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# Unconstitutional Parenthood

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# UNCONSTITUTIONAL PARENTHOOD

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## I. INTRODUCTION

A flurry of recent noteworthy articles have urged the U.S. Supreme Court to elaborate further on the federal constitutional requisites for legal parenthood relevant to child custody, child visitation, and allocation of parental responsibility. These articles appear under such titles as *Constitution of Parenthood*, *Constitutional Parenthood*, *Constitutional Parentage*, and *The Constitutionalization of Fatherhood*.[1] They follow recent initiatives by both

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1. *See* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261 (2020); Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483 (2018); Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307 (2017); Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243 (2019); Dara E. Purvis, *The Constitutionalization of Fatherhood*, 69 CASE W. RSRV. L. REV. 541 (2019); Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U.L. REV. 909 (2019).

Comparably, some recent commentaries explore the federal constitutional requisites for the rights of marriage now that the right to marry has been extended. *See, e.g.*, Kerry Abrams, *The Rights of*

the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) suggesting new forms of childcare parenthood.[2] And they follow new parentage law initiatives by state legislatures and courts.[3] This Article goes beyond these developments as it speaks to the yet unrecognized limits on such constitutionalization and initiatives.[4]

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*Marriage:* Obergefell*,* Din*, and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501 (2018).

See, e.g., Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN'S L. REV. 965, 969 (2016) [hereinafter Federal Constitutional Childcare Parents] (urging the court to "provide more precise definitions" as to who is "a federal constitutional parental child caretaker"), for a discussion on why it is likely the U.S. Supreme Court will not pursue new forms of constitutional parenthood.

See Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221 (2020), on why and how the federal constitutional parentage interests of birth mothers need reassessment (making "visible a law of the multidimensional mother, one obscured by constitutional maternity's insistence on singular and monolithic motherhood").

2. *See, e.g.*, UNIF. PARENTAGE ACT (NAT'L CONF. COMM'R ON UNIF. STATE LAWS 2017) [hereinafter 2017 UPA] (superseding its 1973 and 2000 Acts [hereinafter 1973 UPA and 2000 UPA]); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2000) [hereinafter 2000 ALI Principles]; RESTATEMENT OF CHILDREN AND THE LAW (AM. LAW. INST., Council Draft No. 5, 2019) [hereinafter 2019 ALI Draft]. *See generally* Courtney G. Joslin, *Preface to the UPA (2017)*, 52 FAM. L.Q. 437, 437–44 (2018) (describing a brief history of UPA developments); UNIFORM NONPARENT CUSTODY AND VISITATION ACT (NAT'L CONF. COMM'R ON UNIF. STATE LAWS 2018) [hereinafter 2018 UNCVA] (reviewing federal constitutional limits on, and preferred approaches to, nonparent childcare orders over parental objections); Jeff Atkinson & Barbara Atwood, *Moving Beyond* Troxel*: The Uniform Nonparent Custody and Visitation Act*, 52 FAM. L.Q. 479, 479 (2018) (reviewing the UNCVA).

3. While elsewhere the term childcare parentage is used to include both varying forms of custodial rights or interests and support duties, herein childcare parentage is limited to rights or interests in custody, visitation, parental responsibility or decision making, and the like. See, e.g., Jeffrey A. Parness & Matthew Timko, *De Facto Parentage and Nonparent Child Support Orders*, 67 AM. U.L. REV. 769 (2018) [hereinafter Child Support Orders], for a discussion on the implications of the new forms of childcare parentage (and nonparent childcare) on child support. See Purvis, *supra* note 1, at 563–85 (urging that both federal constitutional Due Process and Equal Protection analyses are pertinent), for a discussion on the implications of the new forms of parentage on intestate inheritance by nonmarital children and on the transmission of U.S. citizenship.

4. To date, some distinguished commentators have suggested that federal constitutional parenthood law expansions will likely originate from the state family law developments. *See, e.g.*, NeJaime, *supra* note 1, at 262 (demonstrating how state family-law authorities "draw on and apply constitutional principles in ways constitutional decisionmakers may eventually adopt"); *see also* Cahill, *supra* note 1, at 2222 (stating, "The idea that new maternity could unsettle constitutional maternity is not necessarily radical—that project has been unfolding in state courts for years.").

The developments on childcare parentage go by varying terms, including residency or hold out parentage; de facto parentage; voluntary acknowledgment parentage; assisted reproduction parentage; and spousal parentage. While these forms vary significantly interstate, they have a common thread. None depend exclusively upon biological ties (either actual or presumed, as with spouses of birth mothers[5]) or formal adoptions (parentage typically arising only after judicial proceedings that may terminate any or some parental rights or interests of expecting or existing legal parents[6]). Rather, they depend upon other conduct that may occur preconception, postconception but prebirth, or postbirth. Relevant conduct can involve the acts of those then nonparents; of those then expecting or existing legal parents;[7] or of both those who are then legal parents and nonparents. Such relevant acts only sometimes encompass express, implied, or apparent consent to new childcare parent status, with consent possibly needed from two legal parents; from one, but not both, legal parents; or from one then a nonparent.[8] Such consent, at times, must be expressed in a record, which may (like a voluntary parentage acknowledgment) or may not (like a contract) need be filed with the state to take effect.[9]

The most troublesome new developments on childcare parentage do not involve express, implied, or apparent consent[10] but nevertheless subject people

5. *Compare, e.g.*, Santosky v. Kramer, 455 U.S. 745, 745–53 (1982) ("fundamental liberty interest of natural parents in the care, custody, and management of their child"), *with* Troxel v. Granville, 530 U.S. 57, 65 (2000) (fundamental liberty interest of parents in the "case, custody, and control of their children").

6. Expecting legal parents include those who will or may have childcare interests in children who will later be born (as with pregnant women and their spouses interests and some prospective adoptive parents). Existing legal parents are those with childcare interest in existing children.

7. Expecting legal parents also include those whose parentage will (not may) arise at the time of a later birth (as with pregnant women and those who signed prebirth voluntary acknowledgment parentages (VAPs)), barring unforeseen or unusual circumstances sometime before birth (as perhaps with prenatal illegal drug use by an expectant birth mother or a prebirth waiver of parental rights by a biological father). Expecting legal parents also include those whose parentage may arise at the time of a later birth or thereafter (as with a biological father of a child born to an unwed mother where the father undertakes to create a parent-child relationship). Existing legal parents are parents of living children who are then recognized under law, whether recognition occurred at birth (as with a birth mother) or occurred later (as with an adoption).

8. *See generally* 2000 ALI Principles, *supra* note 2, § 2.03(1)(b)(iii)–(iv).

9. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 4 (AM. L. INST. 1981) [hereinafter ALI RESTATEMENT (SECOND) OF CONTRACTS].

10. Earlier initiatives also prompted lost childcare rights, as with inadequate notice requirements in formal adoptions and with extreme confidentiality in safe haven child abandonments. *See, e.g.*,

to grants of new childcare rights or to diminished, if not eliminated, childcare rights.[11] Often, developments follow the presumed consent, common authority, and quasi-contract doctrines recognized outside of the childcare setting.

The ALI's 2019 Draft of a Restatement on Intentional Torts (2019 ALI Intentional Torts Draft) generally recognizes that an actor should not be liable to another for otherwise tortious intentional conduct[12] if the one acted upon "gives legally effective consent to that conduct."[13] Categories of effective consent include actual consent,[14] apparent consent,[15] and presumed consent.[16] "Presumed consent," under the Draft, encompasses intentional acts by an actor who "is justified in engaging" in the acts without the "actual . . . consent" or the "apparent consent" of the person acted upon.[17] Thus, the presumed consent by the one who is harmed by an otherwise intentional tort does not depend upon the acts of the one who is harmed. In the childcare parentage setting, for example, a nonresidential legal parent may be harmed due to the diminishment, if not elimination, of childcare interests resulting from the intentional acts of a nonparent in childcaring with a residential legal parent under circumstances where the nonparent later is deemed a legal parent.[18]

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Jeffrey A. Parness & Therese A. Clarke Arado, *Safe Haven, Adoption and Birth Record Laws: Where Are the Daddies?*, 36 CAP. U.L. REV. 207 (2007) (presented at Third Annual Wells Conference on Adoption Laws by Professor Parness at Capital University Law School in 2007).

11. Elsewhere, I have urged there be created "new mechanisms for formal declarations of intended childcare parentage" to safeguard better any parental interests founded on actual consents. Jeffrey A. Parness, *Formal Declarations of Intended Childcare Parentage*, 92 NOTRE DAME L. REV. 87, 88 (2017).

12. On intent by a tortfeasor, the ALI generally suggests, at least for the tort of battery, that a tort is intended where the actor intends to cause "a contact" with another or where the actor's intent constitutes "transferred intent." RESTATEMENT (THIRD) OF TORTS § 1 (AM. L. INST., Tentative Draft No. 4, 2019) ("transferred intent" is defined under § 11 (not yet available)).

13. *Id.* § 12.

14. *Id.* §§ 13(a), 14(a) (stating "actual consent" encompasses consent to conduct where a person is "willing for that conduct to occur," with willingness either "express or . . . inferred from the facts," as long as the conduct "is not substantially different in nature from the conduct that the person is willing to permit").

15. "Apparent consent" encompasses intentional acts undertaken with a reasonable belief that the person acted upon, due to their conduct, "actually consents to the conduct." *Id.* §§ 12(b), 16(a).

16. *Id.* § 12(c).

17. *Id.* § 16(b).

18. Of course, all forms of consent recognized by the ALI in intentional tort settings need not operate in a single U.S. state in all childcare parentage contexts. *Compare, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (West 2020) (de facto parent must have had "the support and consent of the child's

In the Fourth Amendment search setting, the "common authority" doctrine operates much like the presumed consent doctrine in the intentional tort setting. There, constitutional losses occur for those who undertook no acts of actual or apparent consent.[19]

Finally, a similar doctrine, at times deemed "quasi-contracts," operates in some settings wherein one is contractually bound solely due to another's (though not an agent's) acts.[20]

The recent initiatives on childcare parentage utilizing a presumed consent, common authority, and quasi-contract approach, prompting constitutional losses of childcare rights, pose significant questions that have not yet been adequately addressed by commentators, model lawmakers, or U.S. state legislatures or courts. These questions encompass constitutional losses for nonparents seeking childcare parent status where the nonparents have federal constitutional parentage opportunity interests.[21] These questions also

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parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent"), *with* DEL. CODE ANN. tit. 13, § 8-201(a)(5) (West 2020) (a man is a presumed father of a child with whom he resided for the first two years of the child's life while holding out the child as his own; no express need for consent by birth mother or by the birth mother's husband at the time of birth, though he is also a presumed father).

19. Under the common authority doctrine in Fourth Amendment search cases, one can be deemed to have authorized another to consent to a search of property, though authorization was not express, implied, or apparent, at times where there was even an earlier specific refusal to permit the search. *See, e.g.*, Fernandez v. California, 571 U.S. 292, 294 (2014) (common authority of occupants, residents, and tenants regarding searches of dwellings).

20. The ALI recognizes some contractual obligations for those who have not acted in any "actual" or "apparent" ways involving consent. ALI RESTATEMENT (SECOND) OF CONTRACTS, § 4 cmt. b (noting that quasi-contracts, unlike implied contracts, "are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises"; rather, quasi-contracts "are obligations created by law for reasons of justice," as with one spouse's duty to pay for "necessary clothing and supplies" purchased by the other spouse where the spouses are separated and the obligated spouse must pay though that spouse directed the seller not to furnish such clothing and supplies). *See, e.g.*, Woodfield Lanes, Inc. v. Village of Schaumburg, 523 N.E.2d 36, 40 (Ill. App. Ct. 1988) ("contract implied by law without regard to agreements or promises between the parties when the contract must be imposed upon the parties in order to avoid an inequitable result"; here, a governmental body took benefits arising from the acts of a private party but then, notwithstanding an ordinance, failed to compensate the private party).

21. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 261 (1983) (explaining that when an unwed biological father of a child born of sex to an unwed birth mother "demonstrates a full commitment to the responsibilities of parenthood" by rearing his child, "his interest in personal contact with his child acquires substantial protection under the Due Process Clause").

encompass constitutional losses of childcare rights for expecting or existing legal parents.[22]

The flurry of constitutional scholarship on childcare parentage includes Professor NeJaime's review of how "insights, principles, and values observable in constitutional precedents on parenthood and the family point toward a liberty interest in parental recognition that reaches nonbiological parents."[23] Professor Higdon urges the U.S. Supreme Court to "offer more guidance on how states may define constitutional parenthood,"[24] suggesting such parenthood be limited to those with biological ties, intentions to childcare that occur before birth, or

22. Other significant constitutional issues arising from the new forms of childcare parentage also remain largely unaddressed, including the obligations owed by a childcare parent with no biological or formal adoptive ties for child support; the interests of the children, their siblings, and their other family members, when the childcare of the children is at issue; the appropriate roles of race, gender, and class in formulating the constitutional law of family status; and the credit that a U.S. state must afford the childcare parentage statutes and cases of another U.S. state. See, e.g., Merle H. Weiner, *When a Parent Is Not Apparent*, 80 U. PITTSBURGH L. REV. 533, 533 (2019) (exploring "the appropriate definition of parenthood for purposes of triggering inter se obligations between a child's parents . . . as part of a new co-parent, or 'parent-partner,' status"), for a discussion on the inter se obligations between parents for support. *See, e.g.*, Nancy E. Dowd, *Children's Equality Rights: Every Child's Right to Develop to their Full Capacity*, 41 CARDOZO L. REV. 1367, 1367 (2019) (exploring U.S. Supreme Court precedents on childcare that fail to consider the perspective and interests of children with respect to all the significant adults in their lives); David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 835–37 (1999) (demonstrating U.S. Supreme Court reluctance to recognize independent constitutional rights of children to develop family relationships with their prospective adoptive parents or other nonparent caregivers), for a discussion on the constitutional interests of children. See, e.g., Mark Strasser, *Custody, Visitation, and Parental Rights under Scrutiny*, 28 CORNELL J.L. PUB. POL'Y 289 (2018); Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 U. COLO. L. REV. 941 (2019), for a discussion on the constitutional and nonconstitutional interests of nonparental family members and others in childcare proceedings. See, e.g., Serena Mayeri, *Intersectionality and the Constitution of Family Status*, 32 CONST. COMMENT. 377 (2017), for a discussion on the failure to consider race, gender, and class in assessing new forms of childcare parentage. See, e.g., Jeffrey A. Parness, *Faithful Parents: Choice of Childcare Parentage Laws*, 70 MERCER L. REV. 325 (2019), for a discussion on the credit to be afforded to de facto parent and similar state childcare laws. See, e.g., Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399 (1990), for a discussion on the credit afforded to surrogacy arrangements by states with restrictive surrogacy laws whose citizens evaded those laws by going elsewhere.

23. NeJaime, *supra* note 1, at 262; *see also* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2347–57 (2017) [hereinafter The Nature of Parenthood] (arguing that equal protection requires the recognition of nonbiological parents).

24. Higdon, *supra* note 1, at 1483.

both.[25] And Professor Grossman considers "the ways in which constitutional parental rights have—or should have—affected the rules to determine which adults have rights and responsibilities with respect to which children."[26]

Some of the recent scholarship chiefly focuses on only one of the new forms of childcare parentage. Professor Feinberg explores how the nationwide recognition of same-sex marriage "calls into question the future of the marital presumption, and, in particular, the future role that genetics-based considerations [should] play in the application" of that presumption.[27] Professor Harris examines voluntary parentage acknowledgments, calling for their availability to same-sex parents.[28] Professor Purvis "identifies a new approach using modern precedents to provide a clearer theory of constitutionalizing fathers."[29] And Professor Strauss argues that the NCCUSL and ALI support for de facto parenthood is wrong as it "is either unnecessary, unwise, or unconstitutional."[30]

Unfortunately, contemporary scholarship has failed to focus adequately on some important issues raised by the new models, principles, and state laws on childcare parentage, particularly issues involving parentage that are not reliant on acts by those who are harmed. This Article will provide greater focus on these issues. It posits that any childcare parentage for those without biological or formal adoptive ties generally should only arise where there is actual or

25. *Id.* at 1538–39 (discussing how "psychological parentage" does not encompass such intentions as an intentional parent subsequently enters a child's life and begins acting as a parent: "[P]sychological parentage . . . would arise only after the child has already been born").

26. Grossman, *supra* note 1, at 308.

27. *Compare* Feinberg, *supra* note 1, at 243–44 (claiming that because same-sex marriage is legal, the marital presumption should be extended to same-sex marriages where one spouse gives birth or, alternatively, the marital presumption should be abolished entirely), *with* Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473 (2017) (urging the role of male genetics in assessing parentage generally be diminished in cases where children are born of consensual sex).

28. Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U.J. GENDER, SOC. POL'Y LAW 467, 487–88 (2012) (urging there be special VAP laws "that are adapted to the particular circumstances of same-sex couples"); *see also* Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. FEMINISM 99 (2018) [hereinafter Extending VAPs to Female Same-Sex Couples].

29. Purvis, *supra* note 1, at 541.

30. Strauss, *supra* note 1, at 909.

apparent consent on behalf of interested nonparents, expecting legal parents, or existing legal parents.[31]

The Article proceeds in five major parts. Each part reviews one new form of childcare parentage by exploring NCCUSL, ALI, and state law initiatives, as well as related scholarship. The childcare parentage forms are (1) residency or hold out parentage;[32] (2) de facto parentage;[33] (3) voluntary acknowledgment parentage (VAP);[34] (4) parentage arising from assisted reproduction births;[35] and (5) spousal parentage.[36] The Article explores the constitutional issues arising from each new form, suggesting when childcare parentage should be forbidden or should be recognized.[37]

## II. PART I: RESIDENCY OR HOLD OUT PARENTAGE

All Uniform Parentage Acts (UPAs) recognize childcare parentage in some who have resided with children whom they held out as their own. Residency or hold out parentage, as a form of parentage for those without biological or formal adoption ties, can be grounded on the actual, apparent, or presumed consents by existing legal parents to share custody with their partners,

31. In doing so, the Article veers from employing mother–father and maternity–paternity distinctions, focusing instead on childcare parenthood. This approach thus suggests that there be no consideration of gender identity in assessing actual–prospective legal parenthood. *But see* Cahill, *supra* note 1, at 2222 (describing the new maternity while recognizing the cementing of the federal constitutional "idea of maternity into a fundamental principle of sex equality law that applies in settings—like transgender rights—that have nothing to do with certain mothers and uncertain fathers").

32. *See infra* Section II.

33. *See infra* Section III.

34. *See infra* Section IV.

35. *See infra* Section V.

36. *See infra* Section VI.

37. Elsewhere, I have argued there is limited space for federal constitutional childcare parentage recognition precedents (or for Congressional initiatives on recognizing new forms of childcare parentage) due to the deference afforded to U.S. lawmakers on family law issues, though opining that the stated rationales for such deference are not strong. *See* Federal Constitutional Childcare Parents, *supra* note 1, at 1002 (discussing how deference given to state lawmaking is unique, as no other federal constitutional rights holders are so significantly defined by state statutes and precedents; this deference has resulted in significant interstate variations in de facto parent, equitable adoption, presumed parent and surrogacy matters, as well as significant problems that can be remedied by further U.S. Supreme Court constitutional law pronouncements).

Herein, I will not explore what constitutes the parameters of constitutional parenthood once parental status is established. *But see* Abrams, *supra* note 1, at 556–63 (considering what rights accompany marriage now that new forms of marriage are recognized).

roommates, family members, or others.[38] Here, the consents are in some ways like the consents in common law marriage settings in that generally consents are only recognized by the state after family relationships end.[39] Yet, implied consents to marriage are, in some important ways, quite distinct from implied consents to dual parentage.

The 1973 UPA itself is very different than the later UPAs on residency or hold out parentage. The 1973 UPA has this parentage presumption: "A man is presumed to be the natural father of the child if . . . while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child."[40] The 2017 Uniform Parentage Act says:

> An individual is presumed to be a parent of a child if . . . the individual resided in the same household with the child for the first two years of the life of the child, including periods of temporary absence, and openly held out the child as the individual's child.[41]

Many current U.S. state laws reflect the policies of either the 1973 UPA or the 2017 UPA on residency or hold out parentage, though only a few so far have expressly extended it to same-sex couples.[42] Nevertheless, residency or hold out parentage seems generally available to a female partner of a birth mother given equality demands.[43] Residency or hold out parentage is generally

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38. To date, there are no residency or hold out parents recognized for childcare purposes wherein there are agreements to share childcare involving expecting legal parents (i.e., pregnant women and those awaiting formal adoption approval) and their partners or others. Expecting parents and their partners or others can utilize other forms of parentage by consent (like agreements regarding assisted reproduction births) to prompt childcare parentage.

39. *See generally* 2017 UPA, *supra* note 2, § 609 cmt.

40. 1973 UPA, *supra* note 2, § 4(a)(4).

41. 2017 UPA, *supra* note 2, § 204(a)(2).

42. *See, e.g.*, VT. STAT. ANN. tit. 15C, § 401(a)(4) (West 2020) (using the term "person," not man); WASH. REV. CODE ANN. § 26.26A.115(1)(b) (West 2020) (using the term "individual," not man); *see also* Jeffrey A. Parness, *Marriage Equality, Parentage (In)equality*, 32 WIS. J.L., GENDER SOC'Y 179, 188–89 (2017) (discussing the need to treat equally men and women involved in same-sex residency or hold-out parentage (and other parentage)).

43. *See, e.g.*, Elisa B. v. Superior Ct., 117 P.3d 660, 670 (Cal. 2005) (finding former unwed lesbian partner a child support parent under California statutory law on presumed natural hold out fathers); Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶ 41, 180 Vt. 441, 912 A.2d 951 (stating upon dissolution of civil union of lesbian couple, both women are custodial parents as statute making husband the presumed "natural parent" of a child born to his wife was applicable via a second statute saying that civil union and married couples shall have the "same" rights) (citing VT. STAT. ANN. tit. 15, § 308(4) (repealed 2017); VT. STAT. ANN. tit. 15, § 1204(f) (2006)). Similar equality mandates

unavailable, however, to a male partner of a birth father where there is a birth mother who remains a legal parent because state laws recognizing three parents simultaneously are quite limited.[44]

As noted, there are varying U.S. state laws reflecting the distinct UPA approaches to residency or hold out parentage. Some states limit residency or hold out parentage to those who childrear in the first two years of the child's life,[45] following the 2017 UPA.[46] In California, following the 1973 UPA, a man is "presumed to be the natural [father] of a child" if he "receive[d] the child into [his] home and openly holds out the child as [his] natural child."[47] There is no

operate when there is common law, rather than statutory, hold out parentage. *See, e.g.*, Wendy G-M. v. Erin G-M., 985 N.Y.S.2d 845 (N.Y. Sup. Monroe Cnty., 2014); *see also* Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 LAW CONTEMP. PROBS. 195, 211–19 (2014) (explaining even where statutes only explicitly recognize residency or hold out parentage for men, women are sometimes deemed parents under the statutes).

44. In California, though, there can sometimes be three legal parents, including the birth mother, her spouse, and a residency or hold out parent. *Compare* CAL. FAM. CODE § 7612(c) (West 2020) (permitting three parents where recognition of only two parents "would be detrimental to the child"), *with* C.G. v. J.R., 130 So. 3d 776, 782 (Fla. Dis. Ct. App. 2014) (holding that Florida law does not support enforcement of an agreement on sharing child custody that was entered into by the married birth mother, her spouse, and the biological father of a child born of sex).

45. *Compare* TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2019) (stating a man is a presumed father if "during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own"), *and* WASH. REV. CODE § 26.26.116(2) (repealed 2019) (stating a person is presumed to be the parent of a child if "during the first two years of the child's life, the person resided in the same household with the child and openly held out the child as his or her own"), *with* MONT. CODE ANN. § 40-6-105(d)(1) (2019) (stating a person is presumed the natural father if "while the child [was] under the age of majority, the person receives the child into the person's home and openly represents the child to be the person's natural child").

46. There are other interstate variations in custodial parentage based on residency or hold out. For example, some state laws do not require receipt into the home. *See, e.g.*, N.J. STAT. ANN. § 9:17-43(a)(4) (West 2020) (either receives into his home or "provides support for the child"). Some U.S. state laws more explicitly require existing legal parents to agree to such matters as residency or hold outs by nonparents who can later morph into new childcare parents on equal footing with existing legal parents. *Compare, e.g.*, VT. STAT. ANN. tit. 15C, § 401(a)(4) (providing presumed residency or hold out parent if in child's first 2 years, "another parent" of child jointly held child out as presumed parent's child), *with* N.J. STAT. ANN. § 9:17-43(a)(4)–(5) (stating that a man can be "presumed to be the biological father" of a child on equal footing with the unwed birth mother if he "openly holds out the child as his natural child" and either "receives the child into his home" or "provides support for the child"), *and* N.J. STAT. ANN. § 19:17-40 (West 2020).

47. CAL. FAM. CODE § 7611(d) (West 2020). How long an alleged residency or hold out parent must so act is determined on a case-by-case basis. *See, e.g.*, *In re* J.B., No. B291208, 2019 WL

explicit statutory requirement that a man who holds out a child as a "natural child" needs to have any beliefs about actual biological ties. California cases have recognized as presumed parents those who knew there were no biological ties but who acted as if there were in the community.[48] By contrast, other states recognize possible residency or hold out parentage only for those who help to raise children from birth,[49] following the 2017 UPA.[50]

Importantly, U.S. state laws vary on the circumstances allowing, and the standing available to present a challenge to, residency or hold out parentage. Consider challenges by nonresident biological parents (like an unwed biological father or an ova donor in an assisted reproduction birth) who did not know, and could not reasonably have known, that residency or hold out was

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1451304 (Cal. Ct. App. 2019) (two day hold out is insufficient for presumed parent status). As to what constitutes receipt into the home, see, e.g., *In re* N.V., No. A141323, 2014 Cal. App. LEXIS 8870 (Cal. Ct. App. 2014) (reviewing cases). *See also* MONT. CODE ANN. § 40-6-105(d)(1) (West 2019) (person is presumed the natural father if "while the child [was] under the age of majority," the person "receives the child into the person's home and openly represents the child to be the person's natural child").

Such a presumption has been sustained when challenged on the ground of interfering with federal constitutional childcare interests. *See, e.g.*, R.M. v. T.A., 233 Cal. App. 4th 760 (Cal. Ct. App. 2015) (preponderance of evidence norm used to establish presumption).

48. *See, e.g.*, *In re* Jesusa V., 85 P.3d 2, 11 (Cal. 2004) (holding that both Paul (the husband) and Heriberto (the biological father) were each judicially declared to be "presumed" California fathers because each had received Jesusa V. into his home and held her out as his natural child); Barnes v. Cypert, No. F049259, 2006 Cal. App. 5th LEXIS 10543 (Cal. Ct. App. 2006) (holding a birth mother's uncle to be a presumed parent); *In re* Jerry P., 95 Cal. App. 4th 793, 816 (Cal. Ct. App. 2002) (holding that presumed residency or hold out parent need not have, or even claim to have, biological ties).

49. *See, e.g.*, TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2019) (man is a presumed father if "during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own"); WASH. REV. CODE. 26.26.116(2) (repealed 2019) (similar).

50. The 2017 UPA first two-year rule is followed in DEL. CODE ANN. tit. 13, § 8-204(a)(5) (West 2020), while the 1973 UPA common residency rule is followed in CAL. FAM. CODE § 7611(d) (West 2020) (which presumed natural parents receive children into their home and openly hold them out as their natural children). There are other variations interstate in custodial parentage based on residency or hold out. For example, some U.S. state laws do not require receipt into the home. *See, e.g.*, N.J. STAT. ANN. § 9:17-43(a)(4) (West 2020) (either receives into his home or "provides support for the child"). Some U.S. state laws more explicitly require existing legal parents to agree to such matters as residency or hold outs by nonparents who can later morph into new childcare parents on equal footing with existing legal parents. *Compare, e.g.*, VT. STAT. ANN. tit. 15C, § 401(a)(4) (West 2020) (providing presumed residency or hold out parent if in child's first 2 years, "another parent" of child jointly held child out as presumed parent's child), *with* N.J. STAT. ANN. §§ 9:17-43(a)(4)–(5), 9:17-40 (West 2020) (providing that a man can be "presumed to be the biological father of a child" on equal footing with the unwed birth mother, if he "openly holds out the child as his natural child" and either "receives the child into his home" or "provides support for the child").

being undertaken by a nonparent together with an existing legal parent (often the birth mother). In Vermont, such a person may challenge a residency or hold out parentage within two years of "discovering the potential genetic parentage" in cases where there was no earlier actual or reasonably assumed knowledge of the potential due to "material misrepresentation or concealment."[51] Elsewhere, there are different time limits,[52] as well as the unavailability of "misrepresentation" or "concealment" as a condition of extending the time limits for challenging residency or hold out parents.[53] Thus, some state laws effectively foreclose nonresidential biological parents, with constitutional rights or interests, from challenging the residency or hold out parentage in others.[54]

So, the establishment of residency or hold out parentage in another sometimes operates for an existing legal parent like the earlier-described doctrines of "presumed consent" in intentional tort cases, "common authority" in Fourth Amendment search cases, and "quasi-contracts" in contract cases. Such an establishment is sometimes problematic, suggesting an "as applied" approach to challenging residency or hold out parentage laws, as when a nonresident parent, outside of Vermont, encounters "material misrepresentation or concealment."[55]

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51. VT. STAT. ANN. tit. 15C, §§ 401(a)(4), 402(b)(2) (West 2020).

52. *Compare, e.g.*, states following 2017 UPA, *supra* note 2, § 204(a)(2) (granting presumed parenthood for residency or hold out in child's first two years), § 204(b) (allowing presumption of parentage to be resolved through adjudication), *and* § 608(b) (presumption rebuttal usually must be presented before the child turns two), *with* states following 1973 UPA, *supra* note 2, § 4(a)(4) (providing residency or hold out where child is "under the age of majority"), *and* § 6(b) (rebuttal "at any time").

53. *Compare, e.g.*, 2017 UPA, *supra* note 2, §§ 204(a)(2), 204(b), 608(b) (stating a two year limit on challenging residency or hold out parentage of an "individual" does not operate when the individual is "not a genetic parent, never resided with the child, and never held out the child as the presumed parent's child"), *with* 2000 UPA, *supra* note 2, §§ 204(a)(5), 204(b), 607(b) (stating a two year limit on actions to disprove earlier determined presumed residency or hold out parentage in a "man" does not operate when there was, in fact, no cohabitation or sexual intercourse during the probable time of conception and the presumed parent never openly held out the child as his own), *and* 1973 UPA, *supra* note 2, §§ 4(a)(4), 6(b) (presumed residency or hold out parentage can be challenged "at any time").

54. Even where there is standing to challenge, the established parental rights—per *Troxel*—or the parental opportunity interests—per *Lehr*—of the challengers may be overcome in a child's best interest hearing, which does not have the substantive and procedural safeguards of a parental rights termination proceeding—per *Santosky*—as occurs, e.g., in a formal adoption case.

55. VT. STAT. ANN. tit. 15C, § 402(b)(2) (West 2020).

Commentaries generally have failed to address this problem. Such failures are especially disheartening where the nonresident parent has maintained a substantial, or even some, degree of childcare, thus maintaining his or her "superior" parental rights. For example, Professor Higdon only implicitly acknowledges that states must "adequately protect" a legal parent's right to continue to childcare where the acts of others thwart that right.[56] His focus on how parental intentions should sometimes prompt "constitutional parenthood" is primarily on the consensual acts of would-be parents before children are conceived (or perhaps born), not on the consensual acts of legal parents involving intended parentage that prompt new parental status for living children (as with residency or hold out parentage and with, what he terms, "psychological" parenthood).[57] Thus, he does not address, for example, how recognitions of residency or hold out parentage in stepparents might be limited by the parental interests of nonresidential, spousal, or biological parents who continue to childcare.

While Professor NeJaime supports federal constitutional liberty interests for certain intended parents of living children, he reviews only briefly the limits on such interests, focusing mainly on state policies (like promoting a child's best interests, preventing detriment to a child, and preserving nonresidential parent's "continuing relationship") and not any federal constitutional limits on impacting negatively the superior parental rights of an existing legal parent uninvolved in (and unaware of) the childcare undertaken by someone then a nonparent.[58]

## III. PART II: DE FACTO PARENTAGE

The 2017 UPA, but neither of its predecessors, expressly recognizes "de facto" parenthood as a form of childcare parentage for those without biological or formal adoption ties.[59] Such parenthood is grounded in far more explicit agreements for shared custody between existing legal parents and those then

56. Higdon, *supra* note 1, at 1537 (expressly recognizing state responsibility to "adequately" protect an expecting (or potential) parent's "opportunity to become" a legal parent).

57. *Id.* at 1534–40 (stating obviously Equal Protection must be afforded).

58. NeJaime, *supra* note 1, at 341–43. *Compare id.* (focusing briefly on state policy limits of such liberty interests), *with* Meyer, *supra* note 22, at 788–92 (recognizing the *Lehr* case limits on formal adoptions posed by the constitutional interests of biological fathers who were uninvolved in the adoption proceedings).

59. 2017 UPA, *supra* note 2, § 609(c)(3) cmt. (explaining that the term "de facto" parent did not originate in the 2017 UPA, that the de facto parentage standard was modeled on Maine and Delaware statutes, and that "de facto" parenthood is recognized when a third party meets certain criteria).

nonparents than in any comparable agreements required for residency or hold out parentage.[60]

While both de facto parentage and residency or hold out parentage in the 2017 UPA encompass human acts occurring at no particular time or in no particular place, only de facto parentage has all of the following conditions:

> (a) A proceeding to establish the parentage of a child under this section may be commenced only by an individual who: (1) is alive when the proceeding is commenced; and (2) claims to be a de facto parent of the child.
>
> (b) An individual who claims to be a de facto parent of a child must commence the proceeding . . . (1) before the child [is] 18 years of age; and (2) while the child is alive. . . .
>
> (d) In a proceeding to adjudicate the parentage of an individual who claims to be a de facto parent of the child, if there is only one other individual who is a parent or has a claim to parentage of the child, the court shall adjudicate the individual who claims to be a de facto parent to be a parent of the child if the individual demonstrates by clear and convincing evidence that: (1) the individual resided with the child as a regular member of the child's household for a significant period; (2) the individual engaged in consistent caretaking of the child; (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial [benefit]; (4) the individual held out the child as the individual's child; (5) the individual established a bonded and dependent relationship with the child which is parental in nature; (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and (7) continuing the relationship between the individual and the child is in the best interest of the child.
>
> (e) Subject to other [applicable] limitations in this [part], if in a proceeding to adjudicate the parentage of an individual who claims to be a de facto parent of the child, there is more than one other individual who is a parent or has a claim to parentage of the child and the court determines that the requirements of

60. Expecting legal parents are foreclosed under the 2017 UPA from being bound to any agreements on de facto parentage for children to be born of sex later, as the model law requires, e.g., "a bonded and dependent relationship with the child." *Id.* § 609(d)(5). Thus, there is not recognized a possible "bonded and dependent relationship" with a fetus, a fertilized egg, or some child of sex yet unconceived.

> [paragraphs (1) through (7) of] subsection (d) are satisfied, the court shall adjudicate parentage under Section 613.[61]

Clearly, de facto parentage, but not residency or hold out parentage, expressly requires intentional acts by existing legal parents that have prompted healthy, parental-like relationships between their children and those then nonparents.

Of particular note is the 2017 UPA de facto parentage requirement that an existing legal parent (i.e., "another parent") "fostered or supported" the parental-like relationship between the child and one then a nonparent.[62] This fostering and support seemingly can qualify as "actual consent" (whether "express" or "inferred"), as "apparent consent," or as "presumed consent" to shared custody by the existing legal parent. While addressing childcare arrangements between one legal parent and a nonparent, the 2017 UPA makes no mention, however, of any conduct, consensual or otherwise, of any second (or third) existing legal parent (like a voluntary acknowledgement parent or a presumed spousal parent) or any expecting legal parent (like a biological father of a child born of sex who maintains a paternity opportunity interest). Such an unmentioned legal parent may not even know of "another" parent's fostering and support. Under the 2017 UPA, a fostering and support nonparent can later be deemed a de facto parent concurrent with the (effective) termination or diminution of the unaware second legal parent's childcare interests.[63]

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61. *Id.* §§ 609(a)–(b), (d)–(e).

62. *Id.* § 609(d)(6).

63. *Id.* § 613 (stating where there is no state law recognition of the possibility of three or more custodial parents, a court must "adjudicate parentage in the best interest of the child," with guiding factors enumerated). In the 2017 UPA, there is provided no express and significant mechanism for a second existing legal, or an expecting legal parent, to challenge a petition to establish de facto parentage. *See, e.g.*, *id.* § 609(e) (explaining that beyond the birth or adoptive parent, if there is another individual "who is a parent or has a claim to parentage of the child" for whom an alleged de facto parent seeks parental status, that individual's interests must be adjudicated). Yet, how would a court learn of this individual? And is it reasonable to assume that such an individual would likely know of the de facto parent petition and thus be able to intervene?

In Vermont, which substantially enacted the 2017 UPA, an alleged de facto parent's petition to adjudicate their "claim to parentage" is to be determined by "clear and convincing evidence," with no explicit statutory mention of the participatory rights of a nonresidential person with "a claim to parentage." VT. STAT. ANN. tit. 15C, §§ 501(a)(1), 501(b) (West 2020). *Compare* VT. STAT. ANN. tit. 15C, §§ 501(b), 206(a)(6) (West 2020) (explaining that in considering claims of de facto parentage, courts must consider the "likelihood" of "harm to the child"), *with* DEL. CODE ANN. tit. 13, 8-201(c) (West 2020) (de facto parent norms, wherein there is not any presumed parentage if the norms are met), *and* 2017 UPA, *supra* note 2, § 8-609(b) (adjudicated father may be challenged no later than two years

Further, the 2017 UPA provides that a proceeding to establish de facto parentage may only be commenced by a living individual claiming to a de facto parent.[64] Thus, upon a breakup of a family unit between an individual and an existing legal parent and his or her child, the existing legal parent or the child may not try to establish de facto parentage for child support purposes. By contrast, an existing legal parent and the child (and others, like a child-support agency) may pursue an alleged residency or hold out parent for support.[65] The differences in the standing norms present significant Equal Protection, as well as public policy, concerns.[66]

On challenges to earlier determined de facto parentage, the 2017 UPA is relatively silent. It does provide, however, that a child is not bound by an earlier de facto parentage finding unless "the child was a party or was represented" in the earlier proceeding.[67] Further, it recognizes that a party with standing "to adjudicate parentage"[68] may not challenge an earlier de facto parentage finding if that party was a party in the earlier proceeding or received notice of that earlier proceeding.[69]

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after the adjudication). While findings of de facto parentage in favor of petitioners can effectively terminate parentage or parental opportunity interests for many, such findings—unlike findings in formal adoption proceedings—need not, at least expressly under the statutes, be preceded by reasonable attempts to notify those whose parental interests are possibly terminated should the petitions be granted.

64. 2017 UPA, *supra* note 2, § 609(a).

65. *Id.* §§ 602, 204(a)(2) (explaining residency or hold out parentage); *id.* § 203 (stating that "a parent-child relationship established under this [act] applies for all purposes"). Few public policy or equality concerns have surfaced when there is standing to pursue child support against, for example, an unwed biological father who has lost any childcare parentage opportunity he once possessed. *See, e.g.*, *In re* Stephen Tyler R., 584 S.E.2d 581 (W.Va. 2003).

66. *See, e.g.*, Jeffrey A. Parness, *Comparable Pursuits of Hold Out and De Facto Parentage: Tweaking the 2017 Uniform Parentage Act*, 31 J. AM. ACAD. MATRIM. L. 157 (2018).

67. 2017 UPA, *supra* note 2, § 623(b)(4).

68. *Id.* § 602 (standing is recognized for an individual personally or through an authorized legal representative "whose parentage of the child is to be adjudicated").

69. *Id.* §§ 611(b), 603 (stating notice is governed by § 603, which includes "an individual whose parentage of the child is to be adjudicated," which seemingly could include a nonbirth mother who claims to be a biological parent and thus claims protected parentage opportunity interests). Of course, as in formal adoption proceedings, notice may never reach such a biological parent, as when notice is served by publication.

Both the 2000 ALI Principles[70] and the 2019 ALI Parental Authority Draft[71] also recognize forms of "de facto" or comparable parentage. Each of the forms requires both residence and consent by at least one existing legal parent.[72] Yet the requirements for these forms differ not only from the 2017 UPA "de facto" parent requirements but also, perhaps surprisingly, from each other.

The 2000 ALI Principles recognize, as a "parent by estoppel," an individual who lived with the child for at least two years, with "a reasonable, good-faith belief" of biological ties and who continued to accept parentage responsibilities when the belief ended; an individual who lived with the child for at least two years pursuant to an agreement with the child's legal parent (or, if there are two legal parents, both parents) and who held out parentage while accepting "full and permanent" parental responsibilities, assuming the child's best interests are served; and an individual who lived with the child since birth pursuant to "a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents)," assuming the child's best interests are served.[73] A parent by estoppel can bring an action for an allocation of custodial responsibility.[74]

The 2000 ALI Principles recognize as a "de facto parent" one who is "other than a legal parent or a parent by estoppel"[75] and who lived with and cared for the child for at least two years under an "agreement of a legal parent to form a parent-child relationship."[76] A de facto parent can "bring an action" for "an

70. 2000 ALI Principles, *supra* note 2, § 2.03(1)(c) (stating that requirements include residence with the child, as well as "the agreement of a legal parent to form a parent-child relationship" unless the legal parent completely fails, or is unable, "to perform caretaking functions.").

71. 2019 ALI Draft, *supra* note 2, § 1.72(a) (stating that requirements include residence with the child, as well as establishing that "a parent consented to and fostered the formation of the parent-child relationship").

72. 2000 ALI Principles, *supra* note 2, § 2.03(1)(c); 2019 ALI Draft, *supra* note 2, app. B § 1.72(a).

73. 2000 ALI Principles, *supra* note 2, § 2.03(1)(b)(ii)–(iv).

74. *Id.* §§ 2.04(1)(b), 208.

75. *Id.* § 2.03(1)(a) (stating, "A legal parent is an individual who is defined as a parent under other state law.").

76. *Id.* § 2.03(1)(c). Alternatively, a de facto parent is one who is other than a legal parent or a parent by estoppel and who lived with and cared for the child for at least two years "as a result of a complete failure or inability of any legal parent to perform caretaking functions." *Id.* at § 2.03(1)(c)(ii). Precedents predating the 2000 ALI Principles recognize the concept of de facto parentage in different settings. *See, e.g.*, *In re* Kieshia E., 859 P.2d 1290, 1296 (Cal. 1993) (discussing the standing of a de facto parent in a juvenile delinquency proceeding); *In re* Dependency of J.H., 815 P.2d 1380, 1384

allocation of custodial responsibility for a minor child when the parents do not live together."[77] Unlike a legal parent or a parent by estoppel, however, a de facto parent has no presumptive right to an allocation of decision-making responsibility for the child[78] and no presumptive right of "access to the child's school and health-care records to which legal parents have access by other law."[79]

The 2019 ALI Draft describes a de facto parent as a third party who establishes that they "lived with the child for a significant period of time;" was "in a parental role [long enough that they] have established a bond and dependent relationship . . . parental in nature;" they had no "expectation of financial compensation;" and "a parent" consented to third party's parental-like role.[80] As yet, there is no "parent by estoppel."

The 2019 ALI Draft and the 2000 ALI Principles on forms of de facto parentage recognize new childcare parentage designations that adversely impact the childcare interests of one expecting legal parent due to an "agreement" with, or the consent by, another existing legal parent. As with intentional torts, here too the ALI reflects a presumed consent approach. By contrast, under the 2000 ALI Principles, parentage by estoppel can only arise with the agreement of the two existing legal parents of the child.[81]

There are some U.S. state statutes and common law precedents on nonmarital, nonbiological, and nonadoptive childcare parentage similar to the suggestions in 2017 UPA, the 2000 ALI Principles, and the 2019 ALI Draft on de facto parents. For example, before 2017 there were quite comparable Maine and Delaware statutes[82] and a less comparable Wisconsin Supreme Court

(Wash. 1991) (holding that in a delinquency case, permissive intervention, not intervention as of right, is available to some foster parents claiming de facto (or psychological) parent status); *In re* B.G., 523 P. 2d 244, 254 n. 21 (Cal. 1974) (choosing not to resolve whether a de facto parent may have the same rights of notice, hearing, or counsel as have natural parents in Juvenile Court Law proceedings under due process or equal protection principles). The Reporter's Notes to the 2000 ALI Principles observes the "law that most closely approximates the criteria for a 'de facto' parent relationship is that of Wisconsin" where "visitation (but not custody) may be awarded to an individual who has formed a 'parent-like relationship' with a child." 2000 ALI Principles, *supra* note 2, § 2.03 cmt. c.

77. 2000 ALI Principles, *supra* note 2, §§ 2.01, 204(1)(c).

78. *Id.* § 209(2).

79. *Id.* § 209(4).

80. 2019 ALI Draft, *supra* note 2, app. B § 1.72(a); *see also id.* (b)–(c) (providing that proof by clear and convincing evidence is required to allow de facto parent's contacts with child or "custodial and decisionmaking responsibility for a child").

81. 2000 ALI Principles, *supra* note 2, § 2.03(1)(b).

82. ME. REV. STAT. ANN. tit. 19-A, § 1891 (2020); DEL. CODE ANN. tit. 13, § 8-201(c) (2020).

precedent[83] that were utilized by the 2017 UPA drafters.[84] Since 2017, a few states have statutorily recognized de facto parenthood utilizing the 2017 UPA guidelines.[85]

Current U.S. state de facto parentage laws vary.[86] In Delaware, a de facto parent can be judicially recognized for one who had "a parent-like relationship" with "the support and consent of the child's parent"; who exercised "parental responsibility"; and who "acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature."[87] In Washington, a de facto parent resides with the child for a significant period; engages in consistent childcare; expects no financial compensation for acting in parent-like way; has a bonded and dependent relationship parental in nature; and has the support of another parent.[88]

On occasion, a single U.S. state statute can recognize both residency or hold out and de facto parentage. Thus, the Maine Parentage Act, effective in July, 2016, provides for presumed parents who resided since birth with a child for at least two years and "assumed personal, financial or custodial responsibilities,"[89] as well as for de facto parents who, inter alia, resided with the child "for a significant period of time," established with the child "a bonded and dependent relationship," and "accepted full and permanent responsibilities as a

83. *In re* Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995) (explaining parental-like relationship can prompt visitation rights when in child's best interests).

84. 2017 UPA, *supra* note 2, § 609 cmt.

85. *See, e.g.*, WASH. REV. CODE ANN. § 26.26A.440 (West 2020); VT. STAT. ANN. tit. 15C, § 501 (West 2020).

86. 2019 ALI Draft, *supra* note 2, § 1.72 cmt. l (summarizing the many varying de facto parentage state laws).

87. DEL. CODE ANN. tit. 13, § 8-201(a)(4) (West 2020) (explaining that a mother can be determined to be a de facto parent); *id.* § 8-201(b)(6) (explaining that a father can be determined to be a de facto parent); *id.* § 8-201(c) (detailing the three factors to attain "de facto parent status"). De facto parents are on equal footing with biological or adoptive parents. *See, e.g.*, Smith v. Guest, 16 A.3d 920 (Del. 2011). *But see In re* Bancroft, 19 A.3d 730 (Del. Fam. Ct. 2010) (finding the statute overbroad and violative of fit mother's and father's due process rights when the mother's boyfriend seeks to be a third parent). *Compare* K.A.F. v D.L.M., 96 A.3d 975 (N.J. Super 2014) (former female domestic partner of birth mother has standing to seek childcare order where birth mother ceded some of her parental authority but where adoptive parent had not; former partner must show "exceptional circumstances"), *with* Watkins v. Nelson, 748 A.2d 558, 564 (N.J. 2000) (using the "exceptional circumstances" language).

88. WASH. REV. CODE. ANN. § 26.26A.440(4) ("by a preponderance of the evidence").

89. ME. REV. STAT. ANN. tit. 19-A, § 1881(3) (2019).

parent . . . without expectation of financial compensation."[90] Similarly, there is both residency or hold out and de facto parentage in distinct statutes in Delaware,[91] Washington,[92] and Vermont.[93]

Beyond statutes, some judicial precedents beyond Wisconsin recognize forms of de facto parentage. In 2008, the Supreme Court of South Carolina,[94] adopting the Wisconsin high court analysis, determined that a nonparent could petition for psychological parent status if the petitioner could show (1) the biological or adoptive parents consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support, without expectation of financial compensation; and (4) the petitioner had been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[95] And in 2009, a federal appeals court[96] noted that the Mississippi Supreme Court had long recognized that a person standing "in loco parentis," meaning "one who has assumed the status and obligations of a parent without a formal adoption," has the same "rights, duties and liabilities" as a natural parent.[97]

By contrast, in some U.S. states, where there are no de facto parent statutes, courts choose not to develop precedents (even when they are sympathetic to the

90. *Id.* § 1891(3)(D). The recognition of de facto parentage allows one who began childcare shortly after birth to achieve parental status though there was no childcare since birth. 2017 UPA, *supra* note 2, §§ 609 cmt., 609(d)(3).

91. DEL. CODE ANN. tit. 13, § 8-204(a)(5) (discussing presumed residency or hold out parentage); *id.* § 8-201(c) (discussing how de facto parent status is established).

92. WASH. REV. CODE. ANN. § 26.26A.115(b) (presuming residency or hold out parent "for the first four years"); *see also id.* § 26.26A.440 ("de facto parent").

93. VT. STAT. ANN. tit. 15C, § 401(a)(1) (West 2020) (presuming residency or hold out parent after the first two years); *id.* § 501(a) ("de facto parent").

94. Marquez v. Caudill, 656 S.E.2d 737 (S.C. 2008) (following *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435–36 (Wis. 1995), which set norms for nonparent child visitation orders); *see also* Conover v. Conover, 146 A.3d 433, 446–47 (Md. 2016) (using *H.S.H.-K.*, 533 N.W.2d 419, in recognizing de facto parent doctrine).

95. *Marquez*, 656 S.E.2d at 743 (quoting *H.S.H.-K.*, 533 N.W.2d at 435–36).

96. First Colony Life Ins. v. Sanford, 555 F.3d 177, 183 (5th Cir. 2009) (relying on, inter alia, Favre v. Medders, 128 So. 2d 877, 879 (Miss. 1961)).

97. *Id.* (quoting *Favre*, 128 So. 2d at 879).

pleas for de facto or comparable parentage). In Illinois[98] and elsewhere,[99] high courts have refused to act because any new de facto parentage norms are deemed the responsibility of state legislators. Beyond separation of power concerns, in some states there are expansive and detailed statutory schemes on most aspects of parentage, in and outside of childcare, which are said to balance competing individual and societal interests.[100]

Whether in model laws, principles, statutes, or precedents, forms of de facto childcare parentage can sometimes arise without the "actual consent" or "apparent consent," per the 2019 ALI Torts Restatement draft, of an existing legal parent (like a voluntary acknowledged or spousal parent). Such de facto parentage is condoned by some state laws, as well as by the 2017 UPA, because only one of two parents needs to foster or support the de facto parent's dependent relationship.[101]

Similarly, the 2019 ALI Draft on de facto parentage requires only that "a parent" to consent to the "formation of the parent-child relationship."[102] By contrast, as noted, the 2000 Principles on parentage by estoppel require the support, fostering, or consent of two existing legal parents.[103] Perhaps this requirement arises because here there can be, for the parent by estoppel, both an allocation of decision-making responsibility or, at least, access to school and health-care records.[104]

Some recent commentaries expressly support forms of de facto parentage as envisioned by the 2017 UPA[105] and the 2000 ALI Principles.[106] While Professor Grossman supports and Professor NeJaime encourages

98. *See, e.g.*, *In re* Parentage of Scarlett Z.D., 28 N.E.3d 776, 790–95 (Ill. 2015) (holding that while there is a need for a "comprehensive . . . solution," it must come from the legislature).

99. *See, e.g.*, Jeffrey A. Parness, *State Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Powers and More Rational Distinctions*, 50 CREIGHTON L. REV. 479 (2017); *see generally* Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55 (2017) (forcefully arguing on the need for continuing the common law "equitable parenthood doctrine" even where there are related statutes).

100. *See generally* 2017 UPA, *supra* note 2, § 609 cmt.

101. *Id.* § 609(d)(6).

102. 2019 ALI Draft, *supra* note 2, § 1.72(a)(4).

103. 2000 ALI Principles, *supra* note 2, § 203(1)(b)(iii)–(iv).

104. *Id.* §§ 209(2), 209(4).

105. *See, e.g.*, 2017 UPA, *supra* note 2, § 609.

106. *See, e.g.*, 2000 ALI Principles, *supra* note 2, §§ 2.03, 3.02.

constitutionalizing such parentage,[107] Professor Higdon urges that any recognition of de facto parenthood (under what he terms the "psychological parentage" doctrine) be independent of federal constitutional parenthood, assuming no Equal Protection issues.[108] But there is generally a failure to recognize the constitutional limits on such envisioned de facto parentage, as in the 2017 UPA, where a second (existing or expecting) legal parent is uninvolved.[109]

By contrast, Professor Strauss finds the de facto parent doctrine to be not only "unnecessary" and "unwise" but also "unconstitutional."[110] Yet his concerns involve the lack of consent by a residential parent "to create a new parent by accepting caretaking assistance or encouraging her [or his] partner to form a relationship with her [or his] child,"[111] as well as the fact that there is "no evidence children often suffer harm when their relationships with co-residential stepparents, cohabitants, or relatives end."[112] Harm or detriment to the child, however, may not be constitutionally required to support de facto

107. *See, e.g.*, Grossman, *supra* note 1, at 336–37 (employing *In re* Parentage of L.B., 122 P.3d 161, 178 (Wash. 2005) and Smith v. Guest, 16 A.3d 920, 931 (Del. 2011) to suggest de facto parents can be legal parents with co-equal fundamental parental interests in raising children together with biological or adoptive parents); NeJaime, *supra* note 1, at 343 (stating, "Guided by family-law developments on the status of nonbiological parent-child relationships, including how recognizing such relationships furthers constitutional commitments, constitutional understandings of parenthood may evolve in ways that reach nonbiological parents.").

108. Higdon, *supra* note 1, at 1538–39. Professor Higdon opts for state law recognition "in order to safeguard the states' interest in protecting families," as an "overly prescriptive definition of constitutional parenthood can . . . lead to changes in state law that could disrupt the fabric of family law and policy in a state." *Id.* at 1538 (quoting Elizabeth G. Patterson, *Unintended Consequences: Why Congress Should Tread Lightly When Entering the Field of Family Law*, 25 GA. ST. U.L. REV. 397, 399 (2008)). Yet he supports expanded federal constitutional precedents covering those utilizing assisted reproduction who desire parental status before children are born. *Id.* at 1539.

109. *See, e.g.*, Grossman, *supra* note 1, at 333–39. *But see* Meyer, *supra* note 22, at 788–92 (recognizing constitutional interests of involved biological father in formal adoption proceedings).

110. Strauss, *supra* note 1, at 909. He deems the doctrine "unnecessary" as, within the 2017 UPA, "the new parentage presumptions and assisted reproduction provisions apply irrespective of gender or sexual orientation." *Id.* There was an earlier need for the doctrine, which was especially employed, rightly Strauss believes, to protect same-sex parents from discriminatory parentage statutes. *Id.* Strauss deems the doctrine "unwise," as often "parents' constitutional rights" are violated as these parents consented to "help" with their children, not "to transfer their parental rights" and as "little evidence suggests that limiting a child's ongoing relationships with secondary caretakers is harmful." *Id.*

111. *Id.* at 977.

112. *Id.*

parents,[113] as it is not in sustaining parentage by recognizing assisted reproduction agreements or in allowing formal adoptions. Little attention is paid by Professor Strauss to the childcare rights or interests of nonresidential existing or expecting legal parents who do not consent, though he does recognize that in formal adoption proceedings, the rights or interests of nonresidential parents must be considered.[114]

## IV. PART III: VOLUNTARY ACKNOWLEDGMENT PARENTAGE

All UPAs recognize childcare parentage in those who have undertaken a voluntary parentage acknowledgment (VAP). With VAPs there are clearly actual consents to parentage by those then either expecting or existing legal parents and those then nonparents. Such nonparents may have no biological ties to the acknowledged children. Increasingly, they need not even believe there are such ties when executing VAPs.[115]

The 1973 UPA recognizes "a man is presumed to be the natural father of a child," thus prompting childcare parentage, if "he acknowledges his paternity of the child in a writing" filed with the state that is not disputed by the birth mother "within a reasonable time after being informed."[116] Beliefs about "natural" bonds seem quite important, even if mistaken.

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113. *See, e.g.*, 2018 UNCVA, *supra* note 2, § 4 cmt. 3, at 13–14 (noting that as of 2017, at least 16 states require proof of harm, detriment, or similar circumstances before visitation is granted to a nonparent; also noting that the U.S. Supreme Court in *Troxel v. Granville*, 530 U.S. 57, 73 (2000), did not opine on the issue).

114. Strauss, *supra* note 1, at 940 ("Adoption's substantive and procedural rules were designed to establish new parents in ways consistent with the constitutional rights of existing parents and with the child's welfare. A child can be adopted only if he is 'available' for adoption, which means either the child has no legal parents or the parents consent to adoption. Existing legal parents must have notice of the adoption proceeding and an opportunity to contest it. If the legal parent does not consent, the adoption cannot proceed unless her rights are terminated for neglect, abandonment, or other statutory factors.").

115. In contrast to VAPs, where sometimes presumed spousal parents deny parentage due to lack of biological ties so that biological parents may undertake VAPs, at times presumed spousal parents can deny parentage without any accompanying new VAP undertaking. *See* Mackley v. Openshaw, 2019 UT 74, ¶3, 456 P.3d 742, 744 (holding that husband could not rescind his earlier denial because any mistake involved legal consequences of signing the document, not factual matters).

116. 1973 UPA, *supra* note 2, § 4(a)(5), (b) (explaining rebuttal of such a presumption occurs only with "clear and convincing evidence" of no biological ties, together with "a court decree establishing paternity of the child by another man").

The 2000 UPA recognizes no childcare parentage presumption attending a VAP signature.[117] It does recognize the birth mother and "a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man's paternity."[118] Here too, genetic bonds seem quite important even where beliefs are mistaken.

The 2017 UPA also recognizes that VAPs prompt childcare parentage without a presumption.[119] Parentage establishments can be undertaken by an expanded field of VAP signatories, including those who claim to be "an alleged genetic father" of a child born of sex;[120] a presumed parent (man or woman) due to an alleged or actual marriage;[121] a presumed parent due to a holding out of the child as one's own while residing in the same household with the child "for the first two years of the life of the child";[122] and an intended parent (man or woman) in a nonsurrogacy, assisted reproduction setting.[123] VAPs may be undertaken "before or after the birth of the child."[124] Here, beliefs as to genetic ties need not always exist.[125]

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117. *See generally* 2000 UPA, *supra* note 2, § 204(a).

118. *Id.* § 301. "[A] sworn assertion of genetic parentage of the child" is needed though not "explicitly" required by federal welfare subsidy statutes that often prompt state VAP laws, a federal statutory "omission" that is corrected in the 2000 UPA. *Id.* § 301 cmt. A male sperm donor may undertake a VAP in an assisted reproduction setting where his "partner" is the birth mother. *Id.* A VAP can be rescinded within 60 days of its effective date by a "signatory." *Id.* § 307. After the 60 days, a signatory can commence a court case to "challenge" the VAP, but only "on the basis of fraud, duress, or material mistake of fact" within two years of the VAP filing. *Id.* § 308(a).

119. 2017 UPA, *supra* note 2, § 201(5); *see also id.* § 204(a)(c)(i) (providing that some marital parentage presumptions, including marriages occurring after birth, can be prompted by parentage assertions in records filed with the state).

120. *Id.* § 301.

121. *Id.* § 204(a)(1)(A).

122. *Id.* §§ 301, 204(a).

123. *Id.* at §§ 301, 703.

124. *Id.* § 304(b).

125. *Id.* § 308(a)(1) (stating that, as with the 2000 UPA, signatories may rescind within 60 days); *id.* § 309 (permitting challenges to proceed thereafter "but no later than two years after the effective date" and "only on the basis of fraud, duress, or material mistake of fact"); *id.* §§ 309(b), 610(b)(1)–(2) (stating that while nonsignatory VAP challenges may be pursued within "two years after the effective date of the acknowledgement," such challenges usually will only be sustained when a judge finds the child's "best interest[s]" are served); *id.* §§ 610(b), 602 (limiting nonsignatory challengers to those with standing, including the child; a parent under the 2017 UPA; "an individual whose parentage is to be adjudicated"; an adoption agency; or child support or other authorized, governmental agency). Thus, the parents or siblings of an alleged biological father of a child born of consensual sex seemingly cannot challenge a VAP.

The explicit recognition in the 2017 UPA that VAPs may be undertaken by those with no biological ties to the children whom they acknowledge is new and revolutionary. The 2017 UPA allows circumvention of formal adoption laws and the safeguards they provide for children, including background checks and best interest findings. A Comment to the 2000 UPA laments that the federal statutes guiding state VAP laws did not expressly "require that a man acknowledging paternity must assert genetic paternity."[126] Further, the related Comment indicates that the 2000 UPA was "designed to prevent circumvention of adoption laws by requiring a sworn statement of genetic parentage of the child."[127] In 2017, the UPA policy on VAPs thus changed dramatically. This policy change prompts significant constitutional issues for states following the 2017 UPA.

Current U.S. state laws reflect the varying UPA approaches to VAPs. Only a few states to date, as with the 2017 UPA, have extended VAP authority to a married same-sex female couple where a child is born of consensual sex.[128] VAP opportunities are not, and clearly could not be, extended to a same-sex male couple where one of the men naturally conceived a child born of sex. There, the birth mother is an existing legal parent, and state laws generally fail to recognize VAPs for third parents.[129]

VAP statutes most often are employed by birth mothers and unwed men who seek to establish legal paternity.[130] VAPs are typically distinguished from birth certificate recognitions of childcare parents encompassing those married to birth mothers, who frequently are presumed parents, but who never undertake

126. 2000 UPA, *supra* note 2, art. 3 cmt.

127. *Id.*

128. *See, e.g.*, VT. STAT. ANN. tit. 15C, §§ 301(a)(4), 401(a)(1) (West 2020) (stating that a person married to birth mother at time child is born can undertake voluntary parentage acknowledgment); WASH. REV. CODE ANN. § 26.26A.200 (West 2020) (stating the birth mother and "presumed parent" may sign acknowledgment); *id.* § 26.26A.115(1)(a)(i) (noting that presumed parent includes the spouse of birth mother). On the need for allowing VAPs for same-sex female couples, see, e.g., Extending VAPs to Female Same-Sex Couples, *supra* note 28, at 135 (discussing same-sex female couples who conceive children using donated sperm). On the problems with two women VAPs for children born of consensual sex, see Jeffrey A. Parness, *Unnatural Voluntary Parentage Acknowledgments Under the 2017 Uniform Parentage Act*, 50 U. TOL. L. REV. 25 (2018).

129. CAL. FAM. CODE § 7612(c) (West 2020) (allowing for three parents under law). *But see id.* §§ 7611, 7612(c) (providing that VAP does not prompt presumed parentage and one such parent cannot be a VAP parent).

130. *But see In re* Sebastian, 879 N.Y.S.2d 677 (N.Y. Sur. Ct. 2009) (suggesting woman whose ova was used by her partner to bear a child born of assisted reproduction might employ the voluntary acknowledgment process).

VAPs.[131] Presumptive spousal parentage is usually more easily rebutted than VAP parentage. VAP parents who reside and hold out children as their own also differ from residency or hold out parents who never undertake VAPs,[132] as a VAP is more difficult to challenge than is a residency or hold out parentage.

State VAP establishment laws otherwise vary significantly.[133] Here, as with possible VAP signatories, constitutional issues sometimes arise. Thus, state laws differ on whether there needs to be an express requirement of possible biological ties by a signing male. In Vermont and Washington, by statute, the VAP forms cannot speak only to biological ties.[134] In Wyoming, there is no explicit requirement that the signing man affirm a belief in biological ties, though the signor elsewhere is referred to as the "natural father."[135] In Vermont, a woman residing with a birth mother for the first two years of a child's life is eligible to sign a VAP.[136]

In only some states can VAPs be filed prior to birth.[137] And only in some states must information as to any completed genetic testing be submitted; may forms be used by residents for out-of-state births; are witnesses or notaries

131. *See, e.g.*, Castillo v. Lazo, 386 P.3d 839 (Ariz. Ct. App. 2016) (holding that a birth certificate naming the husband is not "equivalent" to a VAP).

132. *See, e.g.*, VT. STAT. ANN. tit. 15C, §§ 301(a)(4), 401(a)(4) (stating a presumed holdout or residency parent may, but need not, sign a VAP).

133. *See* Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53 (2010) [hereinafter For Those Not John Edwards] (reviewing states' voluntary acknowledgment statutes on parentage establishments); *see also* Jayna Morse Cacioppo, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479 (2005); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.) (revealing that state VAP laws vary in their disestablishment standards due to federal welfare subsidy mandates and that states must conform to the federal Social Security Act); Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 44–54 (2003) (discussing disestablishment (i.e., rescissions and challenges)); Paula Roberts, *Truth and Consequences: Part III. Who Pays When Paternity Is Disestablished?*, 37 FAM. L.Q. 69 (2003).

134. VT. STAT. ANN. tit. 15C, §§ 301(a)(4), 401(a)(1) (discussing how a presumed spousal parent, including a female spouse of a birth mother, may sign a VAP); WASH. REV. CODE ANN. §§ 26.26A.200, 26.26A.115 (West 2020); *see also* Delaware Voluntary Acknowledgement of Paternity Form and Utah Voluntary Declaration of Paternity by Parents Form.

135. *See* Vital Records Servs., State of Wyoming, Affidavit Acknowledging Paternity; *see generally* Cacioppo, *supra* note 133, at 489–91.

136. VT. STAT. ANN. tit. 15C, §§ 301(a)(4), 401(a)(4).

137. *See, e.g.*, TEX. FAM. CODE ANN. § 160.305(b) (West 2019); VT. STAT. ANN. tit. 15C, § 304(b).

needed; and must there be parental or guardian consent if the signing mothers are young.[138]

There are also differences in current state VAP challenge laws. Under federal statutes, VAPs in states participating in certain federal welfare subsidy programs may only be challenged on the grounds of fraud, duress, or material mistake of fact.[139] These grounds are not further defined by Congress, and they are differently implemented in U.S. states.[140]

There are also varied time limits on VAP challenges. Challenges must be commenced per written law within a year in Massachusetts,[141] within two years in Delaware,[142] and within four years in Texas.[143] In Utah, a statutory challenge to a VAP may be made "at any time" on the ground of fraud or duress but only within four years for material mistake of fact.[144] Where there are no written time limits, (often quite broad) trial court discretion reigns.[145] Further, there are interstate differences in whether a successfully challenged VAP eliminates past child support arrearages.[146]

For nonsigning biological fathers of children born of consensual sex, VAP laws present significant constitutional issues. The issues involve the limits on VAP challenges by the biological fathers who have a federal constitutional opportunity interest, under *Lehr v. Robertson*, in developing a parent-child

138. The varying state forms are reviewed in For Those Not John Edwards, *supra* note 133, at 63–87.

139. *See, e.g.*, 42 U.S.C. § 666(a)(D)(iii).

140. *See, e.g.*, Jeffrey A. Parness David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity*, 92 CHI.-KENT L. REV. 177, 183–203 (2017) [hereinafter Reforming VAPs].

141. MASS. GEN. LAWS ANN. ch. 209C, § 11(a) (West 2020); *see also* State v. Smith, 392 P.3d 68, 74–77 (Kan. 2017) (holding that the one-year (after birth) limit on signatory challenges applied though there were technical violations found, e.g., no proper notarizations, in the statute).

142. DEL. CODE ANN. tit. 13, § 308(a)(2) (West 2020); *see also* VT. STAT. ANN. tit. 15C, § 308(a)(2); Paul v. Williamson, 322 P.3d 1070, 1073 (Okla. Civ. App. 2014) (employing Oklahoma's two-year limit against alleged biological father per OKLA. STAT. ANN. tit. 10, § 7700-609(B) (West 2020)). *But see* LA. STAT. ANN. § 9:406 (2020) (noting a two-year prescriptive period previously imposed for revocation of authentic acts of acknowledgement was repealed in 2016).

143. TEX. FAM. CODE ANN. § 160.607(a) (West 2019).

144. UTAH CODE ANN. § 78B-15-307 (West 2020).

145. *See, e.g.*, *In re* Neal, 184 A.3d 90 (N.H. 2018) (holding as a sustainable exercise of trial court discretion where a 2009 VAP was challenged by a male signatory in 2015 after a 2012 paternity test revealed he was not the biological father; the challenge was brought in November, 2015 after child contact was cut off in March, 2014).

146. *See, e.g.*, Adler v. Dormio, 872 N.W.2d 721 (Mich. Ct. App. 2015) (reviewing Michigan laws on when responsibility for arrearages may be eliminated).

relationship for childcare purposes.[147] Consider challenges by nonsigning biological fathers who did not know that other men, or women in some states, were signing VAPs alongside birth mothers and who did not know of, and did not reasonably foresee, their potential parentage for some time. In Vermont, such a father is somewhat protected as he may challenge a VAP within two years after discovery of his "potential parentage," as in cases where there was "concealment" of the pregnancy or birth though there was no fraud, duress, or mistake.[148] Elsewhere, such fathers are effectively unprotected as concealment of a pregnancy or of a live birth by the birth mother (and, at times, others) may not extend the time for a biological father to challenge a VAP, as where there operate strict repose periods.[149]

Further, for nonsigning biological fathers (and their family members), state laws vary on which nonsignatories have standing to challenge VAPs. Again, in Vermont, challenges are available to "a person not a signatory."[150] Elsewhere, standing is far more limited, as with statutory standing provisions encompassing particular types of challengers, such as children and governments.[151]

Clearly, VAP models, principles, and laws invite infringements on the parentage opportunity interests (under *Lehr*) of some men whose consensual sex prompted births, as well as of some women who were intended parents of children born to others employing those women's genetic material. Here, it seems wise to limit problematic VAP laws through as applied constitutional challenges rather than to strike such laws as facially invalid.

Some recent commentaries do recognize the constitutional limits on VAPs. For example, Professor Feinburg limits her proposal to extend VAPs to same-

147. *See* Lehr v. Robertson, 463 U.S. 248, 262 (1983) ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possess to develop a relationship with his offspring."). *But see* Michael H. v. Gerald D., 491 U.S. 110 (1989) (resulting in a 4–4 split on whether such an opportunity is recognized for a natural father when the birth mother was married to another individual who continues to live with the mother and child within a stable family unit).

148. VT. STAT. ANN. tit. 15C, § 308(b) (West 2020).

149. *See, e.g.*, Reforming VAPs, *supra* note 140, at 198–200 (noting that VAP challenges within the relevant time limits may also be foreclosed by laches or estoppel).

150. VT. STAT. ANN. tit. 15C, § 308(b).

151. *See, e.g.*, Reforming VAPs, *supra* note 140, at 188–94. While the 2017 UPA expressly recognizes a VAP, it may be challenged by a nonsignatory. 2017 UPA, *supra* note 2, §§ 309(b), 610 (stating that a proceeding may be "brought by an individual other than the child"); *see also* 1973 UPA, *supra* note 2, §§ 4(a)(5), 6(b) (any interested party may sue to disestablish an acknowledged father). The 2000 UPA only explicitly recognizes signatory challenges. 2000 UPA, *supra* note 2, § 308(a).

sex female couples to settings where children are conceived "using sperm donated in compliance with state donor non-paternity laws."[152] But Professor Harris has problematically posited that "unmarried same-sex couples may successfully argue that they are constitutionally entitled to use existing VAP statutes [per Equal Protection] to establish legal parentage for the partner who is not the biological parent of a child born in the relationship."[153] More explicit recognitions of the limits on VAPs by those with no biological ties are warranted, especially given the 2017 UPA invitation to certain spouses and to resident or hold out parents to undertake VAPs.

## V. PART IV: PARENTAGE FOR ASSISTED REPRODUCTION BIRTHS

The new forms of childcare parentage by consent involving birth mothers and nonbirth parents (both women and men) in assisted reproduction settings[154] typically involve few instances of inferred, apparent, or presumed consent; common authority; or quasi-contracts. Here express consents reign. As with VAPs, there could be, but generally are not, state-required forms indicating express consent.[155] In California, though, in nonsurrogacy settings there are statutorily-recommended consent forms that may be used.[156]

Here, significant constitutional issues can still arise. They can involve alleged procreational interests of both genetic and nongenetic parents seeking childcare designations. Should constitutional procreational interests be explicitly recognized in children born of assisted reproduction, further issues

152. Extending VAPs to Female Same-Sex Couples, *supra* note 28, at 135. Professor Feinberg rightly recognizes the limits posed by "the law's historical privileging of genetic connections in parentage determinations." *Id.* at 138.

153. Harris, *supra* note 28, at 487 (noting, however, that "a better course is for states to enact statutes based on the VAP that are adapted to the particular circumstances of same-sex couples"). Professor Harris does not differentiate between same-sex male and female couples, though with births to unmarried male couples there are birth mothers, especially when children are born of sex, who are usually existing legal parents at birth. *Id.*; *see infra* note 175.

154. Assisted reproductive technology is generally defined in 42 U.S.C. § 263a-7(1). Relevant procedures and U.S. state laws are reviewed in *Assisted Reproductive Technologies*, 20 GEO. J. GENDER L. 313 (2019) and The Nature of Parenthood, *supra* note 23, at apps.

155. Deborah L. Forman, *Exploring the Boundaries of Families Created with Known Sperm Providers: Who's In and Who's Out?*, 19 U. PA. J.L. SOC. CHANGE 41, 77–91 (2016) (discussing the problems arising in assisted reproduction settings by assessing intentions of parental or non-parental childcare by donors).

156. CAL. FAM. CODE § 7613.5(a), (d) (West 2020) (recommending forms for assisted reproduction pacts by two married or unmarried people, where signatories may or may not have used their own genetic material to prompt a pregnancy).

will likely arise regarding the means of pursuing procreation. As with the pursuit of abortion, such issues could involve possible informed consent requirements and mandated assistance by health professionals.

### A. *Without Surrogate*

The 1973 UPA recognizes, but generally does not deal with, the "many complex and serious problems raised by the practice of artificial insemination."[157] It does, however, address "one fact situation that occurs frequently,"[158] a "consent" by a husband to the artificial insemination of his wife with "semen donated by a man not her husband."[159] Here, the husband is to be "treated in law as if he were the natural father" if consent is given in writing and "signed by him and his wife," with certification undertaken and the consent then filed, including the date of insemination, by the supervising "licensed physician."[160] No model form is suggested for such a consent. The semen donor who is not the husband is to be "treated in law as if he were not the natural father."[161]

In response to the increasing number of children born of assisted reproduction, the 2017 UPA contains distinct articles on nonsurrogacy and surrogacy births. In nonsurrogacy settings, the 2017 UPA "is substantively similar" to the 2000 UPA, with the "primary changes . . . intended to update the article so that it applies equally to same-sex couples."[162] The 2017 UPA recognizes that, in the absence of an early consent to legal parentage or of common residence in the first two years while holding out a child as one's own, "[a] donor is not a parent of a child conceived by assisted reproduction."[163] Such consent must be signed by the birth mother and "an individual who intends to be a parent," though the "record" need not be certified by a physician.[164] The lack of such a consent does not foreclose, however, childcare parentage for an intended parent where there is found clear-and-convincing evidence of an

157. 1973 UPA, *supra* note 2, § 5 cmt.

158. *Id.*

159. *Id.* § 5(a).

160. *Id.* (all papers and records pertaining to the insemination are to be kept confidential, though subject to inspection pursuant to a court order "for good cause shown").

161. *Id.* § 5(b).

162. 2017 UPA, *supra* note 2, at art. 7 cmt.

163. *Id.* § 702.

164. *Id.* § 704(a). The lack of a need for physician certification seemingly recognizes the prospect of turkey baster or other do-it-yourself forms of assisted reproduction.

"express agreement" between the individual and the birth mother "entered into before conception."[165]

The nonsurrogacy parentage norms in the UPAs are now reflected, to at least some degree, both in state statutes[166] and precedents untethered to

165. *Id.* § 704(b)(1). *See, e.g.*, Heather NN v. Vinnette OO, 180 A.D.3d 57, 62 (N.Y. App. Div. 2019) (holding that there was clear and convincing evidence of preconception agreement to conceive and jointly raise a child between two women); 2017 UPA, *supra* note 2, § 704(b)(2) (noting that lacking such consent does not foreclose an individual's childcare parentage where the child was held out as the individual's own in the child's first two years); *see, e.g.*, *Heather NN*, 180 A.D.3d at 744 (recognizing that a post-birth agreement to raise jointly a child differs from the "conception test," which embodies a preconception agreement); *see also* 2017 UPA, *supra* note 2, § 705(1) (providing that the nonparental status of one married to a birth mother of a child born by assisted reproduction, even if a gamete donor, may be established by a showing of a lack of consent and of no holding out of the child as one's own).

166. American state statutes include TEX. FAM. CODE ANN. § 160.7031 (West 2019) (discussing fatherhood for an unwed man, intending to be the father, who provides sperm to a licensed physician and consents to the use of that sperm for assisted reproduction by an unwed woman, where consent is in a record signed by the man and woman and kept by the physician); N.H. REV. STAT. ANN. § 5-C:30(I)(b) (2020) (noting that unwed mother has sperm donor "identified on the birth record" when "an affidavit of paternity" has been executed); DEL. CODE ANN. tit. 13, § 8-704(a) (West 2020) ("Consent by a woman and an intended parent of a child conceived via assisted reproduction must be in a record signed by the woman and the intended parent."); WYO. STAT. ANN. § 14-2-904(a) (West 2020) (like Delaware); and N.M. STAT. ANN. § 40-11A-703 (West 2020) ("A person who provides eggs, sperm or embryos for or consents to assisted reproduction as provided in Section 7-704[, which states, '[R]ecord signed . . . before the placement'] . . . with the intent to be the parent of a child is a parent of the resulting child.").

statutes.[167] There are, though, some interstate variations.[168] The 2017 UPA provisions have been enacted in a few states.[169]

Nonsurrogacy assisted reproduction childcare parentage for a birth mother and an intended parent frequently arises from the express willingness of each to share childcare parentage. Written preimplantation pacts can guide later childcare disputes. Where there are no writings, consents can be "inferred" from findings of facts regarding, for example, the consequences that should follow if a "turkey baster" baby is conceived and born.[170]

Assessments and consequences of intent would be greatly facilitated if there were state suggested (if not state required) forms for nonsurrogacy assisted reproduction pacts as there are forms for VAPs. There are now suggested forms in California covering varying persons (e.g., wedded and unwedded) entering into nonsurrogacy arrangements.[171] The lack of forms hinder, at times, the pursuit or protection of parental childcare interests.

While the U.S. Supreme Court has not yet recognized the effects of such intentions in constitutional precedents, the flurry of commentary,[172] as well as

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167. *See, e.g.*, Shineovich v. Shineovich, 214 P.3d 29 (Or. Ct. App. 2009) (ruling, to avoid constitutional infirmity, that assisted reproduction statute as written solely for married opposite sex couple applied to same sex domestic partners); Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789 (Cal. Ct. App. 2014) (finding that though the statute (both pre-2011 and post-2011) explicitly indicated a lack of paternity for this particular semen donor after his unwed partner delivered a child conceived via assisted reproduction, the statute on presumed parentage for one (either male or female) who receives a child into the home and openly holds out the child as one's own natural child can support—in certain circumstances—legal paternity for the semen donor); Ramey v. Sutton, 362 P.3d 217, 221 (Okla. 2015) (maintaining that an unwritten preconception agreement prompts in loco parentis childcare status for former lesbian partner of birth mother, though she contributed no genetic material); Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 501 (N.Y. 2016) (finding an agreement between lesbian partners can prompt parentage in non-birth mother).

168. See Forman, *supra* note 155, at 46–59 (noting that most often problems arise in nonsurrogacy settings where sperm from known providers is used by single women and lesbian couples), for a review and critique of these cases.

169. *See* WASH. REV. CODE ANN. § 26.26A.610 (West 2020); VT. STAT. ANN. tit. 15C, § 701 (West 2020) (following the 2017 UPA, *supra* note 2, §§ 701–08 suggested assisted reproduction involving no surrogates).

170. The consequences on parentage of do it yourself assisted reproduction leading to birth have been reviewed. *See* McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989) (noting that a semen donor can have parental rights if he had an agreement with mother); Bruce v. Broadwine, 770 S.E.2d 774, 777–78 (Va. Ct. App. 2015) (noting that a semen donor has parental rights as he was biological father).

171. CAL. FAM. CODE § 7613.5 (West 2020).

172. *See, e.g.*, Higdon, *supra* note 1, at 1541 (stating that it is time for the U.S. Supreme Court to "provide a more contemporary definition" of "constitutional parenthood" that "protects the rights of intentional parents").

the 2017 UPA in particular,[173] support such recognition. Without new precedents, constitutional liberty interests might be thwarted.[174]

Do the commentators, model lawmakers, and state lawmakers agree on the appropriate constitutional norms for protected childcare parentage rights and interests for intended parents in nonsurrogacy settings? The U.S. Supreme Court ruling in *Lehr* supports such constitutional interests at least in donors of genetic material in nonsurrogacy settings where the donors (men or women) were recognized, at least at some point, as intended parents.[175] Professor Hendricks seemingly reads *Lehr* quite differently, as she opines that the view that an unwed biological father of a child born of consensual sex has "genetic entitlement to establish a relationship with his biological child if he chooses . . . is inconsistent with Supreme Court precedent."[176]

The significance of *Lehr* for genetic donor parentage in nonsurrogacy settings was recognized by the Florida Supreme Court in 2013 when it deemed *Lehr* applicable to an egg donor in a nonsurrogacy setting.[177] It emphasized the "long-standing constitutional law that an unwed biological father has an inchoate interest that develops into a fundamental right to be a parent protected by the Florida and United States Constitutions when he demonstrates a

173. 2017 UPA, *supra* note 2, § 103(c).

174. *See, e.g.*, McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989) (holding that a semen donor has federal constitutional interests in childcare parentage where he and birth mother agreed preconception to his fatherhood). *But see In re* K.M.H., 169 P.3d 1025 (Kan. 2007) (holding that a sperm donor's paternity following a do-it-yourself implantation and related birth is dependent upon a written agreement with birth mother, per statute, even if the donor notoriously or in his own writing recognized his paternity); E.E. v. O.M.G.R., 20 A.3d 1171, 1177 (N.J. Super. Ct. Ch. Div. 2011) (holding that parental rights of sperm donor in a do-it-yourself assisted reproduction birth could not be terminated simply through a requested consent order submitted to the court by the birth mother and the donor and that the statute on doctor-assisted conception did not apply).

175. *See, e.g.*, Grossman, *supra* note 1, at 323–25 (noting the law under *Lehr*, in which a sperm donor in a nonsurrogacy setting cannot be deprived of parental rights where he grasped the parentage opportunity interest via "mutual agreement to share parenting rights and responsibilities" because there is consent by the birth mother). *But see, e.g.*, 2017 UPA, *supra* note 2, § 402 cmt. (recognizing the "concern raised by *Lehr*" regarding the constitutional interests of biological fathers in formal adoption proceedings but failing to recognize any "concern" with the constitutional interests of genetic material donors, in nonsurrogacy settings where those with no biological ties undertake VAPs, 2017 UPA, *supra* note 2, §§ 610(b)(2) and 602(4), that are challenged by those biologically-tied (only need to show "best interest of the child.")).

176. Jennifer S. Hendricks, *Father and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 479 (2017).

177. *See* D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013).

commitment to raising the child by assuming parental responsibilities."[178] This inchoate interest, a parentage opportunity interest, was said to be possessed by all biological parents, regardless of sex or the method of conception.[179] Yet the court emphasized that a "biological relationship per se" would not have "constitutional significance" for a man, or for a woman beside the birth mother, whose genetic material prompted a birth.[180] As with births arising from consensual sex, clearly there is a "biology plus" standard.[181]

The parentage opportunity interest arising from *Lehr* generally appears unavailable to intended parents who are not genetic material donors and are not birth mothers. Yet, might interests arise due to the payment for genetic materials used in nonsurrogacy settings, where any parentage interests of the genetic material donors have been waived and where payment was coupled with express intentions regarding future childcare parentage in the payor that were undertaken by both the payor and the future birth mother? By the way, the parentage opportunity interest of a contracting nondonor partner (perhaps a spouse) in the child of a contracting woman who later conceives and bears a child via assisted reproduction can also be recognized under the contract even if *Lehr* and its progeny provide no federal constitutional interest in the partner.[182]

178. *Id.* at 327–28 (relying upon Lehr v. Robertson, 463 U.S. 248, 256 (1983)).

179. *Id.* at 328.

180. *Id.* (quoting *In re* Adoption of Doe, 543 So. 2d 741, 748 (Fla. 1989)).

181. *See, e.g.*, Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. MARY J. WOMEN L. 47 (2004).

182. *See, e.g.*, Bilbao v. Goodwin, 217 A.3d 977, 988 (Conn. 2019) (contract governs disposal of stored embryo when contracting couple divorces); Kristine H. v. Lisa R., 117 P.3d 690, 696 (Cal. 2005) (contract was embodied in a prebirth court judgment on parentage that was followed for two years); *In re* Parentage of M.J., 787 N.E.2d 144 (Ill. 2003) (assisted reproduction contract with birth mother sustains nondonor's support obligations upon birth); Interest of C.B., 837 S.E.2d 517, 519–20 (Ga. Ct. App. 2019) (parentage for birth mother bearing child conceived with donated egg and husband's sperm as she was, under GA. CODE ANN. § 19-8-42(a) (2020), "the recipient intended parent"). *But see* Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007) (enforcing contract between birth mother and sperm donor in assisted reproduction setting where mother agreed not to seek child support and donor agreed not to seek visitation). See Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 AM. U.L. REV. 515 (2018), for a discussion on the need for state statutory requirements for enforceable embryo disposition contracts.

### B. *With Surrogate*

As to surrogacy, the 1973 UPA is silent.[183] The 2017 UPA, like the 2000 UPA, distinguishes between genetic ("traditional") and gestational surrogacy.[184] Unlike its 2000 predecessor, the 2017 UPA does not require all agreements to be validated by a court order prior to any medical procedures.[185] The 2017 UPA imposes differing requirements for the two surrogacy forms, with "additional safeguards or requirements on genetic surrogacy agreements,"[186] as only they involve a woman giving birth while "using her own gamete."[187] The 2017 UPA recognizes there can be "one or more intended parents."[188] The common requirements include signatures in a record, "attested by a notarial officer or witnessed"; independent legal counsel for all signatories; and execution before implantation.[189]

Special provisions for gestational surrogacy pacts include opportunity for "party" termination "before an embryo transfer" and opportunity for a prebirth court order declaring parentage arising at birth.[190] Special provisions for genetic surrogacy pacts include the general requirement that "to be enforceable," an agreement must be judicially validated "before assisted reproduction" upon a finding that "all parties entered into the agreement voluntarily" and understood its terms;[191] that a genetic surrogate may withdraw consent "in a record" at any time before seventy-two hours after the birth;[192] and that a genetic surrogate cannot be ordered by a court to "be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures."[193]

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183. 1973 UPA, *supra* note 2, § 5 cmt. (addressing husband-wife pacts on assisted reproduction where the wife bears the child and intends to parent but "does not deal with many complex and serious legal problems raised by the practice of artificial insemination").

184. 2017 UPA, *supra* note 2, at art. 8 cmt.

185. *Id.* § 807 pt. II cmt.

186. *Id.* at art. 8 cmt.; *id.* §§ 802–07 (detailing the common safeguards or requirements for all surrogacy pacts); *see also id.* §§ 808–12 (special requirements for gestational surrogacy agreements); *id.* §§ 813–18 (special requirements for genetic surrogacy agreements).

187. *Id.* § 801(1); *id.* § 801(2) (contrasting gestational surrogacy, which covers births to a woman who uses "gametes that are not her own."); *see also id.* §§ 808–12 (special rules for gestational surrogacy pacts); *id.* §§ 813–18 (special rules for genetic surrogacy pacts).

188. *Id.* § 801(3).

189. *Id.* § 803(6)–(7), (9).

190. *Id.* §§ 808(a), 811(a).

191. *Id.* § 813(a)–(b).

192. *Id.* § 814(a)(2).

193. *Id.* § 818(b).

As with nonsurrogacy assisted reproduction parentage, in the surrogacy setting there is often clear evidence on consents to future childcare parentage and nonparentage (in donors) within written preimplantation pacts. In the absence of a writing, dispositive consents could also be inferred, as when there are "turkey baster" babies later born to alleged genetic surrogates.[194]

UPA surrogacy parentage norms are now reflected both in state statutes[195] and precedents untethered to statutes.[196] Certain provisions of the 2017 UPA

194. As to genetic surrogacy births where the standards on agreements are not met, the 2017 UPA urges childcare parentage be judicially determined, where courts look to "the best interest of the child." *Id.* § 816(d). In genetic surrogacy, but not nonsurrogacy, settings under the 2017 UPA, any such agreements can be retracted by a genetic surrogate post birth as well as preimplantation or postconception. *Id.* § 814(a)(2). In genetic surrogacy, but not nonsurrogacy, settings under the 2017 UPA, any such agreements can be retracted by an intended parent only "before a gamete or embryo transfer." *Id.* § 814(a)(1). In gestational surrogacy settings under the 2017 UPA, any such agreements may be terminated by "a party . . . at any time before an embryo transfer." *Id.* § 808(a).

195. *See, e.g.*, 750 ILL. COMP. STAT. ANN. § 47/20(b)(1)–(2) (West 2020) (stating that intended parents can include unwed heterosexual couple where each contributes "at least one of the gametes resulting in a pre-embryo that the gestational surrogate will attempt to carry to term" and the couple has "a medical need for the gestational surrogacy"). In New Hampshire, before insemination pursuant to a surrogacy contract will be deemed "lawful," N.H. REV. STAT. ANN. § 168-B:16(I) (LexisNexis 2020), a court "shall" be petitioned for "judicial preauthorization," N.H. REV. STAT. ANN. § 168-B:12(I). Requirements include evaluations of the intended parents and carrier. N.H. REV. STAT. ANN. § 168-B:1. Authorization is permitted only where the "surrogacy contract is in the best interest of the intended child." N.H. REV. STAT. ANN. § 168-B:23(III)(d). *See* The Nature of Parenthood, *supra* note 23, at 2376–81 (discussing gestational surrogacy laws); Courney G. Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561081 [https://perma.cc/4GG9-8JHK] (reviewing and compiling genetic surrogacy laws).

196. Precedents recognizing judicial discretion to enforce surrogacy arrangements include *In re* Paternity of F.T.R., 2013 WI 66, ¶ 73, 349 Wis. 2d 84, 833 N.W.2d 634 (enforcing surrogacy pact between two couples as long as child's best interests were served, while urging the legislature to "consider enacting legislation regarding surrogacy" to insure "the courts and the parties understand the expectations and limitations under Wisconsin law"); *In re* Baby, 447 S.W.3d 807, 833 (Tenn. 2014) ("traditional surrogacy contracts do not violate public policy as a general rule" where surrogate artificially inseminated with sperm of intended father, who was not married to intended mother); *In re* Amadi A., No. W2014-01281-COA-R3-JV, 2015 WL 1956247 (Tenn. Ct. App. Apr. 24, 2015) (finding gestational surrogate for married couple is placed on birth certificate, as said to be required by statute, where intended father's–husband's sperm used with egg from unknown donor and intended mother–wife was recognized by all parties as legal mother, and reiterating plea from *In re Baby* that the legislature should enact a comprehensive statutory scheme); Raftopol v. Ramey, 12 A.3d 783, 784–87 (Conn. 2011) (finding biological father's male domestic partner can also be intended parent of a child born to a gestational surrogate). Beyond enforcing a surrogacy pact in the absence of statute, an intended parent (also the sperm donor) who employed a gestational surrogate was allowed in one case

have been enacted in a few states.[197] Elsewhere, major sections of the 2000 UPA on surrogacy operate.[198] As noted, there are as yet no state required forms, as with VAPs, but there are suggested forms for nonsurrogacy assisted reproduction births in California.[199] The use of required forms, and the availability of suggested forms, would diminish significantly individual case disputes in surrogacy settings over whether there were consents to parentage or nonparentage.

The commentators have to date chiefly focused on constitutional analyses that would yield federal constitutional (procreational) rights and interests to intended parents in surrogacy settings, while denying such rights and interests to gestational carriers. Such recognitions and denials would be founded on actual consent (though their effects may vary if undertaken preimplantation, postconception but prebirth, or postbirth). Professor Grossman suggests that consents can be validated as they are comparable to consents in formal adoptions, though their standards may vary where surrogates have genetic ties.[200]

Federal constitutional interests in surrogacy cases are not generally threatened, as actual consents likely guide any disputes on childcare parentage.[201]

## VI. PART V: SPOUSAL PARENTAGE

With advances in reproductive technologies and the advent of same-sex marriages, there are increased opportunities for marital children to have no biological or adoptive ties to one of their legal parents. All UPAs recognize spousal parentage. The 1973 UPA deems "a man is presumed a natural father of a child if . . . he and the child's mother are or have been married to each other

to adopt formally his genetic offspring. Matter of John (Joseph G.), 103 N.Y.S.3d 541 (N.Y. App. Div. 2019).

197. *See, e.g.*, WASH. REV. CODE ANN. § 26.26.A.715 (West 2020) (gestational or genetic surrogacy agreement); VT. STAT. ANN. tit. 15C, § 801 (West 2020) (gestational carrier agreements).

198. *See, e.g.*, UTAH CODE ANN. § 78B-15-801 (West 2020) (similar to the 2000 UPA).

199. *See* CAL. FAM. CODE § 7613.5 (West 2020).

200. Grossman, *supra* note 1, at 325–27 (reviewing two surrogacy cases, where in one a genetic surrogacy arrangement was invalidated, while in another a gestational surrogacy arrangement was sustained).

201. *See, e.g.*, Katherine Farese, *The Bun's in the Oven, Now What?: How Pre-Birth Orders Promote Clarity in Surrogacy Law*, 23 U.C. DAVIS J. JUV. L. POL'Y 25 (2019) (urging that such consents are better reflected in pre-birth court orders that definitively determine post-birth parentage, reassuring those involved of their anticipated childcare roles and clarifying choice of law analyses).

and the child is born during the marriage, or within 300 days after the marriage is terminated."[202] For a child born into marriage via "artificial insemination" utilizing semen that was not donated by a husband, assuming the means of conception were known to a court, there are different requirements for male spousal parentage, including the husband's "consent" and the "supervision of a licensed physician."[203]

The 2000 UPA similarly recognizes presumptive male spousal parentage for children born of sex[204] and nonpresumptive spousal male parentage via consent to "assisted reproduction."[205] Further, the 2000 UPA recognizes nonpresumptive spousal parentage via a "validated" gestational mother "agreement."[206]

The 2017 UPA recognizes spousal parentage presumptions that are applicable to both male and female spouses[207] who are married to the birth mothers at the time of birth; married to the birth mothers within 300 days of the marriage's termination; or married to the birth mothers after the child's birth as long as the spouses "asserted parentage."[208] Such presumptive parentage does

202. 1973 UPA, *supra* note 2, § 4(a)(1); *id.* § 4(a)(2)–(3) (recognizing male parentage presumptions in certain men who married or attempted to marry the natural mothers before or after the births).

203. *Id.* § 5 (other forms of artificial insemination, raising "complex and serious legal problems," are not dealt with, as was noted in the earlier Comment to § 5). Failure to follow section five mandates may nevertheless prompt a marital parentage presumption under section 4 for a child born of artificial insemination. *See, e.g.*, *id.* § 4(a)(1) (stating that a husband is presumed the natural father of a child born to his wife "during the marriage").

204. 2000 UPA, *supra* note 2, § 204(a)(1)–(2). As with the 1973 UPA, there is also a marital parentage presumption for a man who attempted to marry the birth mother before the child's birth and the child is born "during the invalid marriage or within 300 days after its termination," *id.* § 204(a)(3), as well as for a man who married or tried to marry the mother "after the birth of the child" and who "voluntarily asserted his paternity of the child," *id.* § 204(a)(4).

205. *Id.* § 703 (with the consent requisites in § 704). Within 2 years of birth, a husband may dispute paternity if he did not provide sperm or consent. *Id.* § 705(a). However, if the husband did not provide sperm and did not consent, he may pursue "at any time" an adjudication of nonpaternity where he and the mother "have not cohabited since the probable time of assisted reproduction" and he "never openly held out the child as his own." *Id.* § 705(b).

206. *Id.* § 201(b)(6). As to a child born to a gestational carrier where there is a validated agreement, a man and woman are parents, *id.* § 801(b), unless the agreement is terminated, *id.* § 806.

207. 2017 UPA, *supra* note 2, § 204(a) ("an individual is a presumed parent"). To date, only a few states recognize marital parentage in the female spouse of a birth mother for a child born of sex. *See, e.g.*, WASH. REV. CODE ANN. § 26.26.A.115(1)(a) (West 2020); VT. STAT. ANN. tit. 15C, § 401(a)(1) (West 2020).

208. 2017 UPA, *supra* note 2, § 204(a)(1).

not, and should generally not, arise for those marrying expecting or existing legal fathers. Here, the typical bar on three legal parents is implicated because there is already another expecting or existing legal parent: the birth mother. Presumptive spousal parentage does not arise where births occur through assisted reproduction.[209]

In each UPA, marital-like acts can also prompt spousal parentage. Attempts to marry that do not result in actual marriages can trigger childcare parentage in the would-be spouse. For example, under the 2017 UPA, there is presumed parentage in a person who married the birth mother after the birth of the child, even if the marriage "is or could be declared invalid."[210]

So, spousal parentage can arise, at times, where there is no explicit consent to parentage and, as well, a likely adversity to parentage, as when a wife's extramarital affair prompts for her and her spouse a pregnancy, birth, and childcare parentage.

Current state laws generally reflect the policies of the UPAs on childcare parentage for spouses. However, some states do not comparably implement these policies. For example, spousal parentage can arise from a marriage in existence at the time of birth, in existence at the time of conception, or in existence during a pregnancy though not at conception or birth.[211]

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209. *Id.* § 701. Nonpresumptive parentage under the 2017 UPA attaches to consenting individuals who agree with birth mothers on joint future parentage where the mothers give birth via "assisted reproduction." *Id.* § 801(3); *see also id.* §§ 802–07 (providing comparable requirements for each form of agreement); *id.* §§ 808–12 (additional special rules for gestational surrogacy pacts); *id.* §§ 813–18 (additional special rules for genetic surrogacy pacts). Further, nonpresumptive parentage also attaches to married spouses, unmarried couples, "or one or more intended parents" where there are either gestational or genetic surrogacy agreements. *Id.* § 703 (consent by an "individual," with the consent requisites in § 704).

210. *Id.* § 204(a)(1)(C) (assuming the person is "in a record filed with the [state agency maintaining birth records]" or is named on the child's birth certificate); *see also* 1973 UPA, *supra* note 2, § 4(a)(3); 2000 UPA, *supra* note 2, § 204(a)(4). State laws include 750 ILL. COMP. STAT. 46/204(a)(3) (West 2020) and CAL. FAM. CODE § 7611(b) (West 2020).

211. *See, e.g.*, 2017 UPA, *supra* note 2, § 204(a)(1)(A) ("An individual is presumed to be a parent of a child if . . . the individual and the woman who gave birth to the child are married to each other and the child is born during the marriage."). *Compare* GA. CODE ANN. § 19-7-20 (West 2020) (legitimizing children "born in wedlock or within the usual period of gestation thereafter"), *with* ARIZ. REV. STAT. ANN. § 25-814(a)(1) (2020) (marriage "at any time in the ten months immediately preceding the birth."), *and* MICH. COMP. LAWS ANN. § 722.1433(e) (West 2020) (marriage at time of conception or birth). *See also* State v. EKB, 35 P.3d 1224 (Wyo. 2001) (discussing two spousal parents as birth mother was married twice during pregnancy: first husband was presumed spousal parent as child was born within 300 days of his divorce, while second husband was presumed spousal parent as

Spousal parentage, as a form of parentage for those without biological or adoptive ties, may be seen as grounded in the inferred consents to share custody inherent in actual or purported marriages between expecting or existing legal parents and their actual or would-be spouses.[212] Consents arise when the marriage ceremony occurs or is attempted.[213] Consents to parentage encompass future children, whether or not now conceived, as well as some current living children (as with some postbirth marriages).[214]

The circumstances permitting spousal parentage disestablishments vary interstate. Variations arise when state public policies differ on the importance of biological ties. Biological ties are less, if at all, important when marriage—as seen in *Obergefell*, where opportunities for same sex marriages were deemed constitutionally demanded—is viewed as "the basis for an expanding list of governmental rights, benefits, and responsibilities,"[215] including child custody and support.[216] In Vermont, biological ties are less important. A presumed parent is a person who is married to the birth mother at the time of the birth of a child born of consensual sex.[217] An alleged unwed genetic father may challenge the presumption within two years of "discovering the potential genetic parentage," but the court may choose not to disestablish the presumed parentage.[218] Biological ties are more important where a child is born of consensual sex into a marriage where the nonbirth spouse is not a genetic parent, but is a presumed parent, and where the childcare parentage

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he was married to birth mother at the time of birth); Ex Parte Kimbrell, 180 So. 3d 30 (Ala. Civ. App. 2015) (discussing a child born to a woman and her supposed second husband, though there was no divorce from her first husband: both men were presumed spousal parents).

212. Jeffrey A. Parness, *Illinois Childcare Parentage Law (R)Evolution*, 51 LOY. U. CHI. L.J. 911, 922 (2020).

213. *Id.*

214. *Id.*

215. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

216. *See, e.g.*, McLaughlin v. Jones, 401 P.3d 492, ¶¶ 11, 13 (Ariz. 2017) (explaining marital paternity presumption applies to female spouse of birth mother; Arizona spousal parentage presumption statute, ARIZ. REV. STAT. ANN. § 25-814(A)(1), does not specifically reference any likelihood of biological ties in the spouse but rather addresses the spouse's rights and responsibilities); Henderson v. Box, 947 F.3d 482, 487 (7th Cir. 2020) (stating same sex female spouses are both legal parents of child born in wedlock); *see also* LC v. MG & Child Support Enforcement Agency, 420 P.3d 400, 424–25 (Haw. 2018) (majority opinion on Part III B) (not allowing female spouse to rebut marital parentage due to spouse's failure to consent to assisted reproduction involving her wife because the child's best interests require "a child have two parents to provide financial benefits").

217. VT. STAT. ANN. tit. 15C, § 401(a)(1) (West 2020).

218. VT. STAT. ANN. tit. 15C, § 402(b)(2).

presumption may be easily overcome by the birth mother or by a person (like an alleged genetic father) outside the marriage.[219]

Spousal parentage might also arise where there is a common law marriage. Here, there is no actual or attempted ceremony. Rather, the marriage may only be judicially recognized after receiving proof of an earlier marital-like relationship that did not arise on a particular date, as does a formal marriage.[220] While the UPAs and written state laws today do not expressly address childcare parentage for common law spouses of birth mothers, seemingly such a spouse can attempt to pursue childcare parentage by proving a common law marriage existed at the time of conception, pregnancy, or birth (depending on the state law) so that the child can be deemed to be born into a marriage.[221]

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219. Spousal parentage sometimes can be challenged solely due to lack of biological ties. *See, e.g.*, *In re* Waites, 152 So. 3d 306 (Miss. 2014); Castro v. Lemus, 2019 UT 71, 456 P.3d 750 (finding that denial of challenge opportunity would raise constitutional issue, especially where the unwed biological father came forward and provided childcare; constitutional issue was not addressed as the relevant statute allowed a challenge to spousal parentage by "a man whose paternity of the child is to be adjudicated" under UTAH CODE ANN. § 78B-15-602(3) (West 2020)). *Compare* Michael H. v. Gerald D., 491 U.S. 110, 129 (1989) (finding that federal constitution does not bar a state marital parentage presumption law where the presumption cannot be rebutted by an unwed genetic parent), *and* Strauser v. Stahr, 726 A.2d 1052, 1056 (Pa. 1999) (finding that marital presumption is not rebuttable by genetic father where marriage is intact) (employed in Interest of A.M., 223 A.3d 691, 697 (Pa. Super. Ct. 2019) (finding female spouse [who used male pronouns] of birth mother entitled to marital paternity presumption)), *with* B.S. v. T.M., 782 A.2d 1031, 1036 (Pa. Super. Ct. 2001) (finding no irrebuttable marital parent presumption as marriage was not intact at relevant times).

While an unwed biological father may not himself be able to petition for an adjudication of custodial parentage, he may still be able to be pursued, as by state welfare officials seeking welfare payment reimbursements, for an adjudication of child support parentage, especially when a cuckolded husband is disestablished as a presumed parent. *See, e.g.*, Vargo v. Schwartz, 940 A.2d 459 (Pa. Super. Ct. 2007).

220. *See, e.g.*, Valentine v. Wetzel, No. 790 MDA 2018, 2019 Pa. Super. LEXIS 887 (Pa. Super. Ct. March 12, 2019) (affirming that while the state law barred common law marriages entered into after January 2005, the earlier common law marriage norms before 2005 can continue because the bar was not put into place retroactively).

221. *See id.* (noting that while state law barred common law marriages entered into after January, 2005, the court applies the earlier common law marriage norms to conduct before 2005 because the bar was not made retroactive); *In re* Marriage of Hogsett & Neale, No. 17CA1484, 2018 Colo. App. LEXIS 1820 (Colo. App. Dec. 13, 2018) (concluding that *Obergefell* applied retroactively to give same-sex couple right to prove common law marriage for purposes of a dissolution proceeding), *cert. granted*, No. 19SC44, 2019 Colo. LEXIS 1023 (Colo. Sept. 30, 2019) (limiting review to factors to be considered in assessing whether a common law marriage exists between same-sex partners); Gill v. Nostrand, 206 A.3d 869 (D.C. 2019) (finding that the common law marriage doctrine applied in case involving alimony and marital property).

To date, commentators generally speak to the constitutional dimensions of spousal parentage when they consider the rights or interests of the biological fathers of children born of consensual sex to women who are married (at the relevant time) to others.[222] Those fathers, it is often agreed, have no federal constitutional right to state recognition of their childcare parentage, per the ruling in *Michael H. v. Gerald D.*[223] However, these fathers sometimes have state constitutional rights to state-recognized childcare parentage.[224]

Commentators do not speak much of the constitutional dimensions of spousal parentage when children are born other than by consensual sex.[225] Consider children born of assisted reproduction where a sperm donor or an ova donor was not the spouse but was an intended parent (that is, intended by the birth mother and the donor). Here, unlike children born of sex, there may be stronger claims to protected procreation interests by those outside the marriage.

As to assisted reproduction births to married mothers whose spouses contributed no genetic material, Professor Feinberg aptly describes how new state spousal parentage laws may be crafted, suggesting varying rationales for parentage recognitions in spouses and nonspouses, including biological ties, parental interest, parental function, "the protection of marital family units from outside intrusion, the promotion of marriage as the preferred site for parentage establishment, and the furtherance of children's best interests."[226] She further suggests lawmakers might explore "the possibility of states establishing two distinct marital presumption standards, the applicability of which would depend upon whether conception occurred through sexual or nonsexual means."[227]

Federal constitutional limits on recognizing childcare parentage for marital children remain somewhat unclear. Yet a few observations can be made. First, state lawmakers will continue to guide such parentage without significant

222. *See, e.g.*, Stone v. Thompson, 833 S.E.2d 266, 268–72 (S.C. 2019) (reviewing common law marriage cases in state court, while prospectively eliminating this form of marriage).

223. *Michael H.*, 491 U.S. at 129.

224. *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182, 192 (Iowa 1999) (holding a statute unconstitutional under the Due Process Clause, where an unwed biological father of a child born of consensual sex had no standing to overcome male spousal parentage).

225. *But see* Feinberg, *supra* note 1, at 246–47 (describing a need to amend laws to account for both intent and function based spousal parentage presumption).

226. *Id.* at 246.

227. *Id.* at 248. Unfortunately, neither Professor Feinberg nor the 2017 UPA (which takes assisted reproduction births outside of the spousal parent presumption) explore the implications of government inquiries into how children were conceived, especially where there were no intended parent consent to parent forms utilized and there were no prebirth parentage cases initiated.

federal constitutional limits, though state constitutional rights may emerge. Second, as well described by Professor Feinberg, state laws might be grounded on a variety of viable rationales, making it likely that there will be interstate differences.[228] Third, with the advent of same-sex marriages nationwide, federal equal protection principles will limit state law differences on (presumed) parentage between male and female spouses of birth mothers.[229] Fourth, disputes over federal constitutional rights can be diminished if states suggest (as in California), or even mandate, the utilization of preimplantation forms governing biological ties, parental intentions, and later parental functions of those involved in assisted reproduction where one or more of the participants are married. Here, the forms should differentiate between surrogacy and nonsurrogacy births, as only with surrogacy are a birth mother's constitutional rights as a childcare parent possibly unavailable. Finally, as in the 2017 UPA, legal parentage upon surrogacy births into marriages should be differently guided where there are gestational and genetic surrogates because there are heightened federal constitutional rights and interests of genetic surrogates, per the parentage opportunity afforded by the U.S. Supreme Court in *Lehr v. Robertson*.[230]

## VII. CONCLUSION

Several commentators have recently urged the U.S. Supreme Court to elaborate further on the federal constitutional requisites for childcare parentage beyond biological or adoptive ties. However, their recommendations are not only incomplete but also sometimes constitutionally suspect. These recommendations follow recent initiatives by the National Conference of Commissioners on Uniform State Laws and the American Law Institute suggesting new forms of childcare parentage. And they follow new childcare parent law initiatives recently established by state lawmakers.

It is time to examine more closely some of these recommendations and initiatives. In particular, it is time to better recognize the significant limits on expanding childcare parentage to nonparents with no biological or formal adoptive ties. Such parentage usually should require acts constituting actual or apparent consent both by the nonparents and by the impacted expecting or

228. *Id.* at 300.

229. *See, e.g.*, Treto v. Treto, No. 13-18-00219-CV, 2020 Tex. App. LEXIS 569 (Tex. Ct. App. Jan. 23, 2020) (reviewing state cases and concluding spousal parentage (including for support purposes) arises for a nonbiological female spouse of a birth mother).

230. 2017 UPA, *supra* note 2, at art. 8 cmt.; *see* Lehr v. Robertson, 463 U.S. 248 (1983).

existing legal parents. Such acts may be undertaken, on occasion, by agents, as when an existing legal parent foregoes any custody or visitation while delegating to the other legal parent full discretion to childrear in ways benefitting their child. Such acts should not generally encompass acts of "presumed consent," as in the 2018 ALI Intentional Torts Draft; "common authority," as in Fourth Amendment cases; or "quasi-contracts," as in contract cases.