

## Nurturing Parenthood Through the UPA (2017)

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**ABSTRACT.** Same-sex couples now have the right to marry throughout the country. Douglas NeJaime’s insightful article carefully explains how LGBT parent-families remain vulnerable despite this important development. NeJaime demonstrates that while the law recognizes nonbiological parentage, it does so in asymmetrical ways that “reflect[] and perpetuate[] inequality based on gender and sexual orientation.” These asymmetries harm the adults and the children in these families, and violate core constitutional mandates.

This Response shows how the recently approved revisions to the Uniform Parentage Act (UPA) – UPA (2017) – address many of the critical gaps in parentage law identified by NeJaime. The UPA (2017) expands the ways in which a nonbiological parent may establish her or his parentage. The Act carries over the longstanding holding-out provision, but revises it so that it applies equally to men and women. The UPA (2017) also adds a new provision on de facto parents, under which someone who has been acting as a parent can legally establish his or her parentage, and expands the classes of people who can establish parentage through the voluntary acknowledgment process. The Act also updates the assisted reproductive technology (ART) provisions to permit individuals of any gender to establish their parentage based on proper consent to the ART procedure.

In addition, the UPA (2017) removes many gender-based distinctions that long have shaped parentage law. In so doing, the UPA (2017) helps states bring their parentage statutes into compliance with the Supreme Court’s decisions in *Obergefell v. Hodges*, *Pavan v. Smith*, and *Sessions v. Morales-Santana*. These Supreme Court decisions make clear that family law provisions that discriminate on the basis of gender or sexual orientation may be constitutionally suspect.

By adopting the UPA (2017) and making these changes, states can reform parentage law to more evenhandedly protect all parent-child relationships.

Same-sex couples now have the right to marry throughout the country.<sup>1</sup> Yet despite this important development, LGBT-parent families still often find that their parent-child relationships are not recognized and protected. In *The Nature*

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

of *Parenthood*,<sup>2</sup> Douglas NeJaime offers a careful exploration of why parentage law fails to protect LGBT-parent families and how it can be reformed to address those gaps in protection.

NeJaime's article shows how parentage law fails to protect LGBT-parent families by only partially recognizing nonbiological parents. In contemporary discussions of family law, it is often claimed that parentage law seeks merely to identify and recognize biological parents.<sup>3</sup> NeJaime shows that this claim is, at best, incomplete; the law has long recognized some nonbiological parents.<sup>4</sup> However, the law's recognition of nonbiological parentage has been "partial and incomplete."<sup>5</sup> Specifically, NeJaime demonstrates how the law recognizes nonbiological parenthood in asymmetrical ways that "reflect[] and perpetuate[] inequality based on gender and sexual orientation."<sup>6</sup> The marital presumption is one useful example. The marital presumption offers protection for nonbiological parents. In most states today, however, the literal text of the provision refers only to husbands, not wives.<sup>7</sup> It is this type of asymmetry that

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2. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2265-66 (2017). To be sure, it is not just LGBT-parent families who remain vulnerable under existing parentage schemes. Other women who "separate motherhood from biological ties" may also experience difficulties in having their parentage recognized. *Id.* at 2266.
  3. See, e.g., Petitioner's Supplemental Brief at 5, *McLaughlin v. Jones ex rel. Cty. of Pima*, 401 P.3d 492 (Ariz. 2017) (No. CV-16-0266-PR), 2017 WL 2874198, at \*5 ("To date, the legislature has never extended parentage beyond biology or adoption."). It is not uncommon to encounter inaccurate claims about the past and present state of family law. See, e.g., Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1483 (2013) [hereinafter Joslin, *Marriage, Biology*] (describing the invocation of such claims). The persistence of the myth of family law localism is another example of a claim that is often made about family law that is likewise inaccurate or at least incomplete. See, e.g., Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 789 (2015) (exploring the persistence of the myth of family law localism); see also, e.g., Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1764 (2005) (noting "the standard perception that there is a long-standing tradition of federal non-involvement in domestic relations law and policy"); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 870 (2004) (describing and critiquing the claim that "family law is exclusively local"); Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393, 415 (2002) ("[A]lthough statements that family law 'belongs' to the states are often made, federal statutory regimes govern many facets of family life.").
  4. NeJaime, *supra* note 2, at 2272-75.
  5. *Id.* at 2268.
  6. *Id.*
  7. See, e.g., *id.* app. A (noting that only 11 states and the District of Columbia have statutory gender-neutral marital presumptions).

leaves vulnerable LGBT parents and others who “break from traditional norms of gender and sexuality,”<sup>8</sup> even in this post-marriage-equality era.

These asymmetries are cause for concern on a number of levels. First, adults in same-sex relationships are more likely to have their functional parentage relationships unprotected under current parentage law. This is yet another way in which LGBT-parent families continue to be treated unequally under the law. Second, these asymmetries can and often do harm children. If children’s relationships with their functional parents are not protected, they may experience “dire consequences.”<sup>9</sup> In some states, “children [in these families] can legally be denied any continued relationship with one of the parents and any financial or other support from that parent.”<sup>10</sup> In addition, these asymmetries in parentage law may be unconstitutional. Scholars and litigants alike are indebted to NeJaime for sharpening our understanding and appreciation of the inequalities that still pervade parentage law.<sup>11</sup>

After providing this context, NeJaime offers concrete suggestions as to how states could amend their parentage laws to eliminate, or at least minimize, inequality based on gender and sexual orientation.<sup>12</sup> NeJaime gestures to courts as the entities most likely to resolve constitutional defects in parentage rules.<sup>13</sup> But as this Response points out, constitutional oversight can also come from state legislatures. Like courts, legislatures have an obligation to comply with the Constitution. Even without being judicially ordered to do so, legislatures are well situated to proactively reform their parentage statutes to address these sex- and sexual-orientation-based distinctions that continue to permeate parentage laws in many states.

Indeed, efforts have already been made to help state legislatures do just that. The newly revised UPA (2017)<sup>14</sup> – a project of the Uniform Law Commission (ULC) – implements many of the specific reforms that NeJaime recommends.

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8. *Id.* at 2265-66.

9. *Sinnott v. Peck*, No. 2015-426, 2017 WL 5951846, at \*7 (Vt. Dec. 1, 2017).

10. *Id.*

11. The provision of a painstakingly careful and complex picture of history is a hallmark of NeJaime’s scholarship. *See, e.g.*, Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 91 (2014) (exploring the relationship between efforts to recognize nonmarital relationships and marriage); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1187 (2016) [hereinafter NeJaime, *Marriage Equality*] (exploring the dynamic relationship between the evolution of parentage law and marriage equality successes).

12. NeJaime, *supra* note 2, at 2266.

13. *Id.* at 2347-59.

14. UNIF. PARENTAGE ACT (UNIF. LAW COMM’N 2017).

First, the UPA (2017) expands the ways in which a nonbiological parent may establish her or his parentage. The Act carries over the holding-out provision, but revises it so that it applies equally to men and women.<sup>15</sup> It also adds a new provision on de facto parents, under which someone who has been acting as a parent can legally establish his or her parentage.<sup>16</sup> Finally, the Act updates the assisted reproductive technology (ART) provisions to permit individuals of any gender to establish their parentage based on proper consent to the ART procedure.<sup>17</sup> All ART provisions of the UPA (2017) apply equally without regard to the sex, sexual orientation, or marital status of the intended parents.<sup>18</sup>

Second, by adopting the UPA (2017), states would bring their parentage statutes into compliance with the Supreme Court's decisions in *Obergefell v. Hodges*,<sup>19</sup> *Pavan v. Smith*,<sup>20</sup> and *Sessions v. Morales-Santana*<sup>21</sup> by removing gender-based distinctions. These Supreme Court decisions make clear that family law provisions that discriminate on the basis of gender or sexual orientation may be constitutionally suspect. The UPA (2017) addresses this potential constitutional infirmity by removing most of the gender distinctions in the Act.<sup>22</sup> As a result, most of the provisions in the Act apply without regard to gender or sexual orientation.

This Response to NeJaime's article has two goals. First, I highlight some of the ways that *The Nature of Parenthood* deepens our understanding of both the past and present law of parentage. NeJaime carefully demonstrates that the law has long recognized nonbiological parentage, but that this recognition is rooted in and perpetuates discriminatory distinctions. Second, I show how the recently approved revisions to the Uniform Parentage Act (UPA) provide a concrete

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15. *Id.* § 204(a)(2) cmt.

16. *Id.* § 609.

17. Nonsurrogacy forms of ART are addressed in article 7 of the UPA (2017); surrogacy is addressed in article 8.

18. See, e.g., *id.* § 102(13) (“‘Intended parent’ means an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction.”); *id.* § 703 (“An individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.” (emphasis added)).

19. 135 S. Ct. 2584 (2015).

20. 137 S. Ct. 2075 (2017).

21. 137 S. Ct. 1678 (2017).

22. See, e.g., *Why Your State Should Adopt the Uniform Parentage Act*, UNIFORM L. COMMISSION (2017), [http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act%20\(2017\)](http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act%20(2017)) [<http://perma.cc/X827-Y2ED>] (“After these decisions, state parentage laws that treat same-sex couples differently than different-sex couples are likely unconstitutional. By adopting UPA (2017), states can avoid litigation over these issues and uphold constitutional protections.”).

way for states to reform their parentage laws to correct many of the inadequacies identified by NeJaime.

In Part I, I provide a brief overview of the important contributions NeJaime makes in *The Nature of Parenthood*. Through a careful review of past and current parenthood law, NeJaime shows how the law of parenthood in many states remains rooted in and reflects gender- and sexual orientation-based distinctions. NeJaime then charts a path that addresses those legal inadequacies. In Part II, I demonstrate how states have the opportunity to put many of those proposals in place now by adopting the UPA (2017). In Part III, I show how implementing those proposals could protect children's wellbeing and eliminate much of the discrimination identified by NeJaime.

### I. INEQUALITIES IN PARENTAGE LAW

In recent years, opponents of equality for same-sex couples have suggested that the law properly elevates biological parenthood over other forms of parenthood.<sup>23</sup> This claim was critical to their argument about why it was permissible to exclude same-sex couples from marriage. Same-sex couples could not, the argument continued, fulfill the core purpose of marriage, which was to promote biological parenting.<sup>24</sup> In *The Nature of Parenthood*, NeJaime eloquently illustrates that that narrative is, at best, incomplete. The law does and always has recognized some forms of nonbiological parenthood. The core rule for assigning parenthood to men historically—the marital presumption—“both facilitated parental recognition that departed from biological facts and cut off claims to parental recognition based on biological facts.”<sup>25</sup> Conversely, nonmarital biological fathers generally had no parental rights historically.<sup>26</sup> Thus, con-

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23. I detail and critique these claims elsewhere. Joslin, *Marriage, Biology, supra* note 3, at 1467.

24. *Id.* at 1472 (“Under responsible procreation, same-sex couples are excluded from enjoying the benefits of marriage at the federal level because it just so happens that same-sex relationships cannot fulfill the core reason the federal government extends benefits to married couples in the first place: to foster and promote biological parenting.”); *see also* Windsor v. United States, 699 F.3d 169, 199 (2d Cir. 2012) (Straub, J., dissenting), *aff’d*, 133 S. Ct. 3675 (2013) (“DOMA advances the governmental interest in connecting marriage to biological procreation by excluding certain couples who cannot procreate simply by joinder of their different sexual being[s] from the federal benefits of marital status.”).

25. NeJaime, *supra* note 2, at 2272.

26. *See id.* at 2274-75; *see also* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81-82 (2003) (“[B]y the late nineteenth century, mothers were generally accorded a formal legal connection to their out-of-wedlock children . . . . But while illegitimate children gained a formal connection to their mothers, non-marital fathers remained free of the legal burdens and benefits of parenthood.” (footnote omitted)); Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J.

trary to the assertions of some,<sup>27</sup> the law has recognized and continues to recognize nonbiological parenthood.

However, NeJaime continues, the law recognizes nonbiological parentage in asymmetrical ways. Within marriage, parentage rules reflect and enforce a “gender-differentiated, heterosexual family.”<sup>28</sup> For example, in most states, the statutory marital presumption refers only to the “husband” of the woman who gave birth to the child.<sup>29</sup> This reinforces the perception that biology is destiny (and required) for motherhood, but not for fatherhood. Moreover, as a matter of law, some courts have refused to apply this type of gendered marital presumption equally to the female spouse of the woman who gave birth.<sup>30</sup> These

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2292, 2295 (2016) (“Traditionally, fathers had few rights or responsibilities to their nonmarital children.”).

27. See, e.g., Petitioner’s Supplemental Brief at 4-5, *McLaughlin v. Jones ex rel. Cty. of Pima.*, 401 P.3d 492 (Ariz. 2017) (No. CV-16-0266-PR), 2017 WL 2874198, at \*5 (“To date, the legislature has never extended parentage beyond biology or adoption.”); Appellant’s Final Reply Brief at 12, *Gartner v. Iowa Dep’t of Pub. Health*, 830 N.W.2d 335 (Iowa 2013) (No. 12-0243) (“[P]aternity is defined consistently in Iowa Code as ‘origin or descent from a father’ or ‘male parentage’; ‘father’ is uniformly defined and understood as ‘the male, biological parent of a child.’” (citation omitted)).
28. NeJaime, *supra* note 2, at 2268.
29. See, e.g., MONT. CODE ANN. § 40-6-105(1) (2017) (“A person is presumed to be the natural father of a child if any of the following occur: (a) the person and the child’s natural mother are or have been married to each other and the child is born during the marriage or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce or after a decree of separation is entered by a court . . .”).
30. See, e.g., *Turner v. Steiner*, 398 P.3d 110, 113 (Ariz. Ct. App. 2017), *abrogated by McLaughlin*, 401 P.3d 492 (“Because [the] language [of Arizona’s marital presumption] is clearly and unambiguously gender-specific to apply to men, the family court erred by applying the presumption of paternity to Oakley.”); *Paczkowski v. Paczkowski*, 10 N.Y.S.3d 270, 271 (N.Y. App. Div. 2015) (holding that the marital presumption of legitimacy could not be applied to a female spouse because “presumption of legitimacy . . . is one of a biological relationship”); *In re A.E.*, No. 09-16-00019-CV, 2017 WL 1535101, at \*8 (Tex. Ct. App. Apr. 27, 2017), *petition for review pending* (“*Obergefell* did not hold that every state law related to the marital relationship or the parent-child relationship must be ‘gender neutral.’”).

To be clear, however, other courts have disagreed. See, e.g., *McLaughlin*, 401 P.3d at 498 (“In sum, the presumption of paternity under § 25-814(A)(1) cannot, consistent with the Fourteenth Amendment’s Equal Protection and Due Process Clauses, be restricted to only opposite-sex couples. The marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses.”); *Wendy G-M. v. Erin G-M.*, 985 N.Y.S.2d 845, 859 (N.Y. Sup. Ct. 2014) (holding that a female spouse was a parent of a child born to her spouse under the marital presumption of legitimacy). In addition, a number of states have amended their marital presumptions to clarify that they must be applied equally to female spouses. See, e.g., CAL. FAM. CODE § 7611(a) (West 2017); D.C. CODE ANN. § 16-909(a-1)(2) (2017); 750 ILL. COMP. STAT. ANN. 46/204(1) (2017); ME. STAT., tit. 19-A, § 1881(1) (2017); N.H. REV. STAT. § 168-B:2(V) (2017); WASH. REV. CODE ANN. § 26.26.116(1)(a) (2017).

rules and decisions make it difficult for women who “separat[e] the biological fact of maternity from the social role of motherhood” to establish parentage.<sup>31</sup> Under these gender-specific parentage rules, the parental relationships of female spouses in same-sex couples and nonbiological mothers in different-sex relationships may be unrecognized and unprotected. Moreover, by anchoring marital parenting around the woman who gave birth, the rules make it difficult for fathers in families without biological mothers to establish parenthood.

In the context of nonmarital families, “biological connection continu[es] to anchor nonmarital parenthood.”<sup>32</sup> In most same-sex-parent families, at least one adult lacks a genetic relationship to the child. As a result, gay and lesbian parents are often denied full and equal legal recognition.

Recent Supreme Court decisions suggest that gender- and sexuality-based parentage rules are not only unjust but also unconstitutional. In *Morales-Santana*, the Court declared that laws, including rules about children, that “grant[] or deny[] benefits ‘on the basis of the sex of the qualifying parent’ . . . differentiate on the basis of gender, and therefore attract heightened review under the Constitution’s equal protection guarantee.”<sup>33</sup> In *Obergefell*, the Supreme Court held that same-sex couples must be permitted to marry and that these couples must be extended the rights and obligations of marriage equally.<sup>34</sup> In June 2017, the Supreme Court held in *Pavan*<sup>35</sup> that Arkansas’s refusal to list a woman on the birth certificate of a child born to her same-sex spouse was inconsistent with its prior declaration in *Obergefell*. In light of these and other Supreme Court decisions, parentage rules that make distinctions based on sex or sexual orientation may infringe on the fundamental right to marry in violation of the Due Process Clause, or may constitute impermissible discrimination in violation of the Equal Protection Clause, or both.<sup>36</sup> Thus, the Arizona Supreme Court recently held that that state’s marital presumption had to be applied equally to a female spouse.<sup>37</sup> As the Arizona Supreme Court ex-

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31. NeJaime, *supra* note 2, at 2268.

32. *Id.*

33. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (quoting *Califano v. Westcott*, 443 U.S. 76, 84 (1979)).

34. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601, 2604-05 (2015) (holding that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, states must permit same-sex couples to marry and extend to them “the constellation of benefits that the States have linked to marriage”).

35. *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (“Having made that choice [to list nonbiological male spouses on the birth certificate of a child born to a married couple], Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.”).

36. See, e.g., *McLaughlin v. Jones ex rel. Cty. Of Pima*, 401 P.3d 492, 498 (Ariz. 2017).

37. *Id.*

plained, under Arizona’s marital presumption, husbands were recognized as parents even if they were not biological parents. After *Obergefell* and *Pavan*, the court continued, that rule could not “be restricted only to opposite-sex couples.”<sup>38</sup>

In addition to raising constitutional concerns, these gender- and sexuality-based asymmetries harm children.<sup>39</sup> When the law fails to recognize and protect functional or social parent-child relationships, children are harmed in a number of ways. Thousands of children have been abruptly cut off from one of the people they looked to and relied upon as a parent.<sup>40</sup> Experience and existing research tells us that this is damaging to children.<sup>41</sup> In addition, children may be denied a range of critical financial protections through that person, including child support and children’s social security benefits, just to name two.<sup>42</sup> As I have previously noted, “[W]hether children have adequate financial support, and particularly whether they have access to child support, directly impacts their overall development and well-being.”<sup>43</sup> For these reasons, it is important to seriously consider the problems identified by NeJaime.

After identifying the asymmetrical recognition (or nonrecognition, depending on how you view it) of nonbiological parentage, NeJaime begins to chart a path forward for addressing these legal inadequacies.<sup>44</sup> NeJaime’s proposals are not quixotic; in fact, they are achievable. Indeed, advocates and state policy-makers have an opportunity to put many of these proposals into place *now*. As I show in the next Part, many of NeJaime’s proposals have been incorporated into the UPA (2017).

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38. *Id.*

39. For a more comprehensive exploration of the ways children are harmed when their functional parent-child relationships are not recognized and protected, see, for example, Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010) (exploring financial harms); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 573 (1990) (exploring emotional harms).

40. For one of the many heartbreaking stories, see Elaine Herscher, *Family Circle for Nancy Springer*, S.F. CHRON. (Aug. 29, 1999) (describing the real-life aftermath of the decision in *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Cal. Ct. App. 1991)).

41. See, e.g., *In re Custody of C.C.R.S.*, 892 P.2d 246, 258 (Colo. 1995) (en banc) (noting that disrupting emotional bonds between a child and psychological parents “would likely prove devastating to the child and would result in long-term, adverse psychological effects on the child” (citation omitted)).

42. Joslin, *supra* note 39.

43. *Id.* at 1196.

44. NeJaime, *supra* note 2, at 2332 (introducing the Part that “suggests how the law might better realize egalitarian commitments in parentage, not only with respect to families formed through ART but across the wider swath of families in contemporary society”).

## II. IMPLEMENTING REFORM—THE UPA (2017)

I served as the Reporter for the UPA (2017).<sup>45</sup> First promulgated in 1973, the UPA is a comprehensive statutory scheme for determining a child’s legal parentage.<sup>46</sup> The UPA is a product of the ULC, which “provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.”<sup>47</sup> The ULC promulgates state laws on a variety of topics on which uniformity is desirable—from business matters (Uniform Commercial Code), to probate matters (Uniform Probate Code), to child custody jurisdiction (Uniform Child Custody Jurisdiction and Enforcement Act).<sup>48</sup> While the drafters of Uniform Laws often look to state developments for guidance, the goal of the drafting process is not simply to “restate” the existing law.<sup>49</sup> Rather, the goal is to draft “well-conceived and well-drafted” legislation.<sup>50</sup> And often, projects are instituted to help states address newly emerging legal issues<sup>51</sup> or to respond to developments in an area of law.

This latter goal has been particularly evident throughout the history of the UPA. As Harry Krause, the Reporter of the original UPA, explained, states had been slow to reform their parentage laws to eliminate rules that discriminated against nonmarital children. Writing in 1966, Krause explained that “few states have undertaken a comprehensive review of their position on illegitimacy, and sporadic statutes are the common denominator.”<sup>52</sup> This lack of action on the

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45. NeJaime served as an Observer on this project.

46. A revision of the UPA was undertaken in the 1990s. After approval by the ULC in 2000, the UPA (2000) underwent additional revision in 2001 and 2002 to respond to concerns raised by the ABA regarding the ways in which the UPA (2000) discriminated against nonmarital children. I participated in the negotiations and the revisions that led to the UPA (2002). For an account of this process, see John J. Sampson, *Preface to the Amendments to the Uniform Parentage Act (2002)*, 37 FAM. L.Q. 1 (2003).

47. *About the ULC*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> [<http://perma.cc/NF82-H2BZ>].

48. Once an Act has been approved by the ULC, states are then encouraged to enact the statutory schemes. *Id.*

49. *Id.*

50. *Id.*

51. A good contemporary example of this is the Uniform Regulation of Virtual Currency Businesses Act, which was approved by the ULC in July 2017. UNIF. REGULATION OF VIRTUAL CURRENCY BUS. ACT (UNIF. LAW COMM’N 2017), [http://www.uniformlaws.org/shared/docs/regulation%20of%20virtual%20currencies/2017AM\\_URVCBA\\_AsApproved.pdf](http://www.uniformlaws.org/shared/docs/regulation%20of%20virtual%20currencies/2017AM_URVCBA_AsApproved.pdf) [<http://perma.cc/T8Z7-SYR8>].

52. Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 831 (1966).

part of state legislatures was concerning, both as a matter of policy and as a matter of law. More and more children were being born outside of marriage, and these children were being treated unequally and unfairly in many states, Krause contended.<sup>53</sup> Moreover, Supreme Court decisions suggested that many then-existing state parentage laws were unconstitutional.<sup>54</sup> The UPA (1973) sought to help states comply with these constitutional mandates and to fulfill what was seen as an important policy goal: eliminating the status of illegitimacy and establishing the principle of equality for all children.<sup>55</sup>

The UPA has been quite influential. Laws in over half the states are now based on variations of the UPA.<sup>56</sup> Approximately nineteen states—ranging from Montana to Kansas to Hawaii to Rhode Island—enacted the UPA (1973) in whole or in significant part.<sup>57</sup> And eleven states—ranging from Alabama to Wyoming to Texas to Maine—enacted the UPA (2002).<sup>58</sup>

The newest revision of the Act—the UPA (2017)—was approved by the ULC in July 2017 and is now available for adoption by the states.<sup>59</sup> Like its pre-

53. *Id.* at 829.

54. *See, e.g.*, *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (per curiam) (holding unconstitutional a Texas child support statute that only imposed child support obligations on fathers of legitimate but not “illegitimate” children); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding unconstitutional an Illinois custody law that excluded nonmarital fathers of “illegitimate” children from the definition of “parent”).

55. *See, e.g.*, UNIF. PARENTAGE ACT prefatory note (UNIF. LAW COMM’N 2002) (“When work on the [1973] Act began, the notion of substantive legal equality of children regardless of the marital status of their parents seemed revolutionary. Even though the Conference had put itself on record in favor of equal rights of support and inheritance in the Paternity Act and the Probate Code, the law of many states continued to differentiate very significantly in the legal treatment of marital and nonmarital children. A series of United States Supreme Court decisions invalidating state inheritance, custody, and tort laws that disadvantaged out-of-wedlock children provided both the impetus and a receptive climate for the Conference to promulgate UPA (1973).”).

56. *See id.*

57. *See id.* (“As of December, 2000, UPA (1973) was in effect in 19 states stretching from Delaware to California; in addition, many other states have enacted significant portions of it.”); *see also* UNIF. PARENTAGE ACT Refs & Annos (UNIF. LAW COMM’N 1973) (listing state adoptions).

58. *See Legislative Fact Sheet—Parentage Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act> [<http://perma.cc/HAL9-BXXL>] (listing the following states as adopters: Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming).

59. The UPA (2017) was approved by the ULC on July 19, 2017. The UPA (2017) is available at UNIF. PARENTAGE ACT (UNIF. LAW COMM’N 2017), [http://www.uniformlaws.org/shared/docs/parentage/UPA2017\\_Final\\_2017sep22.pdf](http://www.uniformlaws.org/shared/docs/parentage/UPA2017_Final_2017sep22.pdf) [<http://perma.cc/647K-AUGG>]. For a memo describing the key changes implemented by the 2017 revision, see Memorandum from Jamie Pedersen, Chair, Unif. Parentage Act Drafting Comm. & Courtney Joslin, Re-

decessors, the UPA (2017) seeks to help states comply with newly recognized constitutional obligations and to better reflect and address the reality of the modern family.<sup>60</sup> The UPA (2017) implements, in concrete statutory language, many of the important reforms that NeJaime proposes.

Like NeJaime's prescriptions for review, the UPA revision process was guided by two principles. First, the UPA (2017) expands the pathways for recognition of nonbiological parentage.<sup>61</sup> Second, the UPA (2017) seeks to eliminate gender-based distinctions.<sup>62</sup> These changes help states comply with newly recognized constitutional mandates and reflect the emerging appreciation of the value in recognizing and protecting functional parent-child relationships.<sup>63</sup>

#### A. *Recognizing the Social Bonds of Parenthood*<sup>64</sup>

A core goal of the UPA (2017) is to further a principle that has animated the UPA since its inception—recognizing and protecting actual parent-child bonds.<sup>65</sup> Often, the people who are parenting a child are the child's biological

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porter, Unif. Parentage Act Drafting Comm., to Unif. Law Comm'rs (June 9, 2017), [http://www.uniformlaws.org/shared/docs/parentage/2017AM\\_Parentage\\_IssuesMemo.pdf](http://www.uniformlaws.org/shared/docs/parentage/2017AM_Parentage_IssuesMemo.pdf) [<http://perma.cc/67UT-PE6P>].

60. See, e.g., Memorandum from Jamie Pedersen, Chair, Study Comm. on Possible Amendments to the Unif. Parentage Act, to Comm. on Scope and Program 1 (Oct. 5, 2015), [http://www.uniformlaws.org/shared/docs/parentage/2015oct5\\_AUPA\\_Report%20to%20Scope.pdf](http://www.uniformlaws.org/shared/docs/parentage/2015oct5_AUPA_Report%20to%20Scope.pdf) [<http://perma.cc/XG5D-VQU4>] (“We believe a drafting committee should be appointed to consider revisions to the UPA in light of developments in constitutional law, innovations at the state legislative level, and changes in American society over the nearly 20 years since the last major revision process began for the UPA.”).
61. See, e.g., Memorandum from Courtney Joslin, Reporter, Unif. Parentage Act 2017 Drafting Comm., to Unif. Parentage Act 2017 Drafting Comm. 3-11 (Oct. 5, 2016), [http://www.uniformlaws.org/shared/docs/parentage/2016oct\\_RUPA\\_Issues%20memo.pdf](http://www.uniformlaws.org/shared/docs/parentage/2016oct_RUPA_Issues%20memo.pdf) [<http://perma.cc/7776-XPE2>] (providing background information related to de facto parentage).
62. See, e.g., Memorandum from Jamie Pedersen, Chair, Study Comm. on Possible Amendments to the Unif. Parentage Act, to Comm. on Scope & Program 3 (June 12, 2015), [http://www.uniformlaws.org/shared/docs/parentage/Parentage\\_StudyCmteFinalReport\\_2015jun12.pdf](http://www.uniformlaws.org/shared/docs/parentage/Parentage_StudyCmteFinalReport_2015jun12.pdf) [<http://perma.cc/MJ9B-B3RD>] (noting that in light of developments with regard to marriage equality, “ULC staff have begun the work of reviewing other ULC acts that include gender-specific references to husbands, wives, mothers, and fathers” and urging that the same should be done with the UPA).
63. See, e.g., *Why Your State Should Adopt the Uniform Parentage Act*, *supra* note 22.
64. This, again, is a principle that animates many of the reforms called for by NeJaime. See NeJaime, *supra* note 2, at 2338 (advocating for the “[f]uller recognition of the social bonds of parenthood”).
65. The UPA (1973) and the UPA (2002) both included marital presumptions. Under both versions of the Act, the marital presumption protected the relationship between a woman's husband and a child born to the woman even if the husband was not the genetic father.

parents. But this is not always the case. The UPA has and continues to take the position that actual parent-child bonds are important to children and that these relationships are worthy of protection, even if the parent and the child are not also connected by biology. As noted above, children may be harmed if the law fails to recognize and protect their actual parent-child relationships. The UPA (2017) furthers this core principle in several ways.

First, the UPA (2017) revises the holding-out provision so that it applies equally without regard to gender.<sup>66</sup> The holding-out provision has been included in the UPA since its first promulgation in 1973. Under the provision, a person can be recognized as a parent based on the individual's *conduct* of living with the child and treating the child as her own.<sup>67</sup> Initially, some courts concluded that the provision could only be used to recognize functional parent-child relationships if those relationships were also based on a biological connection. For example, in *In re Nicholas H.*, a California intermediate appellate court

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UNIF. PARENTAGE ACT § 204(a) (UNIF. LAW COMM'N 2002) (“A man is presumed to be the father of a child if: (1) he and the mother of the child are married to each other and the child is born during the marriage . . . .”); UNIF. PARENTAGE ACT § 4(a) (UNIF. LAW COMM'N 1973) (“A man is presumed to be the natural father of a child if: (1) he and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court . . . .”). The UPA (2002) had a particularly strong version of the marital presumption, providing that it became conclusive or irrebuttable after the child's second birthday, and permitting a court to deny a request for genetic testing even within that two-year window. UNIF. PARENTAGE ACT §§ 607, 608 (UNIF. LAW COMM'N 2002).

In addition, both the UPA (1973) and the UPA (2002) allowed an individual to establish parentage based on the individual's conduct of living with the child and functioning as a parent to the child. *Id.* § 204(a)(5) (providing that a man is presumed to be the father of a child if: “for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own”); UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973) (providing that a man is presumed to be a parent 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”).

66. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017) (“An *individual* is presumed to be a parent of a child if: . . . (2) the individual resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual's child.” (emphasis added)).
67. *Id.* The holding-out provision of the UPA (1973) had no time limitations (other than the requirement that the relationship be developed when the child was still a minor). UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973) (providing that a man is presumed to be a parent 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”). In 2002, a new time requirement was added. To be covered under the holding-out provision, the individual had to have functioned as a parent “for the first two years of the child's life.” UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM'N 2002). This time requirement from the UPA (2002) was carried over in the most recent revision of the Act.

held that even if the holding-out presumption arose based on the man's conduct of living with the child and treating the child as his own, the presumption was necessarily rebutted by evidence that the man was not the child's biological parent.<sup>68</sup> Over time, however, an increasing number of courts has rejected this limited understanding of the holding-out provision. This was true in the *Nicholas H.* case itself—on appeal, the California Supreme Court concluded that the man could be recognized as a parent under the holding-out provision even though he was not the child's genetic parent.<sup>69</sup> Courts in many other states have likewise concluded that functional, nongenetic parents can be recognized and protected under the holding-out provision.<sup>70</sup>

As noted above, the UPA (2017) continues to include the holding-out provision but takes it a step further by making the provision gender-neutral. Because a woman seeking protection under the provision will rarely be connected to the child by biology,<sup>71</sup> this revision makes it even more clear that the purpose of the provision is to recognize and protect actual parent-child relationships, including relationships that are not biologically based.

Second, the UPA (2017) includes an entirely new method of establishing parentage—the de facto parent provision.<sup>72</sup> Most states today extend some protection to functional, nonbiological parents.<sup>73</sup> Some states do this through a

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68. 110 Cal. Rptr. 2d 126, 141, *rev'd*, 46 P.3d 932 (Cal. 2002), *modified* (July 17, 2002) (“Therefore, under section 7612, the presumption is rebutted by ‘clear and convincing’ evidence that the man is not the child’s natural, biological father.”).

69. 46 P.3d at 941.

70. *See, e.g., In re Parental Responsibilities of A.R.L.*, 318 P.3d 581, 584-85 (Colo. App. 2013); *Partanen v. Gallagher*, 59 N.E.3d 1133, 1138-40 (Mass. 2016); *In re Guardianship of Madelyn B.*, 98 A.3d 494, 499 (N.H. 2014); *Chatterjee v. King*, 280 P.3d 283, 292-93 (N.M. 2012).

71. Usually, the woman who is genetically connected to the child is the woman who gave birth to the child. Such a woman is a parent by virtue of having given birth to the child. UNIF. PARENTAGE ACT § 201(1) (UNIF. LAW COMM’N 2017) (“A parent-child relationship is established between an individual and a child if: (1) the individual gives birth to the child [except in situations involving surrogacy] . . .”). The woman who gave birth to the child, therefore, would not need to invoke the holding-out provision to establish parentage. Sometimes, however, the woman who gave birth to the child is not the child's genetic parent. *See, e.g., K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (demonstrating parentage litigation involving twins born to a lesbian couple through ova sharing).

72. UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM’N 2017). To be clear, some people who qualify as parents under the newly added de facto parent provision might have been protected under other provisions of earlier versions of the UPA. For example, such a person might have been protected under the holding-out provision of the UPA (1973). That said, the UPA (2017) is the first version of the Act to include the term “de facto parent.” *See, e.g., Memorandum from Courtney Joslin, Reporter, Unif. Parentage Act 2017 Drafting Comm., to Unif. Parentage Act 2017 Drafting Comm., supra note 61.*

73. *See, e.g., Courtney G. Joslin, Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495 (2014) (providing an overview of developments in the law).

holding-out provision.<sup>74</sup> But even more states recognize and protect functional parent-child relationships under equitable doctrines.<sup>75</sup> The UPA (2017) incorporates this trend in the law in a particularly robust way. Under section 609, persons alleging themselves to be “de facto parents”—that is, parents in fact—can be recognized as legal parents who stand in parity with any other legal parents, including genetic parents, for all purposes.<sup>76</sup> This new method of establishing parentage based on function is written in gender-neutral terms and applies equally to men and women.<sup>77</sup> In addition, the provision captures and protects relationships that may not be covered by the holding-out provision. The holding-out provision of the UPA (2017) applies only when the individual was residing with and holding the child out as her own from birth. In many cases, however, functional parents come into children’s lives at some point after they are born. The de facto parent provision provides a mechanism for recognizing these types of parent-child relationships.

Both the holding-out provision and the de facto parent provision require the development of an actual parent-child bond over time.<sup>78</sup> Thus, a person cannot be recognized as a parent under either provision at the moment of birth. In some situations, this lag in legal recognition can leave a family vulnerable. To be clear, however, there are other provisions of the UPA (2017) under which a biologically unrelated person can be recognized as (or at least presumed to be) a legal parent at or near the moment of birth. This may be possible, for example, under the marital presumption,<sup>79</sup> the voluntary acknowledgment pro-

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74. See *supra* notes 68-70 and accompanying text.

75. See, e.g., Joslin, *supra* note 73, at 499-502.

76. UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM’N 2017). The factors included in section 609 are based on the factors that have been developed by courts under common-law doctrines. In some states, however, individuals recognized under these common-law doctrines do not stand in parity with any other legal parents. See Joslin, *supra* note 73, at 500-01.

77. This provision also applies without regard to marital status.

78. See, e.g., UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM’N 2017) (providing that the individual must have “resided in the same household with the child for the first two years of the life of the child . . . and openly held out the child as the individual’s child”); *id.* § 609(d)(5) (providing that an individual claiming to be a de facto parent must demonstrate that he or she “established a bonded and dependent relationship with the child which is parental in nature”).

79. *Id.* § 204(a)(1). Under the marital presumption, the spouse of the woman who gave birth is presumed to be a parent of the child as soon as the child is born.

cess (which is described below),<sup>80</sup> and the assisted reproduction and surrogacy provisions.<sup>81</sup>

Third, the UPA (2017) expands the classes of people who can establish parentage through state voluntary acknowledgment processes (VAP). State VAP procedures implement a federal directive. To be eligible to receive certain federal funds, states must have in place a simple, administrative process for establishing paternity.<sup>82</sup> Once the procedures have been properly followed, completion of a VAP establishes parentage. Federal law provides that the properly completed VAP has the force of a judgment and must be recognized and respected by all other states.<sup>83</sup> Because the systems in most states only apply to men, they are generally referred to as “voluntary acknowledgments of *paternity*.” Moreover, not only are the VAP systems generally limited to men, but most states allow only a man who is alleged to be a genetic father to establish parentage through this process.<sup>84</sup>

Most same-sex parent families, however, include at least one nonbiological parent. As a result, “the biological foundation of VAPs does not repair – but instead exacerbates – burdens experienced by the nonmarital children of same-

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80. As explained in more detail below, the voluntary-acknowledgment-of-parentage provisions are included in article 3 of the UPA (2017).

81. Nonsurrogacy forms of assisted reproduction are addressed in article 7 of the UPA (2017) and surrogacy is addressed in article 8. As described in more detail below, articles 7 and 8 have been revised to apply to all intended parents, regardless of sex, sexual orientation, or marital status. Under article 7, if the intended parent consents to the insemination as required, the intended parent is a parent of the child from the moment of birth. *See, e.g., id.* § 703 (providing that an individual who consents to the assisted reproduction “is a parent of the child”). Under article 8, if the agreement complies with the article’s requirements, an intended parent of a child born through gestational surrogacy “is a parent of the child.” *Id.* § 809(a).

82. *See, e.g.,* 42 U.S.C. § 666(a) (2012) (“In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures . . .”).

83. *See, e.g.,* Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2049 (2016) (noting that after the rescission period has elapsed, a VAP is treated as a “final legal judgment that can be challenged only on grounds of fraud, duress, and material mistake of fact”); *see also* 42 U.S.C. § 666(a)(5)(C)(iv) (2012) (providing that states must “give full faith and credit to such an affidavit signed in any other State according to its procedures”). As I explain elsewhere, having certainty that one’s parentage will be recognized and respected across state lines is vitally important to families. Without a judgment of parentage or an establishment that is treated as a judgment, a person’s status as a parent may flicker on and off as one travels from state to state. *See, e.g.,* Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL’Y REV. 31 (2010).

84. Nevada recently enacted a gender-neutral VAP procedure for children born through assisted reproduction. 2017 Nev. Legis. Serv. Ch. 63 (West).

sex couples.”<sup>85</sup> To eliminate unnecessary gender distinctions and provide greater clarity and certainty to nonbiological parents, the UPA (2017) renames these “acknowledgments of *parentage*” and permits a wider group of people to establish parentage through this process. Section 301 provides that in addition to an alleged genetic father, a VAP can also be used to establish the legal parentage of “an intended parent” of a child born through assisted reproduction and of a “presumed parent” (which, most commonly, will be the woman’s spouse—male or female).<sup>86</sup>

This revision is an extremely important development. The new groups of people who can establish parentage under this provision are those who would already be considered or presumed to be parents under their relevant state’s law. But in the absence of a formal judgment of parentage, other states may not be required to respect and recognize that parent-child status.<sup>87</sup> And we know from existing case law that courts do refuse to recognize the parental status of LGBT parents, even if it was clear that they were considered parents in the state in which their child was born.<sup>88</sup> These problems arise because, absent a judgment of parentage, states often apply their own forum law when adjudicating parentage.<sup>89</sup> And when the person is LGBT, as NeJaime demonstrates, that

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85. NeJaime, *supra* note 2, at 2344; *id.* at 2344-45 (“A more egalitarian system would expressly allow VAPs to recognize parents not only on biological but also on social grounds. Voluntary acknowledgements of paternity could become voluntary acknowledgements of parentage and apply to both biological and nonbiological parents, including both men and women.” (emphasis omitted)); see Joslin, *supra* note 83 (proposing a VAP-like system designed to protect LGBT-parent families); see also Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 467 (2012).

86. NeJaime calls for a similar reform. NeJaime, *supra* note 2, at 2344 (“The equality principles guiding reform would lead states to open VAPs to same-sex couples in ways that render VAPs explicitly capable of capturing social, and not only biological, grounds for parenthood.”).

87. For more detailed explorations of this issue, see Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563 (2009); Joslin, *supra* note 83.

88. Indeed, some courts have gone so far as to refuse to recognize a judgment recognizing the parentage of an LGBT parent entered by the court of another state. See, e.g., *Embry v. Ryan*, 11 So.3d 408, 410 (Fla. Dist. Ct. App. 2009) (overruling a trial court decision that had declined to recognize and enforce an out-of-state adoption judgment). It is now clear that where the party had been properly adjudicated to be a parent by the court of another state, that judgment must be given “exact” full faith and credit in other states. *V.L. v. E.L.*, 136 S. Ct. 1017, 1020, 1022 (2016) (per curiam) (quoting *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998)).

89. While states are constitutionally required to recognize and enforce out-of-state judgments, including parentage judgments, it is generally constitutionally permissible for courts to apply their own state’s law to an action properly pending before them. See, e.g., Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L.

person may not be considered a parent under the law of many states. This new, expanded VAP procedure helps mitigate some of this uncertainty. As a result, parties would have a means of establishing a final, secure determination of parentage without having to go to court.<sup>90</sup>

Fourth, the UPA (2017) provides greater clarity and direction to courts in deciding which of multiple claimants should be declared a child's parent when genetics and function suggest different results. The UPA requires courts to weigh a range of factors.<sup>91</sup> These factors include: "the length of time during which each individual assumed the role of parent of the child"; "the nature of the relationship between the child and each individual"; and "the harm to the child if the relationship between the child and each individual is not recognized."<sup>92</sup> Critically, almost all of the factors focus on the person's relationship to the child. As such, these rules permit a court to choose social bonds over genetic bonds.<sup>93</sup> Here again, the revision clarifies that parentage need not be based on biological connections and that biological connections are not necessarily more important than other means of establishing parentage.

To be sure, courts have discretion under section 613 when weighing competing claims of parentage. While a court could choose social ties over genetic bonds, it is not required to do so. And it is possible that a court could place significant weight on biology when weighing the respective claims. That said, this new provision makes clear that biology does not necessarily trump social bonds; if that were the case, a best-interests-of-the-child analysis that involves consideration of a range of factors focused on the individuals' relationships with the child would be unnecessary.

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REV. 1669, 1718 (2011) ("Modern choice-of-law doctrine recognizes that a state can constitutionally apply its own laws to an action so long as the chosen law has 'a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" (citation omitted)); *see also* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1058-59 (2009) (stating that it is likely constitutionally permissible for a court to apply forum law to a case if the court properly has jurisdiction over the action).

90. I previously called for the creation of such a system. Joslin, *supra* note 83, at 43-45.

91. UNIF. PARENTAGE ACT § 613 (UNIF. LAW COMM'N 2017).

92. *Id.*

93. *Id.*

### B. Eliminating Gender Distinctions

In addition to the changes described above, the UPA (2017) incorporates additional reforms intended to eliminate many gender distinctions in the rules of parentage.<sup>94</sup>

The UPA (2017) seeks to further the goal of gender equality through its very terminology. The prior versions of the Act distinguished between paternity and maternity and created different mechanisms for establishing each one.<sup>95</sup> Not only did this distinction erect different rules for men and women, but it also reinforced the notion that some inherent difference exists between mothers and fathers. In contrast, the UPA (2017) takes the position that under most of the rules for establishing parentage, an individual's gender is not relevant.<sup>96</sup> Accordingly, the UPA (2017) eliminates many of the gender-based distinctions from the Act and unifies the methods of establishing parentage under a single rubric. The UPA (2017) now lays out the ways in which any individual—male or female—can establish a legally recognized parent-child relationship.<sup>97</sup>

Consistent with this basic principle, throughout the Act, specific means of establishing parentage have been made gender-neutral. In addition to the provisions discussed above, the two articles addressing the parentage of children born through forms of assisted reproduction—article 7 addressing nonsurrogacy forms of ART, and article 8 addressing surrogacy—likewise replace gendered terms with gender-neutral ones. An earlier version of the Act—the UPA (2002)—had addressed the parentage of children born through ART, but its provisions referred only to intended couples consisting of one man and one

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94. As discussed below, the UPA (2017) does not eliminate all distinctions based on gender and biology; it continues to place weight on a woman's gestation of a fetus. *See infra* notes 112–115 and accompanying text.

95. *See, e.g.*, UNIF. PARENTAGE ACT § 201 (UNIF. LAW COMM'N 2002).

96. In addition to revising the Act to replace most gender-specific references with gender-neutral ones, the Act continues to include (as it has since its inception) a provision requiring parentage rules to apply in a gender-neutral manner to the extent practicable. UNIF. PARENTAGE ACT § 107 (UNIF. LAW COMM'N 2017) (“To the extent practicable, a provision of this [act] applicable to a father-child relationship applies to a mother-child relationship and a provision of this [act] applicable to a mother-child relationship applies to a father-child relationship.” (alterations in original)); *see also* UNIF. PARENTAGE ACT § 21 (UNIF. LAW COMM'N 1973) (“Any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this Act applicable to the father and child relationship apply.”).

97. UNIF. PARENTAGE ACT § 201 (UNIF. LAW COMM'N 2017); *see also id.* § 201 cmt. Thus, as NeJaime urges, the UPA (2017) moves “away from separate regulations of *maternity and paternity* and instead work[s] toward the general regulation of *parentage*.” NeJaime, *supra* note 2, at 2337–38.

woman.<sup>98</sup> Because the provisions were written in gendered terms, some courts refused to apply these gendered statutory provisions equally to same-sex intended parents who had children together through assisted reproduction.<sup>99</sup>

Articles 7 and 8 of the UPA (2017), by contrast, cover all intended parents, without regard to the sex, sexual orientation, or marital status of the intended parents.<sup>100</sup> These changes are consistent with NeJaime’s call for “[a] more comprehensive and evenhanded use of consent in the regulation of ART” as a means to “promote equality, based on gender, sexual orientation, and marital status.”<sup>101</sup> By replacing gendered language with gender-neutral language, the UPA (2017) promotes equality by opening up additional methods of establishing parentage to all individuals. In doing so, the Act also works to break down the persistent legal and social distinctions between mothers and fathers.

The revisions to the assisted reproduction provisions also further the first identified goal of recognizing and protecting social parenthood. As was true under the UPA (2002), the UPA (2017) does not require intended parents of children born through ART or surrogacy to have a genetic connection to the resulting child.<sup>102</sup> Indeed, under articles 7 and 8, parentage is established en-

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98. See, e.g., UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM’N 2002) (“A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.”).

99. See, e.g., *In re A.E.*, No. 09-16-00019-CV, 2017 WL 1535101, at \*10 (Tex. App. Apr. 27, 2017), *petition for review pending* (“Reading the [assisted reproduction statute based on UPA (2002)] as requested by Appellant would affect a substantive change to the respective statutes, and it would materially alter the requirements outlined in subsection (a) and (b) of the ART statute as to husband and wife. The substitution of the word ‘spouse’ for the words ‘husband’ and ‘wife’ would amount to legislating from the bench, which is something that we decline to do.”).

100. See, e.g., UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM’N 2017) (“An individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.”); see also, e.g., *id.* § 102(13) (defining “intended parent” to mean “an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction”).

101. NeJaime, *supra* note 2, at 2345. NeJaime relies on my own call for a gender-neutral consent-to-parent rule. Joslin, *supra* note 39, at 1183 (arguing that “the most appropriate solution is to apply the consent = legal parent rule to all children born through alternative insemination, regardless of the marital status, gender, or sexual orientation of the participants”).

102. Some states do include such a requirement. For example, in Louisiana, surrogacy is permitted only when the intended parents are a married husband and wife who are using only their own gametes. LA. STAT. ANN. § 40.32(1) (2012 & Supp. 2017) (providing that “[b]iological parents’ means a husband and wife, joined by legal marriage recognized as valid in this state, who provide sperm and egg for in vitro fertilization, performed by a licensed physician, when the resulting fetus is carried and delivered by a surrogate birth parent who is related by blood or affinity to either the husband or wife”).

tirely by virtue of conduct.<sup>103</sup> Genetic connection is simply not relevant to establishing the parentage of intended parents under these articles.<sup>104</sup> Thus, an intended mother of a child born through assisted reproduction can be a legal mother even if she lacks a genetic or gestational connection to the resulting child.<sup>105</sup>

The Act also updates the parentage presumptions, including the marital presumption,<sup>106</sup> to remove most gender-based distinctions. All fifty states have a marital presumption.<sup>107</sup> In most states, however, the marital presumption expressly applies only to the *husband* of the woman who gave birth.<sup>108</sup> In such states, some courts have refused to apply their gender-specific marital presumption equally to female spouses.<sup>109</sup> In such jurisdictions, male spouses who are not biological parents are presumed to be legal parents, but similarly situated female spouses are not. This, some courts have concluded, is unconstitu-

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103. See, e.g., UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM'N 2017) (“An individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.”); *id.* § 809(a) (“Except as otherwise provided in subsection (c) or Section 810(b) or 812, on birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, each intended parent is, by operation of law, a parent of the child.”); see also, e.g., *id.* § 102(13) (defining “[i]ntended parent” to mean “an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction”).
104. Indeed, a new section was added to article 5, addressing genetic testing, that drives this point home. The new section 502(b) states that genetic testing cannot be used to challenge the parentage of an individual who is a parent under articles 7 or 8. This new subsection was added because “parentage of an intended parent under articles 7 and 8 is not premised on a genetic connection.” *Id.* § 502 cmt. Therefore, “the lack of genetic connection should not be the basis of a challenge to the individual’s parentage.” *Id.*
105. *Id.* § 801 (laying out criteria for intended parents through surrogacy).
106. For an earlier consideration of these questions regarding the application of the marital presumption to same-sex couples, see Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006).
107. See, e.g., LESLIE HARRIS ET AL., FAMILY LAW 865 (4th ed. 2014) (“In all states a child born to a married woman is at least rebuttably presumed to be the child of her husband.”).
108. See, e.g., NeJaime, *supra* note 2, app. A (indicating that only 11 states and the District of Columbia have statutory gender-neutral marital presumptions).
109. See, e.g., *Turner v. Steiner*, 398 P.3d 110, 114 (Ariz. Ct. App. 2017), *abrogated by* *McLaughlin v. Jones ex rel. Cty. of Pima*, 401 P.3d 492, 498 (Ariz. 2017) (“The first flaw is that *Obergefell* does not extend so far as to require the courts to modify statutory schemes relating to same-sex parenting.”); *In re A.E.*, No. 09-1600019-CV, 2017 WL 1535101, at \*8 (Tex. App. Apr. 27, 2017), *petition for review pending* (“Furthermore, we conclude that *Obergefell* does not require this Court to act as the Legislature and re-write the Texas statutes that define who has standing to bring a [suit affecting the parent-child relationship].”).

tional.<sup>110</sup> The UPA (2017) addresses this potential constitutional infirmity by making the marital presumption expressly apply equally to both male and female spouses of the woman who gave birth.<sup>111</sup>

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To be clear, the UPA (2017) does not entirely eliminate considerations of gender and biology. The Act still places great weight on gestation. Thus, except in cases involving surrogacy, the woman who gave birth to the child is automatically considered a parent.<sup>112</sup> For this reason, the UPA (2017) does not go as far as NeJaime urges with regard to the marital presumption.<sup>113</sup> Because the woman who gave birth is statutorily defined as a parent, the marital presumption only applies to the spouse of the *woman who gave birth*.<sup>114</sup> It does not apply to the spouse of a man who is a legal parent. The spouse of that man may be able to establish parentage through other means, such as de facto parentage or the holding-out presumption. But he or she is not presumed to be a parent solely by virtue of his or her marriage to a parent.

In addition, the surrogacy provisions place some weight on genetics. While the intended parents need not have a genetic connection to be recognized as parents, article 8 does distinguish between gestational surrogacy and genetic surrogacy (often referred to as “traditional” surrogacy).<sup>115</sup> One may argue that if biology is not destiny, one should treat these forms of surrogacy identically. That is, if biology does not necessarily make one a parent, the surrogacy rules

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110. See, e.g., *McLaughlin*, 401 P.3d at 498 (“In sum, the presumption of paternity under § 25-814(A)(1) cannot, consistent with the Fourteenth Amendment’s Equal Protection and Due Process Clauses, be restricted to only opposite-sex couples. The marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses.”).

111. UNIF. PARENTAGE ACT § 204(a)(1)(A) (UNIF. LAW COMM’N 2017) (“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 . . .”).

112. *Id.* § 201(1).

113. See NeJaime, *supra* note 2, at 2340 (arguing that some variation of the marital presumption should apply to the spouse of a legal father).

114. While NeJaime argues that some variation of the marital presumption should apply to the spouse of a legal father, he agrees that the traditional presumption should not be applied to that scenario. Instead, he proposes a “two-tiered system of marital presumptions.” *Id.* A fully gender-neutral marital presumption, he concedes, “may insufficiently protect the rights of women who give birth.” *Id.*

115. UNIF. PARENTAGE ACT art. 8 cmt. (UNIF. LAW COMM’N 2017) (“While UPA (2017) continues to permit both types of surrogacy, UPA (2017) imposes additional safeguards or requirements on genetic surrogacy agreements.”).

should apply equally, without regard to whether the surrogate is genetically related to the child. Treating these two forms of surrogacy differently, one may argue, unnecessarily re-elevates the importance of genetic connections.

The reality today, however, is that all states that address surrogacy through comprehensive statutory schemes distinguish between the two forms of surrogacy. Most of these states simply refuse to permit and regulate genetic surrogacy expressly.<sup>116</sup> And the few states that explicitly permit genetic surrogacy by comprehensive statutory scheme impose additional requirements on such agreements.<sup>117</sup> While ULC drafting committees seek to advance the law substantively, they also seek to draft laws that can be widely enacted, with the ultimate goal of uniformity throughout the nation. Here, the drafting committee determined that those two goals would be best furthered by the above approach. By including and permitting genetic surrogacy, the committee was providing clear rules and therefore greater clarity and certainty for those who form families through this means. But at the same time, the provisions regarding genetic surrogacy erect additional safeguards, thereby acknowledging and responding to the political reality that state legislators have been more reluctant to enact legislation expressly permitting this form of surrogacy.

### III. NURTURING PARENTAGE LAW

If broadly adopted by a significant number of states, the revisions incorporated into the UPA (2017) would go a long way toward both addressing the discrimination that NeJaime identifies and protecting children's wellbeing. Since its first promulgation almost fifty years ago, the UPA has been a critical lever in addressing discrimination in parentage law. By enacting the original

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116. Only four jurisdictions expressly permit genetic surrogacy by statute. These jurisdictions are Florida, Maine (for close relatives only), Virginia, and the District of Columbia. *E.g., id.* art. 8 pt. 3 cmt.

117. For example, in Maine, genetic surrogacy arrangements are permissible only if the surrogate is a family member. ME. REV. STAT. ANN. tit. 19-A, § 1931(1)(E) (2017) (providing that the surrogate must “[n]ot have contributed gametes that will ultimately result in an embryo that she will attempt to carry to term, unless the gestational carrier is entering into an agreement with a family member”). In Florida, Virginia, and the District of Columbia, the provisions give a genetic surrogate additional time in which to withdraw her consent. D.C. Code Ann. § 16-411(4) (West 2017) (“In the case of a child born by a traditional surrogate, [the surrogate can withdraw her consent] within 48 hours after the birth of the child.”); FLA. STAT. ANN. § 63.213(2)(a) (West 2017) (providing that the surrogate (what Florida calls a “volunteer mother”) has the right to rescind her consent “any time within 48 hours after the birth of the child, if the volunteer mother is genetically related to the child”); VA. CODE ANN. § 20-161(B) (West 2017) (“Within 180 days after the last performance of any assisted conception, a surrogate who is also a genetic parent may terminate the agreement by filing written notice with the court.”).

1973 version, states began to chip away at longstanding discrimination and unequal treatment of nonmarital children.<sup>118</sup> It would be a tremendously positive step in the lives of children and their families if the most recent revision of the UPA was as successful as its predecessors.

As NeJaime suggests, there are a number of important reasons why states should consider revising their statutes in these ways. First and foremost, these changes help protect children and their families. Under current law in many states, people who children view and rely upon as parents may not be recognized as parents. Failing to recognize those relationships can harm children in very tangible ways.

Moreover, leaving families uncertain about their legal relationships to each other can be emotionally destabilizing. It can result in contentious litigation against an outsider who refuses to recognize and respect the family, such as an insurance company that denies benefits on the ground that they are not legal family members. Or the litigation could arise from within the family, such as upon the breakdown of the family where one person—often the biological parent—argues that the nonbiological parent is not a parent and not entitled to seek contact with the child. Family breakdowns are almost always difficult for children, and placing the child in the middle of acrimonious litigation can make that process even more difficult.

As NeJaime suggests, these families can and often do ask courts to apply gender-specific statutes in gender-neutral ways. But requiring individual families to ask courts to do this on a case-by-case basis places an enormous burden on families. It also places burdens on courts. Thus, in recent years, a number of courts have called upon state legislatures to do their part to update incomplete and outdated parentage regimes.<sup>119</sup> By enacting clear, express statutory provisions, states can provide families with clarity about the rules governing them. This clarity can help avoid unnecessary litigation and reduce the challenges that children face during what are already difficult periods in their lives.

Enacting the UPA (2017) would also help states comply with constitutional mandates of due process and equal protection. If a state permits a husband to be recognized as a legal parent even if he is not a genetic parent, the Constitu-

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118. The UPA (1973) grew out of work by Krause. *See, e.g.*, Krause, *supra* note 52, at 829.

119. *See, e.g.*, *McLaughlin v. Jones ex rel. Cty. of Pima*, 401 P.3d 492, 500-01 (Ariz. 2017) (urging the legislature to act); *Sinnott v. Peck*, No. 2015-426, 2017 WL 5951846, at \*12 (Vt. Dec. 1, 2017) (“We continue to urge the Legislature to take action in this realm, and hope that the study commissioned by the Legislature and cited by the dissent leads to the enactment of statutory revisions that render this decision, and others cited above, obsolete. The global perspective, consideration of extensive empirical evidence, and public input and accountability of the legislative process are better suited than case-by-case adjudications to developing a coherent law of parental status.” (citation omitted)).

tion requires the state to make the same protection available to a female spouse.<sup>120</sup> As the Arizona Supreme Court reminded us, these constitutional mandates apply not just to courts—they also apply to state legislatures. And indeed, if the changes come from state legislatures rather than through the courts, the constitutional correction need not occur on a case-by-case basis. “[L]egislative enactments and rulemaking . . . can forestall unnecessary litigation and help ensure that [the] law guarantees same-sex spouses the dignity and equality the Constitution requires—namely, the same benefits afforded couples in opposite-sex marriages.”<sup>121</sup> Adoption of the UPA (2017) assists states in fulfilling these constitutional obligations.

If adopted, these advances certainly will benefit and be felt by same-sex married couples and their children. Under the UPA (2017), many more of these married same-sex parents will have legally recognized relationships with their children, and these families will have greater certainty and security regarding their familial relationships as they travel about the country.

Helping states fulfill their constitutional obligation to treat married same-sex couples equally was a key impetus for the revision project. But it is also important not to overlook the fact that the impact of the UPA (2017) will extend beyond the boundaries of the marital family. Consistent with one of the core principles of the original UPA, the UPA (2017) seeks to ensure the equal treatment of nonmarital children as well.<sup>122</sup> As described above, many of the key provisions in the UPA (2017) apply equally not only without regard to gender and sexual orientation, but also marital status. The provisions that apply equally without regard to marital status include almost all of the provisions discussed above: the holding-out provision, the de facto parent provision, the VAP provisions, and the assisted reproduction provisions. The UPA (2017) is, therefore, an example of how marriage equality successes may be leveraged to achieve progress for all families—marital and nonmarital.<sup>123</sup>

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120. *McLaughlin*, 401 P.3d at 498 (“The marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses.”).

121. *Id.* at 501.

122. See UNIF. PARENTAGE ACT § 2 (UNIF. LAW COMM’N 1973) (“The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.”).

123. In this way, the UPA (2017) is a concrete example of the very dynamic that NeJaime identified in *Marriage Equality and the New Parenthood*: the UPA (2017) “shows how marriage equality can facilitate the expansion of intentional and functional parentage principles across family law—not only inside but also outside marriage, for both same-sex and different-sex couples.” NeJaime, *Marriage Equality*, *supra* note 11, at 1190; see also Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017) (arguing that the

## CONCLUSION

As NeJaime carefully demonstrates in *The Nature of Parenthood*, parentage law in most states continues to “reflect[] and perpetuate[] inequality based on gender and sexual orientation.”<sup>124</sup> As a result, the law often leaves LGBT parents and women who separate social parenthood from genetic parenthood inadequately protected under the law. These legal inadequacies harm not only adults, but also the children in these families.

States have the opportunity to reform many of these existing limitations in parentage law by enacting the UPA (2017). The UPA (2017) implements many of the concrete reforms called for by NeJaime. I am hopeful that many states will seize this opportunity to do just that.

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Court’s gay rights decisions can support rather than foreclose protections for those living outside of marriage).

124. NeJaime, *supra* note 2, at 2268 (footnote omitted).