children born to unmarried couples through alternative insemination live in states in which their parents are not assured the right to complete a second-parent adoption.[221] While I believe that second-parent adoptions should be available in all jurisdictions, again, I do not see this response as appropriate or sufficient.

First, adoptions cannot be completed until after the birth of the child. Accordingly, such a regime (while a positive development generally) would do little to help the resulting children whose parents pass away or end their relationship prior to the children's births. In addition, many couples, particularly lower-income couples who have little access to lawyers or knowledge about the law, may not realize the necessity of completing an adoption.[222] Moreover, there are a number of reasons why couples may fail to complete adoptions even if they know an adoption is necessary. Adoptions are expensive and, therefore, may be financially out of reach for many couples.[223] These are some of the reasons the law

220. *See* Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 588–89 (2005) ("Like children of heterosexual parents, children of gay and lesbian couples should not need their parents' marriage to access [important protections].").

221. *See supra* note 67 and accompanying text.

222. For further discussion of the inadequacy of second-parent adoptions, see Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 30 (1999) ("I have two major concerns about second-parent adoptions. First, I believe they divide our community. Second, I believe that the uncritical acceptance of second-parent adoptions contributes to our domestication.").

223. *See, e.g.*, Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of* Alison D. v. Virginia M., 17 COLUM. J. GENDER & L. 307, 340 (2008) (noting that because of the expense of adoptions "[s]ome couples who plan to have more than one child simply find it more efficient and economical to wait to do all of the adoptions together").

includes default rules to protect marital children born through assisted reproduction; the law seeks to ensure that those children are protected regardless of what steps their parents take or do not take to secure their legal relationships to their children.

D. ADOPTING A CONTRACT-BASED THEORY OF PARENTAGE

A number of scholars recently have called for the adoption of parentage rules based on contract.[224] To the extent the parties did enter into a written agreement, that written agreement should be relevant evidence in assessing the intentions of the parties. That said, however, I do not support a rigid parentage rule that depends on the existence of a formal written contract. One concern with such a rule is that it likely would leave many children—particularly children born to lower-income families who have fewer resources available to them—unprotected. Families with greater access to financial resources, attorneys, and legal information will be much more likely to comply with a written contract requirement. By contrast, families without access to such resources will be less likely to comply with such a rule.

In addition, adopting a contract-based theory presumably would mean that the parties not only could contract to take on the rights and responsibilities of parentage, but that they also could contract for some but not all of the rights and responsibilities of parentage. While I am not necessarily opposed to frameworks that accord limited or partial parental rights and responsibilities in certain situations,[225] it is my position that when a person intentionally brings a child into the world through assisted reproduction with the intention of parenting the resulting child, that person should be accorded the full panoply of rights and responsibilities of

224. *See, e.g.*, Harvey L. Fiser & Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of "Best Interest of the Child" and the Right to Contract for Lesbian Potential Parents*, 15 CARDOZO J.L. & GENDER 1, 20 (2008) (identifying ways that contracts can "mitigat[e] judicial bias"); Katherine M. Swift, *Parenting Agreements, the Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913, 913 (2007) (arguing "that properly drafted parenting agreements should be enforced by family courts").

225. For further consideration of whether nonparental caregivers should be extended some parental rights or obligations, see, for example, Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 49 (2007) (seeking to "understand why . . . the 'more-than-two' parent family is so widely agreed to be undesirable, even while so many people practice alternatives to the two-parent nuclear family norm"); and Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 388 (2008) ("[B]ecause family law understands caregiving as parenting, it precludes recognition of the way in which parents and nonparents work together to discharge caregiving responsibilities.").

parenthood.[226]

Making the conscious and deliberate choice to bring a child into the world is a profound decision and one, I believe, that should bring with it appropriately profound consequences. In addition, it is important for the parties and for the child to have clarity about their respective rights and responsibilities and their relationships to each other. When the primary model unbundles parenthood and parcels out the rights and responsibilities individually, this clarity is diluted. As June Carbone has argued,

> If parenthood is to be constitutive of the child's identity, if it is to provide "an organizing framework which holds the past and present together," it needs a measure of permanence. While identity is not a static concept, and a child's development involves a continuous creation and refinement of her sense of herself in relationship to her caretakers and the community surrounding her, the sense of who she is should provide a measure of continuity and stability.[227]

E. AN ALTERNATIVE PROPOSAL

Ultimately, having considered other potential responses, I believe the most appropriate solution is to extend the consent = legal parent rule to all children born through assisted reproduction,[228] regardless of the marital status, gender, or sexual orientation of the intended parents. Specifically, states should provide that *any individual*, regardless of gender, sexual

226. Thus, at least in this particular context, I part company with those who have advocated for the unbundling of parental rights and responsibilities. *See, e.g.*, Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 913 (2006) ("I would separate economic responsibility from the privileges and rights of social fatherhood."); Kessler, *supra* note 225, at 74 ("[W]e may need to further disaggregate the bundle of parental rights. Currently, it is all or nothing."). *But see* Emily Buss, Essay, *"Parental" Rights*, 88 VA. L. REV. 635, 636 (2002) ("[A] state [should have] broad authority to identify nontraditional caregivers as parents, and, if it does so, it must afford their child-rearing decisions the same strong protection afforded more traditional parental figures."); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1818–19 (1993) ("A child-centered perspective would distinguish the two. It would view obligation as a corollary of procreation—responsibility assigned to the creator for the consequence of creation. It would view authority as a corollary of stewardship—and earned during gestation and childhood and exercised in service to the child's emerging capacity.").

227. June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1334 (2005) (footnote omitted). *See also* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 944 (1984) ("Because exclusivity in parental rights strengthens the nuclear family to the benefit of children, traditional doctrine should remain society's first choice.").

228. As noted above, this model is not limited to alternative insemination. Rather, it applies to all nonsurrogacy forms of assisted reproduction.

orientation, or marital status, who consents[229] to a woman's insemination with the intent to be a parent is a legal parent of the resulting child.[230] Applying this rule equally to all children provides the child and the child's family certainty and security about their respective legal relationships and ensures that the child will not individually have to litigate his or her right to various benefits in times of family trauma. Further, applying the consent = legal parent rule to all children signals to the adults the seriousness of their procreative endeavor.

Why should consent be the trigger? Recently, a number of commentators have proposed parentage theories under which the nongestational parent would not gain parental rights until some time after the child's birth.[231] In the context of ART, however, I believe that the determination of parentage should be made at an earlier stage. Where children are brought into the world through assisted reproduction, there is necessarily a convergence of procreative activity and intent to parent; there is no other reason to engage in that procreative activity. As Anne Reichman Schiff explained, "the defining feature of [alternative insemination] . . . is intentionality."[232] By contrast, just because one intentionally engaged in sexual intercourse does not necessarily mean that both parties intended to parent any potentially resulting child. If we hold men responsible for resulting children in the context of sexual intercourse, it is all the more appropriate to hold people responsible for conduct that very often is much

229. To be clear, the relevant point of inquiry is whether the parties consented *at the time of conception*.

230. The American Bar Association Family Law Section recently included a gender-neutral, marital status–neutral assisted reproduction provision in its Model Act Governing Assisted Reproductive Technology ("ABA Model Act"). AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 603 (2008), *available at* http://www.abanet.org/family/committees/artmodelact.pdf ("An individual who provides gametes for, or consents to, assisted reproduction by a woman as provided in Section 604 with the intent to be a parent of her child is a parent of the resulting child.").

231. *See, e.g.*, Karen Syma Czapanskiy, *To Protect and Defend: Assigning Parental Rights When Parents Are Living in Poverty*, 14 WM. & MARY BILL RTS. J. 943, 946 (2006) ("If the birth mother designates a parental partner early in the child's life and changes her mind within the first month of the child's life, she may revoke the designation. After that time, she may not revoke her designation."); Spitko, *supra* note 112, at 138 ("As argued above, in only the most extraordinary circumstances could a biological father perform sufficient parental labor by the time of the birth of his child to qualify him as a constitutional parent."). *See also* Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 134 (2003) ("Specifically, I argue that fatherhood should be defined by *doing* (action) instead of *being* (status), with the critical component being acts of nurturing."). It is important to note that, generally speaking, these articles are not focused on children born through ART. Therefore, the comments cited above may not reflect the authors' opinions about the rules that should apply in that context.

232. Schiff, *supra* note 9, at 550.

more intentional, from an intent-to-parent perspective.

Moreover, bringing a child into the world is a profound action. Where people have intentionally and consciously brought a child into the world through assisted reproduction, the gestational/intended parent should be given assurance that she can rely on the promises of the other party. As Marjorie Shultz wrote almost two decades ago, "Where artificial or assisted reproductive techniques are used, the need to reduce uncertainty, to project decisions into the future, and to protect reciprocal expectations and reliance is especially significant."[233]

I certainly am not the first to call for a rule that establishes the parentage of children born through ART based on the parties' preconception consent or intent. As noted above, scholars have been calling for such a rule for over twenty years.[234] This Article, however, makes a number of new and important contributions to this earlier body of work. First, this Article offers a new argument in favor of applying a marriage-neutral consent = legal parent rule. Specifically, this Article demonstrates how the alternative—an exclusionary marriage-only rule—harms the well-being of nonmarital children. Second, in the discussion that follows, I proffer a detailed theoretical model that addresses a number of specific issues that, to date, have remained underdeveloped.

First, under this proposal, consent of the gestational intended parent is required as well.[235] This requirement makes sense because the consent = legal parent rule is intended to give legal effect to a *joint* procreative

233. Shultz, *supra* note 9, at 324. While Janet Dolgin is certainly correct that "intentions change," Janet L. Dolgin, *Response to Professor Woodhouse*, 28 CONN. L. REV. 107, 110 (1995), it is my position that legal consequences should flow from intentional procreative activity, even if one later regrets this decision. Dolgin is also correct that there will be cases in which it is difficult to determine the parties' intentions at the time of conception. *See id.* at 111 ("Moreover, reliance on intent is unworkable in practice because no clear measure exists by which conflicting intentions can be delineated, identified and weighed."). I believe, however, that courts are capable of sorting out this type of factual dispute.

234. *See, e.g.*, Hill, *supra* note 9, at 358 (arguing that in the context of ART, "the parental rights of the intended parents should be legally recognized from the time of conception"); Polikoff, *supra* note 215, at 234 (arguing in favor of "enactment of a gender-neutral and marital status-neutral statute assigning parentage based on consent to the insemination with the intent to parent"); Shultz, *supra* note 9, at 323 (arguing that in the context of reproductive technologies, "bargained-for intentions [should be] determinative of legal parenthood"); Storrow, *supra* note 44, at 678–79 ("I have argued that parental intent is in essence an aspect of parental function supporting recognition of parentage wholly apart from genetic or gestational contributions or marital presumptions.").

235. This requirement is consistent with the 2002 UPA. The 2002 UPA implicitly requires the consent to the procreative endeavor to be mutual. For example, the Act clarifies that the consent of both the man and the woman must be in a written record signed by both parties. 2002 UPA, *supra* note 46, § 704(a), 9B U.L.A. 70 (Supp. 2010).

endeavor.[236] Under a contrary rule, the gestational/intended parent would have no control over who would be her child's other parent; it could even be someone unknown to or estranged from her. To remove any remaining uncertainty about this issue, this requirement should be made explicit. Specifically, the law should provide that an individual who consents to alternative insemination by a woman with the intent to be a parent of the resulting child *and with the consent of the woman* is a parent of the resulting child.

Second, this rule—establishing legal parentage based on consent to assisted reproduction with the intent to parent the resulting child—should apply to all individuals who engage in this conduct. Therefore, this rule would not be limited to intimate partners of the gestational/intended parent.[237] The relevant inquiry focuses on the person's conduct, not his or her identity. While cases involving persons who are not intimate partners may present more complicated factual disputes and inquiries, ultimately the potential burden on the courts is justified by the need to hold people responsible for their intentional and deliberate procreative conduct. It simply does not make sense to provide children with important emotional and financial protections when their intended parents are in an intimate relationship and to deny these protections to children whose intended parents did not happen to be in an intimate relationship but nonetheless engaged in the otherwise identical intentional procreative behavior.[238]

Third, the majority of existing statutory provisions governing the parentage of children born through alternative insemination require the

236. At this point, I part company with Richard Storrow. Storrow takes the position that a person can become a legal parent through intent even over the objection of the intended/gestational parent. *See* Storrow, *supra* note 44, at 677 ("[I]ntentional parenthood, unlike functional parenthood, is a type of parenthood that does not depend on the permission of a legally recognized parent.").

237. This position is also consistent with the 2002 UPA and the ABA Model Act. For example, in section 603 of the ABA Model Act, there is no limiting language describing the second intended parent. AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 603 ("An individual who provides gametes for, or consents to, assisted reproduction by a woman as provided in Section 604 with the intent to be a parent of her child is a parent of the resulting child."). The language of section 703 of the 2002 UPA is similar, although the terms of the UPA provision are gendered. 2002 UPA, *supra* note 46, § 703, 9B U.L.A. 70 (Supp. 2010) ("A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.").

238. A requirement of intimate conduct would itself require a court to engage in a complicated factual inquiry that could result in seemingly odd results. For example, under a rule that applied only to intimate partners, the rule would apply to couples who engage in intimate sexual conduct, but would not apply to other people who consider themselves to be a couple but who, for whatever reason, do not engage in intimate sexual conduct.

nonbirth partner's consent to be in writing.[239] There is no question that having written consent is helpful.[240] Having a written consent reduces the likelihood that there will be a dispute about the parties' respective preconception intentions. Moreover, signing a written consent reinforces the seriousness and potential consequences of the procreative endeavor.[241] Accordingly, the parties should be encouraged to enter into written consents. The statutory scheme could encourage this behavior by creating an irrebuttable presumption of parentage where there is proof of written consent.

That said, however, this proposal does not mandate written consent or require a long period of actual parenting in the absence of written consent. Consistent with the concerns raised above with regard to a rigid contract-based rule for establishing parentage, a child should not be denied financial and emotional protections just because the adults failed to comply with some legal formality. Instead, under this proposal, if the evidence indicates that there was *consent in fact* to the insemination at the time of the insemination, the nonbirth partner is a legal parent regardless of whether the parties entered into a written consent.

While eliminating the requirement of written consent does inject a level of uncertainty into some cases, the hurdles are not insurmountable. In many, if not most, cases, there will be tangible evidence of actual consent with intent to parent. Such evidence could include testimony that the second intended parent was present at the insemination and presented himself or herself to others as an intended parent; the second intended parent paid for the insemination; the second intended parent was identified as an intended parent on documents related to the insemination; and evidence that the parties told other people that they were going to have a child together. Moreover, courts in the past have proven themselves to be capable of making this type of factual determination.[242] For example, in

239. *See* JOSLIN & MINTER, *supra* note 5, § 3:9, at 179 ("Many, but not all, statutes addressing the legal parentage of children born through alternative insemination require that the man's consent be in writing.").

240. Under the 2002 UPA, a man is considered the legal parent of a child born through assisted reproduction in the absence of written consent "if the woman and the man, during the first two years of the child's life resided together in the same household with the child and openly held out the child as their own." 2002 UPA, *supra* note 46, § 704(b), 9B U.L.A. 70 (Supp. 2010).

241. Lane v. Lane, 912 P.2d 290, 295 (N.M. Ct. App. 1996) (noting that written consent "serves an evidentiary function" and "a cautionary purpose").

242. *See, e.g.*, Brown v. Brown, 125 S.W.3d 840, 841 (Ark. Ct. App. 2003) (affirming the trial court's finding that the father was "barred by the doctrine of estoppel from denying the children are his" even though he did not consent in writing to the insemination (internal quotation marks omitted)); Laura G. v. Peter G., 830 N.Y.S.2d 496, 504 (Sup. Ct. 2007) (finding on the facts that the former husband was

Lane v. Lane, a child was born to a married couple through alternative insemination but the parties failed to enter into a written consent.[243] Rather than holding that the man was therefore not a legal parent, the court instead proceeded to review the evidence to determine whether the husband had consented in fact to his wife's insemination.[244] Ultimately, the court found consent in fact based on a number of facts, including that the husband brought his wife to some of her doctor's appointments; attended birthing class with his wife; was present at the hospital when the child was born; and, after the child was born, held himself out as the child's father.[245] While cases involving unmarried couples may present more difficult factual inquiries, again, courts have proven themselves able to make these determinations.[246] Moreover, it would not be unprecedented to have a statutory scheme that did not mandate written consent in the context of assisted reproduction. The revised version of the Uniform Probate Code ("UPC"), for example, does not mandate written consent.[247] Rather, in the absence of written consent, the UPC directs courts to engage in a fact-based inquiry related to the person's conduct and intent.[248]

To ease the burden of the factual inquiry, the scheme could create a presumption of consent in fact where the parties were living an interdependent life together[249] at the time of conception through assisted

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the father of a child conceived by alternative insemination in the absence of written consent).

243. *Lane*, 912 P.2d at 292.

244. *Id.* at 294.

245. *Id.* at 292.

246. *See In re* Parentage of M.J., 787 N.E.2d 144, 152 (Ill. 2003) (stating that "Raymond's *alleged* conduct evinces a powerful case of actual consent" to the insemination of his nonmarital female partner); *In re* A.B., 818 N.E.2d 126, 132 (Ind. Ct. App. 2004) ("Assuming the facts alleged in the complaint to be true, as we must at this stage, it is apparent that A.B. would not have been born if Dawn and Stephanie had not agreed to be co-parents to the resulting child."), *vacated on procedural grounds sub nom.* King v. S.B., 837 N.E.2d 965 (Ind. 2005).

247. UNIF. PROBATE CODE § 2-120(f)(2) (2008).

248. Specifically, the 2008 amendments to the UPC provide that where there was no written consent, a person can be held to be a parent of a child born through assisted reproduction where the person "functioned as a parent of the child no later than two years after the child's birth" or "intended to function as a parent of the child no later than two years after the child's birth but was prevented from carrying out that intent by death, incapacity, or other circumstances." *Id.* The UPC test is slightly too limited, however, because it would exclude a person who consented in fact to the insemination but who was not "prevented" from carrying out his or her intent.

In another respect, however, my proposed framework is more limited than the relevant UPC provisions: the inquiry with regard to consent under my proposed framework is whether the person consented with the intent to parent *at the time of the conception*.

249. The scheme could list a number of nonexhaustive factors that a court could consider when determining whether the parties were living an interdependent life. The ALI Principles include a list of factors that could serve as a model. *See* ALI PRINCIPLES, *supra* note 140, § 6.03(7), at 1021–22 (listing, in the chapter addressing domestic partners, factors to be considered when determining whether a

reproduction and were not related to each other by blood or adoption. This presumption could be rebutted by evidence that the person did not engage in a mutual procreative endeavor. For example, the presumption could be rebutted by evidence that the person did not know that the gestational/intended parent was seeking to have a child through assisted reproduction, or through clear evidence that the person clearly communicated to the other party that he or she did not intend to parent the resulting child.[250] For persons who do not live with the gestational parent, no presumption of consent would exist and the burden would instead be on the second alleged intended parent to prove that he or she consented to the woman's insemination with the intent to parent the resulting child and that the woman consented to that person parenting the resulting child.

Finally, while I am urging that states extend the consent = legal parent rule to children born to nonmarital couples, I am not suggesting that courts should stop using equitable principles to protect children. These doctrines are crucial to giving courts the ability to respond to the realities of children's lives. The point here is simply that where parties—married or not—deliberately choose to bring children into the world through alternative insemination with the intention of parenting those children together, equitable doctrines simply are not enough. As we have seen, these doctrines leave many children without adequate protections.

VII. CONCLUSION

Over the past forty years, many of the laws that once penalized children born outside of marriage have been eliminated or at least mitigated. One glaring exception to this trend is the law governing the parentage of children born through assisted reproduction. Despite the data indicating that increasing numbers of children are being born to unmarried couples through ART, the vast majority of states have statutes and common law rules that apply only to children born to heterosexual married couples. Many of those who resist expanding the existing parentage rules to include nonmarital children claim that they do so based on child welfare concerns. Specifically, scholars and advocates have asserted that children do best when their parents are a married mother and father. The law, therefore,

couple "share[] a life together").

250. As noted above, the inquiry here should be focused on whether the person intended to parent the resulting child. Therefore, if the person indicated that he or she would parent the child, but that he or she did not want to be financially responsible to support the child, that intent would be sufficient to establish parentage. It does not matter what legal rights and obligations the person thought he or she was acquiring. The question is simply whether the person intended to function as a parent to the child.

should specially protect people who have children in this family structure and should penalize those who have children outside this family structure.

Contrary to the asserted child welfare aim of such commentators, this Article demonstrates that marriage-only ART rules directly and substantially harm the children who are excluded from those rules. When children lack a legal parent-child relationship with their functional parents, they often are denied crucial financial protections—such as child support and children's Social Security benefits—that are designed to protect them in times of family crisis. Moreover, the equitable doctrines that often are used by judges to fill the gaps created by exclusionary or otherwise inadequate parentage rules simply are not adequate or sufficient; many children are left unprotected by these doctrines as well. If our concern truly is the well-being of children, reform, therefore, is necessary.

After assessing a range of possible responses, ultimately I conclude that states should apply the consent = legal parent rule equally to all children born through ART, regardless of the marital status, gender, or sexual orientation of the intended parents. Such a rule ensures that children's financial security and overall well-being are not dependent on the adults' compliance with some legal formality, such as marrying, entering into a formal contract, or completing an adoption. Such a rule also provides the children and their parents certainty and security about their respective legal relationships and reinforces to the parties the seriousness of their decision to engage in procreative activity.