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## Thoroughly Modern Motherhood

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# THOROUGHLY MODERN MOTHERHOOD

Joanna L. Grossman\*

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## I. INTRODUCTION

AS explored in Lawrence Friedman’s introductory essay in this symposium,<sup>1</sup> many a Victorian novel revolved around a simple reality: children born to unmarried mothers had “no name.” These children existed in reality, of course, but not in law. They had neither mothers nor fathers, as far as the law was concerned, even though they might have lived in a house being raised by the two people who gave them life. They did not inherit property from those adults, nor benefit from their social reputation. Quite the contrary—they represented a rejection of conventional social norms that resulted in the loss of respect from polite society. As a plot point, the birth of an illegitimate child could be and often was the basis for all sorts of intrigue—disrupted inheritance lines, secret affairs, bigamy, sibling rivalry, and so on.

Art imitates life—and law. The reason that a revelation of a bastard child could sustain an entire scintillating novel (scores of them, in fact) is that the plight resonated with readers who understood that the novel spoke the truth about the society in which they lived. But the simplicity of the plight—that a child born to an unmarried woman had “no name”—belies a complex set of interlocking legal and social norms that produced and reinforced that status. The fate of these children and their mothers was not an unfortunate side effect but rather the intended result of a system designed to confine sex to marriage—and to punish harshly those who transgressed the norm. The norm was maintained through several different legal doctrines, each carrying some of the weight of keeping unmarried pregnant women in their places. In this Essay, I will explore

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1. Lawrence M. Friedman, *No Name*, 74 SMU L. REV. 235 (2021).

those intersecting doctrines first in their original form (and as the backdrop for Victorian novels) and then in their modern form, with an account of the changing social norms that led us from one place to the other.

## II. MARRIAGE, PARENTAGE, AND THE COST OF TRANSGRESSION

The story of the Vanstone family, depicted in Wilkie Collins's novel *No Name*<sup>2</sup> and discussed in Lawrence Friedman's piece by the same name, is a perfect focal point for understanding the set of family law and inheritance law rules that dictated the consequences of having a "no name" baby. In short, Andrew Vanstone and his wife (speaking of names, she isn't even given one in the novel) live with their two daughters, Norah and Magdalen; the wife is pregnant with a third. He dies in an accident; then she dies in childbirth; then, a few hours later, the baby dies too. Only after the death of their parents and newborn sibling do the two daughters learn a well-kept family secret: Andrew had married another "unsuitable" woman abroad before he met their mother. This twist makes family and inheritance laws central to the plot. When he returned and became involved with another woman, he and the no-name woman assumed they were married, but they were not. Norah and Magdalen were thus illegitimate children before they were orphans. When Andrew learned that his first wife had died, he and the mother of his children secretly married. Their third child, who lived only briefly, was therefore legitimate. Norah and Magdalen, however, were thrust into a lifelong drama arising from their status at birth as "no name" children.

A variety of different legal doctrines come into play to make this story work. Let's begin with the adult relationships involved in this story. When Andrew Vanstone became involved with the woman who would become the mother of his three children, he was already married to another woman. Under the laws of bigamy (then and now, in England and in the United States), an individual can have only one spouse at a time.<sup>3</sup> An attempted marriage to a second person is void from the outset, regardless of whether they go through the motions of obtaining a marriage license and having their union solemnized by an officiant.<sup>4</sup> The attempt to marry a second time was also a crime, as was sex with the second partner (adultery).<sup>5</sup> Bigamy was also more common in the Victorian era; information

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2. WILKIE COLLINS, *NO NAME* (Dover Publications 1978) (1862).

3. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 197–201 (1993); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 361–62 (2004).

4. See, e.g., S.C. CODE § 20-1-80 (2020) ("All marriages contracted while either of the parties has a former wife or husband living shall be void.").

5. See, e.g., N.Y. PENAL § 255.15 ("A person is guilty of bigamy when he contracts or purports to contract a marriage with another person at a time when he has a living spouse, or the other person has a living spouse. Bigamy is a class E felony."). See generally Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 752–53 (2005); Maura Strassberg, *The Crime of*

did not travel fast, and a man could just pick up and move to a new town and start over again, with a second wife none the wiser.<sup>6</sup> Any children produced in that second, invalid relationship would be illegitimate. Vanstone's third child was saved by the death of his first wife, which freed him up to marry the mother of his two daughters before the birth of the third.

The plot really thickens when we turn from the rules regarding marriage to those regarding parent–child relationships. Under English law, marital status was the exclusive determinant of both legitimacy and parentage: a child born to married parents was legitimate, and the legal parents were the woman who gave birth to the child and her husband.<sup>7</sup> The husband's parentage was the product, technically, of the “marital presumption,” which assumes that a woman's husband is the biological father of the offspring born to her during the marriage.<sup>8</sup> In the English version, this rule was conclusive, absent proof that the husband was “out of the kingdom” during the period when conception must have occurred.<sup>9</sup> It was reinforced by Lord Mansfield's rule, which “prevented either spouse from giving testimony that cast doubt on the husband's biological paternity.”<sup>10</sup> This meant, practically speaking, that husbands were deemed legal fathers regardless of any biological tie to the children born to their wives. Thus, marital status and parentage were one and the same—a married mother bestowed legitimacy upon her children.

The plight of illegitimate children was the converse: rather than having two legal parents regardless of biological ties to the father, a child born to an unmarried mother had none, regardless of biological or caretaking ties to both mother and father. An unmarried mother gave birth to a child deemed *filius nullius*—the child of nobody.<sup>11</sup> As described by Blackstone, “I proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can *acquire*; for he can *inherit* nothing, being looked upon as the son of nobody, and sometimes

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*Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353 (2003); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253 (2009); Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327, 1345–47 (2008); Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45 (1992).

6. See Lawrence M. Friedman, *Crimes of Mobility*, 43 STAN. L. REV. 637, 640–50 (1991).

7. See Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 562 (2000); see also MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994).

8. Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 248 (2019).

9. See Leslie Joan Harris, *Obergefell's Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 72 n.90 (2017).

10. *Id.*

11. Norma Adams, *Nullius Filius: A Study of the Exception of Bastardy in the Law Courts of Medieval England*, 6 U. TORONTO L.J. 361, 377 (1946). This rule, in turn, had Roman roots. See Horace H. Robbins & Francis Deák, *The Familial Property Rights of Illegitimate Children: A Comparative Study*, 30 COLUM. L. REV. 308, 310–11 (1930).

called *filius nullius*, sometimes *filius populi*.”<sup>12</sup> This meant that the child could not inherit from either biological parent, and that the parents could not inherit from the child. It also meant that neither parent was obligated to support the child. Mothers may have raised illegitimate children in this era, but the legal status that might have given rise to rights or obligations was nonexistent.

As these principles were adopted into early American law, they were similar in structure but never quite as harsh in practice. Marital status did often determine (or preclude) parentage, but the formal rule was sometimes ignored in favor of recognition of a tie between nonmarital children, their mothers, and maternal kin.<sup>13</sup> By the end of the nineteenth century, the formal rule was replaced by one that recognized the ties between illegitimate children and unmarried mothers.<sup>14</sup> Unwed fathers were categorically disavowed under the law in most states, at least in terms of whether they qualified as legal parents.<sup>15</sup> Despite their lack of recognition (and a concomitant lack of parental rights), unwed biological fathers began to be subjected under state law to financial obligations.<sup>16</sup> In the early twentieth century, states began to pass laws formalizing the obligation of parents to support their children; many of these were drafted expressly to cover fathers’ of out-of-wedlock children.<sup>17</sup> States established civil and criminal causes of action for “bastardy”—the act of fathering a child out of wedlock—that permitted support orders after proof of paternity.<sup>18</sup> Even where unwed fathers were subject to a legal obligation to support children, they generally did not have any parental rights.<sup>19</sup> Some of the laws formally imposed the obligation of support on mothers, but unwed mothers were practically charged with that regardless.<sup>20</sup> However, the financial obligations imposed on unwed biological fathers did not, as a general rule, come with parental rights.

For children born to married mothers, early American law embraced the marital presumption, often in its conclusive form, which meant no contrary evidence could be introduced to rebut it.<sup>21</sup> Over the course of the twentieth century, many states weakened the marital presumption from conclusive to rebuttable.<sup>22</sup> However, successful rebuttals were rare. As Theresa Glennon has noted, “the marital presumption prevailed in all

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12. 1 WILLIAM BLACKSTONE, COMMENTARIES \*458.

13. See MASON, *supra* note 7, at 24; see also MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 207–15 (1985).

14. See generally John Witte, Jr., *Ishmael's Bane: The Sin and Crime of Illegitimacy Reconsidered*, 5 PUNISHMENT & SOC'Y 327, 336–37 (2003).

15. See *id.* at 335.

16. *Id.* at 337.

17. 4 CHESTER G. VERNIER, AMERICAN FAMILY LAWS § 231, at 5 (1936).

18. *Id.*

19. See generally Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 614–18, 626–31 (2009).

20. See *id.*

21. See *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (plurality opinion) (describing and upholding conclusive marital presumption of paternity).

22. Feinberg, *supra* note 8, at 248–54.

but a very limited set of circumstances through the first half of the twentieth century.”<sup>23</sup> But even as scientific developments increased the capability of accurately determining paternity—first through blood-typing evidence that could be used to exclude a man as a father, and then through DNA testing that could be used to affirmatively prove paternity—courts continued to be reluctant to exclude husbands as fathers or to acknowledge biological fathers who were not husbands. The Wisconsin Supreme Court upheld a determination of husband-paternity despite blood-typing evidence that excluded him, significant evidence that he was stationed far away from his wife during the likely period of conception, and strong evidence of an extramarital affair and attempted cover-up.<sup>24</sup> That’s how strong the marital presumption was, even when it was technically rebuttable. The marital presumption was more than a stand-in for biology, however. It represented not only the state’s best guess as to the father of a married woman’s child but also the state’s normative preference. Sex with anyone else was taboo, even illegal perhaps, and the very process of making the determination of paternity could ruin the woman’s reputation and delegitimize her child, without any obvious offsetting benefit.<sup>25</sup> The cuckold was more likely to be a proper father than the interloper.

The laws that cemented the lesser status of nonmarital children—and the non-status of unwed fathers—were found in different, intersecting legal doctrines. The core regulation of parent–child relationships is found in the family law or domestic relations code of each state. There, one can find the basic rules about who qualifies as a parent and what rights come with that status. For example, the 1967 version of the Illinois Juvenile Court Act—a statute that would eventually be invalidated by the U.S. Supreme Court—defined “parent” to include both mother and father in the case of legitimate children, but only the mother in the case of illegitimate children.<sup>26</sup> But the true plight of the “no name” child resulted from the intersection of parentage laws with other areas of law, such as inheritance law and tort law.

23. Glennon, *supra* note 7, at 565.

24. See *Prochnow v. Prochnow*, 80 N.W.2d 278, 280–81 (Wis. 1957). The Wisconsin Supreme Court upheld the lower’s finding that the husband was the legal father, despite admitting the implausibility of the wife’s story. As the majority wrote, “Cynics, among whom we on this occasion we must reluctantly number ourselves, might reasonably conclude that Joyce, finding herself pregnant in February or early March, made a hasty excursion to her husband’s bed and an equally abrupt withdrawal when her mission was accomplished. The subsequent birth of a full-term child a month sooner than it would usually be expected if caused by this copulation does nothing to dispel uncharitable doubts.” *Id.* at 280.

25. On the law’s confinement of legitimate sex to marriage, see JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* (2011). One study in the 1940s found that 10% of children born to married women were fathered by someone other than the woman’s husband. See Chris W. Altenbernd, *Quasi-Marital Children: The Common Law’s Failure in Privette and Daniel Calls for Statutory Reform*, 26 FLA. ST. U. L. REV. 219, 227–28 (1999).

26. ILL. REV. STAT. 1972, ch. 37, § 701-14, *invalidated by Stanley v. Illinois*, 405 U.S. 645, 650 (1972).

Inheritance law dictates the passage of property upon a person's death. In Victorian England, the mechanisms of entail (created by a property owner in a will or other transfer) and primogeniture (intestate rule) meant that land often ended up in the hands of a parent's eldest son.<sup>27</sup> (*Downton Abbey* fans might recall that the opening premise of the show arose when a cousin of Lord Grantham sunk with the Titanic, dying without an obvious male heir.)<sup>28</sup> Although primogeniture never made it into American law, there were a variety of other rules that increased the likelihood that children would benefit from their parents' wealth. Intestacy laws provided some protection for children by providing that when a person dies without a will, their estate passes to a spouse and descendants. Despite significant differences between the English and American inheritance schemes, "no name" children, historically, would fare equally poorly in both systems.

In the American system, inheritance protections for children turn on legal parent-child status. In other words, the family law rules dictate whether two people are related as parent and child, and the inheritance laws dictate the rights of those who qualify as children. Children have three main inheritance protections. First, when a parent dies without a will, children inherit the estate unless there is a surviving spouse, in which case they either share the estate or get trumped, depending on the particular state's intestacy code.<sup>29</sup> Second, although only Louisiana has a forced share for children, most states have provisions designed to protect children against accidental disinheritance.<sup>30</sup> Thus, a child who is born or adopted after the execution of a parent's will or accidentally omitted from a will might be able to claim a share. This approach replaces the common law rule under which a man's premarital will would be invalidated by marriage and birth of a child, which was the traditional English rule.<sup>31</sup> Third, disinherited children usually have standing to file a will contest—and tend to be sympathetic figures to the judges or juries who decide whether to set aside a parent's will on grounds of incapacity, undue

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27. For more detail on the relevant English law, see Lloyd Bonfield, *Farewell Downton Abbey, Adieu Primogeniture and Entail: Britain's Brief Encounter with Forced Heirship*, 58 AM. J. LEGAL HIST. 479 (2018).

28. See Sarah Lyall, *Son and Heir? In Britain, Daughters Cry No Fair*, N.Y. TIMES, June 23, 2013, at A1 (discussing *Downton Abbey* plot and the gender inequity of primogeniture).

29. See generally Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J. L. & PUB. POL'Y 1, 10 & n.22 (2015).

30. On the history and evolution of Louisiana's forced heirship statute, see Katherine Shaw Spaht, Kathryn Venturatos Lorio, Cynthia Picou, Cynthia Samuel & Frederick W. Swaim, Jr., *The New Forced Heirship Legislation: A Regrettable "Revolution"*, 50 LA. L. REV. 409 (1990). On accidentally disinherited children, see Richard F. Storrow, *Family Protection in the Law of Succession: The Policy Puzzle*, 11 NE. U. L. REV. 98 (2019).

31. Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26, § 18 (Eng.); see also CORPUS JURIS SECUNDUM WILLS § 438 (2021).

influence, or some other defect in the will.<sup>32</sup> Historically, the “no name” child would have benefited from none of these protections. If family law dictated that no parent–child relationship existed, then that child could not qualify as an heir or a forgotten child.<sup>33</sup> And even legitimate children might suffer an inheritance loss if they had half-siblings because relatives of the “half-blood” were usually disqualified from inheriting or had their shares cut in half.<sup>34</sup>

The bars on inheritance by illegitimate children were often expressly laid out in the probate code.<sup>35</sup> Other penalties for one’s “accident of birth” could be found in other sections of the code.<sup>36</sup> Wrongful death laws, for example, granted standing only to those recognized as intestate heirs.<sup>37</sup> Illegitimate children could not recover for a parent’s injury under workmen’s compensation laws.<sup>38</sup> They could not renew a parent’s copyright protection,<sup>39</sup> inherit through intestate succession,<sup>40</sup> or qualify as dependents under welfare programs.<sup>41</sup> These legal penalties and disabilities were by design—to deter nonmarital childbearing and punish those stepped outside of the acceptable social bounds. “The bastard,” as one researcher wrote in 1939,

like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, an undeniable evidence of contramoral forces; in short, a problem—a problem as old and unsolved as human existence itself.<sup>42</sup>

Andrew Vanstone’s children were thus the victims of a perfect storm—marriage law, parentage law, and inheritance law—that combined to ensure that his two surviving daughters were destined to live as social outcasts.

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32. See generally Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996).

33. Whether children are entitled to Social Security benefits when a parent dies also turns on the state parentage law determination, even though the benefits are provided by federal law. See *Astrue v. Capato*, 566 U.S. 541 (2012).

34. See Ralph C. Brashier, *Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-Blood Statutes to Reflect the Evolving Family*, 58 SMU L. REV. 137, 161–63 (2005).

35. See *id.* at 159.

36. On the general state of affairs before the Supreme Court first recognized a right against illegitimacy discrimination, see Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

37. See Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 480 (1967); Witte, *supra* note 14, at 335. See generally Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829 (1966).

38. See, e.g., *Murrell v. Indus. Comm’n*, 126 N.E. 189, 190–91 (Ill. 1920).

39. See Note, *supra* note 36, at 342.

40. Witte, *supra* note 14, at 335.

41. See *id.*

42. Kingsley Davis, *Illegitimacy and Social Structure*, 45 AM. J. SOC. 215, 215 (1939).



## III. THE SHIFT AWAY FROM THE PAST

At the margins, there was some softening of the harsh English rules for “no name” children as those rules were adopted first by American colonies and then by states and territories. But the key components of the system—parentage tied to marriage, harsh penalties for illegitimacy, and property and inheritance rights flowing only from and through formal parent–child ties—remained in place for two centuries. The system finally began to crumble in the United States in the 1960s and 1970s, as social norms evolved to be more tolerant of sex outside of marriage, as well as of the children that might result. These changes were the product of a variety of forces, including the civil rights movement, the sexual freedom movement, and the burgeoning women’s rights movement. The developing constitutional right of privacy reflected and reinforced these changes, as both married and single women had greater control over contraception and abortion.<sup>43</sup> Nonmarital cohabitation went from rare to commonplace over the course of just a few decades.<sup>44</sup> So did nonmarital childbearing: Estimated at only 3.8% in 1940, nonmarital childbearing began to increase sharply in the 1970s.<sup>45</sup> By 1985, 22.0% of all children were born to unmarried mothers; in 1997, 32.4%; and by 2008, 40.6%.<sup>46</sup> The births to unmarried women have declined slightly since 2008: in 2018, 39.6% of all births were to unmarried women.<sup>47</sup> Enormous racial and ethnic variations persist today. In 2018, the rate of nonmarital births for non-Hispanic white women was 28.2%, while the rate for non-Hispanic black women was 69.4%, and the rate for Hispanic women was 51.8%.<sup>48</sup>

The changes in nonmarital cohabitation and nonmarital childbearing began to be felt and reflected in the law. The traditional system was under pressure, as it increasingly did not reflect the American family. The conventional approach lost its hold as the Supreme Court recognized that unwed fathers had a constitutional right not to be categorically excluded from their children’s lives and that nonmarital children had the constitutional right not to be singled out for disadvantage.

As nonmarital sex and childbearing became more common, the unfairness of laws that penalized children for the “sins” of their parents became

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43. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (invalidating ban on sale of contraceptives to married couples under principles of substantive due process); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (invalidating ban on sale of contraceptives to single people under principles of equal protection); *Roe v. Wade*, 410 U.S. 113, 166–67 (1973) (invalidating ban on pre-viability abortion under principles of substantive due process).

44. See THEODORE CAPLOW, LOUIS HICKS & BEN. J. WATTENBERG, *THE FIRST MEASURED CENTURY: AN ILLUSTRATED GUIDE TO TRENDS IN AMERICA, 1900–2000*, at 72–73 (2001) (estimating proportion of cohabiting U.S. couples at 0.2% in 1960 to 7.1% in 1998).

45. Stephanie J. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1940–99*, NAT’L VITAL STATS. REPS., Oct. 18, 2000, at 17 tbl.1.

46. Joyce A. Martin, Brady E. Hamilton, Paul D. Sutton, Stephanie J. Ventura, T.J. Matthews & Michelle J.K. Osterman, *Births: Final Data for 2008*, NAT’L VITAL STATS. REPS., Dec. 8, 2010, at 10 tbl.C.

47. See Joyce A. Martin, Brady E. Hamilton, Michelle J.K. Osterman & Anne K. Driscoll, *Births: Final Data for 2018*, NAT’L VITAL STATS. REPS., Nov. 27, 2019, at 5.

48. *Id.* at 5.

more apparent. The Supreme Court first took up this issue in 1968, in *Levy v. Louisiana*.<sup>49</sup> A state law prevented a deceased mother's five children from collecting damages for her wrongful death because they had been born out of wedlock.<sup>50</sup> The Court struck down the law as a form of invidious discrimination, given that "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother."<sup>51</sup> State law classifications on grounds of illegitimacy were entitled to heightened scrutiny at the same level as those based on gender or alienage.<sup>52</sup> Although the Court did not invalidate every law that distinguished among people based on legitimacy under this standard, it did consistently rule that states could not arbitrarily single out illegitimate children for disadvantage.<sup>53</sup> And perhaps more important to the overall dismantling of the conventional system, even when courts upheld differential treatment of nonmarital children, they did not question the existence of a legal mother-child relationship.<sup>54</sup> These cases ultimately stood for the idea that marital status had no effect on the legal mother-child relationship, even if states still had some leeway to impose financial penalties designed to deter nonmarital births.

The second key shift away from the traditional system built on the first and was even more consequential. In *Stanley v. Illinois*, the Supreme Court considered the constitutionality of an Illinois rule deeming an unwed father a legal stranger to his children regardless of whether he had played any role in raising them.<sup>55</sup> Joan and Peter Stanley never married but raised three children together and cohabited on and off for almost two decades.<sup>56</sup> After her death in the late 1960s, the two children, who were still minors, were made wards of the state and placed with a court-appointed guardian.<sup>57</sup> Because Peter was not married to Joan, he was not recognized as a legal parent.<sup>58</sup> The law defined "parents" as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent."<sup>59</sup>

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49. 391 U.S. 68 (1968).

50. *Id.* at 69–70.

51. *Id.* at 72.

52. *See id.* at 71; *see also* *Craig v. Boren*, 429 U.S. 190, 210 (1976) (applying heightened scrutiny to sex-based classification); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (applying heightened scrutiny to classification based on alienage).

53. *See, e.g.,* *Glon v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75–76 (1968) (holding that a law that denies mothers of illegitimate children the right to recover for wrongful death violates the Equal Protection Clause of the Constitution); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972) (invalidating law that denied workmen's compensation recovery rights to unacknowledged illegitimate children was unconstitutional). *But see* *Labine v. Vincent*, 401 U.S. 532, 539–40 (1971).

54. *See, e.g.,* *Labine*, 401 U.S. at 538.

55. *Stanley v. Illinois*, 405 U.S. 645, 646–47 (1972).

56. *Id.* at 646.

57. *Id.*

58. *Id.* at 646–47.

59. The provisions applicable to this case are cited and discussed in the opinion of the Illinois Supreme Court. *See In re Stanley*, 256 N.E.2d 814, 815 (Ill. 1970), *rev'd sub nom. Stanley v. Illinois*, 405 U.S. 645 (1972).

Thus, when Joan died, the children had no legal parent and were therefore deemed “dependent” on the state under the child welfare law.<sup>60</sup> Peter could have petitioned to be their custodian or guardian, but even if he were appointed, he would not be their legal parent. He would have to adopt his own children in order to obtain the status he thought he already had.

The Supreme Court concluded that the law categorically excluding unwed fathers from the definition of “parent” violated the Due Process Clause of the Fourteenth Amendment.<sup>61</sup> The starting point was the Court’s prior rulings on illegitimacy discrimination:

Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit.<sup>62</sup>

The state does not, the majority continued, have unfettered discretion to “draw [the] ‘legal’ lines [of parenthood] as it chooses.”<sup>63</sup> The Court applied the well-established principle that “[t]he rights to conceive and to raise one’s children” are “essential.”<sup>64</sup> This principle was established in the early twentieth century, decades before the Supreme Court recognized rights related to contraception, abortion, or other aspects of privacy. In a trilogy of cases, the Court recognized that parents have a fundamental right to make decisions about the care, custody, and control of their children.<sup>65</sup> Parental rights are not absolute, but they are fundamental and cannot be abridged by the state without a compelling reason.<sup>66</sup>

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60. ILL. REV. STAT. 1967, ch. 37, § 702-05 (current version at 705 ILL. COMP. STAT. 405/2-4 (2021)).

61. See *Stanley*, 405 U.S. at 657–58.

62. *Id.* at 651–52.

63. *Id.* at 652 (quoting *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75–76 (1968)).

64. *Id.* at 651 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

65. See *Meyer*, 262 U.S. at 402 (invalidating state law banning instruction in any foreign language before ninth grade); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (invalidating an Oregon law requiring children between ages eight and sixteen to attend public school); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (upholding conviction of child’s aunt for allowing her niece to sell religious pamphlets on the street in violation of state labor law).

66. The Supreme Court strongly reinforced this line of cases in a modern one. In *Troxel v. Granville*, the Supreme Court fortified this robust notion of parental rights by invalidating a third-party visitation statute that did not give enough weight to the preferences of a fit parent. 530 U.S. 57, 75 (2000) (plurality opinion). The Washington state law at issue allowed “any person” at “any time” to petition for visitation with a child and permitted courts to grant such requests based solely on the best interests of the child. See *id.* at 60 (quoting WASH. REV. CODE § 26.10.106(30) (1994)).

The *Stanley* Court then considered whether Illinois's choice to exclude unwed fathers from the category of "parent" was a constitutionally permissible means of achieving the state's desired ends.<sup>67</sup> Quite the contrary—the Court concluded that the categorical disavowal of unwed fathers actually undermined the state's identified interests.<sup>68</sup> The state aimed "to protect 'the moral, emotional, mental, and physical welfare of the minor and the best interests of the community' and to 'strengthen the minor's family ties whenever possible.'"<sup>69</sup> Yet it adopted a system that would at least sometimes result in children being cut off from custodial, biological fathers for reasons wholly unrelated to their capacity to parent. As the Court observed, "[T]he State registers no gain toward its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family."<sup>70</sup> Even if "most unmarried fathers are unsuitable and neglectful parents[,] . . . some are wholly suited to have custody of their children."<sup>71</sup> The state was not permitted to rely on an irrebuttable presumption at the expense of individual due process rights, even though this approach was "cheaper and easier than individualized determination."<sup>72</sup> It had to make it possible for unwed fathers to establish parentage, even if they were not automatically endowed with that status.<sup>73</sup>

*Stanley* spelled the end of a very long era in which children born to unmarried mothers did not have legal fathers. The Supreme Court would continue the work it began in *Stanley* in a series of cases in which it considered the scope of unwed fathers' constitutional parental rights. In those later cases, not all of which involved a father like Stanley who had lived with and participated in raising his children, the Court settled on a standard that made legal fatherhood a possibility but not an inevitability. And it declined to insist that unwed mothers and fathers be treated identically, given biological differences relevant to the reproductive process and the relatively greater difficulty of ascertaining the connection of fathers to their offspring compared with mothers. Women become legal mothers by giving birth, unless the birth occurs within an enforceable surrogacy arrangement. For men, however, the biological connection creates an opportunity for legal fatherhood that must be affirmatively grasped—or can be sacrificed.<sup>74</sup> If a man fails to grasp the opportunity to act like a

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67. *Stanley v. Illinois*, 405 U.S. 645, 652–53 (1972).

68. *Id.*

69. *Id.* at 652.

70. *Id.* at 652–53.

71. *Id.* at 654.

72. *Id.* at 656–57.

73. *See id.* at 657–58.

74. *Lehr v. Robertson*, 463 U.S. 248, at 249–50 (1983) (upholding New York's putative father registry as sufficient protection for the parental rights of unwed fathers); *see also* *Quilloin v. Walcott*, 434 U.S. 246, 255–56 (1978) (upholding provision of Georgia code that denied an unwed father the right to veto a proposed adoption because father had failed to legitimate child through available statutory procedure); *Caban v. Mohammed*, 441 U.S. 380, 381–82 (1979) (invalidating New York law that gave unmarried mothers but not un-

father, “the Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interests lie.”<sup>75</sup> Men who hesitate lose out, but those who rise to the occasion can secure legal rights.<sup>76</sup>

The illegitimacy and unwed-father cases combined to accelerate a shift in the conception of the nonmarital family. As a result of developing social norms and the recognition of constitutional rights that protected nonmarital as well as marital families, the historical tie between marriage and parentage began to loosen. With a little forced loosening by the Supreme Court, states began to rethink aspects of the law and policies governing the creation of parent–child relationships. The modern scheme is best exemplified by the Uniform Parentage Act (UPA), which was first proposed in 1973 and significantly amended in 2002 and again in 2017.<sup>77</sup> Under the UPA, a man is the “legal father” of a child under any of the following conditions: the adjudication or acknowledgment of paternity, marriage to the mother, open and notorious acknowledgment of fatherhood, or clear and convincing evidence of paternity.<sup>78</sup> The adoption of the UPA and similar statutes finalized a shift away from reliance on marital status as a proxy for biological fatherhood and toward recognition, and protection, of both burgeoning and full-fledged father–child relationships.

Most states designed new statutory schemes that gave at least constitutionally required protection to unwed fathers—often more—while balancing the desire to facilitate the mother’s choice to surrender a child for adoption or raise a child with a new partner when the biological father was unlikely to be a source of care or financial support.<sup>79</sup> This trend was reinforced by Congress’s intervention into child support law beginning in the 1980s, when it began to impose mandates on states as a condition of receiving welfare subsidies. Among the mandates was the requirement that states allow a mother and father to sign a “voluntary acknowledgment of paternity,” which is one basis for establishing legal parentage for unwed fathers.<sup>80</sup> Paternity can also be adjudicated by a court, in a proceeding brought by the mother and perhaps the father or a third party as

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married fathers the right to veto an adoption); *Michael H. v. Gerald D.*, 491 U.S. 110, 123–24 (1989) (plurality opinion) (finding that that California’s refusal to permit putative fathers to contest the paternity of children born during their mother’s marriage to another did not violate the Due Process Clause of the Fourteenth Amendment).

75. *Lehr*, 463 U.S. at 262.

76. *See, e.g., In re Adoption of B.Y.*, 356 P.3d 1215, 1219–20 (Utah 2015) (denying parental rights to teen father who relied on representations by the mother about how to protect his rights); *see also* Joanna L. Grossman, *He Who Hesitated Lost: Unwed Father in Utah Forfeits Parental Rights*, JUSTIA: VERDICT (Sept. 2, 2015), <https://verdict.justia.com/2015/09/02/he-who-hesitated-lost-unwed-father-in-utah-forfeits-parental-rights> [https://perma.cc/B4EV-H2ZN].

77. *See* UNIF. PARENTAGE ACT prefatory note (UNIF. L. COMM’N 2017).

78. *See id.* § 204.

79. On the evolution of modern paternity law, *see* Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1299–1307 (2013).

80. 42 U.S.C. § 666(a)(5)(C) (2018).

well.<sup>81</sup> Federal law also requires that mothers who apply for public assistance cooperate with child support enforcement officials to establish paternity and obtain a child support order.<sup>82</sup>

The resulting statutes give men a variety of ways to assert paternity but impose time limits and other procedural requirements that sometimes make it difficult for even a well-meaning father to preserve his rights.<sup>83</sup> The bright-line rules that made “no name” children such a reliable plot line became blurred. It might be weeks, months, or even years before we know whether a particular child has one parent or two. Moreover, the social and legal consequences of this determination are much less significant than they once were. In addition to revising their parentage statutes to establish pathways to fatherhood for unmarried men, most states adopted a statute expressly providing that parentage does not depend on marital status and that a child’s relationships with either or both parents are not a function of legitimacy.<sup>84</sup>

In this long-running conflict over the treatment of unwed fathers (and their illegitimate children), states struggled to maintain a system that was not only workable—i.e., one that did not preclude adoption placements—but also sufficiently protective of the constitutional parental rights unwed fathers could have if they played their cards right.<sup>85</sup> Here, the conflict was between state laws that employed too narrow a definition of parentage to comply with constitutional standards.<sup>86</sup> The genetic tie gives rise to a constitutional right to parent, which, in turn, sets the parameters for state parentage law—men who grasped the opportunity to parent gained coequal status with their children’s mothers, a status that state parentage law cannot override by statute.<sup>87</sup>

#### IV. MODERNIZING MOTHERHOOD

Although the key legal changes that led to the dismantling of the traditional system of parentage revolved around the rights of unwed fathers and nonmarital children, they cleared a path for the modernization of motherhood as well. Once the law untethered parentage from marriage, the additional steps necessary to recognize a wide variety of parent–child ties became less drastic. This has had the effect of giving women more

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81. See generally Jeffrey A. Parness, *Old-Fashioned Pregnancy, Newly-Fashioned Paternity*, 53 SYRACUSE L. REV. 57 (2003).

82. See Jeffrey A. Parness, *New Federal Paternity Laws: Securing More Fathers at Birth for the Children of Unwed Mothers*, 45 BRANDEIS L.J. 59, 63–64 (2006); Deborah Harris, *Child Support for Welfare Families: Family Policy Trapped in its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619, 621 (1988).

83. See, e.g., UNIF. PARENTAGE ACT § 204 (UNIF. L. COMM’N 2017). See generally GROSSMAN & FRIEDMAN, *supra* note 25, at 288–96.

84. See, e.g., TEX. FAM. CODE ANN. § 160.202 (West 2019).

85. See Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313, 315–18 (1984).

86. See *id.* at 330–31.

87. Joanna L. Grossman, *Parentage Without Gender*, 17 CARDOZO J. CONFLICT RESOL. 717, 723–24 (2016).

control over reproduction and co-parenting relationships.<sup>88</sup> Once a stigmatized object of shame or pity, the unwed mother has become the norm. This is a world in which “Single Mothers by Choice” can thrive as an advocacy group because women can legally choose to parent children alone—whether through birth or adoption.<sup>89</sup> They can conceive children with sperm from a spouse, an unmarried partner, or a known or unknown donor.<sup>90</sup> They can also legally choose to parent children with an unmarried male partner or with a married or unmarried female partner. These options are all made possible by the evolution of parentage law to embrace parent–child ties that arise outside of marriage or in other ways that would have been incomprehensible to the common law.

Parentage law both reflects and reinforces changing social norms. Single parents represent an increasing proportion of all households; single mothers greatly outnumber single fathers.<sup>91</sup> In 1970, single mothers accounted for only 11% of families with minor children, but they accounted for 29% in 2020.<sup>92</sup> But while the law has evolved to provide greater legal and economic security for single-mother families, societal attitudes have not caught up. Societal attitudes about single mothers have traditionally been negative, reflecting stereotypes about them as depending on welfare, holding non-traditional values, or engaging in sexually promiscuous behavior.<sup>93</sup> And even when researchers control for context, single fathers are viewed more positively than single mothers.<sup>94</sup> The stigma has been stubbornly resistant to change.<sup>95</sup> And the realities of single motherhood are far from utopian; many single mothers struggle with poverty and find

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88. *See id.* at 726.

89. *See* Jackie Molloy, *Portraits of Single Moms by Choice*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/05/parenting/single-moms-by-choice-photos.html> [https://perma.cc/U5PC-PP48]; *see also* SINGLE MOTHERS BY CHOICE, <http://www.singlemothersbychoice.org> [https://perma.cc/Y5A6-W8P7].

90. *See* Joanna L. Grossman, *Men Who Give It Away: The Potential Perils of Free and Non-Anonymous Sperm Donation*, JUSTIA: VERDICT (Jan. 24, 2012), <https://verdict.justia.com/2012/01/24/men-who-give-it-away> [https://perma.cc/2CFE-PCQ4].

91. *See Historical Families Tables* tbl. FM-1, U.S. CENSUS BUREAU (Dec. 2020), <https://www.census.gov/data/tables/time-series/demo/families/families.html> [https://perma.cc/S9J6-ACWB].

92. *Id.*

93. For a review of the literature about these attitudes, see Sarah L. DeJean, Christi McGeorge & Thomas Stone Carlson, *Attitudes Toward Never-Married Single Mothers and Fathers: Does Gender Matter?*, 24 J. FEMINIST FAMILY THERAPY 121 (2012); Julie A. Mavity Maddalena, *Floodwaters and the Ticking Clock: The Systematic Oppression and Stigmatization of Poor, Single Mothers in America and Christian Theological Responses*, 63 CROSSCURRENTS 148 (2013) (discussing the stereotypes about single mothers woven into modern welfare policy); Parvin R. Huda, *Singled Out: A Critique of the Representation of Single Motherhood in Welfare Discourse*, 7 WM. & MARY J. WOMEN & L. 341 (2001) (applying intersectionality theory to understand the stereotypes about low-income single mothers).

94. *Id.* at 132–33.

95. *See For Single Mothers, Stigma Difficult to Shake*, NPR (Feb. 24, 2011), <https://www.npr.org/2011/02/24/134031175/For-Single-Mothers-Stigma-Difficult-To-Shake> [https://perma.cc/FY4E-VDGP]; Nicola Carroll, *One in Four Children Grow Up in a Single-Parent Family—So Why Is There Still a Stigma?*, CONVERSATION (Dec. 4, 2019), <https://theconversation.com/one-in-four-children-grow-up-in-a-single-parent-family-so-why-is-there-still-a-stigma-126562> [https://perma.cc/QH7B-L8LL].

it difficult to work and raise children without adequate social supports, especially for women of color.<sup>96</sup> Yet, there are more mothers choosing to have children on their own, a decision that many find empowering despite the social stigma.<sup>97</sup> The evolution of parentage law has given women more options for taking on or carrying out the duties of motherhood.

Modern motherhood is also made possible, at least in part, by advances in reproductive technology. The law permitted parenthood to be separated from marriage, but technology has permitted it to be separated from sex as well. Although there are hints of artificial insemination of women with their husband's sperm as early as the late eighteenth century,<sup>98</sup> it did not occur with donor sperm until at least a century later and did not become a routine practice until at least the 1950s.<sup>99</sup> And in that era, sperm donation was "gradually understood by medical experts and lawmakers as a cure for male infertility, and consequently legalized."<sup>100</sup> Initially, artificial insemination did not raise terribly complicated parentage questions because it was used almost exclusively by married women—in part because intentional single motherhood was socially condemned and in part because doctors would not perform an insemina-

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96. See generally Sarah McLanahan & Irwin Garfinkel, *Single Mothers, the Underclass, and Social Policy*, 501 ANNALS AM. ACAD. 92 (1989) (exploring whether single mothers are "part of an emerging urban underclass"); John Ifcher & Homa Zarghamee, *The Happiness of Single Mothers: Evidence from the General Social Survey*, 15 J. HAPPINESS STUD. 1219 (2014) (finding that single motherhood is a source of unhappiness relatively to other lifestyles); Chris M. Herbst, *Footloose and Fancy Free? Two Decades of Single Mothers' Subjective Well-Being*, SOC. SERV. REV. 189 (June 2012) (same); Seohee Son & Jean W. Bauer, *Employed Rural, Low-Income, Single Mothers' Family and Work Over Time*, 31 J. FAM. ECON. ISSUES 107 (2009) (exploring how low-income single mothers navigate work-family balance); Polly A. Fassinger, *Becoming the Breadwinner: Single Mothers' Reactions to Changes in Their Paid Work Lives*, 38 FAM. RELS. 404 (1989) (studying experience of divorced mothers who transition to a breadwinning role); Julianna Y. Richard & Hang-Shim Lee, *A Qualitative Study of Racial Minority Single Mothers' Work Experiences*, 66 J. COUNSELING PSYCH. 143 (2018) (exploring the work-related challenges for single mothers of color).

97. See Adital Ben-Ari & Galia Weinberg-Kurnik, *The Dialectics Between the Personal and the Interpersonal in the Experiences of Adoptive Single Mothers by Choice*, 56 SEX ROLES 823 (2007) (studying the experiences and decision-making by adoptive single mothers); Jane D. Bock, *Doing the Right Thing? Single Mothers by Choice and the Struggle for Legitimacy*, 14 GENDER & SOC'Y 62 (2000) (studying the decision by women to pursue single parenthood intentionally); Marcia A. Ellison, *Authoritative Knowledge and Single Women's Unintentional Pregnancies*, 17 MED. ANTHROPOLOGY Q. 322 (2003) (exploring the complexity of societal attitudes about single motherhood and the effect on decision-making by women confronting an unintentional pregnancy); Valerie S. Mannis, *Single Mothers by Choice*, 48 FAM. RELS. 121 (1999) (exploring the experiences of financially independent women who deliberately undertook parenthood alone).

98. See George P. Smith II, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127, 128–29 (1968).

99. ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 97 (1995); see also Michelle L. Anderson, Comment, *Are You My Mommy? A Call for Regulation of Embryo Donation*, 35 CAP. U. L. REV. 589, 598 (2006).

100. Noa Ben-Asher, *The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1888 (2009).



tion on an unmarried woman.<sup>101</sup> And many of those who did rely on assisted conception used the sperm of their own husband. This practice, known as artificial insemination by husband, or AIH, was not particularly controversial.<sup>102</sup> The emerging practice of using sperm from a donor, however, was perceived differently, at least initially.<sup>103</sup> Insemination with sperm of a third party was deemed adultery in a few cases and grounds for divorce.<sup>104</sup> But that view gradually gave way to sympathy for couples with male factor infertility; donor sperm, in the words of Professor Noa Ben-Asher, was simply a “cure” for a medical condition.<sup>105</sup> Gradual social and legal acceptance of sperm donation, along with other forms of assisted reproduction as they were developed, paved the way for greater use. And advances in techniques like cryopreservation made the use of donor sperm even more appealing—in 2015 a baby was conceived with 23-year-old sperm.<sup>106</sup>

An even bigger advance was the development of in vitro fertilization techniques. The world’s first “test-tube” baby was born in England in 1978.<sup>107</sup> Since then, more than eight million babies have been born using this technique.<sup>108</sup> This technology vastly expands the circumstances in which a child can be conceived: it opens the door to egg donors and gestational surrogates. It also creates the possibility of a child having two mothers, one with a genetic tie and the other a gestational tie to a child. A rise in infertility rates also fueled a greater turn to sperm donation, in vitro fertilization, and—toward the end of the twentieth century—egg donation.<sup>109</sup> As many as seven million people today suffer from fertility problems, and as many as 1% of all births rely on assisted reproductive technology of some kind.<sup>110</sup> But it is difficult to pinpoint the number of

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101. See Georgia Dullea, *Artificial Insemination of Single Women Poses Difficult Questions*, N.Y. TIMES, Mar. 9, 1979, at A18.

102. See Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1072–74 (2002).

103. See *id.* at 1076–77.

104. See, e.g., *Gursky v. Gursky*, 242 N.Y.S.2d 406, 411 (Sup. Ct. 1963) (holding that child conceived with donor sperm was not the legitimate child of mother’s husband because the insemination constituted adultery).

105. Ben-Asher, *supra* note 100, at 1888–89.

106. Brianne Tolj, *Meet the World’s Oldest Baby*, DAILY MAIL (Dec. 6, 2015, 9:25 AM), <https://www.dailymail.co.uk/news/article-3348138/Meet-world-s-oldest-baby-Newborn-Xavier-Powell-conceived-using-sperm-frozen-23-YEARS-ago-father-cancer-treatment-infertile.html> [<https://perma.cc/A5MW-6NL9>].

107. See Walter Sullivan, *Woman Gives Birth to Baby Conceived Outside the Body*, N.Y. TIMES, July 26, 1978, at A1.

108. Susan Scutti, *At Least 8 Million IVF Babies Born in 40 Years Since Historic First*, CNN (July 3, 2018, 6:04 AM), <https://www.cnn.com/2018/07/03/health/worldwide-ivf-babies-born-study/index.html> [<https://perma.cc/2MTZ-MDVF>].

109. See Anjani Chandra, Casey E. Copen & Elizabeth Hervey Stephen, *Infertility and Impaired Fecundity in the United States, 1982–2010: Data from the National Survey of Family Growth*, NAT’L HEALTH STATS. REPS., Aug. 14, 2013, at 5 (noting an increase in “impaired fecundity” among all U.S. women aged 15–44 from 8.4% in 1982 to 10% in 1995 and a high of 12% in 2002, with higher rates at each point for married women).

110. See *id.* at 2 (estimating that in 2002 7.3 million U.S. women had “impaired fecundity or difficulties conceiving or bringing a pregnancy to term”); see also Anjani Chandra, Casey E. Copen & Elizabeth Hervey Stephen, *Infertility Service Use in the United States*:

sperm donations made per year or the number of live births conceived with donor sperm because there is little to no regulation of the process or industry.<sup>111</sup> Some estimates suggest thirty to sixty thousand sperm donor-conceived births per year in the United States,<sup>112</sup> but the number is likely higher.<sup>113</sup> There is a small but growing number of conceptions from donor eggs as well.<sup>114</sup>

One need only quickly peruse the options for sperm donation in this country to appreciate how vastly different motherhood can be in modern society compared with the past. For example, on the Known Donor Registry, a woman seeking sperm creates a profile in which she shares her personal traits and indicates the type of arrangement she desires.<sup>115</sup> There are pull-down menus so she can choose what gametes she wants (sperm, eggs, or embryos), what method she prefers (artificial insemination, natural insemination, shipped on dry ice, or cryobank deposit), and the degree of contact with the donor (contact after 18, limited contact, frequent contact, or “uncle or friend role”).<sup>116</sup> Potential donors create a similar profile, which indicates what gametes they are offering, which method they prefer for sharing them, and how much contact, if any, they would seek with any resulting child.<sup>117</sup> Other sites, such as Co-ParentMatch.com, provide similar services, including “home insemination kits” and donors from diverse racial and ethnic backgrounds.<sup>118</sup>

The modernization of motherhood is not simply a function of technological advances or new ways to connect with strangers: the law must make it possible for women to use this technology in ways that will result in stable, predictable family ties. Whether a woman seeks sperm from a

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*Data from the National Survey of Family Growth, 1982–2010, NAT'L HEALTH STATS. REPS, Jan. 22, 2014, at 4 (estimating that in 2006–2010 12% of U.S. women aged 15–44 had used medical intervention either to get pregnant or to prevent miscarriage).*

111. See Jennifer M. Vagle, *Putting the “Product” in Reproduction: The Viability of a Products Liability Action for Genetically Defective Sperm*, 38 PEPP. L. REV. 1175, 1234 (2011).

112. Stephanie Chen, *With the Web, Curiosity and Luck, Sperm Donor Siblings Connect*, CNN, (Aug. 11, 2010, 9:25 AM), <http://www.cnn.com/2010/LIVING/08/11/sperm.donor.sibling.connect/index.html> [<https://perma.cc/GS9S-ZXVH>].

113. See LIZA MUNDY, *EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING OUR WORLD* 94 (2008) (estimating 80,000–100,000 artificial inseminations per year).

114. See NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, CTRS. FOR DISEASE CONTROL & PREVENTION, 2014 ASSISTED REPRODUCTIVE TECHNOLOGY: NATIONAL SUMMARY REPORT 45 (2016) (reporting that 20,481 cycles in U.S. in 2014 were performed using donor eggs or embryos); see also Jacqueline Mroz, *One Sperm, 150 Offspring*, N.Y. TIMES, Sept. 5, 2011, at D1; Ron Claiborne, *Babies Born from Donor Sperm Still Big Business*, ABC NEWS (Nov. 6, 2013), <http://abcnews.go.com/blogs/health/2013/11/06/babies-born-from-donor-sperm-still-big-business> [<https://perma.cc/WZX4-8Q5T>].

115. See *Frequent Questions*, KNOWN DONOR REGISTRY, <https://knowndonorregistry.com/about/faq> [<https://perma.cc/D42D-4VD2>].

116. See KNOWN DONOR REGISTRY, <http://www.knowndonorregistry.com> [<https://perma.cc/7GLT-SZ3E>].

117. See *id.*

118. See CO-PARENT MATCH, <http://www.co-parentmatch.com> [<https://perma.cc/H6D3-6G2J>].

free donor on the Internet or through a more “conventional” cryobank, the law is increasingly likely to respect her choice, whether she is a single (legal) mother or has a (legal) co-parent.

During the early days of sperm donation—which typically involved anonymous donors, physician-assisted insemination, and only married women—virtually every state applied a marital presumption of paternity, discussed above. Even if rebuttable, it was hard to rebut, which meant that the use of someone else’s sperm might be ignored in favor of a finding of husband-paternity.<sup>119</sup> This remained the case even as scientific advances made it easier first to disprove and eventually to prove paternity. But cases involving so-called AID—artificial insemination by donor—did sometimes throw paternity into question.<sup>120</sup> Some courts treated the insemination with another man’s sperm as adultery and any resulting child as illegitimate.<sup>121</sup> Others, however, concluded, even in the absence of a controlling statute, that a husband who had consented to his wife’s insemination with donor sperm was the legal father. In *People v. Sorenson*, for example, the California Supreme Court upheld a man’s conviction for failure to support a child, despite proof that he was sterile and that his wife had been inseminated with donor sperm.<sup>122</sup> Because he consented to the procedure, he was the “lawful father” for purposes of the family support provision in the penal code.<sup>123</sup> A trial court in New York reached a similar conclusion in a very early case involving visitation rights for the husband of a woman who conceived a child with donor sperm during their marriage.<sup>124</sup> The court held the husband was entitled to at least the same rights as a foster parent who had adopted a child, including visitation.<sup>125</sup> These cases were few and far between. But as artificial insemination became more common, and the conclusive marital presumption eroded, legislatures and courts had to confront new questions about parentage.

The modern era of parentage was catalyzed by the Supreme Court’s rulings in the unwed father and illegitimacy cases, but it really began to take shape upon promulgation of the UPA in 1973.<sup>126</sup> The original UPA was a comprehensive act designed to address issues regarding the establishment of parent-child relationships, especially those involving unwed

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119. See Walter Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U. L. REV. 777, 779 n.8 (1970).

120. See generally *id.* at 788–92.

121. See, e.g., *Doornbos v. Doornbos*, 23 U.S.L.W. 2308, 2308 (Super. Ct. Cook Cnty. Ill. 1954), *appeal dismissed on procedural grounds*, 139 N.E.2d 844 (Ill. App. Ct. 1957); *Gursky v. Gursky*, 242 N.Y.S.2d 406, 411 (N.Y. Sup. Ct. 1963).

122. *People v. Sorensen*, 437 P.2d 495, 501–02. (Cal. 1968).

123. *Id.* at 498.

124. *Strnad v. Strnad*, 78 N.Y.S.2d 390, 391–92 (Sup. Ct. 1948).

125. *Id.*; see also *In re Adoption of Anonymous*, 345 N.Y.S.2d 430, 435–36 (Sur. Ct. 1973) (allowing ex-husband of child conceived during marriage with donor sperm to object to child’s adoption by woman’s new husband, given state’s strong policy in favor of legitimacy).

126. UNIF. PARENTAGE ACT (UNIF. L. COMM’N 1973).

fathers.<sup>127</sup> As the drafters noted in the prefatory statement, the act was “promulgated at a time when the states need new legislation on this subject because the bulk of current law on the subject of children born out of wedlock is either unconstitutional or subject to grave constitutional doubt.”<sup>128</sup> It was against this backdrop that NCCUSL drafted the original UPA.

States were receptive to the uniform act because many had parentage laws that did not conform to the newly articulated constitutional standards on illegitimacy or the rights of unwed fathers. The 1973 UPA proposed a coherent set of rules that fixed those constitutional infirmities and accounted for a wider range of parentage questions. The UPA moved beyond the traditional approach that conflated questions of legitimacy and parentage, which opened the door to more rational considerations of the policies that might support or undermine a determination of parentage in a particular situation. While the UPA replicated the typical rule for motherhood—that a woman was entitled to legal parent status solely based on the act of giving birth—it changed the formula for fatherhood quite dramatically. A man could be treated as a father based on his marriage to the mother, as he could have under the traditional marital presumption. But that was just one of several ways to determine whether a man was a child’s legal father. Legal fatherhood was based on a “network of presumptions which cover cases in which proof of external circumstances (in the simplest case, marriage between the mother and a man) indicate a particular man to be the probable father.” Section 4 of the UPA provided three pathways to fatherhood: marriage to the child’s mother, an acknowledgment of paternity that was not disputed by the mother, or receiving the child into his home and openly holding out the child “as his natural child.”<sup>129</sup>

In its recognition of the increasing complexity of parentage, the UPA also included a separate provision for children conceived through artificial insemination. But the narrow focus of that section reflected the social realities of the time—only married women were thought to be using artificial insemination when necessitated by the husband’s infertility. Section 5(b) provided that “[t]he donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.” This was paired with . . . section 5(a), [which] provided that the husband of a married woman was considered the natural father of any child she conceived with donor sperm as long as he consented in writing to the insemination. In other words, a married woman could replace the biological father with her husband if all the criteria were met. Through this provision, intent to parent became an adequate

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127. *See generally id.*

128. *Id.* at prefatory note.

129. Grossman, *supra* note 87, at 724–25 (footnotes omitted) (quoting UNIF. PARENTAGE ACT prefatory note, § 4 (UNIF. L. COMM’N 1973)).

substitute for a genetic tie.<sup>130</sup>

By their own terms, these provisions did not apply when sperm was donated to an unmarried woman (or when the semen was not provided to a licensed physician).<sup>131</sup> Conceivably, a man who donated sperm to an unmarried woman or directly to any woman could be subjected to the obligations of fatherhood, and an unmarried woman who used donor sperm to conceive would have no guarantee that her parental rights were exclusive. If the woman was married, her husband might still be deemed the legal father, depending on the strength of the marital presumption in a particular state. If the woman was unmarried, the sperm donor could find himself on the receiving end of an adjudication of paternity and order of child support based on the genetic tie alone. And if the sperm donor wanted to pursue parental rights, he would face no per se bar but would instead be subjected to the statutory rules governing unwed fathers, including, for any men who did not qualify as a presumed father, a three-year statute of limitations.<sup>132</sup> These consequences were unlikely, however, for inseminations involving an anonymous donor, for obvious reasons.

Eighteen states adopted the 1973 UPA fully or substantially.<sup>133</sup> A handful of other states adopted parentage statutes that were similar in at least some respects. But almost as quickly as this round of parentage laws was adopted, they became outdated. The prevalence and nature of assisted reproduction changed rapidly, leading to greater use of donated sperm by single women and lesbian couples, and by unmarried heterosexual partners with male factor infertility. These changes raised more complicated questions about motherhood and fatherhood.

In 1988, NCCUSL (now also known as the Uniform Law Commission) adopted a separate act to deal with the increasingly complicated questions arising from the use of reproductive technology, the Uniform Status of Children of Assisted Conception Act.<sup>134</sup> Although this law was better suited to some of the emerging practices, it was eventually withdrawn in favor of a new version of the UPA in 2000.<sup>135</sup> Section 702 of the new act provided that “[a] donor is not a parent of a child conceived by means of assisted reproduction.”<sup>136</sup> In the comment that followed, the drafters explained:

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130. *Id.* at 744 (footnotes omitted) (quoting UNIF. PARENTAGE ACT § 5(b), (a)).

131. *Id.* § 5(a)–(b).

132. *Id.* §§ 6(c), 7.

133. A small number of states adopted the 1973 UPA but omitted the word “married” in the sperm donor provision, generally without explanation. *See, e.g.*, COLO. REV. STAT. § 19-4-106(2) (2020); OHIO REV. CODE ANN. § 3111.95(B) (LexisNexis 2020); WYO. STAT. ANN. § 14-2-902 (2020).

134. UNIF. STATUS OF CHILD. OF ASSISTED CONCEPTION ACT (UNIF. L. COMM’N 1988). On the question of the parental status of sperm donors, for example, the act protected donors by broadly providing for nonparenthood regardless of the mother’s marital status or whether the semen was provided to a physician. *See id.* § 4(a).

135. UNIF. PARENTAGE ACT (UNIF. L. COMM’N 2000).

136. *Id.* § 702.

If a child is conceived as the result of assisted reproduction, this § clarifies that a donor (whether of sperm or egg) is not a parent of the resulting child. The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.<sup>137</sup>

This, the drafters wrote, means that “donors are to be shielded from parenthood in all situations in which either a married woman or a single woman conceives a child through assisted reproduction. . . . This provides certainty of nonparentage for prospective donors.”<sup>138</sup>

Although the drafters noted that donations to unmarried women had “grown significantly since 1988,” they elected to continue applying the nonpaternity rule to donors who provided sperm to unmarried women, the children of whom would have “no legally recognized father.”<sup>139</sup> Sections 703 and 704 provided, as did the original UPA, that a husband who consents to use of donor sperm by his wife is the father of any resulting child.<sup>140</sup>

The 2000 UPA was amended in 2002.<sup>141</sup> With respect to sperm donated to unmarried women, this version added, for the first time, the possibility that an unmarried male partner could be deemed the legal father of a child conceived by his female partner with donor sperm.<sup>142</sup> Section 703, which previously spoke only of husbands, now provided that “[a] man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.”<sup>143</sup> And Section 704 provided:

(a) Consent by a woman, and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man. This requirement does not apply to a donor.

(b) Failure [of] a man to sign a consent required by subsection (a), before or after birth of the child, does not preclude a finding of paternity if the woman and the man, during the first two years of the child’s life resided together in the same household with the child and openly held out the child as their own.<sup>144</sup>

The comment that followed explained that “[t]he ‘holding out’ requirement substitutes evidence of the parties’ conduct after the child is born for the requirement of formal consent in a record to prospective assisted reproduction.”<sup>145</sup> But note that the “holding out” required that the man and woman live in the same household and hold themselves out as parents together. The post-birth conduct was thus evidence not only of the

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137. *Id.* § 702 cmt.

138. *Id.*

139. *Id.*

140. *Id.* §§ 703, 704.

141. UNIF. PARENTAGE ACT (UNIF. L. COMM’N 2002).

142. *See id.* § 703.

143. *Id.*

144. *Id.* § 704.

145. *Id.* § 704 cmt.

man's intent to parent but also of the woman's consent to share parental rights. And a comment to Section 706, which explained how and when consent by a husband or unmarried partner could be withdrawn (only prior to conception), noted that:

[A] child born through assisted reproduction accomplished after consent has been voided by divorce or withdrawn in a record will have a legal mother . . . . However, the child will have a genetic father, but not a legal father . . . . The section is intended to encourage careful drafting of assisted reproduction agreements. The attorney and the parties themselves should discuss the issue and clarify their intent before a problem arises.<sup>146</sup>

In this iteration, the UPA shifted the line between donors and potential fathers again, but not in a linear direction. It began to focus on pre-conception intent as the touchstone for distinguishing between the two groups rather than focusing on biology, the formality of the medical process, or marital status. The UPA was amended again in 2017.<sup>147</sup> The sperm donor provisions largely track the 2002 version but add two new means through which a "donor" can establish parentage: a written pre-conception agreement with the woman that they both intend to parent the child, or sufficient evidence to establish that an express agreement was reached even if not memorialized by a writing.<sup>148</sup>

Across the nation, states still vary significantly in their treatment of parentage in the context of sperm donation. Three-quarters of the states have a statute that applies a rule of nonpaternity in at least some situations.<sup>149</sup> Some are still based on the original 1973 UPA, some have been amended to reflect the 2000, 2002, or 2017 changes, and some are *sui generis*. Several statutes, for example, provide that a man who donates sperm to an *unmarried* woman is not a father unless he and the woman agreed otherwise in writing before the birth.<sup>150</sup> None of these statutes apply to conceptions achieved through sexual intercourse.<sup>151</sup>

Whether a particular man will be treated as a donor or as a potential father is still a function of both factual and legal variables. Thus, whether a woman's choice to parent alone, with an unmarried partner, or with a

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146. *Id.* § 706 cmt.

147. UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017).

148. *See id.* § 704.

149. Joanna L. Grossman, *Friends with Benefits: Texas Man Who Donated Sperm to a Friend Has Parental Rights*, JUSTIA: VERDICT (Nov. 29, 2016), <https://verdict.justia.com/2016/11/29/friends-benefits-texas-man-donated-sperm-friend-parental-rights> [https://perma.cc/QC4E-3R6Z].

150. *See, e.g.*, KAN. STAT. ANN. § 23-2208(f) (West 2020)) ("The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman."); CAL. FAM. CODE § 7613(b)(1) (Deering 2020) (same).

151. *See, e.g.*, UNIF. PARENTAGE ACT § 701 (UNIF. L. COMM'N 2017); *see also* Straub v. B.M.T., 645 N.E.2d 597, 601 (Ind. 1994) (refusing to enforce agreement to treat genetic father as nonparent for child because "there is no such thing as 'artificial insemination by intercourse'").

spouse will ultimately be respected varies by jurisdiction and circumstance. But the gap between individual expectations and a legal determination of parentage is much more likely to turn on a technicality, or the parties' failure to work within the available legal options, than on the law's rebuke of the choices themselves. And parentage, in turn, is the gateway to all other legal rights and obligations—child support, inheritance, Social Security benefits, wrongful death standing, and so on. Women, by and large, have the right to choose to be single mothers, as long as they navigate the legal landscape carefully.

An examination of other parenting situations would tell a similar story. As Douglas NeJaime explores in his symposium piece,<sup>152</sup> the rules governing nonbiological co-parents have largely evolved to reflect intent and choice over biology in the establishment of parent–child ties. The law of surrogacy, while still in flux, has trended toward a consensus that gestational surrogacy agreements can be enforced, which means that parentage can result solely from intent.<sup>153</sup> Likewise, in the wake of *Obergefell v. Hodges* and the legalization of marriage by same-sex couples,<sup>154</sup> the marital presumption has become a gender-neutral way of vesting parentage in a mother's partner.<sup>155</sup>

## V. CONCLUSION

The world described in Parts III and IV of this Essay would have been unimaginable to Blackstone—and certainly unfamiliar to the Victorian novelists explored in Lawrence Friedman's essay. Simply put, the “no name” child simply doesn't exist any longer because the society that stripped a child of its place based on the circumstances of birth has disappeared. This is not a smooth, linear story line. But in fits and starts, with missteps and corrections, and against the backdrop of seismic changes in social norms, the child of unmarried parents has recovered its name. And the adults have choices about whether, how, and with whom to become parents. By modernizing fatherhood and childhood, we have modernized motherhood as well.

152. Douglas NeJaime, *Biology and Illegitimacy*, 74 SMU L. REV. 259 (2021).

153. See, e.g., Joanna L. Grossman, *A New Age: New York Repeals Longstanding Criminal Ban on Surrogacy*, JUSTIA: VERDICT (Feb. 22, 2021), <https://verdict.justia.com/2021/02/22/a-new-age-new-york-repeals-longstanding-criminal-ban-on-surrogacy> [https://perma.cc/5EBK-LCLB]; see also Courtney G. Joslin, *The Politics of Pregnancy: Surrogacy and the Politics of Pregnancy*, 14 HARV. L. & POL'Y REV. 365, 370–75 (2020) (describing the forces that led to a shift in favor of permissive surrogacy regimes).

154. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

155. On the development of the law of lesbian co-parents, see 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).



