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Counting from One: Replacing the Marital Presumption with a Presumption of Sole Parentage

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COUNTING FROM ONE: REPLACING THE MARITAL PRESUMPTION WITH A PRESUMPTION OF SOLE PARENTAGE

JULIE SHAPIRO*

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INTRODUCTION

Now that DNA testing allows certainty about genetic linkages, that the marital family is no longer the dominant setting in which children are raised,¹ and that significant numbers of children are created using assisted reproductive technology (ART),² the continued utility of the marital

* Professor of Law, Seattle University School of Law. Thanks are due to many people, among them the participants in this symposium (and especially its organizer and guiding spirit, Professor Nancy Polikoff), Stephanie Wilson and Amanda Masters. I also owe an immeasurable debt to the lawyers with whom I serve on the National Family Law Advisory Committee (NFLAC) of the National Center for Lesbian Rights. These lawyers are confronted daily with the problems considered here, and their dedication and talent have contributed immensely to developing the existing law as it stands. Finally, many of the ideas here were developed on my blog, Related Matters, (julieshapiro.wordpress.com). I am indebted to readers and commenters there who have vigorously yet civilly pushed me to more fully articulate and justify the ideas outlined here.

1. See generally Brady E. Hamilton et al., *Births: Preliminary Data for 2009*, 59 NAT'L VITAL STATISTICS REPS. 1, Dec. 21, 2010, at 4 (noting an increase of pregnancies to forty-one percent in 2009).

2. See CTRS. FOR DISEASE CONTROL & PREVENTION, 2008 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 15 (2010) (finding that ART accounts for over one percent of total U.S. births); see also Proposed Model Program for the Certification of Embryo Laboratories, 63 Fed. Reg. 60178, 60180 (Nov. 6, 1998) (defining ART as “[a]ll clinical techniques and laboratory procedures . . . with the intent of establishing a

presumption³ is no longer useful.⁴ However, the presumption is just one method of assigning legal parentage of a child, and it operates as a part of a more complex scheme of parentage law.⁵ Thus, it should not be considered in isolation. Reconsideration of the marital presumption requires reconsideration of the entire framework by which we assign legal parenthood.⁶ In this Article I sketch one approach to that larger task.

At the outset it is important to identify the theoretical context within which I operate: I am a feminist,⁷ and I am a supporter of, as well as a participant in, queer family law.⁸ Both of these perspectives infuse my analysis, and I approach the questions considered here from these perspectives.

I begin with the proposition, shared by those at this conference as well as many others, that the marital presumption is problematic.⁹ There are a

pregnancy”).

3. The marital presumption is the presumption that when a married woman gives birth, her husband is the legal father of the child. The presumption has a long history and has been modified in many jurisdictions, but it remains in force, in some form, in all states. See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 228, 233-34 (2006) [hereinafter Appleton, *Presuming Women*]. For a general discussion of the presumption, see generally Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 467 (2012).

4. See, e.g., *J.A.S. v. Bushelman*, 342 S.W.3d 850, 861 (Ky. 2011) (rejecting the marital presumption).

5. See *id.* (allowing the use of genetic tests to establish paternity in a wife’s lover over the objections of the husband and the wife). See generally Appleton, *Presuming Women*, *supra* note 3, at 234-46 (showing presumption as the traditional approach but one price of parentage determination).

6. Legal parenthood is a critical concept. A legal parent is assigned both rights and responsibilities with respect to his or her child. A legal parent may or may not be a social parent. See generally Appleton, *Presuming Women*, *supra* note 3, at 234-46 (discussing parental responsibilities that are gender-neutral); Nancy Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 208 (2009) [hereinafter Polikoff, *Parentage Laws for Children of Lesbian Couples*].

7. Feminism is an important perspective within the field of family law. Family law, and particularly the law governing parentage and parenting, has historically been explicitly gendered. For example, the law defining who is a mother is different from that defining who is a father. While gender-neutral language has been enacted widely, the practices of parenting remain deeply gendered and so family law itself remains gendered. See Susan B. Boyd, *Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility*, 25 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 63, 65 (2007) [hereinafter Boyd, *Legal Parenthood*].

8. By “queer family law,” I mean law that supports the establishment and maintenance of queer families, which include families of lesbian, gay, bisexual, and transgender people as well as families of heterosexuals that do not fit comfortably within the common contours of the nuclear family.

9. See, e.g., Nicholas Bala & Christine Ashbourne, *The Widening Concept of “Parent” in Canada: Step-Parents, Same-Sex Partners, & Parents by ART*, 20 AM. U. J. GENDER SOC. POL’Y & L. 525 (2012); Nancy D. Polikoff, *The New “Illegitimacy”: Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 721 (2012) [hereinafter Polikoff, *Winning Backward*].

number of shortcomings that have been identified, some of which suggest specific remedies, and I will begin by considering these briefly.¹⁰ I will then turn to the question of how the marital presumption fits within the larger framework of legal parentage and how a revision of the larger framework of legal parentage can obviate the need for a marital presumption. Ultimately, I conclude that the best way to move away from the marital presumption is to abandon the presumption that all children should start life with two legal parents. Instead, I propose that we start counting from one. The latter part of this paper is a justification for this proposal.

I. THE MARITAL PRESUMPTION IS PROBLEMATIC

The marital presumption runs afoul of our societal commitment to equal treatment. Privileging children based on the formal marital status of their parents¹¹ is fundamentally unfair.¹² After all, the child has no control over the relationship status of its parents.¹³ This is perhaps the simplest and most general ground on which the marital presumption can be criticized. The more difficult question is how to remedy the situation.

This requires more detailed consideration of the problems created by the marital presumption. Different formulations of the problem yield different solutions. For example, one objection to the marital presumption is that in many states, lesbian and gay couples are not permitted to marry. Since they cannot marry, they cannot invoke the presumption. This is so even

10. Those who advocate for DNA-based parentage also reject the marital presumption. This view is typified by *J.A.S.*, 342 S.W.3d at 861. Because I reject DNA-based parentage, I have not considered the DNA-based critique of the marital presumption.

11. The use of the word “parent” here is problematic. It tacitly assumes that there are pre-existing parents who can be identified without reference to law. It suggests that we might measure the validity of particular definitions of legal parenthood by the degree to which the definitions correctly assign legal parenthood to those pre-existing parents. In other words, one might think that a good legal definition of parent is one that grants legal recognition to “real parents.”

But who are these pre-legal “real” parents and what exactly is it that makes them parents? This very question—what makes a person a parent—is at the heart of the issues discussed here. It is less than ideal to employ the term “parent” at the outset, before it has been defined or even examined. At the same time, it seems necessary to do so in order to intelligibly discuss the questions raised here.

The terminology problem reappears with a host of other terms like “genetic parents,” “natural parents,” “social parents” and so on. Each term implies that the person labeled falls within the general category “parent,” though this is actually a question for discussion.

12. See generally Polikoff, *Parentage Laws for Children of Lesbian Couples*, *supra* note 6, at 208-12 (discussing parentage without marriage).

13. See Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL’Y & L. 347 (2012) (illustrating the inherent unfairness to children by the decision of their parents not to marry).

where those couples have taken all the legal steps they can take to formalize their relationship to each other. Thus, children of this couple will have but one legal parent at birth, while children of an otherwise identical heterosexual couple who are married will have two. The heterosexual married family has all the legal protections of a two-parent family while the lesbian/gay family does not.¹⁴ This is a particularly focused variety of unfairness. This understanding of the problem yields to a simple remedy: the marital presumption can be extended to other marriage-like relationships.

But there are deeper critiques of the marital presumption, and the extension of the presumption to domestic partnerships does nothing to address those critiques.¹⁵ Extension of the presumption moves a few more children, those of domestic partnerships (DPs) and civil unions (CUs), into two-legal-parent families, but it does nothing to address the fairness issues raised by children whose parents neither marry nor enter into DPs/CUs. Indeed, it arguably exacerbates the problems confronted by these non-conforming families by privileging the relationships most readily seen as akin to marriage—DPs and CUs. This further entrenches the contrast between those whose parents are in state-sanctioned relationships and those whose parents are not¹⁶ and raises the prospect that instead of ridding ourselves of the legitimate/illegitimate distinction, we will simply reinscribe it within the queer community, so there will be children of legitimate queer families and children of illegitimate queer families.¹⁷

Currently, parents who choose not to marry are perceived to be depriving their children of desirable status. This increases the coercive nature of marriage, a topic I have written about before.¹⁸ Allowing the presumption to attach in the case of CUs or DPs extends the coercive nature to these relationships too. It delegitimizes the choice not to enter into a state-

14. For instance, if one of the heterosexual parents were to die, the surviving children would receive social security benefits from the decedent parent. If one of the lesbian or gay parents were to die, eligibility for benefits would turn on whether it was the legal parent who died or the non-legal parent.

15. See Polikoff, *Winning Backward*, *supra* note 9.

16. This is the process of assimilation I described in earlier work. See generally Julie Shapiro, *A Lesbian-Centered Critique of Second Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 30-35 (1999) [hereinafter Shapiro, *A Lesbian-Centered Critique*] (distinguishing between legal and non-legal lesbian mothers).

17. The marital presumption not only judges children as legitimate or illegitimate—it also divides *families* into those categories. Families where the adults choose not to partner/not to marry become less legitimate families as the choice to eschew state sanctions for one's relationship becomes less legitimate.

18. See generally Julie Shapiro, *Reflections on Complicity*, 8 N.Y. CITY L. REV. 657, 661-63 (2005) (evaluating the feminist anti-assimilationist critic of marriage as governmental approval of relationships).

sanctioned relationship.¹⁹ Thus, in addition to being unfair to children, the marital presumption is a restraint on the autonomy of parents. This critique applies equally strongly to presumptions extended to include those in DPs and CUs. Parents should not be compelled to comply with state registration requirements in order to ensure equal treatment for their children.²⁰ Given the liberty and equality interests at stake, the state's preference for some family forms over others is unjustifiable unless it can be shown that the preferred forms offer real and definitive advantages to children, and/or that the disfavored forms result in disadvantages.²¹ The evidence of this is far from clear.²²

Having recognized the inequity of discriminating on the basis of legitimacy,²³ we have formally committed ourselves to equal treatment of all children, including those who would once have been called illegitimate. Many laws have been changed to eradicate this discrimination.²⁴ Yet, as the call for papers for this conference notes, unequal treatment persists.²⁵ Some call for expansion of the presumption as described above, rather than

19. See Ruthann Robson, *Compulsory Matrimony*, in FEMINIST AND QUEER LEGAL THEORY 313, 315-28 (Martha A. Fineman ed., 2009); see also Katherine Franke, *Marriage is a Mixed Blessing*, N.Y. TIMES, June 23, 2011, at A25; Polikoff, *Winning Backward*, *supra* note 9.

20. In any event, treating a broader array of relationships like marriage will inevitably fall short. There will always be children born into relationships that fall just slightly beyond or even far outside the officially drawn line and those children will be disadvantaged.

21. Though it is a subject of debate, family forms of a variety can be favorable for children. See generally NAT'L LESBIAN LONGITUDINAL FAM. STUDY, <http://www.nllfs.org> (last visited Nov. 11, 2011); Judith Stacey & Timothy Biblarz, (How) Does The Sexual Orientation of Parents Matter?, 66 AM. SOC. REV. 159, 175 (2001) (showing evidence that other family forms may have positive influence on children).

While statistics on single mothers are often quoted, rarely are they broken out in ways that tell the whole story. For instance, women who become single mothers by choice are distinct (as a group) from women who become single mothers by default. Similarly, single mothers who are impoverished at the outset are distinct from single mothers who start with ample means.

22. See generally JUDITH STACEY, UNHITCHED: LOVE MARRIAGE AND FAMILY VALUES FROM WEST HOLLYWOOD TO WESTERN CHINA (2011). This assertion runs counter to the contention in marriage litigation—that marriage is better for children. Both sides in ongoing marriage litigation agree that a marital family is best for rearing children.

23. See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 169-70 (1972) (agreeing with *Levy* that it is discrimination to allow an illegitimate child to suffer when a legitimate child would have rights to recover); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (“Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother.”).

24. Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671 (2012) (noting the rejection of the presumption).

25. See generally Polikoff, *Parentage Laws for Children of Lesbian Couples*, *supra* note 6, at 207-25, 247-55 (discussing persistence of presumption).

its abolition, although, as I have shown, this simply shifts the inequities to other children. Nonetheless, the marital presumption persists.

In order to understand this persistence, it is useful to consider what it is that the presumption accomplishes: it ensures that children have two legal parents from the moment of birth. This reflects a deep societal preference for two-parent families. That preference lies at the heart of the persistent endurance of some form of the marital presumption. As long as that preference persists, forms of the marital presumption will endure. Endowing more children with two parents at birth, as expanded versions of the marital presumption do, cannot eliminate the problems discussed above.

Retaining the two-parent preference leads one to ask how to get to two without relying on the legal relationship between the prospective parents, rather than asking more fundamental questions about the validity of the preference itself.²⁶ If we are to finally move beyond all forms of the marital presumption, we must scrutinize the preference for two parents at birth. I am hardly the first to suggest this approach,²⁷ but I want to approach the question from a slightly different direction.

To begin with, why is two the obvious number, such that we have to justify any variation from that number? There are several possible answers, but I doubt any of them offer a convincing justification. For instance, it takes DNA from two people to create a child, thus two parents may seem the “natural” number. But basing parenthood on DNA is something queer-family advocates ought to resist,²⁸ and if DNA is not the basis for parenthood, then it ought not to be the basis for ascertaining the ideal number of parents. Indeed, using DNA as a justification for the ideal number of parents further embeds DNA as a marker of parenthood and is therefore counter-productive.

It is also true that marriage—the institution often viewed as the ideal environment for raising children—is generally premised on two people. But there seems to be no underlying justification for the selection of the number two, beyond observations about the binary nature of sex/gender or the need for genetic materials from a man and a woman to create a child—again, bases for justifying the number two on which we ought not rely.

Ultimately, I conclude that two is a number we have accepted without

26. This can lead to important innovations. The joint enterprise theory described by Professor Nancy Polikoff, and embodied in the Washington DC statute, does indeed get to two parents without relying on the legal relationship between the adults. See Polikoff, *Parentage Laws for Children of Lesbian Couples*, *supra* note 6, at 204-07. Discussed further *infra* Part II.

27. See, e.g., Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 15-16 (2008); Melanie B. Jacobs, *Why Just Two?: Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 313-14, 318-25 (2007).

28. See *infra* text accompanying notes 30-32.

sufficient examination or justification. If this is so, then suppose we begin our inquiry by asking how we should identify people as the parents of children and then, based on the answer to that question, see if there is an ideal number of parents. In framing the question this way, we can avoid predetermining the ideal number of parents.

With this approach in mind, I begin by considering the competing theoretical models of legal parentage and then move on to examine what results consistent application²⁹ of these principles might yield in the absence of any initial assumptions about the proper number of parents.

II. COMPETING MODELS FOR PARENTHOOD

The competing models are not new—volumes have been written about each of them—but they are most frequently deployed to solve specific problems. Instead, I want to use them to generate full pictures of the world of parentage.

There is one obvious and simple test for parentage that should be unacceptable to the vast majority of queer family advocates: DNA-based parentage. Legal parents could be defined as those people whose DNA was used to create the child in question. This would ensure that every child had two, and only two, parents—one male and one female. It is widely assumed that this position is reflected in existing law, though this is not the case.³⁰

Using DNA to determine parental status would effectively end discrimination based on the marital status of the parents. Every child would have one mother and one father without any regard to the relationship between those people. And yet, DNA-based parentage is a standard that will not serve the interests of queer families. It is hardly necessary to catalog the reasons why DNA-based parenthood is a bad idea from the point of view of queer people.³¹

29. In doing this, I am placing a high value on consistency—by which I mean having a single set of rules that apply to all circumstances. At the very least, deviation from consistent rules ought to be specifically justified. See generally Marsha Garrison, *Law Making for Baby Making: An Interpretative Approach To The Determination of Legal Parentage*, 113 HARV. L. REV. 835, 878-82 (2000). Of course, consistency may be overrated.

30. For example, the marital presumption is theoretically inconsistent with DNA-based parenthood although sometimes both reach the same result. See Appleton, *Presuming Women*, *supra* note 3, at 229. Similarly, in many jurisdictions, those who provide gametes for ART are not parents though they are obviously genetically related to the child. See Polikoff, *Parentage Laws for Children of Lesbian Couples*, *supra* note 6, at 221.

31. See generally Shapiro, *A Lesbian-Centered Critique*, *supra* note 16, at 18 (presenting the lesbian arguments against genetic based parenthood); ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION, INFERTILITY AND THE NEW WORLD OF CHILD PRODUCTION* (1999). A brief list of the reasons why DNA based parenthood is undesirable includes the following points:

Although they may be stated in a variety of ways, there are essentially two alternative approaches to parentage apart from DNA. These approaches are intent-based parentage,³² which underlies the joint enterprise theory, and a functional family or de facto parent analysis. Each of these analyses has been exhaustively explored in other writings and it is not my purpose to review this extensive scholarship.³³ I will assume some general familiarity with the operation of these tests and will only highlight a few points relevant to my discussion here.

To begin with, both intent-based parenthood and functional parenthood stand in stark contrast to DNA-based parenthood. Both base parenthood on some notion of volitional choice, whether that choice is manifested by expressing intention or by action. By contrast, DNA-based parenthood is not premised on any choice to be a parent.³⁴

Doctrines of intent-based parenthood were developed to facilitate ART and have generally been restricted to those using ART.³⁵ For those using third-party gametes,³⁶ intent provides a way to ensure that the provider of the gametes does not become a parent by virtue of DNA. Parenthood by intention is also often critical to the operation of surrogacy in order to ensure that the woman who gives birth to the child does not become a

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- It makes the two-mother or two-father family impossible;
 - It creates child parent relationships between people who have no on-going relationship of any sort, so it is not good for the kids;
 - It gives men excessive power/control over women; and,
 - It leads to the conclusion that most ART—commonly used by queers to create their families—is immoral/unacceptable.

32. See Marjorie Maguire Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990) (articulating the intent approach); see also Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HAST. L.J. 597, 600-02 (2002) [hereinafter Storrow, *Parenthood by Pure Intention*]. Storrow ultimately suggests that intention can be considered a subset of function, and that pre-birth, intention plays a role analogous to function. Storrow, *Parenthood by Pure Intention*, *supra* at 641. This seems, if anything, backwards. Surely, function is a species of intention—when you function as a parent, you do so intentionally.

33. See generally Appleton, *Presuming Women*, *supra* note 3, at 271-76 (discussing functional parenthood); sources cited *supra* note 32 (discussing intentional parenthood).

34. See Boyd, *Legal Parenthood*, *supra* note 7, at 85; see also Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347, 364-71 (2009).

35. Of course, this includes many queer families.

36. I avoid the use of the term “donor.” Many people who provide gametes for assisted reproduction receive money in return for their participation. Though generally these arrangements are structured so that the money is typically not described as compensation, I am nevertheless persuaded that it is misleading to label these individuals as gamete/egg/sperm *donors*. The terms gamete/egg/sperm *providers* more reasonably describes those who receive money as a part of the process as well as those who are completely uncompensated donors.

parent.³⁷

Intent-based parentage is obviously related to contract theory,³⁸ and one feature shared with contract analysis requires particular emphasis here: intent requires us to agree on some critical moment in time at which intention is crucial. After that time, intent is fixed and variation in the actual intentions of the parties may fluctuate without legal consequence attaching.

The joint enterprise approach³⁹ is premised upon an intent-based test, where intent is manifested by signing up for the enterprise. This is the critical moment at which intent is or is not established. Once manifested, intent creates legally recognized interests in parenthood.

The main alternative to an intent-based test is a functional analysis. The legal notion of parentage by function has evolved through a string of de facto parent cases litigated by queer family law advocates.⁴⁰ Over the course of many years, a number of jurisdictions have adopted some form of the function/de facto test. The de facto test is backwards looking and focuses on the lived experience of the individuals involved. No one moment in time is of paramount importance.

One of the strengths of intent-based parenthood is that it can be relatively easy to administer and understand. There is or there is not intent

37. The intent test is not applied to those who conceive via intercourse. *See In re C.K.G.*, 173 S.W. 714, 731 (Tenn. 2005) (discussing the concern and care that should be afforded to the test when applied to assisted human reproduction). Where an unmarried man and a woman engage in sexual intercourse resulting in conception, neither party can defeat the man's parentage by saying he lacked intent to become a parent, even if it is clear that he did indeed lack that intent. *See In re Paternity of J.L.H.*, 441 N.W.2d 273, 276-77 (Wis. Ct. App. 1989) (stating that voluntary intercourse results in voluntary parentage). This poses particular problems for single women and members of lesbian couples who eschew ART and choose to conceive via intercourse, a route that may often be travelled by those lacking financial means to afford ART. *But see Fertility Treatment: Surrogacy*, BABYCENTER MED. ADVISORS BOARD, <http://www.babycentre.co.uk/preconception/fertilitytreatments/surrogacy/> (last visited Nov. 20, 2011) (showing that UK law by default assigns parentage to the mother unless steps are taken to assign parentage otherwise).

This also means that choosing intent as a parentage test necessarily implies a two-tiered parentage system—one set of tests for “real families” where children are conceived via intercourse and/or using only the genetic material of their parents—and a second test (the intent test) for those using ART. This is problematic. The mode of reproduction ought not to be relevant to how we determine parentage. There is no sensible reason to accept that. This is the conviction that underlies my commitment to consistency. *See* sources cited *supra* note 30.

38. *See* Marjorie Maguire Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990) (examining new technology and its impacts on parenthood).

39. *See* Polikoff, *Parentage Laws for Children of Lesbian Couples*, *supra* note 6.

40. *See, e.g., In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005); *see also* Shapiro, *A Lesbian-Centered Critique*, *supra* note 16 (discussing problems with second parent adoptions by lesbians).

at the critical time.⁴¹ If you have it, then you can rely on it. This makes planning possible. In contrast, a weakness of functional/de facto parenthood is that it lacks this same clarity. You do not know when you have attained functional parenthood. Generally, it can only be determined in hindsight. Additionally, the issue that must be resolved—whether a person acted like a parent for a long enough period of time—is difficult and brings with it layers of complication and uncertainty.⁴²

At the same time, a functional approach values hands-on caretaking while intent based parentage does not. Carework has historically been assigned to women and has been undervalued or rendered invisible.⁴³ There is a price to undervaluing carework. Boyd's analysis of the position of women, who are expected to do the carework, which is then discounted, is important to keep in mind.⁴⁴ In many different sex couples, the assignment of carework continues to be gendered.⁴⁵ To the extent this is true, a functional test will advantage women over men.⁴⁶ Thus, from a feminist perspective, the functional approach may be preferable.

III. CHOOSING A TEST IN WORST CASE SCENARIOS

Each of the two approaches—intention and function—has strengths and weaknesses. Neither is perfect. In many, if not most cases, intent and function will work together. Function will confirm previously stated

41. Though this is frequently advanced as a rationale for intent-based parenthood, it is not always the case. See JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE* (1997) (noting that intent can be difficult to determine). The joint project approach proposed by Professor Polikoff relies on intent that would need to manifest at the beginning of the process, which might appear to be relatively easy to establish. See Polikoff, *Parentage Laws for Children of Lesbian Couples*, *supra* note 6, at 214. But there are instances where the explicitly stated intent contained in forms does not match the actual intent of the parties. See *K.M. v. E.G.*, 117 P.3d 673, 676 (Cal. 2005) (showing that despite a clinic form stating intent to the contrary, providing of the egg for IVF with lesbian-partner parent was enough to provide intent).

42. Ruthann Robson, *Making Mothers: Lesbian Legal Theory and the Judicial Construction of Lesbian Mothers*, 22 *WOMEN'S RTS. L. REP.* 15, 31-32 (2000); see also Ruthann Robson, *Resisting the Family: Repositioning Lesbians in Legal Theory*, 19 *SIGNS* 975, 987-89 (1974).

43. For the discussions and impacts of careworkers, see generally SUSAN B. BOYD, *CHILD CUSTODY, LAW AND WOMEN'S WORK* (2003); Boyd, *Legal Parenthood*, *supra* note 7.

44. BOYD, *CHILD CUSTODY, LAW AND WOMEN'S WORK*, *supra* note 43.

45. See generally MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

46. The father's rights movement has stressed the importance of quality (rather than quantity) time and the significance of non-caregiving activities such as breadwinning invoking ideals of formal equality. It is a logical mistake to assume that preferring caregivers, which as labor is divided often turns out to be women, is the same as a gendered preference. Preferring caregivers is gender neutral and results in gendered outcomes only to the degree the division of labor is itself gendered.

intention. But the critical cases to consider are those where the two analyses do not work together—the cases where intent and function diverge. In these instances, the choice of test matters enormously. Intent will lead to one outcome, function to a different one.⁴⁷ Only by focusing on these cases can we fully appreciate the differences between the two tests.

There are two circumstances under which the results from the two approaches diverge. First, X could intend to be a parent at the critical time (thereby qualifying for legal parenthood under an intent test), but then fail to follow through with performance (and so fail to qualify as a *de facto* parent). The intention is on paper only, but the function does not follow.⁴⁸ Alternatively, Y could fail to manifest the intent to be a parent at the appropriate time, thus having no entitlement to claim legal parentage under the intent test, but actually assume the role of parent in the child's life and qualify as a *de facto* parent.⁴⁹ In sum, X is a parent if we use the intent test but not a parent if we use the function test. Y is a not a parent if we use the intent test but is a parent if we use the function test.

It is true that there may not be many cases like these; one hopes that they will be rare. But it is only by considering these cases that one can observe the differences between the two approaches to parenthood. Further, through litigation of a lengthy string of intra-lesbian child custody cases, we have learned that the possibility of discord is all too real.⁵⁰ Rather than wait for these cases to arise, it is better to anticipate their inevitable appearance and consider which doctrine will best protect those involved and the broader queer community.⁵¹

47. Given the nature of legal parenthood as an all-or-nothing status, these outcomes will essentially be polar opposites—either a person will have all parental rights or none.

48. *Washington ex rel. D.R.M. v. Wood*, 34 P.3d 887 (Wash. Ct. App. 2001). In *Wood*, two women undertook to have a child as a joint project but separated before they were aware that Wood's partner was pregnant. *Id.* at 890. Thus, intent might have existed at the crucial time, but there was clearly no subsequent performance.

49. In either instance, it is also necessary to assume that the parties disagree as to the appropriate resolution of the case. If they agree, there will obviously be no conflict to resolve.

50. One has only to review the docket of litigation at the National Center for Lesbian Rights to see that intra-lesbian custody cases have replaced the once typical lesbian versus former male partner cases. *Case Docket*, NAT'L CTR. FOR LESBIAN RTS., http://www.nclrights.org/site/PageServer?pagename=issue_families_caseArchive (last visited Nov. 9, 2011). For an early discussion of these cases, see generally Ruthann Robson, *Exploring Parental Rights: Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377 (1994).

51. In this same vein, NCLR has joined with GLAD to issue standards for protecting LGBT families during dissolution of adult relationships. See GAY & LESBIAN ADVOCATES & DEFENDERS, PROTECTING FAMILIES: STANDARDS FOR LGBT FAMILIES, (2011) [hereinafter PROTECTING FAMILIES], available at <http://www.glad.org/uploads/docs/publications/protecting-families-standards-for-lgbt-families.pdf>.

IV. OPTING FOR FUNCTIONAL PARENTHOOD

While opinions here will doubtless differ, I am persuaded that the outcomes under the functional approach are preferable.⁵² In other words, Y should be recognized as a legal parent and X should not be.

As I have noted, the functional test is rooted in the lived reality of children and the adults who surround them. Mere intention cannot outweigh performance, or the lack thereof.⁵³ Though opposing parties will protest that the outcomes are wrong, and rightly observe that expectations based on intent are frustrated, it is inevitable that some parties and some expectations will be frustrated. The question here is how best to assign that frustration.

Assuming for the sake of discussion that the function test is preferred, the next question would be how the function test applies in the circumstances currently governed by the marital presumption—that is, in identifying parents at the time a child is born. This is not the context in which the functional family test was originally shaped, and new questions are raised. What does it mean to say one functions as a parent before a child is born? Who can possibly prove functional parenthood before or at the time of the birth of a child?

There is one obvious person who can do so: the woman who is pregnant. While I am wary of arguing that there is a parent/child relationship before the child is born,⁵⁴ it nevertheless seems to me that she is in a unique position and is at least akin to a parent.⁵⁵ Thus, in extending a functional approach to cover the situation of a newborn, all children would have at least one legal parent—the woman who gave birth to her.⁵⁶

52. Neither the intent nor DNA based parenthood can be easily justified by reference to the interests of children. Each argument would require controversial intermediate assumptions—that a child is generally better off raised by a person who contributes DNA or a person who intended to create the child. It is much easier to craft a defense of the function test based on the child's interest, for the function test provides legal recognition for the reality known to the child. See generally Appleton, *Presuming Women*, *supra* note 3, at 257-64, 273 (discussing the justifications for functional parenthood).

53. I cannot help but think of the countless occasions on which my own children have intended to perform household chores but failed to actually do so. Intention that is not matched with performance is of little value.

54. These concerns arise because of my commitment to reproductive rights, including the right to choose to have an abortion.

55. Some recent scientific studies suggest that the conditions in utero have many more extensive effects on our subsequent lives than has been previously understood. See generally ANNIE MURPHY PAUL, *ORIGINS: HOW THE NINE MONTHS BEFORE BIRTH SHAPE THE REST OF OUR LIVES* (2010).

56. See Appleton, *Presuming Women*, *supra* note 3, at 284-85 (concluding that the functional approach gives the child at least one parent). This is a particular problem for those who use surrogacy—which includes gay men, of course. You can have surrogacy and acknowledge that the woman who gives birth to a mother. This is the practice in the United Kingdom. See PROTECTING FAMILIES, *supra* note 51.

Is there any other de facto parent of a newborn child? Can anyone else function as parent, or in whatever analogous capacity there might be for a child while in utero? Though I have not fully worked this through, it seems to me it may be hard to say yes. No matter how diligently one attends the Lamaze classes, one is not fully going to meet the functional test.⁵⁷ Thus, consistent application of a functional test will mean that children have but one parent at birth.⁵⁸

Notably, this result would resolve the dilemma posed by the marital presumption. All children would have one parent at birth, without regard to the legal relationships of the adults around them. But this is also a problematic outcome that warrants further discussion.⁵⁹ There are many instances where the family into which the child is born will include more than one prospective parent.⁶⁰ In order to overcome this problem, there must be a simple way for additional people who participated in the conception/pregnancy to gain recognition as a legal parent without having to wait for the time that would be required by standard application of the de facto parent tests.⁶¹ This will be necessary not only for queer families but also for traditional heterosexual couples.⁶²

CONCLUSION AND RECOMMENDATIONS

Development of some device by which a second legal parent could easily be recognized⁶³ is a crucial project, but it is beyond the scope of this Article. For the moment, I will only offer a few observations and suggestions for further thought. It may be that we could draw on the experience of gay men using surrogacy who frequently obtain a pre-birth order.⁶⁴ At least in some instances, this order must be confirmed after the

57. One can find some support for this schema in cases like *Lehr v. Robertson*, 463 U.S. 248 (1983). A man is not a father by virtue of genetic connection, nor by genetic connection plus intercourse. *Id.* at 259-60. I think the assumption in those cases is that a woman is a mother. The man must do something more to register as a father.

58. One could avoid this result by lowering the bar for functional parenthood. If less were required, then it is easier to say that a non-pregnant person could meet the standard. But lowering the bar would bring with it its own complications so I am wary of that option.

59. Professor Appleton has suggested identified some policies that might be useful in attempting to formulate some sort of legal process for adding an additional parent. See Appleton, *Presuming Women*, *supra* note 3, at 285-86.

60. It should be obvious that the intent test does not create this problem.

61. What I mean to suggest here is an easy path for those who have already invested substantial time and energy in the creation of the child.

62. See generally Garrison, *supra* note 29 (critiquing the intention theory of parenthood).

63. Second-parent adoptions do this, but they are not adequate to the task posed here. I have previously discussed some of the other problems with second parent adoptions. See generally Shapiro, *A Lesbian-Centered Critique*, *supra* note 16.

64. This result is typically premised on intent-based parentage, a basis that would

birth of the child. Perhaps we could have some initial declaration of intent, which becomes solidified by subsequent performance, which is also manifested by reiteration of intent. This might lead to some form of culmination when the child is born, perhaps allowing for a sort of registration in hospital for those who have fulfilled the earlier requirements.

Ultimately, it is important to recognize that no test can eliminate hard cases. There will be harsh results under a uniform functional approach as there must be under any legal regime. Where a pregnancy has essentially been a joint project—in fact as well as in word—the person who does not give birth might be excluded from legal parentage in some situations. He or she is not automatically deemed a legal parent upon the birth of a child.⁶⁵ There is undeniable unfairness to the person who relies on expressed intention to enter into a joint project. She or he may build substantial expectations around the project. But two points are worth keeping in mind while considering this scenario. First, if the person has not acted in a manner consistent with the expression of intent, then his or her expectations can only reasonably be so strong. Second, we might wish to consider providing a remedy—apart from the recognition of parentage—if the conduct of the pregnant person is wrongful. If reliance was wrongfully encouraged there might be some form of recourse. To be recognized as the parent of a child is not, however, an appropriate remedy.⁶⁶

I close by returning to what I think of as the critical question: Does this proposal—of having a uniform system of functional family recognition that results in all children having one legal parent at birth—in fact serve the interests of queer families? In the broader scheme of things, I believe it does. It challenges the two parent dyadic model, which is one of the most entrenched family values constraining formation of queer families. It creates further room for all those who would prefer that families not be based on a two-person model. If the default number of parents is two, as it currently stands, then the single parent family is not whole; it is missing something.⁶⁷ If the default number is instead one, then sole-parent families can be seen to be complete as they are. This approach also treats all two-

not be available under my proposed regime.

65. This is in contrast to the result that would follow in an intent-based regime.

66. If the person relying on statements of intent has actually performed as a parent to the child, then the matter can be properly resolved by application of the *de facto* parent test. The difficult case is one in which the pregnant person prevents the intending parent from functioning as a parent. In such a case, the injured party remains unknown to the child and has no actual relationship with the child. Under these circumstances, recognizing the person as a parent would be detrimental to the child and hence, while the wrongful conduct of the pregnant person might well be actionable, recognition as a parent should not be an available remedy.

67. Generally, the concerns raised at this conference about the new illegitimacy cannot help the children of single parents. Legitimate or not, they remain children of single parents.

parent families the same, regardless of the genetic relationships of the parties or the nature of the relationships between adults. By putting lesbian and gay couples on the same footing as heterosexual couples, it affirms the equality of all families.

Finally, the attraction of a single theory of parenthood governing all domains is not only grounded in an appeal to uniformity or consistency, but it is grounded in the observation that all legal parents have something in common—that there are reasons we bestow on them the rights and obligations that we do. That commonality is the relationship between adult and child that is the core of the functional model. Thus, it is not uniformity for its own sake, but rather uniformity that bespeaks a universal truth.

