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Biology and Illegitimacy

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BIOLOGY AND ILLEGITIMACY

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I. INTRODUCTION

DENISE Hawkins and Darla Grese were in a committed, unmarried same-sex relationship when they decided to have a child together.[1] Darla became pregnant with donor sperm and gave birth in 2007. For several years, Darla and Denise raised the child together in the home that they shared. But in 2014, Darla and Denise ended their relationship. At that point, the two women continued to share parenting responsibilities as part of an informal custody arrangement.[2]

Two years into this arrangement, however, Darla refused to allow Denise to see their child. Cut off from the son she had been raising for almost a decade, Denise went to court and filed a petition for custody. Two psychologists, as well as a guardian *ad litem*, testified that ending the child's relationship with Denise would inflict psychological and emotional harm on him. In fact, the court found that the child had developed behavioral problems as a consequence of his separation from Denise.[3]

Nonetheless, the Virginia Court of Appeals determined that Denise was not a legal parent and thus was not entitled to custody or visitation over Darla's objections.[4] Because Denise was not a biological parent, was not married to the biological mother, and had not adopted the child, Virginia law did not recognize her as a legal parent. Moreover, the court asserted that Darla, as the child's biological mother, had constitutional

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1. Hawkins v. Grese, 809 S.E.2d 441, 443 (Va. Ct. App. 2018).
2. *Id.*
3. *Id.*
4. *Id.* at 446.

authority to exclude non-parents.[5] Accordingly, she was entitled, as a constitutional matter, to shut Denise out of their son's life. The court severed the child's relationship with one of his parents, even though it was clear that he would be harmed.[6]

In the decades before the Virginia court's ruling, as I show in Part II of this essay, assigning value to biological bonds justified legal recognition of nonmarital parent–child relationships that for too long had been stigmatized and excluded. For centuries, the children of unmarried parents enjoyed no rights to parental support or inheritance. Unmarried parents in many ways were legal strangers to their children. In the U.S., in the second half of the twentieth century, biological connection emerged as a basis on which to protect parents and children in nonmarital families, as a matter of both constitutional doctrine and family law. Judges and lawmakers concluded that unmarried biological parents and their children must enjoy rights and obligations that married parents and their children possess.

Yet for the twenty-first-century Virginia court, as I show in Part III, the value of biological bonds justified the decision to sever a nonmarital parent–child relationship. Appeals to biological connection could construct the nonbiological parent as a legal stranger to her child and could grant the biological parent the right to exclude the child's other parent. Identifying the Janus-faced nature of biology, this brief essay examines how biological parentage, which served as a mechanism by which to repudiate "illegitimacy" and protect nonmarital parent–child relationships, today serves to justify new forms of illegitimacy and to separate unmarried parents from their children.

While the nonrecognition of unmarried nonbiological parents presents an urgent problem for many kinds of families, the paradigm situation involves an unmarried female same-sex couple raising a child conceived through assisted reproduction, like the family in *Hawkins*. In the era that Professor Lawrence Friedman examines in his contribution to this symposium, the legal system and the society failed to respect and protect the status of the unmarried biological mother and her child.[7] Today, largely because of the legal and cultural developments that underwrote the repudiation of illegitimacy, the tie between the unmarried biological mother and her child is granted legal recognition and social status. Instead, it is the unmarried *nonbiological* mother who struggles for legal and social acceptance of her relationship to her child. Yet, just as Friedman documents the ways in which social norms outpaced and shaped changes in the legal order with respect to unmarried mothers,[8] shifting attitudes about family formation by same-sex couples are driving reforms to modern parentage law. Part IV identifies a growing consensus among courts

5. *Id.* at 451–52.
6. *Id.* at 446–49.
7. *See* Lawrence Friedman, *No Name*, 74 SMU L. REV. 235 (2021).
8. *See id.* at 6–24.

and legislatures to repudiate what Professor Nancy Polikoff has termed "the new 'illegitimacy'"[9] by expanding parental recognition to nonbiological parents in nonmarital families.

II. ILLEGITIMACY'S PAST: BIOLOGY AS INCLUSION

For centuries, as Friedman makes clear, Anglo–American law treated nonmarital children as "illegitimate."[10] When an unmarried woman gave birth to a child, the child was deemed *fillius nulius*—the child or heir of nobody—and had no legal parent–child relationships.[11] Over time, as Friedman describes, the common law came to regard nonmarital children as legal children, entitled to parents exercising custodial and financial responsibility.[12] Whereas marriage once defined and limited legal parent–child bonds, unmarried parents and their children now could claim legitimate ties.

Friedman focuses on English law and society, but a similar transition occurred in the U.S.[13] For many years, marriage cabined parenthood. A child born to a married woman had two legal parents—the woman and her husband—and was entitled to their support. A child born to an unmarried woman was "illegitimate" and lacked legally enforceable rights with respect to her parents.[14] While unmarried mothers came to exercise custodial responsibility for their children,[15] those children had no legally enforceable right to paternal support or inheritance.[16]

In the U.S., a combination of constitutional developments and family law reforms altered this landscape.[17] Some states engaged in various reforms by the second half of the twentieth century, but many maintained harsh illegitimacy regimes and required unmarried fathers to formally pe-

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9. *See* 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, 722–23 (2012).

10. *See* Friedman, *supra* note 7, at 239.

11. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *459 (Oxford, Clarendon Press, 3d ed. 1768); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 212 (John M. Gould ed., 14th ed. Boston, Little, Brown, & Co. 1896).

12. *See* Friedman, *supra* note 7, at 254–56.

13. Although, as Professor Joanna Grossman notes, "American law never took as harsh an approach to the status of illegitimate children as English law . . . ." 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, 693 (2012).

14. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 197 (G. Edward White ed., 1985) ("The [illegitimate child] had no recognized legal relations with his or her parents, particularly not those of inheritance, maintenance, and custody. Nor did the illicit couple have any rights or duties toward their spurious issue.").

15. *Id.* at 207. State law increasingly recognized rights and obligations between unmarried mothers and their children. *See id.*

16. *See id.* at 197–98; Simmons v. Bull, 21 Ala. 501, 504 (1852) (explaining that men were "under no legal obligation to support" their illegitimate children). Nonetheless, some states required men to contribute to the financial support of their nonmarital children. *See* GROSSBERG, *supra* note 14, at 215–18.

17. *See* JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 1–23 (2011).

tition for a legal relationship, by guardianship or adoption for instance.[18] Eventually, the U.S. Supreme Court held that nonmarital parents and children possessed relationship interests of constitutional magnitude.[19] In the late 1960s, the Court rejected state laws that distinguished between marital and nonmarital children, recognizing, in two decisions, rights flowing from the relationship between a child and his unmarried mother.[20]

A few years later, in *Stanley v. Illinois*, the Court extended constitutional protection to an unmarried father's parent–child relationship.[21] Traditionalists sought to use marriage as the dividing line between lawful and illegitimate family relations and to bolster the moral superiority of the marital family. As the state of Illinois argued in *Stanley*, the marital father "creat[es] the basic family unit upon which our society is based,"[22] while the nonmarital father "establishes no fixed family unit, but only a transient relationship."[23] If Stanley wanted legal parent–child relationships, he should have married the children's mother. In the absence of marriage, Illinois argued, "the father of a child born out of wedlock" can gain custody "pursuant to an adoption proceeding initiated by him for that purpose."[24] Unmarried fathers, the state explained, must "subject themselves to a legal proceeding . . . . [that] approximates an adoption or guardianship proceeding instituted by a person bearing no blood relationship to the child and in which the best interest showing is required."[25]

Biological parenthood provided the framework through which to repudiate the discriminatory treatment of unmarried fathers. Progressive advocates argued that the biological father should not have to take a formal step, such as marriage or adoption, to enjoy a legally protected relationship with his child. For the *Stanley* Court, investing biological ties with constitutional significance provided a way to vindicate nonmarital family relations.[26] Quoting its 1968 decision in *Levy*, which repudiated "illegitimacy," the Court declared that "familial bonds [in nonmarital families] were often as warm, enduring, and important as those arising within a

18. *See* GROSSBERG, *supra* note 14, at 228–33.

19. *See* Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. Am. Gurantee & Liab. Ins. Co., 391 U.S. 73 (1968).

20. *Levy*, 391 U.S. at 71–72; *Glona*, 391 U.S. at 75–76.

21. Stanley v. Illinois, 405 U.S. 645 (1972). The Court decided *Stanley* on equal protection and procedural due process grounds. *See id.* at 657–58. An unmarried father, unlike "all other parents whose custody of their children is challenged," was deprived of a hearing regarding his fitness. *Id.* at 649. *Stanley*, however, is regularly placed in a line of substantive due process precedents, standing for the *substantive* liberty that an unmarried father possesses in the relationship with his child. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 394 n.16 (1979) (citing *Stanley* in connection with the father's claim "that he was denied substantive due process").

22. Brief for Respondent at 23, *Stanley*, 405 U.S. 645 (No. 70-5014).

23. *Id.* at 24.

24. *In re* Stanley, 256 N.E.2d 814, 815 (Ill. 1970) (quoting ILL. REV. STAT. 1967, ch. 106 3/4, par. 62), *rev'd sub nom. Stanley*, 405 U.S. 645.

25. Brief for Respondent, *supra* note 22, at 31.

26. *See* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 283–84 (2020).

more formally organized family unit."[27]

The Court's ruling in favor of the father in *Stanley* ushered in a new era of protection for nonmarital parents and children.[28] In defining legal parenthood, states were required to extend some level of parental recognition to unmarried fathers.[29] While the Court framed biological connection as the starting point of the father–child bond for constitutional purposes, it did not conclude that the biological tie, standing alone, merited constitutional protection.[30] The unmarried biological father had the unique opportunity to form a relationship with his child, but he must "grasp the opportunity" before his parental status would merit constitutional protection.[31] As the Court explained in its 1983 decision in *Lehr v. Robertson*, a substantive liberty interest attaches only to an unmarried biological father who "demonstrates a full commitment to the responsibilities of parenthood."[32] Courts and commentators refer to this constitutional standard as "biology-plus."[33] As Professor Melissa Murray has argued, even as the Court vindicated unmarried fathers, marriage remained the gold standard; the unmarried father whose claim the Court credited "had not only behaved like a father; he had behaved like a *husband*."[34]

The requirement that the unmarried father "grasp the opportunity" that his biological connection affords served as a way to *limit* the recognition of nonmarital parent–child relations. Those seeking to challenge marital supremacy and provide more comprehensive protection to unmarried fathers sought to make the biological tie, standing alone, more significant as a constitutional matter. Attorneys for Lehr, the unmarried father, argued that "the liberty interest at stake is created by the biological relationship between parent and child."[35] The Court's opinion in *Lehr* was written by Justice Stevens, who had dissented in the Court's previous decision protecting the rights of an unmarried father on constitutional grounds.[36] Justices who had resisted rights for unmarried fathers were crafting a standard that was difficult for many men to meet, including the father in *Lehr*, whose claim the Court rejected.[37] Justices who would have

27. *Stanley*, 405 U.S. at 652.

28. *See* Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1649–50 (2015).

29. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2276–78 (2017).

30. *See* NeJaime, *supra* note 26, at 295–96.

31. Lehr v. Robertson, 463 U.S. 248, 262 (1983); *see* Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

32. *Lehr*, 463 U.S. at 261.

33. *See* Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 361 & n.78 (2012); *see also* Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2060–62 (2016).

34. *See* Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 402 (2012) (emphasis added).

35. *See* Appellant's Reply Brief at 5, *Lehr*, 463 U.S. 248 (No. 81-1756).

36. *See* Caban v. Mohammed, 441 U.S. 380, 414 (1979) (Stevens, J., dissenting).

37. *See Lehr*, 463 U.S. at 267–68.

extended more comprehensive protection to unmarried fathers dissented in *Lehr* and sought to make biological connection matter more. Justice White, for example, echoed Lehr's arguments and asserted that "[t]he 'biological connection' is itself a relationship that creates a protected interest."[38]

Importantly, the constitutional significance of biological connection differed for women and men. The Court required "biology-plus" from an unmarried father but treated a mother's legal status as flowing inevitably from biological facts—namely, pregnancy and birth.[39] As the Court asserted in *Lehr*: "The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures."[40]

Constitutional precedents required states to reform their parentage systems to include unmarried biological fathers. But rather than carefully distinguish between biological fathers based on whether they "grasped the opportunity" to form a parental relationship, states extended rights and responsibilities to biological fathers based largely on their biological tie to the child. In other words, states protected the status of men who would not merit constitutional protection under the Court's precedents. The constitutional standard of biology-plus appeared to matter primarily if the unmarried biological father sought to challenge the child's adoption or displace another man acting as a father—usually the mother's husband.[41] Otherwise, biological fathers could establish their parentage by attesting to their genetic parentage or using blood test evidence. The 1973 Uniform Parentage Act (UPA), which many states adopted, connected biological paternity to legal parentage in explaining that "blood test evidence will go far toward stimulating voluntary settlements of actions to determine paternity."[42]

States, however, were not acting simply to protect unmarried fathers' rights. They also sought to vindicate the rights of nonmarital children, who the Court repeatedly ruled had the same interest in paternal support that marital children enjoyed.[43] The 1973 UPA aimed to extend legal recognition "equally to every child and to every parent, regardless of the marital status of the parents."[44] Establishing paternity was necessary to secure an award of child support from the father of a nonmarital child. Seeking to make such establishment straightforward, states authorized mothers, children, and the government to impose parentage on biological fathers based on biological evidence alone.[45] Ultimately, biological par-

38. *Id.* at 272 (White, J. dissenting).
39. *See id.* at 260 & n.16 (majority opinion).
40. *Id.* at 260 n.16 (quoting *Caban*, 441 U.S. at 397).
41. *See, e.g.*, *In re* Adoption of Anderson, 624 S.E.2d 626 (N.C. 2006) (adoption).
42. *Id.*
43. *See, e.g.*, Clark v. Jeter, 486 U.S. 456 (1988); Pickett v. Brown, 462 U.S. 1 (1983); Mills v. Habluetzel, 456 U.S. 91 (1982); Gomez v. Perez, 409 U.S. 535 (1973).
44. UNIF. PARENTAGE ACT § 2 (UNIF. LAW COMM'N 1973).
45. *See id.* § 12 cmt.

entage became the organizing principle for a more just parentage regime that sought to eradicate discrimination against nonmarital children.

Of course, more straightforward paternity establishment promoted other government interests. Using biological connection to determine paternity, and thus to collect child support, aided the government's efforts to privatize dependency.[46] States, increasingly empowered by federal legislation and regulations, sought to establish legal parentage for unmarried biological fathers and to enforce child support orders against such men.[47] In response to federal intervention, states developed acknowledgments of paternity to easily and quickly identify legal fathers for nonmarital children. As the 2002 UPA explained: "The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man's paternity."[48] Federal law required that states treat the acknowledgment—an administrative form signed by the birth mother and the man purporting to be the biological father—as equivalent to a court judgment.[49]

When a mother applies for means-tested government benefits for her and her child, states are incentivized by federal legislation to initiate complaints against the biological father—to establish paternity if an acknowledgment has not been signed and to pursue child support.[50] The child's mother must cooperate in the state's action.[51] And much of the money, if any, recouped from the father is used to reimburse the government for the aid it distributed, rather than given to the mother and child.[52] From this perspective, biological connection, which had been the basis for progressive reform vindicating nonmarital families, also provides a logic for the state to regulate nonmarital procreation, subject mothers and fathers to oversight, and shift the government's financial obligations to private actors.

It is important to recognize that even as biological connection has become a basis on which to legally recognize a wide range of nonmarital parent–child relations, federal and state laws continue to draw troubling distinctions between marital and nonmarital biological children.[53] None-

46. *See generally* Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2344 (codified as amended in scattered sections of 42 U.S.C.); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S. code).

47. *See* 102 Stat. 2344; 110 Stat. 2105.

48. UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM'N 2002).

49. Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 476 (2012).

50. *See* Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified at 42 U.S.C. §§ 666–667). As Part D of the Social Security Act, Congress created the Office of Child Support Enforcement in 1975. Social Services Amendment of 1974, Pub. L. No. 93-647, 88 Stat. 2337, 2351 (1975) (codified as amended at 42 U.S.C. §§ 651–652).

51. 42 U.S.C. § 654(29) (2018); CONN. GEN. STAT. § 46b-169 (2020).

52. *See, e.g.*, 42 U.S.C. § 654(29); CONN. GEN. STAT. § 46b-169; State *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273, 1275 (Kan. 1993).

53. For example, federal law regulating derivative citizenship makes it more difficult for a child to acquire citizenship through a nonmarital citizen father than through a marital

theless, biological connection was constructed as a potent remedy—both in constitutional doctrine and family law—for the nonrecognition of nonmarital parent–child relations. As the next Part shows, that remedy produced the very structure that today creates and perpetuates new forms of illegitimacy.

III. ILLEGITIMACY'S PRESENT: THE EXCLUSIONARY MEANING OF BIOLOGY

To defend marriage's primacy, traditionalists once rejected biological connection as a sufficient basis for parentage. Today, opponents of a more expansive parentage regime valorize biology in ways that exclude parents and children from legal recognition. They present biological connection not as a recent progressive intervention in parentage law but instead as a timeless truth. Law, on this view, merely reflects a natural and pre-political status.

As the long history of illegitimacy demonstrates, the law for centuries refused to recognize many biological parent-child relationships. At the same time, Anglo–American law recognized nonbiological parent–child relationships absent adoption. In cabining parentage within marriage, the law authorized the recognition of nonbiological father–child bonds. The marital presumption, also referred to as the presumption of legitimacy, treated the husband as the father of the child to whom his wife gave birth, even if the husband was not in fact the biological father. Given the high cost of illegitimacy, the law made the marital presumption practically conclusive.[54]

Even as the circumstances under which the marital presumption can be challenged have grown, the nonbiological operation of the presumption has persisted. In fact, in adjudicating a contest between a nonbiological father who claimed the marital presumption and the unmarried biological father who sought to establish his paternity, the U.S. Supreme Court in 1989 not only permitted but defended the power of marriage to confer parentage on a nonbiological father.[55] In his plurality opinion in *Michael H. v. Gerald D.*, Justice Scalia read the Court's precedents to stand for "the historic respect . . . traditionally accorded to the relationships that develop within the unitary family."[56] To extend protection to the unmarried biological father, Scalia reasoned, would unduly "*deny* protection to a marital father."[57]

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citizen father. *See* Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2136 (2014). State probate law as well continues to distinguish marital and nonmarital father-child relationships for inheritance purposes. *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 357–60 (2011).

54. *See, e.g.*, Phillips v. Allen, 84 Mass. (2 Allen) 453, 454 (1861).

55. *See* Michael H. v. Gerald D., 491 U.S. 110, 111 (1989) (plurality opinion).

56. *Id.* at 123.

57. *Id.* at 130 (emphasis in original).

In the second half of the twentieth century, family law adapted the marital presumption—and specifically its use in recognizing nonbiological parentage—to assisted reproduction. Through case law and legislation, states recognized husbands as legal fathers when their wives gave birth to children conceived with donor sperm.[58] So long as the sperm was used by a married woman, the donor was not the child's legal father but instead merely a source of genetic material.[59]

In an age of marriage equality, courts and legislatures have confronted the application of the marital presumption to same-sex couples. When a woman in a married same-sex couple gives birth to a child conceived with donor sperm, her wife should be treated as the child's legal parent. State legislators have revised their statutory marital presumptions to recognize the *individual*, rather than the *man*, married to the woman who gives birth.[60] And most courts that have considered the question have held that the nonbiological mother is a legal parent.[61] The U.S. Supreme Court, in its 2017 *Pavan v. Smith* decision, ordered Arkansas to issue birth certificates that list both women in a married same-sex couple as parents when one of them gives birth to a child conceived with donor sperm.[62] On this view, the marital presumption reflects not biological parentage but a social understanding of parenthood—aiming to protect the relationships that children have with those who exercise responsibility for their care.[63] Even so, some opponents of LGBTQ equality have continued to press biological arguments to oppose application of the marital presumption to married same-sex couples.[64]

Marriage long authorized the legal recognition of nonbiological fathers and today recognizes nonbiological mothers.[65] Outside of marriage, as we have seen, biological connection became the foundation for parental recognition.[66] It is not surprising, then, that unmarried nonbiological parents and their children are subject to especially harsh treatment. Today, parents who are not married to the birth parent and have not adopted struggle for parental recognition without a biological tie. Indeed, the very attribute that facilitated law's repudiation of illegitimacy has become the justification for what Polikoff has labeled "the new 'illegitimacy.'"[67] The

58. *See* NeJaime, *supra* note 29, at 2292–93.
59. *See id.* at 2296.
60. *See id.* at 2294–95.
61. *See id.* at 2295.
62. *See* Pavan v. Smith, 137 S. Ct. 2075, 2078–79 (2017) (per curiam).
63. *See, e.g.*, Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 350–54 (Iowa 2013).
64. *See, e.g.*, Petition for Writ of Certiorari at 22–31, Box v. Henderson, 141 S. Ct. 953 (2020) (No. 19-1385), 2020 WL 3316793.
65. *See Pavan*, 137 S. Ct. at 2078–79.
66. *See* NeJaime, *supra* note 26, at 295–96.
67. *See* Polikoff, *supra* note 9, at 722 ("[O]btaining parental rights based upon the legal relationship between . . . two mothers, without simultaneously creating parentage for a partner who is not married to a birth mother, . . . revives the discredited distinction between 'legitimate' and 'illegitimate' children."). While my focus is on the legal treatment of unmarried nonbiological parents generally, the treatment of "the new 'illegitimacy'" by Polikoff and other scholars largely has focused on lesbian mothers in particular—a critical

nonbiological parent's lack of a genetic tie justifies her treatment as a legal stranger to her child.[68] The biological parent's special status, as a matter of both constitutional doctrine and family law, justifies her ability to exclude the child's nonbiological parent. Given biology's potent role on both sides of the parental ledger, the problem presented by the new illegitimacy appears even more intractable.

Now, as then, questions of equality and inequality shape understandings of illegitimacy. As Friedman shows, gender and class structured the meanings and implications of illegitimacy in nineteenth-century England.[69] Legal and social condemnation of illegitimacy served as a means to punish female sexuality and to insulate upper-class men from claims on their property.[70] In the U.S., where "children of a slave mother were themselves slaves from birth"[71] regardless of the identity of the father, the illegitimacy regime propped up slavery and licensed sexual exploitation of black women by white men.[72] Since then, the regulation and meaning of illegitimacy have remained critical to race- and class-based subordination.[73]

The lack of recognition for *nonbiological* parent–child relationships does not fall equally on all parents and children. It falls most heavily on LGBTQ parents and their children.[74] Same-sex couples are not similarly situated to different-sex couples with respect to sexual procreation and biological parenthood; they "necessarily include a parent without a gestational or genetic tie to the child, and thus are especially vulnerable in a parentage regime where recognition turns on biological connection."[75] A parentage regime that premises parental recognition on biological connection does not furnish equality to same-sex couples, even if such a regime treats same-sex and different-sex couples the same.

Nonbiological parents in same-sex couples are routinely told they should remedy their lack of parental recognition through the formal legal statuses now available to them in an age of LGBTQ equality. They can secure parentage by marrying the biological parent before the child's birth or by adopting after the child's birth. Today, marriage in the U.S. is increasingly correlated with race and class. While childrearing rates among married and unmarried individuals in the U.S. are similar, those raising children inside a marital family tend to be more white, higher in-

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category of nonbiological parents to which I also direct attention in this essay. *See, e.g.*, Grossman, *supra* note 13, at 672 (describing the "'new 'illegitimacy'" as "a regime in which the rights and welfare of the children of lesbians are dependent on the marital status of their parents, reminiscent of an almost forgotten era in which the same was widely true of all children").

68. *See* Polikoff, *supra* note 9, at 722.
69. *See* Friedman, *supra* note 7.
70. *Id.* at 3–5, 8.
71. *Id.* at 25.
72. *See id.*
73. *See* Appleton, *supra* note 33, at 351–53; Murray, *supra* note 34, at 414-16.
74. *See* NeJaime, *supra* note 29, at 2297.
75. *Id.*

come, and better educated than their unmarried counterparts.[76] The other option, adoption, is a costly, invasive, and time-consuming process.[77] And many parents do not realize they need to adopt their own children.[78]

More importantly, requiring such formal steps reflects and carries forward not only the discriminatory treatment of nonmarital parents and children but also the exclusion of LGBTQ people from legal constructions of the family. While both parents in the typical different-sex couple will be recognized as legal parents without taking formal steps, both parents in the typical same-sex couple will lack such legal recognition without additional steps. This would be the case even if, as in the *Hawkins* case with which this essay began, both women planned to be parents of the child and both parented the child for several years.[79] As *Hawkins* devastatingly illustrates, one parent in the same-sex couple begins from the default position of legal stranger.[80] As Polikoff bluntly states: "The child of two heterosexuals who are not married has two parents. The child of two lesbians deserves the same."[81]

IV. PARENTAGE REFORM TODAY: PROTECTING NONBIOLOGICAL PARENTS AND CHILDREN IN NONMARITAL FAMILIES

Today, biological connection—the very factor invoked to repudiate the discriminatory regime of illegitimacy and to vindicate parent–child bonds forged in nonmarital families—is invoked to prop up a new form of discriminatory illegitimacy and to exclude parent–child bonds formed in nonmarital families. The constitutional precedents that secured rights for unmarried fathers and their children are cited today to leave unmarried nonbiological parents without protection and to empower biological parents to shut out nonbiological co-parents. The family law statutes elaborated to attach parental rights and responsibilities to unmarried biological fathers and to protect nonmarital children are applied today in ways that render unmarried nonbiological parents legal strangers to their children.

This must change. It is time to shift the law's understanding of the status of biological connection—an understanding that is not inevitable but instead emerged from fierce legal and social contestation in the twentieth century. In the twenty-first century, acceptance of LGBTQ family formation, rising rates of assisted reproduction, declining marriage rates, and increasingly diverse family arrangements have produced a moment of

76. *See* PEW RES. CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 9, 11, 111 (2010). Of course, the race and class dimensions of marriage may differ with respect to LGBTQ people. *See* GARY J. GATES, DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY 1–2 (2015).

77. *See* NeJaime, *supra* note 29, at 2317.

78. *See id.* at 2320.

79. *See* Hawkins v. Grese, 809 S.E.2d 441 (Va. Ct. App. 2018).

80. *See id.*

81. Polikoff, *supra* note 9, at 740.

reckoning—an opportunity to reject and remedy new forms of illegitimacy.

Legal reform efforts in the twentieth century made visible the forms of subordination that the illegitimacy regime reflected and perpetuated. The harsh legal treatment of the nonmarital family constituted part of a broader legal system that denigrated black and poor families and that disciplined female sexuality.[82] While these equality concerns may not be obvious on the face of judicial decisions and legislative enactments protecting the rights of nonmarital parents and children, they shaped claims that courts confronted and motivated advocacy for legislative reform.[83]

Today, equality concerns are again motivating reform efforts. A parentage regime that affords legal status to unmarried nonbiological parents would extend recognition to LGBTQ parents and their children and would protect children regardless of their parents' marital status—an increasingly urgent need in light of declining marriage rates.[84]

Courts and lawmakers are acting on these concerns. New York's highest court recognized the relationship between nonbiological parental recognition and LGBTQ equality in its 2016 *Brooke S.B. v. Elizabeth A.C.C.* decision.[85] Brooke and Elizabeth were in a committed relationship when they decided to have a child together. Elizabeth gave birth to a child conceived with donor sperm, and the two women raised the child together.[86] In fact, after Elizabeth's maternity leave, Brooke became the child's primary caretaker.[87] When their relationship dissolved, they continued to co-parent the child. But, as in *Hawkins*, the biological mother eventually cut off the child's contact with the nonbiological mother.[88]

When confronted with Brooke's claim for parental recognition, the court reflected on how the legal landscape had changed in the years since its 1991 decision in *Alison D. v. Virginia M.*[89] In that case, the court had denied legal protections to a nonbiological same-sex parent, holding that, even though the nonbiological mother had "a close and loving relationship with the child, she is not a parent within the meaning of [the law]."[90] As "a biological stranger to [the] child,"[91] she was simply a nonparent

82. *See* Appleton, *supra* note 33, at 351–53; *see also*, *e.g.*, ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS 3–9 (2009); Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 107–09 (2003).

83. *See* Serena Mayeri, *Intersectionality and the Constitution of Family Status*, 32 CONST. COMMENT. 377, 377–78 (2017).

84. *See* Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 495–96 (2014).

85. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

86. *Id.* at 491.

87. *Id.*

88. *See* Douglas NeJaime, *The Story of* Brooke S.B. v. Elizabeth A.C.C.*: Parental Recognition in the Age of LGBT Equality*, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 245, 250 (Melissa Murray, Kate Shaw, & Reva Siegel eds., 2019); Hawkins v. Grese, 809 S.E.2d 441 (Va. Ct. App. 2018).

89. Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991).

90. *Id.* at 28.

91. *Id.*

seeking to infringe on the biological mother's authority to exclude third parties.[92] At the time of that decision, no state had permitted same-sex couples to marry, and no state appellate court had approved second-parent adoptions for same-sex couples.[93] Equality for LGBTQ people, at that moment, was clearly not a judicial or legislative priority.

By the time of *Brooke S.B.*, legal and social views on LGBTQ equality had changed dramatically. Same-sex couples could marry nationwide—a right protected by the U.S. Supreme Court as a matter of both liberty and equality.[94] Child-rearing had figured centrally in the shift to marriage equality.[95] Rejecting the government's interest in biological, dual-gender parenting as a justification for excluding same-sex couples from marriage, the Court not only accommodated but celebrated same-sex parenting.[96] On this view, marriage equality vindicated nonbiological parent-child relationships.[97]

The *Brooke S.B.* court reasoned that marriage equality rendered "*Alison D.*'s foundational premise of heterosexual parenting and nonrecognition of same-sex couples . . . unsustainable."[98] The "premise of heterosexual parenting"—sexual procreation and biological parenthood—presented a problem for the treatment of same-sex couples not only with respect to marriage but also with respect to nonmarital parenting.[99] The *Brooke S.B.* court clearly identified the law's problematic differential treatment between different-sex and same-sex couples:

> Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing [as a legal parent], as only one can be biologically related to the child. By contrast, where both partners in a heterosexual couple are biologically related to the child, both former partners will have standing regardless of marriage or adoption.[100]

In order to fully include LGBTQ parents in the parentage regime, the state needed to supply parental recognition to unmarried nonbiological parents by operation of law. Such an approach, the court declared, "ensures equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents."[101]

In other work, I have examined at length reforms that would produce a parentage regime that not only treats LGBTQ parents and their children as fully belonging, but also ensures that children being raised in a range

92. *See id.* at 29.
93. *See* NeJaime, *supra* note 88, at 252.
94. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).
95. *See id.* at 646.
96. *See id.* at 668, 679; *see also* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1239–40 (2016).
97. *See* NeJaime, *supra* note 96, at 1240.
98. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 498 (N.Y. 2016).
99. *See id.*
100. *Id.* (citation omitted).
101. *Id.* at 498–99.

of nonmarital families have the security that legal parentage provides.[102] Pathways to parentage must be available to nonbiological parents without requiring marriage or adoption. To be clear, biological avenues to parentage would remain, but new avenues would be added. At a general level, parental recognition would arise not only from marital, biological, and adoptive relations, but also from intentional and functional relations.[103]

Intent-based parentage rules can address nonbiological parents who have children through assisted reproduction. As the *Brooke S.B.* court concluded, "where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody."[104] If such rules are designed so that they do not distinguish between individuals based on marital status, gender, or sexual orientation, they have the capacity to recognize a nonbiological unmarried parent as a legal parent based simply on the person's consent to assisted reproduction.[105] The laws of a growing number of jurisdictions, as well as the 2017 Uniform Parentage Act (UPA), take this approach.[106] And, following the UPA, some states now allow intended parents, including unmarried nonbiological parents, to establish parentage through a voluntary acknowledgment of parentage—an update to the voluntary acknowledgment of paternity maintained in every state.[107] On this view, parental intent is the new biology—ensuring the repudiation of illegitimacy.

Functional, or conduct-based, parentage rules can also protect parent–child relationships that have developed outside of biology, marriage, or adoption, regardless of whether the family was formed through assisted reproduction. LGBTQ individuals, as well as others in nonmarital family arrangements, form such parental relationships.[108] Recognizing parentage based on the existence of the parent–child relationship meets the needs of a diverse range of families and protects children by affording them the security of legal parentage.[109] Common law and equitable doctrines, recently enacted statutes, and the 2017 UPA take this approach.[110] A Delaware statute, for example, requires that the person claiming parentage have "acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that

102. *See* NeJaime, *supra* note 29, at 2337–47.

103. *See id.*

104. *Brooke S.B.*, 61 N.E.3d at 490.

105. *See* Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1222–23 (2010); NeJaime, *supra* note 29, at 2345.

106. *See, e.g.*, UNIF. PARENTAGE ACT §§ 703, 704 (UNIF. LAW COMM'N 2017); ME. STAT. tit. 19-A, § 1923 (2020).

107. *See, e.g.*, UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM'N 2017); WASH. REV. CODE § 26.26A.200 (2020); VT. STAT. ANN. tit. 15C, § 301(b) (2021).

108. *See* Joslin, *supra* note 84.

109. *See* Courtney G. Joslin, *De Facto Parentage and the Modern Family*, 40 FAM. ADVOC. 31, 31 (2018).

110. *See, e.g.*, UNIF. PARENTAGE ACT § 609 (UNIF. LAW. COMM'N 2017); *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005).

is parental in nature."[111] On this view, parental conduct is the new biology—ensuring the repudiation of illegitimacy.

Some jurisdictions have resisted functional parental recognition out of concern for the constitutional rights of the biological parent.[112] On this view, the biological parent possesses constitutional authority to exclude the nonbiological parent from the child's life.[113] The nonbiological parent, then, is merely a third party.[114] This is true even if the nonbiological parent is a parent from the child's perspective.[115] That is, the legal determination does not turn on whether, in developmental terms, the person is a primary attachment figure or, in the famous term of Joseph Goldstein, Anna Freud, and Alfred Solnit, a psychological parent.[116]

Many states have met this constitutional objection to functional parentage by articulating a standard that requires the biological (or adoptive) parent's consent or acquiescence to the formation of a parental relationship between the functional parent and the child—a standard that the nonbiological mother would likely have met in *Hawkins*.[117] As the New Jersey Supreme Court explained in a case involving an unmarried same-sex couple, "the biological or adoptive parent . . . must have fostered the formation of the parental relationship between the third party and the child."[118] More specifically, the court reasoned that "the legal parent [must have] ceded over to the third party a measure of parental authority and autonomy and granted to that third party rights and duties vis-à-vis the child that the third party's status would not otherwise warrant."[119] On this view, the biological parent who willingly allows another individual to form a parental relationship with the child cannot later be heard to object to the other parent's legal recognition.[120]

By facilitating the legal recognition of nonbiological parents, this common approach has been critical to the wellbeing of parents and children in nonmarital families. Nonetheless, it proceeds from problematic assumptions about who is a parent and who is a "third party," which often turn on views about biological ties. If biological parental bonds, but not nonbiological (nonadoptive) parental bonds, bestow special entitlements,

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111. DEL. CODE ANN. tit. 13, § 8-201(c)(3) (2020).

112. *See* Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U.J. GENDER SOC. POL'Y & L. 623, 624 & n.7 (2012).

113. *See, e.g.*, Hawkins v. Grese, 809 S.E.2d 441 (Va. Ct. App. 2018).

114. *See id.*

115. *See id.* at 443–44.

116. *See* Anne Alstott, Anne Dailey & Douglas NeJaime, *The Legal Imperative of Parental Care* (manuscript on file).

117. *See* Grossman, *supra* note 13, at 718 ("The 'implied consent' of de facto parentage . . . speaks directly to the relevant question: did the biological mother intend to share her otherwise absolute parental rights with another adult?").

118. V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000).

119. *Id.*

120. *See In re* M.F., 475 P.3d 642, 661 (Kan. 2020) (holding that "proof [the biological mother] implicitly or explicitly *consented* to share parenting with [the nonbiological mother] at the time of [the child's] birth is indispensable to constitutional application of the statutory presumption at issue").

then a conflict between two psychological parents—one who is a biological parent and the other who is a nonbiological parent—appears as a conflict between a parent and a third party. That is, even this more inclusive approach to functional parentage that many states have adopted depends on a distinction between parents and nonparents that continues to view the functional parent presumptively as a nonparent. And even though a legal or adoptive parent is granted the same right to exclude as a biological parent, this approach still proceeds from the "premise of heterosexual parenting."[121] It envisions biological parents as the gold standard and views nonbiological parents skeptically—either as substitute parents created by state law or as outsiders attempting to impinge on the special status of biological parents.

If instead one views the functional parent as a legal parent, based on the conduct of that parent, rather than on the consent of the biological or adoptive parent, one would view the nonbiological parent as possessing the same rights and responsibilities as the biological or adoptive parent. The nonbiological parent's status may arise from developing a relationship with the child that is "parental in nature"[122] or by "holding out"[123] the child as her own for a statutorily prescribed period of time. Parentage would not arise merely from exercising caretaking responsibility or helping the other parent, as a stepparent, cohabiting partner, or extended family member might. Rather, parentage would arise out of assuming the role of *parent*.[124] On this view, both the functional parent and the other legal parent would be understood to possess parental rights. Both have the right to exclude third parties, but neither has the right to exclude each other.[125]

As importantly, the nonbiological parent, just like her biological counterpart, has constitutionally protected interests in parental recognition. In jurisdictions like Virginia that refuse to extend parental recognition as a family law matter, the nonbiological parent may possess a liberty interest in the relationship with her child. As Part II explained, when extending protections to unmarried fathers in the 1970s and 1980s, the U.S. Supreme Court began with the significance of the biological connection.[126] But it also emphasized the act of parenting. Indeed, as the Court continued to consider the claims of unmarried fathers, constitutional protection

121. *See* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 498 (N.Y. 2016).

122. *See, e.g.*, UNIF. PARENTAGE ACT § 609(d)(5) (UNIF. LAW COMM'N 2017) (requiring that "the individual [claiming de facto parentage] established a bonded and dependent relationship with the child which is parental in nature").

123. *See, e.g.*, *id.* § 204(a)(2) (requiring that "the individual 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").

124. *See id.*

125. *See* NeJaime, *supra* note 26, at 328–29. *Cf. In re* Parentage of L.B., 122 P.3d 161,178 (Wash. 2005) (reasoning that because state "common law recognizes the status of *de facto* parents and places them in parity with biological and adoptive parents . . . *both* [women] have a 'fundamental liberty interest[ ]' in the 'care, custody, and control' of [the child]") (third alteration in original).

126. NeJaime, *supra* note 26, at 280.

came to turn on the social, rather than biological, dimensions of parenthood.[127] As I have explained, "biological paternity was not sufficient to garner constitutional rights. Instead, the Court required that the man 'act[ ] as a father.'"[128] Moreover, "[w]hen the Court refused to protect the unmarried biological father on constitutional grounds, it usually cleared the path for a nonbiological father—the man married to the mother—to enjoy parental status under state law,"[129] either by virtue of adoption or based on the marital presumption.[130] Although liberal reformers at the time attempted to attach greater constitutional significance to the biological tie, the Court's appeal to the social act of parenting can support progressive arguments today. The Court's precedents can bolster the view that the social act of parenting, rather than the biological tie, merits constitutional protection.

As I have argued at length, constitutional principles today point toward the protection of nonbiological parent–child relationships:[131]

> Such protection . . . recognizes the difficult work of parenting that individuals undertake in a range of family configurations. It values care work and parental responsibility[,] . . . promotes children's interests by safeguarding their relationships with their psychological parents[, and] . . . serves important equality interests.[132]

In particular, the legal recognition of nonbiological parent–child bonds is necessary to treat LGBTQ parents as truly belonging.[133] Such an approach is not a repudiation of the precedents on unmarried fathers. Instead, it extends and updates key insights from those precedents—valuing the social dimensions of parenthood and vindicating emergent equality principles with respect to family arrangements that law and society now deem worthy of respect.[134] Moreover, protecting nonbiological parent–child relationships carries forward commitments to repudiate illegitimacy and provide equal treatment to nonmarital parents and children—commitments that were forged in an earlier era but retain their importance.[135]

Rather than proceed from the assumption that the biological parent, but not the nonbiological parent, has constitutionally protected rights, states can act on the understanding that those who have formed parent–child relationships possess interests of constitutional magnitude.[136]

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127. *See id.*
128. *Id.* (alteration in original).
129. *Id.*
130. *See* Michael H. v. Gerald D., 491 U.S. 110, 123–24 (1989) (plurality opinion) (discussing the marital presumption); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (discussing adoption).
131. *See generally* NeJaime, *supra* note 26, at 280.
132. *Id*. at 355.
133. *See id.* at 355–58.
134. *See id.* at 356–57.
135. *See id.* at 333.
136. *See id.* at 372 (explaining how states might legislate based on the understanding that nonbiological parents possess constitutional interests in developed parent-child relationships).

Further, the children themselves, who benefit from relationships with their psychological parents and who experience trauma when such relationships are disrupted, have interests at stake that both family law and constitutional doctrine can recognize.[137] States that have moved to reform their parentage laws—to repudiate the new illegitimacy—have explicitly linked their efforts to the equality interests of LGBTQ parents, the urgent need to protect children, and the constitutional legacy that such reform carries forward.[138]

V. CONCLUSION

Today, the repudiation of illegitimacy requires comprehensive protection for nonbiological parent–child bonds. It requires law and society to challenge the foundation on which the old illegitimacy was repudiated. It requires seeing biological connections as a mode of inclusion in parenthood, rather than a mode of exclusion. It requires appreciating that the very framework built to accommodate families as they exist and to repudiate historical forms of subordination, today is being used as a tool to refuse to accommodate families as they exist and to perpetuate historical forms of subordination. Biological connection, to be sure, has a role to play in the law of parental recognition. But it has no role to play in excluding families who have long been excluded, in punishing parents who fail to conform to conventional norms, and in destroying children's relationships with their psychological parents. For the same reasons that the law repudiated earlier forms of illegitimacy, it should repudiate modern illegitimacy. But today, unlike in an earlier era, biological connection does not provide the path forward and instead simply stands in the way.

137. *See, e.g.*, JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 254–79 (2006).

138. *See* NeJaime, *supra* note 26, at 329–40.