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FAMILY LAW'S DOCTRINES

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## INTRODUCTION

The father of the American law school, Christopher Columbus Langdell, famously conceptualized the law as akin to science.<sup>1</sup> On this account, legal doctrine was a series of scientific truths that judges systematically revealed over time. Decades later, the Legal Realists took issue with Langdell's rigid conception of legal development.<sup>2</sup> In their view, law was not simply a set of formal doctrines that was applied neutrally. Instead, the Legal Realists argued that real world concerns—including politics—informed the application and evolution of legal doctrine.<sup>3</sup> Judges thus were not scientists, faithfully applying doctrine in an evenhanded way, but rather keen political actors who could—and did—manipulate doctrine to achieve desired outcomes.<sup>4</sup>

Today, almost 150 years after Langdell elevated legal doctrine to the status of scientific truth, this Symposium questions whether doctrine survives in the present day, or if it has been completely subordinated to the exigencies of contemporary situations, as the Legal Realists claimed. I approach these questions from the domain of family law, where the circumstances that animate case law are often deeply idiosyncratic and particularized. As Leo Tolstoy observed (in a nonlegal context), “Happy families are all alike; every unhappy family is unhappy in its own way.”<sup>5</sup>

Despite the idiosyncratic nature of families and family life, most family law scholars and practitioners would agree that there is a robust body of family law doctrine, as evidenced by the work of federal and state courts and the many efforts to codify various family law principles into statutes. While this growing body of state and federal law<sup>6</sup> plays an important role in

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<sup>1</sup> Christopher Columbus Langdell, *Harvard Celebration Speeches*, 3 L.Q. REV. 118, 124 (1887) (declaring that “law is a science”). As early as 1871, Langdell had taken a similar position. See CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at vi (Boston, Little, Brown & Co. 1871) (“Law, considered as a science, consists of certain principles or doctrines. . . . Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries.”).

<sup>2</sup> For a discussion of Legal Realism, see generally LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960 (1986).

<sup>3</sup> See *id.* at 164 (discussing the legal realist view that the personalities and past experiences of judges—as opposed to legal rules—play a paramount role in the development of legal doctrines).

<sup>4</sup> *Id.*

<sup>5</sup> LEO TOLSTOY, ANNA KARENINA 3 (Leonard J. Kent & Nina Berberova eds., Constance Garnett trans., Modern Library 2000) (1877).

<sup>6</sup> Traditionally, state statutes and adjudications by state tribunals have been regarded as the principal sources of family law doctrine. See, e.g., Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 197 (1999) (“Under our federalist system, the axiom has it, family law resides within the province of the states.”); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821 (1995) (“From the earliest days of the Republic until the recent past, family law has

the adjudication and resolution of familial disputes, it is not the only source of family law doctrine.

In this Article, I offer a more nuanced view of the field and the role of doctrine in it. Although there is a robust body of family law doctrine, including judge-made case law,<sup>7</sup> various state family law codes,<sup>8</sup> federal statutory law,<sup>9</sup> and federal constitutional law,<sup>10</sup> as well as the model codes that

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unquestionably belonged to the states.”). Over time, however, a growing number of federal actors have participated in the articulation of family law principles and doctrines. *See* Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1721 (1991) (noting that although state law directly regulates families, “federal law does govern a host of legal and economic relations that do affect and sometimes define family life”).

<sup>7</sup> *See generally, e.g., Family Law in the Fifty States 2011–2012: Case Digests*, 46 FAM. L.Q. 543 (2013) (compiling examples of case law developments in areas such as adoption, child support, and custody).

<sup>8</sup> *See, e.g., Family Law in the 50 States*, ABA, [http://www.americanbar.org/groups/family\\_law/resources/family\\_law\\_in\\_the\\_50\\_states.html](http://www.americanbar.org/groups/family_law/resources/family_law_in_the_50_states.html) (last visited May 12, 2015), *archived at* <http://perma.cc/GT84-PXTB> (summarizing family law statutes in each state, including statutory provisions related to alimony, custody, child support, property division in divorce, and visitation rights).

<sup>9</sup> *See, e.g.,* 18 U.S.C. §§ 2261–2266 (2012) (making domestic abuse a federal crime when the perpetrator crosses state lines); Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (2012) (extending full faith and credit to child custody determinations); Child Support Enforcement Act, 42 U.S.C. §§ 651–669 (2012) (establishing national program to aid states in developing and implementing child support enforcement policies and procedures); Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101–5106i (2012) (establishing comprehensive federal program directed toward the prevention and treatment of child abuse and neglect); Family Violence Prevention and Services Act, 42 U.S.C. §§ 10401–10415 (2012) (providing federal funding to states to address the problem of family violence); Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 553, 108 Stat. 3518, 4056-57 (repealed 1996) (prohibiting state agencies from denying foster or adoptive placements solely on the basis of race).

<sup>10</sup> *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 118-32 (1989) (plurality opinion) (upholding a statutory presumption that a child born to a married woman living with her husband is the husband’s child and allowing only the husband or wife to rebut that presumption); *Palmore v. Sidoti*, 466 U.S. 429, 431-34 (1984) (holding that concern for the effects of racial prejudice cannot justify removing a child from the custody of an otherwise fit parent); *Mills v. Habluetzel*, 456 U.S. 91, 99-102 (1982) (invalidating a state statute providing that a paternity suit for purposes of obtaining child support for an illegitimate child must be brought within one year of birth); *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (holding that a state may terminate the rights of natural parents only if it can “support its allegations by at least clear and convincing evidence”); *Caban v. Mohammed*, 441 U.S. 380, 388-94 (1979) (striking down a state statute permitting an unwed mother, but not an unwed father, to block the adoption of their child by withholding consent); *Lalli v. Lalli*, 439 U.S. 259, 266-76 (1978) (upholding a state law conditioning the inheritance of illegitimate children from their father on a filiation order made during father’s lifetime); *Zablocki v. Redhail*, 434 U.S. 374, 388-91 (1978) (striking down a Wisconsin statute requiring residents subject to child support orders to obtain court approval before marrying); *Quilloin v. Walcott*, 434 U.S. 246, 254-56 (1978) (holding that equal protection does not require that the unwed father of an illegitimate child have the same authority as a married or divorced father to veto adoption); *Moore v. City of E. Cleveland*, 431 U.S. 494, 498-506 (1977) (striking down a city housing ordinance barring extended family members from living together); *Stanton v.*

often inspire law reform,<sup>11</sup> the legal rules that these forms enshrine often assume and privilege a particular family model—marriage and the biological family produced in marriage. When families depart from the marital and biological model on which these doctrines rest, the assurances and predictability of legal doctrine evaporate. In these circumstances, the question of doctrine—of legal truths—becomes deeply contested as courts confront scenarios that require them to grapple with the fraught question of how to apply doctrine in light of real world concerns and the particular circumstances of litigants' lives.

This aspect of family law is perhaps most evident in the recent shift toward a more functional understanding of the family.<sup>12</sup> In recent years, courts and policymakers have taken affirmative steps to recognize the way in which groups may function in the manner of families—and indeed, may consider themselves to be family—even where they have not comported with the formal indicia that traditionally are used to establish family status.<sup>13</sup> For example, in the 1986 case *Braschi v. Stahl Associates*, the New York Court of Appeals concluded that two gay men could be considered “family members” for purposes of a local rent control ordinance because they comported themselves in the manner of spouses.<sup>14</sup> Similarly, in 2002, the American Law Institute published its *Principles of the Law of Family Dissolution*, which relied on a more functional understanding of the family in

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Stanton, 421 U.S. 7, 13-17 (1975) (striking down a state child support statute providing that daughters attain majority at eighteen but sons attain majority at twenty-one); *Stanley v. Illinois*, 405 U.S. 645, 649-59 (1972) (holding that the state was barred from taking custody of the children of an unwed father, absent a hearing and particularized finding that the father was an unfit parent); *Loving v. Virginia*, 388 U.S. 1, 7-12 (1967) (striking down state laws prohibiting interracial marriage).

<sup>11</sup> See, e.g., UNIF. ADOPTION ACT (1994) (providing a model adoption code); UNIF. MARITAL PROP. ACT (1983) (providing a model framework for establishing the shared property rights of both spouses during a marriage and upon dissolution); UNIF. PARENTAGE ACT (1973) (providing a model code for determining parentage).

<sup>12</sup> See Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1484 (2014) [hereinafter Appleton, *Leaving Home*] (“Function and performance of ‘family’ have become important criteria for legal recognition, diminishing the once exclusive emphasis on formalities, such as ceremonial marriage.”).

<sup>13</sup> See, e.g., *Hann v. Hous. Auth.*, 709 F. Supp. 605, 610 (E.D. Pa. 1989) (concluding that an unmarried couple and their children were a family for purposes of public housing eligibility); *Marvin v. Marvin*, 557 P.2d 106, 116, 122-23 (Cal. 1976) (recognizing a contract for support between unmarried cohabitants).

<sup>14</sup> See 543 N.E.2d 49, 55 (N.Y. 1989) (“Appellant and Blanchard lived together as permanent life partners for more than 10 years. They regarded one another, and were regarded by friends and family, as spouses.”).

order to identify basic principles for guiding disputes involving, among other things, relationship dissolution and child custody.<sup>15</sup>

Critically, however, this functional turn has involved more than just efforts to resolve familial disputes in a more equitable fashion. In addition, courts have gradually integrated the emphasis on function into family law doctrine itself.<sup>16</sup> That is, the emphasis on function is not merely a supplement to the family law that was originally organized around the formal categories of marriage, biological parenthood, and heterosexuality. Instead, the functional turn has actually reshaped the law, embedding the logic of functionality into the doctrine itself. Thus, in trying to move beyond doctrine, courts actually have transformed the doctrine so that these exceptions have become part of the rules that govern everyone.

To elaborate on these observations, this Article offers a case study of the evolution of the doctrine of legal parenthood in California to show how courts have grappled with the fixed doctrine of parenthood and the rapidly changing realities of family life. In 1975, California adopted provisions of the Uniform Parentage Act (UPA), codifying them, with some modest modifications, as part of its Family Code.<sup>17</sup> The UPA was rooted in the assumption that parent-child relationships would emerge within marital families or, if not, through nonmarital heterosexual reproduction.<sup>18</sup> But California's doctrine of legal parenthood quickly confronted the complications of modernity.<sup>19</sup> Technological advances in the science of reproduction, coupled with changes in the demographics of family life, pushed the boundaries

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<sup>15</sup> See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.01, 3.01 (2002) (explaining that these guiding principles encompass both formal and functional conceptions of family).

<sup>16</sup> See Appleton, *Leaving Home*, *supra* note 12, at 1486-87 ("Exemplifying family law's functional turn, concepts such as de facto parents, parents by estoppel, psychological parents, intent-based parenthood, and *in loco parentis* status can establish legal *parentage* based on *parenting conduct*." (citations omitted)).

<sup>17</sup> Provisions of the UPA are now codified in California's Family Code. See CAL. FAM. CODE §§ 7600-7730 (West 2004 & Supp. 2013).

<sup>18</sup> See Jenny Wald, *Legitimate Parents: Construing California's Uniform Parentage Act to Protect Children Born Into Nontraditional Families*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 139, 142 (2005) (noting that the UPA "did not anticipate all of the future permutations in the creation of biological and social families," such as lesbian and gay families, but instead focused on parentage in the context of heterosexual relationships).

<sup>19</sup> See, e.g., Megan S. Calvo, Note, *Uniform Parentage Act—Say Goodbye to Donna Reed: Recognizing Stepmothers' Rights*, 30 W. NEW ENG. L. REV. 773, 787-88 (2008) (noting that the California Supreme Court's decision in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (en banc), involved "a situation that was unforeseen when the UPA was drafted").

of the legal doctrine of parenthood, prompting courts to adapt doctrinal rules to account for the realities of family life.<sup>20</sup>

Although these changes produced reappraisals of family law doctrine, courts nevertheless emphasized—and indeed, entrenched—crucial assumptions associated with the traditional marital family. In particular, even as courts credited departures from the traditional marital family configuration in their interpretations of the UPA, they nonetheless emphasized the degree to which these families comported with the basic structure and functions of the marital family.<sup>21</sup> Moreover, in interpreting the various provisions of the UPA, courts underscored a traditional function of the marital family—the privatization of support and care of children.<sup>22</sup>

This Article proceeds in three parts. Part I provides a brief history of the UPA, including its adoption and codification in California in 1975. Part II then traces the California courts' evolving interpretations of certain UPA provisions in a series of cases involving the determination of parentage. Over time, California courts revised and modified existing interpretations of these statutory provisions in order to accommodate changes in technology and in the structure of the family. But even as the courts' interpretations of these statutory provisions evolved, what remained consistent was the underlying commitment to the marital family form, the two-parent dyad, and the privatization of dependency within the family. Part III explores these commitments to marriage, the marital family, and

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<sup>20</sup> See *id.* at 787 (discussing *Johnson*, where the California Supreme Court interpreted California's UPA provisions to hold "that when both the genetic relationship with the child and gestation of the child do not abide in one woman, the woman who intended to create and raise the child is the legal mother").

<sup>21</sup> See, e.g., *Alameda Cnty. Soc. Servs. Agency v. Kimberly H. (In re Nicholas H.)*, 46 P.3d 932, 940-41 (Cal. 2002) (vesting legal parenthood in a man who was not biologically related to the child on the grounds that he had functioned in the manner of a father, living with the child and the child's mother and holding the child out as his own since the child's birth); *Kern Cnty. Dep't of Human Servs. v. Monica G. (In re Salvador M.)*, 4 Cal. Rptr. 3d 705, 708-09 (Ct. App. 2003) (determining, in circumstances where the biological parents were unavailable, that a half-sister was a presumed mother because she had taken care of the child since birth and raised him as her own); *L.A. Cnty. Dep't of Children & Family Servs. v. Leticia C. (In re Karen C.)*, 124 Cal. Rptr. 2d 677, 681-83 (Ct. App. 2002) (recognizing a woman who was not biologically related to the child as a presumed mother because she had held the child out as her own for years).

<sup>22</sup> See *Buzzanca v. Buzzanca (In re Marriage of Buzzanca)*, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998) (noting that parentage determinations are intended in part to identify those who are "obligated to provide maintenance and support for the child"); see also Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 360 (2012) [hereinafter Appleton, *Illegitimacy and Sex*] (noting that while the UPA reflected a desire to remove the distinction between legitimate and illegitimate birth, its focus on identifying parents inside and outside the marital family "pav[ed] the way for the increasing privatization of dependency").

the privatization of dependency within the family. As I argue, these commitments, perhaps more so than case law and statutory text, reveal the true doctrinal framework that has undergirded—and continues to define—family law.

#### I. CREATING A DOCTRINE OF LEGAL PARENTHOOD—CALIFORNIA'S ADOPTION OF THE UNIFORM PARENTAGE ACT

In 1968, the United States Supreme Court began dismantling the legal impediments that traditionally attended illegitimate birth. In *Levy v. Louisiana*<sup>23</sup> and a companion case, *Glona v. American Guarantee & Liability Insurance Co.*,<sup>24</sup> the Court struck down state laws that prohibited illegitimate children and their parents from recovering under wrongful death claims.<sup>25</sup> According to the Court, the distinction drawn between marital and nonmarital birth had no rational relationship to the purpose and administration of the wrongful death statutes at issue.<sup>26</sup> Instead, the Court found that the distinctions invidiously discriminated against children born out of wedlock, punishing them for their parents' "sin[s]."<sup>27</sup>

The Court's decisions in *Levy* and *Glona* and their progeny have been credited with ushering in a sea change in the legal approach to illegitimacy.<sup>28</sup> Although some scholars debate the extent to which the Supreme Court's illegitimacy jurisprudence was revolutionary,<sup>29</sup> it certainly influenced the law of parentage. Partly in response to the Court's illegitimacy decisions,

<sup>23</sup> 391 U.S. 68 (1968).

<sup>24</sup> 391 U.S. 73 (1968).

<sup>25</sup> *Id.* at 75-76; *Levy*, 391 U.S. at 72.

<sup>26</sup> See *Glona*, 391 U.S. at 75 ("[W]e see no possible rational basis for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served." (citation omitted)).

<sup>27</sup> *Id.* (noting that punishing the "sin" of nonmarital sex is the historical reason for the creation of legal impediments based on illegitimacy).

<sup>28</sup> See Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 211-12 (2009) (noting that in the wake of *Levy*, *Glona*, and their progeny, the "legal doctrine of 'illegitimacy' had all but disappeared").

<sup>29</sup> See Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 413 (2012) [hereinafter Murray, *New Illegitimacy*] ("*Levy* and *Glona* do not represent a broad shift in law's understanding of illegitimacy. Instead, both cases are entirely consistent with law's persistent skepticism of non-marriage and its veneration of marriage and the marital family." (citation omitted)); see also Serena Mayeri, *Marital Supremacy and the Constitution of the Non-Marital Family*, 103 CALIF. L. REV. (forthcoming 2015) (manuscript at 104) (on file with author) ("By focusing on the blamelessness of children, these decisions not only obscured the constitutional harms of illegitimacy penalties' detrimental impact on adults, they ignored how these laws reinforced broader racial, sexual, and socioeconomic inequities that impoverished entire families.").

the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Parentage Act (UPA) in 1973.<sup>30</sup> In keeping with the Supreme Court's skepticism of illegitimacy as a basis for distinguishing between individuals, the UPA sought to remove distinctions based on the parents' marital status at the time of the child's birth while also providing ways to establish paternity in circumstances involving unmarried fathers.<sup>31</sup>

California, like many states, adopted a modified version of the UPA in 1975.<sup>32</sup> As Senator Anthony Beilenson, the author of California's version of the UPA, noted at its passage, the new law struck "the entire concept of 'illegitimacy' . . . from California's law books."<sup>33</sup> The California law "repeal[ed] all legal references to legitimacy and illegitimacy and substitute[d] the concept known as the 'parent and child relationship' which will be used in the future."<sup>34</sup>

In this regard, the UPA looked beyond marriage to provide multiple ways to determine parentage. Women could establish maternity in the traditional way through gestation and birth.<sup>35</sup> But establishing paternity required more. In the case of marital births, the UPA deployed the traditional marital presumptions in place in most American jurisdictions, which presumed a woman's husband to be the father of any child born to her during the course of the marriage or within three hundred days of its termination.<sup>36</sup> For nonmarital births, however, rather than relying on a presumption based on the horizontal relationship between two adults, the

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<sup>30</sup> See Polikoff, *supra* note 28, at 211 (noting that the critiques of illegitimacy influenced the National Conference of Commissioners on Uniform State Laws, which in turn led to the promulgation of the UPA). Importantly, Harry Krause, an architect of the effort to dismantle legal impediments based on illegitimacy, was also integrally involved in the development of the UPA. *Id.* at 209-211; see also Mary Kay Kisthardt, *Of Fatherhood, Families, and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 TUL. L. REV. 585, 589-90 (1991) (discussing Krause's role in the UPA's drafting).

<sup>31</sup> See Wald, *supra* note 18, at 140 ("The primary purpose of the [UPA] was to eliminate the distinction between legitimate and illegitimate children.").

<sup>32</sup> Jessica Hawkins, *My Two Dads: Challenging Gender Stereotypes in Applying California's Recent Supreme Court Cases to Gay Couples*, 41 FAM. L.Q. 623, 625 (2007).

<sup>33</sup> Anthony C. Beilenson, Op-Ed., *Archaic Injustice Eliminated*, L.A. TIMES, Oct. 19, 1975, at F5.

<sup>34</sup> *Id.*

<sup>35</sup> See UNIF. PARENTAGE ACT § 3(1) (1973) ("The parent and child relationship between a child and . . . the natural mother may be established by proof of her having given birth to the child."); see also Wald, *supra* note 18, at 141 ("Because the fact of maternity was obvious, social motherhood—a mother's relationship with her child—was inextricably linked to a woman's biological relationship to her child.").

<sup>36</sup> UNIF. PARENTAGE ACT §§ 4-6 (1973). Meaningfully, the UPA permitted the presumption to be rebutted in certain circumstances. See *id.* § 4(b) (explaining that a "court decree establishing paternity of the child by another man" would rebut the presumption).



UPA fashioned new presumptions based on the parent–child relationship, including biological connections<sup>37</sup> and the father's conduct toward the child.<sup>38</sup>

A critical aspect of the UPA and its adoption in California and elsewhere was the link between establishing parentage and the attachment of child support obligations.<sup>39</sup> Indeed, as Susan Frelich Appleton has argued, many of the changes in the treatment of unmarried fathers and nonmarital children were driven by private welfare concerns.<sup>40</sup> If marriage provided a private welfare system for those children born to married parents, the UPA's provisions attempted to construct an analogous system of privatized support by establishing paternity—and attaching the obligation of child support—in nonmarital families through the recognition of biological connections and conduct.

Although the UPA responded to the growing rate of nonmarital families, it did not anticipate other tectonic shifts in family life. For example, the statute barely acknowledged the emergence of assisted reproductive technologies (ARTs). Indeed, the statute's one nod to this aspect of modernity was its provisions relating to the use of artificial insemination.<sup>41</sup> But even there, its contemplation of insemination as a route to parenthood struck a traditional note. The UPA presumed that insemination would occur within the context of the marital family. It provided that the husband of a woman receiving artificial insemination under a physician's supervision was presumed to be the legal father of the

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<sup>37</sup> See *id.* § 12 (“Evidence relating to paternity may include . . . evidence of sexual intercourse between the mother and alleged father at any possible time of conception.”).

<sup>38</sup> See *id.* § 4(a)(4) (providing that paternity can be established by a man who “receives the child into his home and openly holds out the child as his natural child”).

<sup>39</sup> See Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 8 (1974) (discussing the UPA's “guiding principle” that all children have an equal interest in establishing their right to a relationship with—and support from—both parents); see also Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L.Q. 41, 42 (2001) (“[R]esolving parentage issues has economic implications for the public. Many of the benefits of establishing parentage whether for marital or nonmarital children are monetary. In the absence of financial support, a child may need public assistance.”).

<sup>40</sup> See Appleton, *Illegitimacy and Sex*, *supra* note 22, at 360 (“If the Supreme Court's decisions and the 1973 UPA were child-focused—developments designed to help children of unmarried parents achieve parity with other children—they also offered welcome changes for the state itself, paving the way for the increasing privatization of dependency.”). In fact, one of the major illegitimacy cases concerned nonmarital children's rights to support. See *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (per curiam) (“[O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.”).

<sup>41</sup> UNIF. PARENTAGE ACT § 5 (1973).

child born.<sup>42</sup> In adopting various provisions of the UPA, however, California made a critical change to the model code's terms, modifying the provisions dealing with paternity in the context of artificial insemination to allow unmarried women to use physician-supervised artificial insemination without vesting the sperm donor with the status of legal father.<sup>43</sup>

In time, however, it became clear that technology, as well as the changing demographics of family life, might lead to circumstances in which the factors relevant to determining parentage could point in different directions.<sup>44</sup> How, then, to resolve the puzzle of parenthood? California adopted section 4(b) of the UPA, which provided that if two or more presumptions arose, "the presumption which on the facts is founded on the weightier considerations of policy and logic controls."<sup>45</sup> This provision left much discretion to judges dealing with the often complex factual circumstances of modern families. In addition, the UPA instructed that, "[i]nsofar as practicable, the provisions . . . applicable to the father and child relationship apply" to establishing the mother-child relationship.<sup>46</sup> Accordingly, presumptions applicable to fathers could apply to mothers. But as Part II makes clear, even with these guidelines, the California UPA's provisions were often inadequate to resolve the pressing issues that arose in the idiosyncratic circumstances of family life. In such situations, doctrine could be a guide—and even a tool—for resolving such disputes, but other interests would also be important decisional factors.

## II. PUZZLING OVER PARENTHOOD—THE EVOLUTION OF THE CALIFORNIA UPA IN CASE LAW

When California adopted the UPA in 1975, the model act reflected an interest in eliminating distinctions between marital and nonmarital children.<sup>47</sup> By emphasizing biological connections and conduct as critical indicia

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<sup>42</sup> See *id.* § 5(a) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.").

<sup>43</sup> CAL. FAM. CODE § 7613(b) (West 1994) ("The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.").

<sup>44</sup> See Calvo, *supra* note 19, at 787-88 (discussing the facts of *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (en banc), where the court confronted conflicting claims to motherhood—one from the surrogate who actually gave birth to the child and the other from the biological egg donor).

<sup>45</sup> CAL. FAM. CODE § 7612(b) (West 1994); UNIF. PARENTAGE ACT § 4(b) (1973).

<sup>46</sup> UNIF. PARENTAGE ACT § 21 (1973). California adopted and codified this provision of the UPA into its Family Code, at CAL. FAM. CODE § 7650 (West 2004).

<sup>47</sup> See UNIF. PARENTAGE ACT § 2 (1973) ("The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."); see also *id.* § 2

of parenthood, the UPA diminished the importance of marriage for establishing legal parentage.<sup>48</sup> Additionally, the emphasis on biology and conduct as means of establishing parentage provided the state with alternatives—beyond marriage—for identifying private sources of support for children.<sup>49</sup>

But while the UPA reflected shifts in the composition of family life, it assumed that traditional heterosexual reproduction would be the primary conduit to parenthood.<sup>50</sup> As ARTs emerged, California courts struggled to adapt the UPA's provisions to the rapidly shifting terrain that these new modes of reproduction created.<sup>51</sup>

### A. Johnson v. Calvert

In *Johnson v. Calvert*,<sup>52</sup> the California courts grappled with the fraught question of how to determine parentage in circumstances involving new reproductive technologies. After a hysterectomy left her unable to carry a pregnancy to term, Crispina Calvert and her husband, Mark, decided to pursue in vitro fertilization (IVF) and surrogacy.<sup>53</sup> In 1990, the Calverts entered into a surrogacy contract with Anna Johnson, a paid gestational surrogate. The contract provided that an embryo created using the Calverts' genetic material would be implanted in Johnson for gestation.<sup>54</sup> In exchange for \$10,000 and a \$200,000 life insurance policy, Johnson would bear the child and, upon birth, relinquish "all parental rights" to the child to the Calverts.<sup>55</sup> By the time the child was born, however, relations between the Calverts and Johnson had deteriorated.<sup>56</sup> Shortly after the birth, the

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cmt. ("[T]he major substantive sections of the Act[] establish the principle that regardless of the marital status of the parents, all children and all parents have equal rights with respect to each other."); Appleton, *Illegitimacy and Sex*, *supra* note 22, at 381 ("The 1973 UPA set forth a network of parentage presumptions applicable to children to whom the presumption of legitimacy did not apply.").

<sup>48</sup> Appleton, *Illegitimacy and Sex*, *supra* note 22, at 360.

<sup>49</sup> *See id.* (noting that although the UPA was "designed to help children of unmarried parents achieve parity with other children," its emphasis on biology and conduct as conduits to parenthood also permitted new paths for "the increasing privatization of dependency").

<sup>50</sup> In 2000, in an attempt to remedy this oversight, the UPA was amended by responding directly to the challenges presented by improved genetic testing and the proliferation of ARTs. *See, e.g.*, UNIF. PARENTAGE ACT § 701 cmt. (2002) ("Article 7 only applies to children born as the result of assisted reproductive technologies . . .").

<sup>51</sup> *See Calvo*, *supra* note 19, at 787 ("[E]ven prior to its amendment, the Supreme Court of California applied the UPA to a situation that was not considered when it was drafted.").

<sup>52</sup> 851 P.2d 776 (Cal. 1993) (en banc).

<sup>53</sup> *Id.* at 778.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

Calverts and Johnson all filed actions to be recognized as the legal parents of the child.<sup>57</sup>

In framing their claims, the parties looked to the UPA provisions that governed the determination of maternity.<sup>58</sup> The Calverts, who had furnished their genetic material to create the embryo to be implanted and gestated, based their claim on genetics.<sup>59</sup> Conversely, Johnson based her claim on her status as the gestational mother.<sup>60</sup> By the terms of the statute, which provided that the mother-child relationship “may be established by proof of . . . having given birth to the child,”<sup>61</sup> Johnson appeared to have the stronger claim. The trial court, however, prioritized genetics, noting that while Johnson had given birth to the child, the Calverts were the child’s “genetic, biological and natural” father and mother.<sup>62</sup> Accordingly, Johnson had no “parental” rights to the child, and the surrogacy contract was legal and enforceable against her claims.<sup>63</sup> An intermediate appellate court affirmed the trial court decision, and Johnson appealed to the California Supreme Court.<sup>64</sup>

The California Supreme Court acknowledged the complexities of the situation: “Both women . . . ha[d] adduced evidence of a mother and child relationship as contemplated by the Act.”<sup>65</sup> In other words, Johnson was a mother because she had birthed the child, while Crispina Calvert was a mother by virtue of her biological connection to the child. The trouble, of course, was that the statute reflected “the ancient dictum *mater est quam [gestation] demonstrat* (by gestation the mother is demonstrated).”<sup>66</sup> As such, the statute’s understanding of maternity was one in which gestation and genetics coincided. The statute did not contemplate the complications that

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 777-78. Critically, the parties’ decisions to frame their arguments with reference to the UPA were animated, at least in part, by the broad skepticism of surrogacy agreements that emerged after the Supreme Court of New Jersey found surrogacy contracts to be unenforceable in *In re Baby M*, 537 A.2d 1227, 1248-50 (N.J. 1988). Following the controversial decision, courts were reluctant to make doctrine around surrogacy contracts. In this regard, any impulse toward shifting family law doctrine in a more contractual direction was effectively foreclosed by the *Baby M* backlash and the ensuing effort to reroute surrogacy disputes through the UPA. For a discussion of this dynamic, see generally Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109 (2009).

<sup>59</sup> *Johnson*, 851 P.2d at 779.

<sup>60</sup> *Id.*

<sup>61</sup> CAL. CIV. CODE § 7003(1) (West 1991) (current version at CAL. FAM. CODE § 7610(a) (West 2004)).

<sup>62</sup> *Johnson*, 851 P.2d at 778.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 781.

<sup>66</sup> *Id.* (citation omitted).

surrogacy and ARTs would present, and thus did not foresee the possibility that maternity might one day be bifurcated such that one woman would be a child's genetic mother, while another would be its gestational mother.

Confronted with just this situation, the *Johnson* court retreated from statutory text and the scientific truths upon which it was based. The court reasoned that "while gestation may demonstrate maternal status, it is not the sine qua non of motherhood."<sup>67</sup> In the face of a statutory impasse, the court turned its attention to "the parties' intentions."<sup>68</sup> Although the court refused to address the issue of the surrogacy agreement's enforceability,<sup>69</sup> it found the agreement relevant for discerning the parties' intentions regarding the child.<sup>70</sup> The surrogacy agreement made clear that the Calverts "affirmatively intended the birth of the child" and that Crispina Calvert "from the outset intended to be the child's mother."<sup>71</sup>

The *Johnson* court's articulation of "intentional parenthood" marked a profound shift in the determination of parentage. Nevertheless, even as it broke new ground, the California Supreme Court hewed to the traditional model of dual parentage in rendering its decision.<sup>72</sup> While the court discussed the parties' intentions at length, it spent hardly any time at all considering the prospect of vesting legal parenthood in three different people.<sup>73</sup> Indeed, the possibility of a child with three legal parents was an unorthodox—and unwelcome—outcome. Vesting any of the legal incidents of parentage in Anna Johnson would invariably "come only at Crispina's expense," and would intrude upon the Calverts' "procreative choices and their relationship with the child."<sup>74</sup> In short, the prospect of three, rather than two, parents would be disastrous, "necessarily detract[ing] from or impair[ing] the parental bond" between the Calverts and their child.<sup>75</sup>

The court's resistance to the prospect of three legal parents gestures toward two distinct, but related, concerns. On one hand, the court's opposition to three legal parents evinced a preference for the familiar two-parent dyad. And critically, the parental dyad (and the preference for

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 782.

<sup>69</sup> *Id.* at 784.

<sup>70</sup> *Id.* at 782.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 781 n.8 ("To recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish Crispina's role as mother.").

<sup>73</sup> *See id.* ("We decline to accept the contention . . . that we should find the child has two mothers.").

<sup>74</sup> *Id.* at 786.

<sup>75</sup> *Id.*

it) reflected deep-seated assumptions that heterosexual marriage and biological reproduction would—and *should*—be the most common conduits to parenthood. Dividing parenthood among three persons was a clear departure from the traditional family model; tellingly, the court, in its concern for “the parental bond”<sup>76</sup> between the Calverts and the child, made clear that dividing parenthood between more than two people could threaten the traditional family structure by inserting an unwelcomed interloper into the bosom of the family.

But even as the court’s disdain for dividing parenthood among three people signaled a preference for the traditional family model, it also reflected a traditional function of the marital family: the privatization of dependency within the family unit. Although the *Johnson* court did not mention it explicitly, it likely weighed the appeal of a stable marital family against the prospect of three people all vying for a say in the child’s upbringing or the prospect of Anna Johnson raising the child on her own. With this calculus in mind, it is unsurprising that the court preferred the Calverts, who had planned for the child and sought to raise it together within a traditional marital family structure, over Johnson. The (perceived) economic and emotional stability of the intact marital family was likely preferable to the uncertainty posed by three competing parental claims or the prospect of single motherhood.

#### B. *In re* Marriage of Buzzanca

Though a preference for the marital family and the privatization of dependency was not explicitly expressed in the court’s disposition of *Johnson*, it soon emerged as a critical interest in other cases involving parentage determinations. In *In re Marriage of Buzzanca*,<sup>77</sup> a married couple, John and Luanne Buzzanca, had an embryo implanted in a surrogate.<sup>78</sup> Unlike the circumstances in *Johnson*, the embryo was not genetically related to the Buzzancas.<sup>79</sup> Shortly after the child, Jaycee, was born, the Buzzancas ended their marriage, setting the stage for a lawsuit to determine parentage—and financial responsibility—for Jaycee.<sup>80</sup>

At trial, all of the parties—the Buzzancas, the surrogate, and the surrogate’s husband—stipulated that, because they had no genetic relationship to the child, they were not “biological” parents within the

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<sup>76</sup> *Id.*

<sup>77</sup> *Buzzanca v. Buzzanca (In re Marriage of Buzzanca)*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

<sup>78</sup> *Id.* at 282.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

meaning of the UPA.<sup>81</sup> Although Luanne Buzzanca claimed that she and John were the lawful parents under *Johnson's* theory of intentional parenthood, John "disclaimed any responsibility" for the child, "financial or otherwise."<sup>82</sup> As the trial court explained, because John had not "contributed the sperm" and thus "had no biological relationship to the child," he was not the child's legal father and owed no obligations for the child's care and upkeep.<sup>83</sup> On this logic, the trial court reached "an extraordinary conclusion: Jaycee had *no* lawful parents."<sup>84</sup>

On appeal, the intermediate court immediately invoked *Johnson's* logic of intentional parenthood, using it to inform its own interpretation of the UPA's provisions.<sup>85</sup> According to the appellate court, the trial court had focused unduly on whether there was a biological relationship between John and Jaycee, completely neglecting "the substantial and well-settled body of law holding that there are times when *fatherhood* can be established by *conduct* apart from giving birth or being genetically related to a child."<sup>86</sup> In the appellate court's view, although the Buzzancas were genetically unrelated to Jaycee, their intentions and conduct provided a basis for vesting them with the rights and obligations of parenthood.<sup>87</sup> Accordingly, Luanne Buzzanca was the child's lawful mother because she "caused Jaycee's conception and birth by initiating the surrogacy arrangement."<sup>88</sup> And if Luanne was Jaycee's mother, then John, her husband at the time of the surrogacy agreement and implantation, was the legal father.<sup>89</sup>

In reaching this conclusion, the appellate court analogized the Buzzancas' circumstances to the statutory provisions concerning artificial insemination in the context of an intact marriage. By the UPA's terms, "[i]f, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived."<sup>90</sup> Analogizing surrogacy

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See id.* ("The same rule which makes the husband the lawful father of a child born because of his consent to artificial insemination should be applied here—by the same parity of reasoning that guided our Supreme Court in [*Johnson*—to both husband and wife.").

<sup>86</sup> *Id.* (second emphasis added).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 291.

<sup>89</sup> *See id.* ("John caused Jaycee's conception every bit as much as if things had been done the old-fashioned way." (citation omitted)).

<sup>90</sup> CAL. FAM. CODE § 7613(a) (West 1994).

to artificial insemination and invoking the traditional marital presumption, the appellate court concluded that in a situation involving “a man and woman who were married at the time of conception and signing of the surrogacy agreement,” the rights and obligations of parenthood could attach, even in the absence of a biological connection.<sup>91</sup>

But even as the *Buzzanca* court wedded the logic of intentional parenthood to statutory presumptions that were informed by marriage and marital conduct,<sup>92</sup> it also prioritized more quotidian concerns. Recall that the trial court reached the “extraordinary” conclusion that Jaycee was a “legal orphan” with no parents.<sup>93</sup> The intermediate appellate court immediately identified the flaw in this logic. With no lawful parents, the child—and the burden of her upkeep—would “fall on the taxpayers.”<sup>94</sup> It is little wonder that the *Buzzanca* court blended the UPA’s marital presumptions with *Johnson*’s intentional parenthood doctrine to avoid the unappealing outcome of a child left dependent on the state for her upkeep. After all, as the *Buzzanca* court noted, the UPA’s provisions were promulgated with an eye toward ensuring “that parents will live up to their support obligations,” rather than “leaving the task to the taxpayers.”<sup>95</sup>

### C. *In re Nicholas H. and In re Karen C.*

As in *Buzzanca*, the prospect of a child dependent on the state for his care and provision informed the court’s disposition of *In re Nicholas H.*<sup>96</sup> In many ways, *Nicholas H.* exemplified family law’s functionalist turn, as the facts of the case perfectly captured the changing demographics of the family, as well as marriage’s diminished role as a conduit to parenthood. The case involved Thomas and Kimberly, who had become a couple while Kimberly was pregnant by another man.<sup>97</sup> After the child, Nicholas, was born, Thomas and Kimberly lived together and raised Nicholas together,

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<sup>91</sup> *Buzzanca*, 72 Cal. Rptr. 2d at 287 & n.11.

<sup>92</sup> The *Buzzanca* court’s interpretation of the UPA’s presumptions in tandem with *Johnson*’s notion of intentional parenthood was consistent with an earlier decision, *Moschetta v. Moschetta (In re Marriage of Moschetta)*, 30 Cal. Rptr. 2d 893 (Ct. App. 1994). There, the court “decline[d] to enforce the traditional surrogacy contract . . . because to do so would mean we would have to ignore both the analysis used by our Supreme Court in *Johnson v. Calvert* and the adoption statute that requires a formal consent to a child’s adoption by his or her birth mother.” *Id.* at 901.

<sup>93</sup> *Buzzanca*, 72 Cal. Rptr. 2d at 282, 284.

<sup>94</sup> *Id.* at 284.

<sup>95</sup> *Id.* at 290.

<sup>96</sup> *Alameda Cnty. Soc. Servs. Agency v. Kimberly H. (In re Nicholas H.)*, 46 P.3d 932 (Cal. 2002).

<sup>97</sup> *Id.* at 934.



though they never married.<sup>98</sup> In time, the relationship soured amidst Kimberly's drug use and incarceration, and episodes of domestic violence.<sup>99</sup> Because of Kimberly's instability, a juvenile court removed Nicholas from her care.<sup>100</sup> Thomas petitioned for custody of the boy, but Kimberly objected on the ground that because Thomas was not the boy's biological father, he could not claim parental rights.<sup>101</sup> Thomas conceded that he had no biological connection to Nicholas,<sup>102</sup> but argued that under section 7611(d) of California's UPA, "the father-son relationship he ha[d] developed with Nicholas qualified him as a presumed father."<sup>103</sup> The juvenile court credited Thomas' functionalist argument;<sup>104</sup> an intermediate appellate court, however, rejected the conduct-based claim to parentage because "the presumption set forth in section 7611 is a presumption that a man is the natural, biological father of the child in question."<sup>105</sup> Because Thomas admitted that he had no biological connection to Nicholas, the presumption established under section 7611(d) was, in the appellate court's view, rebutted.<sup>106</sup>

The California Supreme Court disagreed and reversed.<sup>107</sup> It explained that the intermediate appellate court erred in concluding that the absence of a biological connection between Thomas and Nicholas "necessarily rebutted [section 7611(d)'s] presumption."<sup>108</sup> Although section 7611(d)'s presumption *could* be rebutted by evidence that the claimant lacked a biological connection to the child, by the UPA's terms, such a rebuttal could be deployed only "in an appropriate action."<sup>109</sup> According to the court, the circumstances were not an appropriate action in which to rebut the presumption of parenthood.<sup>110</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 934-35.

<sup>100</sup> *Id.* at 935-36.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Alameda Cnty. Soc. Servs. Agency v. Kimberly H. (In re Nicholas H.)*, 110 Cal. Rptr. 2d 126, 128 (Ct. App. 2001), *rev'd*, 46 P.3d 932 (Cal. 2002); *cf.* CAL. FAM. CODE § 7611(d) (West 1994) (providing that a man is presumed to be the natural father of a child if "[h]e receives the child into his home and openly holds out the child as his natural child").

<sup>104</sup> *See Nicholas H.*, 46 P.3d at 935 ("[T]he juvenile court found that the presumption under 7611(d) that Thomas was Nicholas's natural father had not been rebutted.")

<sup>105</sup> *Nicholas H.*, 110 Cal. Rptr. 2d at 141.

<sup>106</sup> *Id.* at 142.

<sup>107</sup> *Nicholas H.*, 46 P.3d at 934, 941.

<sup>108</sup> *Id.* at 935.

<sup>109</sup> CAL. FAM. CODE § 7612(a) (West 1994).

<sup>110</sup> *Nicholas H.*, 46 P.3d at 934.

But what made the circumstances inappropriate for rebutting the presumption of biological parenthood? As the court noted, Nicholas's biological parents were unavailable to care for him.<sup>111</sup> Unemployed and frequently homeless, Kimberly was "a frail reed for Nicholas to lean upon."<sup>112</sup> And while Kimberly had named a former partner, Jason, as Nicholas's biological father, "Jason ha[d] not come forward to affirm that claim, and, indeed, ha[d] not even been located."<sup>113</sup> In this regard, Thomas was "the constant in Nicholas's life."<sup>114</sup> Rebutting section 7611's presumption for lack of a biological connection would render Nicholas "fatherless and homeless."<sup>115</sup> Faced with the grim prospect of a child who would otherwise become a ward of the state, the court interpreted the UPA's provisions broadly enough to allow a man with no biological connections to establish paternity based solely on his conduct over time.<sup>116</sup>

A few months later, in *In re Karen C.*,<sup>117</sup> a California intermediate appellate court built upon *Nicholas H.*, applying its logic in a gender-neutral fashion to conclude that a woman who raised a child given to her at birth by another woman could similarly be the child's presumed parent under section 7611.<sup>118</sup> As in *Nicholas H.*, the *Karen C.* court evinced a deep discomfort with the prospect of rejecting a claim of legal parenthood in circumstances where doing so would render the child a legal orphan.<sup>119</sup> At bottom, the court noted, "[t]he judicial determination of paternity is . . . a mixture of a search for genetic truth and the implementation of the strong public policies favoring marriage and family stability, and disfavoring labels of illegitimacy."<sup>120</sup> With these concerns in mind, a judgment establishing parentage need not be rooted in biological truths. To reach an optimal

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<sup>111</sup> See *id.* at 934 (discussing the "harsh result" that would ensue if the court based parentage solely on the biological relationship).

<sup>112</sup> *Id.* at 935.

<sup>113</sup> *Id.* at 936.

<sup>114</sup> *Id.* at 935.

<sup>115</sup> *Id.* at 934.

<sup>116</sup> See *id.* at 941 (concluding that the California legislature, in enacting the UPA provisions allowing for the rebuttal of a man's presumed status as a natural father, was "unlikely to have had in mind an action like this . . . in which no other man claims parental rights to the child").

<sup>117</sup> L.A. Cnty. Dep't of Children & Family Servs. v. Leticia C. (*In re Karen C.*), 124 Cal. Rptr. 2d 677 (Ct. App. 2002).

<sup>118</sup> See *id.* at 680-81, 683 (summarizing *Nicholas H.*, determining that its "principles should apply equally to women," and vacating the lower court's order denying the existence of a mother-child relationship).

<sup>119</sup> See *id.* at 679 (noting that "Karen has effectively been made an orphan" and therefore "she has an obvious interest in a legal determination of whether Leticia is her mother").

<sup>120</sup> *Id.* at 680.

outcome for the child and ensure the privatization of support, the determination of parenthood could, in some cases, “be a decretal fiction.”<sup>121</sup>

D. *K.M. v. E.G. and Elisa B. v. Superior Court*

Critically, both *Nicholas H.* and *Karen C.* were juvenile dependency cases, a posture that perhaps explains the courts' interest in establishing parenthood, even in the absence of a biological connection. In most dependency cases, the failure to identify an appropriate legal guardian will result in the child becoming a ward of the state. But even as the dependency context likely colored the decisions in *Nicholas H.* and *Karen C.*, the interpretations of the UPA that prevailed in those cases proved instructive outside of the dependency context—including in circumstances involving the parentage rights of same-sex couples.<sup>122</sup>

In *K.M. v. E.G.*, K.M. provided her ova so that they could be fertilized with sperm from an anonymous donor.<sup>123</sup> The resulting embryos were implanted in her lesbian partner, E.G., who became pregnant and carried the resulting twins to term.<sup>124</sup> When their relationship ended, E.G. argued that, despite the use of K.M.'s ova, the couple had undertaken IVF with the understanding that E.G. would be the sole parent of any resulting children.<sup>125</sup> Indeed, as the Court of Appeal noted, California's version of the UPA specifically provided for the prospect of single motherhood by extinguishing the parental claims of anonymous sperm donors who provided genetic material for artificial insemination.<sup>126</sup> On this view, the lower court concluded that K.M. was akin to an anonymous sperm donor, who under section 7613(b) was not considered “the natural [parent] of a child thereby conceived.”<sup>127</sup>

K.M., by contrast, claimed that regardless of the law's provisions for single parenthood, she and E.G. planned to raise any resulting children together<sup>128</sup>—indeed, they *had* raised their children together until their

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<sup>121</sup> *Id.*

<sup>122</sup> See *infra* notes 123-168 and accompanying text.

<sup>123</sup> 117 P.3d 673, 676 (Cal. 2005).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 676.

<sup>126</sup> See *id.* at 677 (noting that the Court of Appeal observed that “the status of K.M. . . . is consistent with the status of a sperm donor under the [Uniform Parentage Act], i.e., treated in law as if he were not the natural father of a child thereby conceived” (omission and alteration in original)); see also CAL. FAM. CODE § 7613(b) (West 2004) (“The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.”).

<sup>127</sup> See *supra* note 126.

<sup>128</sup> *K.M.*, 117 P.3d at 679.

relationship ended.<sup>129</sup> In this regard, K.M. not only had a biological connection to the children E.G. had birthed, she also had received them into her home and held them out as her own. Accordingly, K.M. argued that she was a parent under both the doctrine of intentional parenthood established in *Johnson* and section 7611(d) of the California UPA.<sup>130</sup>

At trial and on the initial appeal, the courts credited E.G.'s interpretation of the statute.<sup>131</sup> Those courts held that K.M.'s status "was analogous to that of a sperm donor, who is treated as a legal stranger to a child."<sup>132</sup> Neither court made much of K.M.'s claim that she was a presumed parent under section 7611(d) because she had received the children into her home and held them out as her natural children.<sup>133</sup> Nor did the lower courts entertain K.M.'s argument that she and E.G. had intended to parent the twins jointly and that E.G. was thus estopped from now denying K.M.'s claim to parenthood.<sup>134</sup> According to the Court of Appeal, "substantial evidence supports the trial courts [sic] factual finding that *only* E.G. intended to bring about the birth of a child whom she intended to raise as her own."<sup>135</sup>

The California Supreme Court, however, took a different approach, concluding that K.M. was a legal parent.<sup>136</sup> In so holding, it drew on past precedents interpreting California's UPA, including *Johnson* and *Buzzanca*.<sup>137</sup> As in *Johnson*, both K.M. and E.G. had biological connections to the children. K.M., who furnished ova for the IVF procedure, was the genetic mother, while E.G., who bore the children, was the gestational

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<sup>129</sup> *Id.* at 676-77.

<sup>130</sup> *Id.* at 677, 679; *see also* CAL. FAM. CODE § 7611(d) (West 2004) (presuming that one is a natural parent of a child if "[h]e receives the child into his home and openly holds out the child as his natural child").

<sup>131</sup> *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 139 (Ct. App. 2004), *rev'd*, 117 P.3d 673 (Cal. 2005).

<sup>132</sup> *K.M.*, 117 P.3d at 677.

<sup>133</sup> *See id.* at 683 ("The [trial] court further ruled that K.M. did not meet the statutory definition of a 'presumed' mother [under section 7611(d)] because she had failed to meet both prongs of the statutory test: receiving the children into her home, and holding them out as her natural children. Although K.M. had received the twins into her home, she had not held them out as her natural children . . ." (citation omitted)); *id.* at 682 ("In light of our conclusion that section 7613(b) does not apply and that K.M. is the twins' parent (together with E.G.), based upon K.M.'s genetic relationship to the twins, we need not, and do not, consider whether K.M. is presumed to be a parent of the twins under [section 7611(d)] . . .").

<sup>134</sup> *See id.* at 677 (noting the Court of Appeal's conclusion that at the time of conception, both parties intended for E.G. to be the sole mother and parent, and therefore any changes to the agreement after the birth did not alter the original scheme).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 682.

<sup>137</sup> *See generally id.* at 678-82 (discussing California's UPA and its interpretation in these two cases).

mother.<sup>138</sup> Using *Johnson* as a template, the *K.M.* court shifted its focus from biology and genetics to examine the parties' intentions.<sup>139</sup> In *Johnson*, as in *Buzzanca*, the fact that the couples were married at the time their children were conceived was crucial to the determination of parentage because it evinced their intent to procreate and parent jointly as a couple.<sup>140</sup> The facts of *K.M.* seemed similar. Although K.M. and E.G. were ineligible to marry in California, they were registered as domestic partners under a municipal domestic partnership scheme<sup>141</sup>—a fact that, for the court, underscored the way in which the couple functioned as a traditional family and “intended to produce a child that would be raised in their own home.”<sup>142</sup> With *Johnson* and *Buzzanca* as guides, the *K.M.* court relied on biology and genetics, filtered through the lens of intent, to declare *both* K.M. and E.G. to be mothers under the UPA.<sup>143</sup>

But irrespective of intent to procreate and jointly parent in a committed, state-recognized relationship, there were other reasons that counseled in favor of recognizing K.M. as a parent—reasons that required the court to retreat from an important aspect of its decision in *Johnson*. Recall that the *Johnson* court roundly dismissed Anna Johnson's claim of maternity in favor

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<sup>138</sup> See *id.* at 678 (“K.M. asserts that she is a parent of the twins because she supplied the ova that were fertilized in vitro and implanted in her lesbian partner . . .”).

<sup>139</sup> See *id.* at 679 (“The circumstances of the present case are not identical to those in *Johnson*, but they are similar in a crucial respect; both the couple in *Johnson* and the couple in the present case intended to produce a child that would be raised in their own home.”).

<sup>140</sup> See *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993) (en banc) (emphasizing that the parents were a married couple who sought to raise a child together within their marriage); *Buzzanca v. Buzzanca (In re Marriage of Buzzanca)*, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (emphasizing the mother's and father's consent as the basis for their legal-parent status in cases of both artificial insemination and birth by surrogate mothers).

<sup>141</sup> For a discussion of California municipal domestic partnership schemes, see Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 294-300 (2013) [hereinafter Murray, *Paradigms Lost*].

<sup>142</sup> *K.M.*, 117 P.3d at 679. In truth, the court made much—perhaps too much—out of the parties' registered partnership. As I have explained elsewhere, municipal domestic partnerships are not—and were not—equivalents of marriage. See Murray, *Paradigms Lost*, *supra* note 141, at 295 (noting that municipal domestic partnership schemes “were not necessarily intended to be close approximations of marriage”). In most cases, these municipal regimes offered a modest complement of benefits—not the full panoply of benefits and expectations attendant to marriage. *Id.* Indeed, E.G. argued that she and K.M. had entered into the municipal domestic partnership solely for the purpose of providing K.M. access to E.G.'s gym membership. Respondent's Answer Brief on the Merits at 3, *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (No. 02-0777).

<sup>143</sup> See *K.M.*, 117 P.3d at 681 (concluding that K.M. and E.G.'s parental claims are “not mutually exclusive” because “K.M. does not claim to be the twins' mother *instead* of E.G., but *in addition* to E.G.”); see also *id.* at 682 (concluding that section 7632 does not permit a “woman who supplies ova to be used to impregnate her lesbian partner . . . [to] waive her responsibility to support that child”).

of Crispina Calvert's.<sup>144</sup> Confidently declaring that "California law recognizes only one natural mother,"<sup>145</sup> the *Johnson* court "rejected the suggestion that . . . the child could have two mothers."<sup>146</sup> Instead, it relied on intent to decide between the two women's competing claims.<sup>147</sup>

In *K.M.*, the court beat a hasty retreat from *Johnson*'s categorical imperative.<sup>148</sup> Although *Johnson* cautioned against recognizing two mothers, the *K.M.* court made clear that this logic was inapt in circumstances involving same-sex partners.<sup>149</sup> As the court explained, "our decision in *Johnson* does not preclude a child from having two parents both of whom are women."<sup>150</sup> Thus while *Johnson* resisted finding more than two parents, *K.M.* resisted finding fewer.

Although *K.M.* departed from *Johnson* by finding two mothers, the court's logic was consistent with the longstanding interest in ensuring a stable family and stable, private sources of financial support for children. This factor was less explicit in *K.M.* than in *Buzzanca*, *Nicholas H.*, and *Karen C.*, where the courts were faced with the prospect of children who would be wards of the court. In *K.M.*, the financial circumstances were not nearly as dire.<sup>151</sup> Nevertheless, it is worth noting that the *K.M.* court had two options: it could either determine that *K.M.* was a parent, thus providing the children with two parents (and two sources of support), or it could credit *E.G.*'s reading of the UPA, which established her as the sole parent of—and sole source of support for—her children.<sup>152</sup>

Given the connections between determining parentage and securing private sources of support for children, it is perhaps unsurprising that the *K.M.* court decided the case in a manner that ensured two parents—and two sources of support—rather than one. In this way, the determination of parentage was as much about attaching obligations as it was about

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<sup>144</sup> See *Johnson*, 851 P.2d at 782 (finding Anna's biological connection insufficient to establish a "mother and child relationship").

<sup>145</sup> *Id.* at 781.

<sup>146</sup> *K.M.*, 117 P.3d at 681 (discussing *Johnson*); cf. *id.* (distinguishing *Johnson*'s facts and holding that "K.M.'s parentage is determined by the usual provisions of the UPA").

<sup>147</sup> See *Johnson*, 851 P.2d at 782 (relying on the "parties' intentions as manifested in the surrogacy agreement" to determine maternity).

<sup>148</sup> See *K.M.*, 117 P.3d at 681 (noting that the "*Johnson* intent test does not apply when '[t]here is no 'tie' to break" (quoting *Moschetta v. Moschetta* (*In re* Marriage of *Moschetta*), 30 Cal. Rptr. 2d 893, 896 (Ct. App. 1994))).

<sup>149</sup> See *id.* (noting that the facts were distinguishable from *Johnson* because "both *K.M.* and *E.G.* can be the children's mothers").

<sup>150</sup> *Id.* (quoting *Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005)).

<sup>151</sup> As an initial matter, *K.M.* was not a dependency case.

<sup>152</sup> *K.M.*, 117 P.3d at 682 (prioritizing the child's right to support and concluding that a parent cannot sign a "waiver [that] effectively cause[s] that woman to relinquish her parental rights").

establishing rights. Furthermore, in choosing to credit K.M.'s reading of the UPA and the extant case law over E.G.'s interpretation, the court subordinated a reading of the UPA that enabled the creation of single-parent families in favor of a broader public policy that prioritized the two-parent family and the privatization of support.

The interest in encouraging two-parent families and facilitating the privatization of support was even more explicit in *Elisa B. v. Superior Court*,<sup>153</sup> which the California Supreme Court heard as a companion case to *K.M.* In *Elisa B.*, Elisa and Emily were committed partners who wished to raise a family together.<sup>154</sup> Using Emily's ova and donor sperm, the couple pursued IVF and Emily eventually gave birth to twins.<sup>155</sup> After their children were born, the couple organized their household along traditional lines.<sup>156</sup> Emily left the workforce to remain at home, while Elisa worked to support the family.<sup>157</sup> Within a few years, however, the couple ended their relationship. Although Emily continued to support the household for a time, she eventually lost her job and was no longer able to contribute financially.<sup>158</sup> In order to support her children, Emily filed for public assistance.<sup>159</sup> When the county filed suit against Elisa to hold her financially responsible for the children, Elisa argued that she was not a legal parent because she was not biologically related to the twins.<sup>160</sup>

The California Supreme Court thought otherwise. Relying on its decision in *Nicholas H.*, the court held that Elisa was a legal parent under section 7611(d) of the UPA because "she received the children into her home and openly held them out as her natural children."<sup>161</sup> Critically, the couple's marriage-like relationship furnished the backdrop against which the court determined that Elisa was a lawful parent with attendant child support obligations. As the court explained, the couple

introduced each other to friends as their "partner," exchanged rings, opened a joint bank account, and believed they were in a committed relationship.

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<sup>153</sup> 117 P.3d 660 (Cal. 2005).

<sup>154</sup> *Id.* at 663.

<sup>155</sup> *Id.*

<sup>156</sup> *See id.* (explaining that the couple decided that Emily would be the "stay-at-home mother" and Elisa the "primary breadwinner").

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 663-64; *see also id.* at 672 (Kennard, J., concurring) (noting that shortly after losing her job, Elisa informed Emily that "because she no longer had a full-time job she could not continue to support Emily and the twins").

<sup>159</sup> *Id.* at 672 (Kennard, J., concurring).

<sup>160</sup> *Id.* at 664 (majority opinion).

<sup>161</sup> *Id.* at 670.

Elisa and Emily discussed having children and decided that they both wished to give birth. Because Elisa earned more than twice as much money as Emily, they decided that Emily “would be the stay-at-home mother” and Elisa “would be the primary breadwinner for the family.” At a sperm bank, they chose a donor they both would use so the children would “be biological brothers and sisters.”<sup>162</sup>

For the court, Elisa’s behavior in the context of a long-term, marriage-like relationship made clear that she and Emily had planned to have and raise children together. Regardless of the lack of a biological connection, Elisa’s *behavior* signaled her intent to function as a parent.

In this respect, the circumstances of *Elisa B.* were consistent with those in *Nicholas H.*, where the court also concluded that biology was no barrier to determining parenthood in circumstances where the individual functioned in the manner of a parent in the context of a conjugal relationship.<sup>163</sup> But critically, the circumstances departed from *Nicholas H.* in a way that made the recognition of Elisa’s parental status even more appropriate. The *Elisa B.* court observed that, unlike Thomas and Kimberly in *Nicholas H.*,

Elisa did not meet Emily after she was pregnant, but rather was in a committed relationship with her when they decided to have children together. Elisa actively assisted Emily in becoming pregnant, with the understanding that they would raise the resulting children together. Having helped cause the children to be born, and having raised them as her own, E[lisa] should not be permitted to later abandon the twins simply because her relationship with Emily dissolved.<sup>164</sup>

Thus, it was not just that Elisa had held the children out as her own, as Thomas had in *Nicholas H.* Rather, like the Calverts and the Buzzancas, Elisa and Emily deliberately had taken steps to conceive children and raise them as a family in the context of a long-term relationship. This, as much as her post-birth conduct, made Elisa a parent in the court’s eyes. Just as John Buzzanca could not disclaim his obligations to Jaycee after consenting to the surrogacy arrangement,<sup>165</sup> Elisa could not now shirk her obligations to the children she helped create.

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<sup>162</sup> *Id.* at 663.

<sup>163</sup> *Id.*; *cf.* *Alameda Cnty. Soc. Servs. Agency v. Kimberly H. (In re Nicholas H.)*, 46 P.3d 932, 933 (Cal. 2002) (discussing a rebuttable presumption of parentage that arises when a man “receives a child into his home and openly holds the child out as his natural child”).

<sup>164</sup> *Elisa B.*, 117 P.3d at 670.

<sup>165</sup> *See supra* notes 85-89 and accompanying text.



Emily's precarious financial situation also weighed heavily in the court's decision. Tellingly, Emily and their children were dependent on public assistance.<sup>166</sup> Such circumstances were exactly what the UPA was promulgated to avoid. As the court explained, "the paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family."<sup>167</sup> When the UPA was drafted, biological paternity provided the vehicle to further the state's interest in privatizing the welfare of children.<sup>168</sup> But as these cases suggest, over time, California courts constructed a model of parenthood that was not dependent on biology alone. This model of parenthood was not only more expansive in its understanding of parenthood, it offered multiple routes for privatizing dependency and attaching parental obligations of support.

#### E. Jason P. v. Danielle S.

The most recent case to consider the UPA's parentage provisions, *Jason P. v. Danielle S.*,<sup>169</sup> involved an unmarried couple who relied on assisted reproductive technology in their quest to become parents. Jason and Danielle tried to have a baby naturally, but after many complications, turned to IVF.<sup>170</sup> Shortly thereafter, Danielle moved out of the home she shared with Jason, purchased sperm from an anonymous sperm donor, and began "to pursue motherhood as a single mother."<sup>171</sup> She began by researching her rights as a "single mother by choice,"<sup>172</sup> learning that under California law, "a man who gives his sperm for artificial insemination is never treated in the law as though he is the father."<sup>173</sup> Eventually, however, the couple reconciled and Jason gave Danielle a letter explaining that although "he was not ready to be a father," Danielle "had his blessing" to use his sperm to conceive "as long as she did not tell others."<sup>174</sup> With these

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<sup>166</sup> *Elisa B.*, 117 P.3d at 672 (Kennard, J., concurring).

<sup>167</sup> *Id.* at 668 (majority opinion) (quoting Kern Cnty. Dep't of Human Servs. v. Monica G. (In re Salvador M.), 4 Cal. Rptr. 3d 705, 708 (Ct. App. 2003)).

<sup>168</sup> See Appleton, *Illegitimacy and Sex*, *supra* note 22, at 360 (noting that the identification and recognition of unmarried fathers paved the way for increased privatization of dependency).

<sup>169</sup> 171 Cal. Rptr. 3d 789 (Ct. App. 2014).

<sup>170</sup> *Id.* at 791.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* The term "single mother by choice" has been popularized by the group "Single Mothers by Choice." For a discussion of the group and its aims, see SINGLE MOTHERS BY CHOICE, <http://www.singlemothersbychoice.org> (last visited May 12, 2015), *archived at* <http://perma.cc/9WA7-TULR>. For a critique of the group and its terminology, see Murray, *New Illegitimacy*, *supra* note 29, at 414-15.

<sup>173</sup> *Jason P.*, 171 Cal. Rptr. 3d at 791.

<sup>174</sup> *Id.* at 792.

caveats issued, Danielle used Jason's sperm to become pregnant via IVF.<sup>175</sup> Their son, Gus, was born in December 2009.<sup>176</sup> According to Jason, the couple raised Gus together, and Jason publicly assumed a paternal role in Gus's life until 2012, when Danielle ended the relationship.<sup>177</sup>

When the relationship ended, Jason petitioned to establish his parental rights.<sup>178</sup> Danielle objected, arguing that under section 7613(b), Jason was a sperm donor and therefore ineligible to be legally recognized as Gus's father.<sup>179</sup> In response, Jason contended, among other things, that section 7613(b) did not apply to a man who was in a relationship with the woman who was using his sperm to conceive via IVF.<sup>180</sup> He further argued that he was a presumed parent under section 7611(d) because he had taken Gus into his home and held him out to others as his natural child.<sup>181</sup>

In rendering its decision, the trial court relied on an earlier California appellate decision, *Steven S. v. Deborah D.*<sup>182</sup> There, a biological father was denied the opportunity to establish paternity because, although he had been in a relationship with the child's mother, the child was conceived using sperm that he had provided to a licensed physician for the purpose of artificially inseminating the mother.<sup>183</sup> According to the *Jason P.* trial court, the facts in *Jason P.* were consistent with those of *Steven S.*, in that "Jason's semen was provided to a licensed physician and surgeon, that Gus was conceived through IVF using Jason's sperm, and that [Jason] and Danielle were never married."<sup>184</sup> According to the trial court, these facts, taken together, "conclusively established that section 7613(b) applies."<sup>185</sup> Because section 7613(b) was the "exclusive means of determining paternity in cases involving sperm donors and unmarried women," the trial court held that Jason could not establish paternity as a presumed parent under section 7611(d).<sup>186</sup>

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See *id.* (describing the evidence that Jason presented concerning his involvement in Gus's upbringing during the first years of the child's life).

<sup>178</sup> *Id.* at 791.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*; see also *id.* at 792-93 (describing the trial court's rejection of "Jason's argument that section 7613(b) does not apply").

<sup>181</sup> *Id.* at 791-93.

<sup>182</sup> 25 Cal. Rptr. 3d 482 (Ct. App. 2005).

<sup>183</sup> *Id.* at 484.

<sup>184</sup> *Jason P.*, 171 Cal. Rptr. 3d at 792.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 793.

On appeal, Jason contended that sections 7613(b) and 7611(d) operated as independent grounds for establishing paternity.<sup>187</sup> By this logic, even if section 7613(b) applied, Jason could still establish paternity under section 7611(d).<sup>188</sup> Danielle, however, contended that, in keeping with the decision in *Steven S.*, Jason, as a mere sperm donor, was precluded from establishing parentage “under any theory.”<sup>189</sup> The appellate court disagreed, noting that in *Steven S.*, the “only issue . . . was whether section 7613(b) applied when the sperm donor is an intimate friend and sexual partner of the mother.”<sup>190</sup> The *Steven S.* court did not confront the question “whether section 7613(b) precluded a finding of parentage under section 7611 or any other theory.”<sup>191</sup>

The critical question, then, was whether the two provisions interacted in such a way that the application of one provision necessarily precluded application of the other. Although prior decisions had not offered the opportunity to consider sections 7613(b) and 7611(d) in tandem, nothing established that the two provisions were mutually exclusive. Indeed, the *Jason P.* court concluded, reading the two provisions together, “with reference to the entire scheme of law,”<sup>192</sup> would “promote rather than defeat the [UPA’s] general purpose, . . . avoiding a construction that would lead to absurd consequences.”<sup>193</sup> According to the court, section 7613(b) had been drafted for the purpose of allowing women, whether married or unmarried, to conceive via artificial insemination “without fear that the [sperm] donor may claim paternity.”<sup>194</sup> Just as important, the provision “provided men with a statutory vehicle for donating semen to married and unmarried women alike without fear of liability for child support.”<sup>195</sup>

By contrast, section 7611’s presumptions were drafted for the purpose of “distinguish[ing] between those fathers who have entered into some familial relationship with the mother and child and those who have not.”<sup>196</sup> Unlike section 7613, which recognized that biology could be the basis of a parental relationship (and thus sought to deny parentage in circumstances involving sperm donors), section 7611 was guided by the understanding that “[a]

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 794.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 795 (citation omitted).

<sup>193</sup> *Id.* (citation omitted).

<sup>194</sup> *Id.* (citation omitted).

<sup>195</sup> *Id.* (citation omitted).

<sup>196</sup> *Id.* at 796 (citation omitted).

biological connection to the child is not necessary for the presumption of paternity to arise.”<sup>197</sup> In this regard, construing the statutes such that the application of section 7613(b) precluded the presumption of parenthood under section 7611(d) would “lead to unintended, and some might say absurd, consequences.”<sup>198</sup> Under Danielle’s interpretation of the two statutes, an ex-husband who had fathered a child via artificial insemination would not be obligated “to support the child because he was a sperm donor under section 7613(b) and could not be found to be the child’s presumed father under section 7611, despite having been married to the mother at the time of the child’s birth and having raised the child as his own.”<sup>199</sup> Such an interpretation would invariably lead to circumstances where children would be left without any sources of support (or with very limited sources of support), severely undermining the state’s interest in privatizing dependency. As the *Jason P.* court confidently asserted, “[t]he Legislature could not have intended this result.”<sup>200</sup> In this way, as in *K.M.*, the *Jason P.* court prioritized the recognition of two-parent families and the privatization of support over the UPA’s stated interest in facilitating single motherhood and other departures from the traditional model of marital parenthood.

### III. FAMILY LAW’S DOCTRINES

In the 1970s, when the UPA was drafted and later adopted in California and other states, the model law’s interest in removing distinctions between marital and nonmarital birth, and in going beyond marriage as a conduit to establishing parentage, was widely regarded as a progressive development.<sup>201</sup> But even as the UPA marked a significant moment of progressive change in family law and policy by reducing the importance of marriage to establishing family rights and responsibilities, it did so by prioritizing biological connections and conduct that comported with behavior associated with the marital family. In so doing, California’s UPA—and the courts interpreting it—further reified, and indeed entrenched, certain aspects of marital family life.

I raise these points because they respond to the essential question that is at the core of this Symposium: what is the role and place of legal doctrine

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 796-97.

<sup>199</sup> *Id.* at 797.

<sup>200</sup> *Id.*

<sup>201</sup> See Wald, *supra* note 18, at 141 (discussing the UPA’s intention to “guarantee the equal rights of all children”).

today? In the family law context, as we have seen, doctrine abounds. But as California's experience with the UPA suggests, doctrine is often ill-equipped to deal with the varied realities of quotidian life. When the UPA was drafted, it responded to a quite limited vision of family life. As the UPA's drafters understood, families were being forged in and outside of marriage<sup>202</sup>—a development to which the extant family law, with its marital presumptions, remained stubbornly resistant. But even as the UPA tried to reboot family law for a new era, it immediately confronted the dramatic shifts in the terrain of family formation that ARTs and same-sex relationships posed.

As the case law makes clear, in the face of modernity, resort to doctrine alone yielded unsatisfying—indeed, absurd—results. Accordingly, California courts molded the doctrine to meet the exigencies of the circumstances with which they were confronted. In *Johnson* and *Buzzanca*, the logic of intentional parenthood emerged to respond to the difficulties presented by surrogacy and ARTs. In *Nicholas H., K.M., and Elisa B.*, doctrine was molded to accommodate circumstances scarcely contemplated at the time the UPA was drafted. In this regard, California's experience with the UPA makes clear that doctrine *does* matter, but that doctrine can be interpreted and realigned in ways that comport with evolving circumstances.

What is perhaps less obvious in these cases is the way in which “doctrine” operates on multiple levels in family law. All of the cases involve courts grappling with established doctrine in the form of judge-made case law and statutory provisions. But, as importantly, in all of the cases, the courts confront—and embrace—a set of doctrinal truths that informs and shapes the development of case law and the interpretation of statutes. Throughout the cases canvassed here, the California courts evince concern for three distinct but interrelated interests: (1) limiting parenthood to two persons, (2) establishing conjugal relationships as the essential context in which reproduction occurs, and (3) confirming the family's role in privatizing dependency. I will say a bit about each of these in turn.

Almost from the start, the development of ARTs raised the prospect of parenthood divided among more than the traditional husband–wife dyad. The anxiety surrounding multiple parenthood is most evident in *Johnson*, where two women vied to be recognized as the child's mother.<sup>203</sup> In *Johnson*, the court dismissed out of hand the prospect of recognizing two women as

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<sup>202</sup> See Polikoff, *supra* note 28, at 211–12 (discussing the UPA's focus on removing the distinction between marital and nonmarital children).

<sup>203</sup> See *supra* notes 52–76 and accompanying text.

the child's mother.<sup>204</sup> Crediting the claims of one woman would invariably diminish the rights of the other.<sup>205</sup> The California Supreme Court later revisited this logic in *K.M.* This time, the court abandoned its resistance to the prospect of a child with two mothers, noting that parenthood could be divided between two persons, and that both of these persons could be of the same gender.<sup>206</sup>

The *K.M.* court's retreat from *Johnson* has largely been received as a progressive development.<sup>207</sup> And in many respects, the court's recognition that a child can have two legal parents of the same sex *is* progress. What this progress narrative masks, however, is the court's underlying conservatism about family structure. Although the *K.M.* court happily recognized two women as legal mothers, it avoided the prospect of single motherhood and never admitted the possibility of multiple parenthood. Indeed, even as it expanded upon the traditional familial model to include two parents of the same sex, the court's notion of parenthood was deeply rooted in the conventional two-parent dyad and the traditional heterosexual organization of the family.

In this regard, the cases also evince an understanding that conjugal relationships, whether in marriage or outside of it, are the paradigmatic context in which reproduction occurs—and *should* occur. Recall that in *Buzzanca*, *K.M.*, *Elisa B.*, and *Jason P.*, the fact that a child was conceived in the context of an intact relationship informed the court's determination that the parties intended to raise the child jointly as co-parents.<sup>208</sup> This development recalls the marital presumption that pervaded the law of parentage that preceded the UPA. At that time, the fact that a child was born to a woman

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<sup>204</sup> See *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993) (en banc) (noting that “for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible”).

<sup>205</sup> See *id.* at 786 (“Any parental rights Anna might successfully assert could come only at Crispina’s expense.”).

<sup>206</sup> See *K.M. v. E.G.*, 117 P.3d 673, 681 (Cal. 2005) (distinguishing *Johnson*’s facts from its holding).

<sup>207</sup> See, e.g., Wald, *supra* note 18, at 153 (“Specifically, in [*K.M.*] the court held that when a couple deliberately brings a child into the world through the use of assisted reproduction, both partners are the parents, regardless of their gender or marital status.”).

<sup>208</sup> See, e.g., *K.M.*, 117 P.3d at 675 (describing the relationship between the parents as a cohabitating partnership); *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 791 (Ct. App. 2014) (noting that Jason and Danielle “cohabitated for many years, but they never married”); *Buzzanca v. Buzzanca (In re Marriage of Buzzanca)*, 72 Cal. Rptr. 2d 280, 286 (Ct. App. 1998) (“If a husband who consents to artificial insemination . . . is ‘treated in law’ as the father of the child by virtue of his consent, there is no reason the result should be any different in the case of a married couple who consent to in vitro fertilization by unknown donors and subsequent implantation into a woman who is, as a surrogate, willing to carry the embryo to term for them.”).

in an intact marriage was sufficient to raise the presumption that the woman's husband was the child's father.<sup>209</sup> The UPA, however, sought to expand the view of legal parentage beyond marriage to include those families formed through nonmarital relationships. Despite these aspirations, intuitions about marriage and marital family norms continued to influence and inform the courts' view of nonmarital parenthood. As the case law suggests, the parties did not need to be married for the court to assume that reproduction was undertaken with the understanding that both parties would raise the child together. Instead, the mere fact that a conjugal relationship existed at the time the child was conceived was sufficient for the court to infer an intent to co-parent and confirm parental rights.

Critically, the interest in limiting parenthood to two persons and recognizing conjugal relationships as the appropriate context for reproduction both relate to another "truth" that is threaded throughout all of the cases. Concern for the financial provision of children shadows the cases and the courts' dispositions of the issues. The emphasis on financial support as a crucial obligation and responsibility of parenthood is perhaps unsurprising. These concerns were present during the drafting of the UPA, when the interest in establishing parentage among unmarried couples was explicitly linked to identifying fathers for the purpose of imposing child support obligations.<sup>210</sup> Put simply, the family has long been the principal means by which we privatize the dependency of children (and other vulnerable subjects), relieving the state of the obligation to do so.

This essential truth of family life is laid bare in the resolution of cases like *Buzzanca*, *Nicholas H.*, and *Elisa B.*, where the courts were concerned about the prospect of interpreting legal doctrine in a manner that produced such "absurd[ities]"<sup>211</sup> as children who were legal orphans or otherwise dependent on the state for their care and provision.<sup>212</sup>

The impulse toward the privatization of dependency is perhaps less obvious in cases like *Johnson* and *Jason P.*, where there was no immediate

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<sup>209</sup> See Wald, *supra* note 18, at 140 (discussing common law marital presumptions, which aimed "to restrict childbearing to the confines of marriage").

<sup>210</sup> See *id.* at 141 (noting that securing child support payments was a major policy goal of the UPA).

<sup>211</sup> *Jason P.*, 171 Cal. Rptr. 3d at 795 (citation omitted).

<sup>212</sup> See *Elisa B. v. Superior Court*, 117 P.3d 660, 664 (Cal. 2005) (noting that the financial responsibility for the children rested with Elisa and was "not the responsibility of the taxpayer"); *Alameda Cnty. Soc. Servs. Agency v. Kimberly H. (In re Nicholas H.)*, 46 P.3d 932, 934 (Cal. 2002) (noting that if paternity were not established for the nonbiological father, the "harsh result" would render the child "fatherless and homeless"); *Buzzanca*, 72 Cal. Rptr. 2d at 284 (noting the "lack of appeal for any result which makes [the child] a legal orphan").

concern that the child would be rendered a ward of the state.<sup>213</sup> Nevertheless, it would be a mistake to assume that concerns about the economic welfare of children do not pervade the decisions in these cases. Recall the *Johnson* court's concern that recognizing Anna Johnson as a mother would invariably intrude upon the rights of Crispina Calvert and her husband.<sup>214</sup> We might speculate that the court was not only concerned about the conflict of rights and its effect on the parties' abilities to raise the child; it likely was also concerned that the Calverts would find the imposition of a third rights-holder untenable in the long run, perhaps prompting them to eventually surrender their rights to Johnson, who would be left as the sole source of support for the child. With these concerns in mind, one might attribute the court's hostility to the prospect of three parents to a preference for the perceived economic stability of the marital family and a desire to protect this source of support from destabilizing forces.

And this preference for the traditional family unit as a means of providing support for children may well explain the California Supreme Court's retreat from *Johnson* in *K.M.* and *Elisa B.* In both cases, the court easily surmounted *Johnson*'s concern for vesting legal motherhood in two women by analogizing the litigants and their relationships to the heterosexual family unit.<sup>215</sup> Parenthood was limited to two people, but both parents could be mothers. We might attribute the court's about-face to a simple acknowledgement of modernity and the changing dynamics of the family. But crucially, the court's decisions were about more than the increasing visibility of same-sex co-parents. The court was also likely swayed by the prospect of ensuring two sources of support for the child—of replicating the structure of the marital family, even if that structure was no longer rooted in heterosexual marriage and reproduction.<sup>216</sup>

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<sup>213</sup> Notably, neither case was a dependency proceeding. In all circumstances, there were adults willing to care for the child. *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993) (en banc); *Jason P.*, 171 Cal. Rptr. 3d at 791.

<sup>214</sup> See *supra* note 205 and accompanying text.

<sup>215</sup> See *K.M. v. E.G.*, 117 P.3d 673, 675 (Cal. 2005) (noting that the mothers were in a domestic partnership); *Elisa B.*, 117 P.3d at 669 (describing the relationship's traditional familial structure).

<sup>216</sup> Given the interest in privatizing support for children within the family, why were the California courts so disdainful of the prospect of multiple parenthood? After all, if two parents were important as sources of economic provision, three or more parents would further amortize the costs of dependency. One might argue that multiple parenthood posed risks associated with diffuse ownership rights—the classic tragedy of the commons. If a number of people were vested with the rights of parenthood, we might worry about whether all of them were performing their parental obligations at full capacity all of the time. We might also worry that an increase in the number of legal parents will lead to increased conflicts over child-rearing decisions, perhaps



But *why* was it so important for the court to assure two sources of support for children? The circumstances of *Elisa B.* suggest one pressing reason for affirming the two-parent dyad and the structure of the traditional family. Recall that in *Elisa B.*, Emily, Elisa's former partner, left the workforce to raise the couple's children.<sup>217</sup> When the relationship ended, Emily and the children were utterly dependent on Elisa for material support.<sup>218</sup> When Elisa withdrew her support, Emily and her children became public charges, dependent on the state.<sup>219</sup> These kinds of dire circumstances made the value of two parents obvious, at least to the court. Two parents, "rather than one," could serve "as a source of both emotional and financial support"—especially in circumstances, like *Elisa B.*'s, "when the obligation to support the child would otherwise fall to the public."<sup>220</sup> In this regard, *Elisa B.* is not simply about reifying the two-parent dyad. It is about reifying the two-parent dyad as a means of ensuring that the family will continue, even in the event of relationship dissolution, to be a means for privatizing dependency.

#### CONCLUSION

All of these observations gesture toward an important insight: doctrine may take many forms in law. We might assume that "doctrine" is limited to case law, statutes, and regulations, but these cases suggest that, at least in the context of family law, there are other "doctrines" that form the backdrop against which law is interpreted, created, and received. Even as family law doctrine has attempted to respond to the changing nature of family life, certain truths remain fixed as bedrock principles that subtly—and not so subtly—inform the work of judges and legislatures. In these cases, the prioritization of the two-parent dyad and conjugal relationships as the site for reproduction is undergirded by an interest in preserving the family (however constituted) as the means by which society provides and cares for its most vulnerable. With this in mind, the question whether doctrine survives as a force in legal decisionmaking is easy to answer. Obviously, doctrine matters. The harder question, of course, is which

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leading to instability in the family unit. Elizabeth Marquardt, a vocal critic of multiple parenthood, has voiced similar concerns. See Elizabeth Marquardt, Op-Ed., *When 3 Really Is A Crowd*, N.Y. TIMES, July 16, 2007, at A13 ("Conflicts will undoubtedly arise when three parents confront the sticky, conflict-ridden reality of child-raising, often leading to a nasty, three-way custody battle.").

<sup>217</sup> See *supra* note 156 and accompanying text.

<sup>218</sup> See *supra* note 158 and accompanying text.

<sup>219</sup> See *supra* note 159 and accompanying text.

<sup>220</sup> *Elisa B.*, 117 P.3d at 669.

doctrines matter—and how? As family law suggests, case law and statutes continue to be meaningful, but at their core, these doctrinal sources are informed and influenced by other core “truths.”