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Other Mothers

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INTRODUCTION

In *Brooke S.B. v. Elizabeth A.C.C.*,[1] two women in New York agreed to have a child together by artificial insemination.[2] The child was born to the unmarried couple in 2009.[3] The child took the surname of the nonbiological mother, who then cared for the child at home.[4] The relationship between the two women eventually broke down, and four years later, the genetic birth mother refused to allow the nonbiological mother to contact the child.[5]

The nonbiological mother—the "other mother"—sought joint custody and regular visitation rights over the genetic mother's objection that the nonbiological mother lacked standing and was not a parent within the meaning of the applicable statute.[6] Ruling for the other mother, the New York Court of Appeals embraced a functional test for standing, which "relate[s] to the post-birth relationship between the putative parent and the child."[7] By rejecting the "bright lines" approach tethered to heterosexual parenting and biological ties, the court recognized the equal claims of same-sex parents.[8]

Contrast *Brooke S.B.* with *Lehr v. Robertson*.[9] In *Robertson*, an unmarried man and woman dated, cohabited, and conceived a child.[10] After the child's birth, the mother "concealed her whereabouts" from the father until he located the child in 1978 with the help of a detective

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1. 61 N.E.3d 488 (N.Y. 2016).
2. *Id.* at 491.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 500.
8. *Id.*
9. 463 U.S. 248 (1982).
10. *Id.* at 268 (White, J., dissenting).

agency.[11] By that time, the woman had remarried and had petitioned for her new husband to adopt the child.[12]

Because the biological father had not registered as a putative father, his contact with the child was restricted.[13] Although he had petitioned separately for paternity and visitation,[14] the U.S. Supreme Court held that a biological connection alone was insufficient to raise an objection.[15] Only when the biological father "demonstrates a full commitment to the responsibilities of parenthood" through personal contact and actual relationship may he invoke constitutional protection.[16] Thus, the Court embraced a functional test for parenthood.

The different outcomes in *Brooke S.B.* and *Lehr* demonstrate the inherent instability of other parents in contrast to the legal parenthood of genetic birth mothers. Other parents' status is relational rather than intrinsic, and it must be earned rather than acquired at birth. In many ways, the legal interests of other mothers and nonmarital fathers are yoked: they do not gestate, give birth, or nurse, yet they consider themselves equally fit parents. Other mothers and nonmarital fathers, like those in *Brooke S.B.* and *Lehr*, are involved in the conception plan,[17] whether by cooperating in assisted reproduction or by propagative intercourse.[18] Despite such prenatal involvement and contributions, other parents' status is less secure.

If, as the Court in *Lehr* reasoned, marriage is "[t]he most effective protection of the putative father's opportunity to develop a relationship with his child,"[19] what happens when this status is unavailable, unwanted, or rejected? This Article examines the parental interests of nonmarital partners of genetic birth mothers. Without the legal parents' consent and cooperation, other parents are reduced to legal strangers to the child.

As demonstrated in *Moore v. City of East Cleveland*,[20] narrow legal definitions of "family" exclude functional domestic units that may still satisfy the intent of the applicable family law.[21] And while family law generally recognizes multiple forms of parenthood claims, it largely defers to the primacy of maternity.[22] Indeed, states privilege maternity over

11. *Id.* at 269.
12. *Id.*
13. *Id.* at 262–63 (majority opinion).
14. *Id.* at 252.
15. *Id.* at 261.
16. *Id.*
17. *See* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 501 (N.Y. 2016) ("That decision no longer poses any obstacle to those courts' consideration of standing by equitable estoppel here, if Brooke B. proves by clear and convincing evidence her allegation that a pre-conception agreement existed.").
18. *See Lehr*, 463 U.S. at 250; *Brooke S.B.*, 61 N.E.3d at 500.
19. *Lehr*, 463 U.S. at 263.
20. 431 U.S. 494 (1977).
21. *See id.* at 505.
22. Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 660 (1992); Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335, 339 (1982).

equally valid claims to parentage, which disadvantages nontraditional families. This Article questions this traditional presumption.

There is a robust body of scholarship[23] and jurisprudence[24] addressing psychological parents, assisted reproductive technology, surrogacy, and same-sex parents, which reinforces the primacy of heterosexual marriage and procreation. This tradition suggests a vulnerability of parental status involving the other parent. Now that legal parenthood can be approached in a number of ways, it is time to take a critical look at the preeminence of motherhood and gestation in the determination of parental status and fitness.

I. DEFINING MATERNITY

The Uniform Parentage Act (UPA) was first drafted in 1973 to "address . . . the status of the nonmarital child."[25] Two additional acts were enacted in 1988 and 1989 to respond to issues arising from reproductive technologies[26] and putative fathers.[27] Most recently amended in 2002, the UPA is currently adopted by nineteen states.[28]

The UPA provided only a brief definition of "maternity" because, when it was drafted, there had not been many challenges to a biological mother's legal parenthood. At common law, which developed before assisted reproductive technology, conclusions about childbirth and parentage for women regarding their biological children remained unquestioned.[29] Indeed, cases involving disputed maternity were thought to be so uncommon that the initial UPA drafters dismissed the need for proliferated legislative treatment.[30] The drafters did not want to "burden these already

23. *See, e.g.*, JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 17–20 (1973) (articulating the indicia of psychological parenting as daily interaction, companionship, and shared experiences); Martin F. Leonard & Sally Provence, *The Development of Parent Child Relationships and the Psychological Parent*, 53 CONN. B.J. 320, 327 (1979).

24. *See, e.g.*, Christian v. Randall, 516 P.2d 132 (Colo. App. 1973) (holding that transsexual orientation was an insufficient ground for a change in child custody); Lippens v. Powers, 179 So. 3d 374 (Fla. Dist. Ct. App. 2015) (reversing an injunction for protection against stalking for a nonbiological parent maintaining contact her with daughter); *In re* Matter of Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (overturning Florida's ban on gay adoption); Moses v. King, 637 S.E.2d 97 (Ga. Ct. App. 2006) (finding same-sex cohabition insufficient grounds to modify custody).

25. UNIF. PARENTAGE ACT (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 2002).

26. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 1989).

27. UNIF. PUTATIVE & UNKNOWN FATHERS ACT (UNIF. LAW COMM'N 1988).

28. *Why States Should Adopt UPA*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPA (last visited Apr. 14, 2017) [https://perma.cc/LX3U-2M2Z].

29. *See* Anne Reichman Schiff, *Solomnic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 267–68 (1995).

30. UNIF. PARENTAGE ACT § 106 cmt.

complex provisions with unnecessary references to the ascertainment of maternity."[31]

Since the last UPA revision in 2002, the law has witnessed extraordinary changes in the recognition and protection of LGBT individuals and families. In 2003, *Lawrence v. Texas*[32] decriminalized sodomy laws.[33] Bans on gay and lesbian adoption were overturned first in Florida in 2010[34] and nationwide in 2016.[35] And same-sex couples' right to marry was recognized as a fundamental right in all fifty states after the Supreme Court handed down *Obergefell v. Hodges*[36] in 2015.[37]

The 1973 UPA sought to guarantee that "all children and all parents have equal rights with respect to each other."[38] Despite significant transformations in family structure and diversity, the contemporary legal conception of parenthood, and particularly maternity, reflects the core principles of the 1970s.

Statutory resistance to recognition of the rights of other mothers demonstrates the instability of nonbiological maternity and the difficulty of redefining the term "parent." In same-sex relationships, where shared genetic parenthood is a practical and scientific impossibility, birth mothers tautologically have superior claims to children over their partners. This illustrates the troubling gap between the assertion of fundamental rights and equitable claims to parenthood.

The UPA lacks a comprehensive expression of legally cognizable "maternity" and instead relies on birth, adoption, or judicial determination, with exceptions made for gestational agreements.[39] Unlike paternity claims that have robust statutory, judicial, and scholarly examinations, current definitions of the "mother" are largely based on assumption and custom.[40]

States that have adopted the UPA continue to base parentage on a heterosexual model that presumes the existence of at least, but not more

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31. *Id.*

32. 539 U.S. 558 (2003).

33. *Id.* at 578.

34. *See In re* Matter of Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

35. *See* V.L. v. E.L., 136 S. Ct. 1017 (2016) (per curiam).

36. 135 S. Ct. 2584 (2015).

37. *Id.* at 2607–08.

38. UNIF. PARENTAGE ACT § 2 cmt. (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 1973).

39. UNIF. PARENTAGE ACT § 201 (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 2002) ("The mother-child relationship is established between a woman and a child by: (1) the woman's having given birth to the child [, except as otherwise provided in [Article] 8]; (2) an adjudication of the woman's maternity; [or] (3) adoption of the child by the woman [; or (4) an adjudication confirming the woman as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law]." (alterations in original)).

40. *See* Richard Storrow, *Parenthood by Pure Intentions: Assisted Reproduction and the Functional Approach to Parenthood*, 53 HASTINGS L.J. 597, 601 (2002) (noting that the judicial approach to maternity has yet to embrace all of its complexities—starting with surrogacy).

than, one woman.[41] The current draft of the 2017 UPA responds to this stagnation by setting forth a new standard emphasizing gender neutrality in the interest of accommodating a multiplicity of families.[42] This new provision would avoid "constitutional infirmit[ies] by amending the provisions so that they address and apply equally to same-sex couples."[43]

The proposed language of the amended UPA emphasizes "parent" rather than "mother" and "father" and deemphasizes "maternity" and "paternity" in favor of "parentage."[44] This approach displaces the language of marriage and the presumption of heterosexuality to make room for additional versions of the parent-child relationship. Definitions of parentage in the current draft are merged into a single section to "remove . . . unnecessary distinctions based on gender."[45] Considering birth as one of several indicia of parentage—rather than the sole indication of parentage—allows other assertions of both male and female parentage to receive equal weight.

II. PARENTAL PRIVILEGE

Parental status secures not only a right of access to children but also the prerogative to exclude others. This power to exclude secures legal parents' liberty interest[46] in making decisions about their children's care, custody, and control.[47] Third parties cannot overcome the wishes of the legal parent who enjoys the fundamental right to make decisions about the child. Only legal parents have this power—and courts defer to that fundamental autonomy.[48]

In *Troxel v. Granville*,[49] the Court supported a vision of independent parenthood free from state intrusions upon the family unit.[50] The Court struck down a Washington statute that allowed third parties to petition for visitation over the objection of the legal parent.[51] Calling the statute "breathtakingly broad,"[52] the Court precluded interested claimants (relatives, caregivers, friends) from leapfrogging over parental decision making.[53]

Although *Troxel* affirms judicial deference to parental autonomy, the decision reflects a limited vision of family, reproduction, and parentage that

41. *See* UNIF. PARENTAGE ACT prefatory note (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS, Draft for Discussion Only 2017) ("The 2002 UPA is written in gendered terms, and its provisions presume that couples consist of one man and one woman.").
42. *Id.* § 102.
43. *Id.* prefatory note.
44. *Id.* § 201.
45. *Id.* § 201 cmt.
46. *See generally* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
47. *See generally* Prince v. Massachusetts, 321 U.S. 158 (1944).
48. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000).
49. 530 U.S. 57 (2000).
50. *Id.* at 65.
51. *Id.* at 67.
52. *Id.*
53. *Id.* at 64.

negates the valid interests of nontraditional families. It presumes a common understanding of the term "parent" that is clearly demarcated by birth, marriage, and adoption. Families that do not fit this classic triangle illustrate the asymmetry of power enjoyed by legal parents and the power to proscribe others.

Legal parents are protected in their fundamental right to control access to their children, while other parents are subject to the legal parents' constitutional prerogatives. This is the traditional approach of relational parenthood, which determines access to children based on the relationship with the genetic birth mother. If a legal parent is married or in a civil union, that partner has parental rights not due to a biological relationship to the child[54] but because of the legal relationship to the legal parent. But if partners are unmarried, their rights are less secure—especially if they live apart from the child. Only a legal parent has the capacity to make decisions concerning the child's health, education, religion, welfare, and custody and visitation. Everyone else is a stranger in the law's eyes.

Alison D. v. Virginia M.[55] is the paradigmatic example of parental privilege and other mother exclusion.[56] In New York, two women met, cohabited, and planned to have a child together.[57] Using donor sperm, their baby was born in July of 1981.[58] They shared a household and medical expenses and expressly agreed to split responsibility for the child's care.[59] The couple ended their relationship when their son was two and a half years old, and the nonbiological mother moved out of the home.[60] She continued to pay for household expenses and maintained frequent visitation with the child.[61] The custodial mother restricted visitation in 1986 and cut off communication completely when the other mother moved to Ireland for work the following year.[62]

The New York Court of Appeals ruled that the nonbiological mother was "not a 'parent'" within the meaning of the applicable statute.[63] The court, acknowledging her "understandable concern for and interest in the child and of her expectation and desire that her contact with the child would continue," held that she was not a biological or adoptive parent with standing to seek visitation rights.[64] The court rejected her claims of de facto parenthood and parentage by estoppel, asserting that only parents (genetic mothers and fathers) had such rights.[65] Granting nonparents (other

54. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 (1989).
55. 572 N.E.2d 27 (N.Y. 1991), *overruled by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).
56. *Id.* at 29.
57. *Id.* at 28.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 29.
64. *Id.*
65. *Id.*

mothers) these rights "would necessarily impair the parents' right to custody and control."[66]

The *Alison D.* decision rejects the functional and performative indicators of parenthood in its adherence to the formal definition of "mother." While the case was decided during an era hostile to LGBT rights,[67] its insistence on biology not only erased other nonparents but also granted the birth mother extraordinary, singular autonomy. In this way, the genetic mother may receive the unilateral care and support from the other mother without obligation to release her exclusionary parental power. In the same way that a landlord may oust a nonconforming tenant from rented property, the legal parent can evict others at will.[68]

III. MARITAL SECURITY

Like much of family law, the determination of rights, protections, and privileges revolves around marriage.[69] Marriage performs a "gatekeeping function"[70] that ensures the primacy of the spouse's claim over children born into the marriage and definitively identifies a particular individual as the other parent. Like all spouses of genetic mothers, other parents' rights to the child are relational—not inherent—regardless of any biological relationship. It must be more than biology alone—they must perform the act of parenting. This only occurs when access is granted. Their legal existence as a parent is predicated upon consent: their own consent to marriage or the biological birth mother's consent to that parental relationship.

Marriage is especially important to nonbiological parents in same-sex relationships. Now that the Supreme Court has recognized marriage as a cognizable constitutional right,[71] the traditional concept of parenthood is ripe for profound reexamination.[72] Because marriage has historically focused on heterosexual relations and reproduction, the rhetoric and expectations around the institution must change to reflect new articulations of legitimacy. Yet there is still a dearth of statutory language expressing a marital presumption of parentage for the other parent in a same-sex couple.

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66. *Id.* The court's demonstrative syntax, referring to the "impair[ing] [of] *the parents'* right," reveals a baseline assumption of two biological parents, male and female. *Id.* (emphasis added). The court employs the article "the" rather than "a" and the plural possessive of "parents'" rather than the singular possessive "parent's."

67. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding a Georgia law banning sodomy only six years before *Alison D.* was decided).

68. Property theory invokes rights of possession, ownership, and exchange. Such property analogies for the care and control of children effectively denote the legal parent's dominion over the child. Family law's approach to parental rights as indivisible, flat, and finite, mirrors these doctrinal interests. *See* Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Family*, 32 CARDOZO L. REV. 225, 229 (2010).

69. *See* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 168 (2015).

70. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1204 (2016).

71. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

72. NeJaime, *supra* note 70, at 1187.

In *McLaughlin v. Jones*,[73] two women married in California in 2008.[74] Both planned to conceive a child with donor sperm, but only one become pregnant.[75] Before the birth, the couple signed a coparenting agreement that waived all laws giving the birth mother greater rights to custody and visitation.[76] The child was born in 2011, and the marriage broke down in 2013.[77] Cutting off contact with the child, the genetic birth mother asserted herself as "the only parent and therefore the only person who has parental rights, which are fundamental rights."[78]

McLaughlin represents deliberately planned, mutually agreed upon parenting—the pregnancy in question was not accidental, unilateral, or coercive. The women mutually agreed to have children together, made possible by technologies enabling reproductive opportunities beyond heterosexual coitus. Yet, only the genetic birth mother can claim the categorical security of parental status and the concomitant right to exclude. The "co-mother," or other mother, has no independent right of her own.

What is the meaning of paternity in a marriage when there is no father? The Arizona Court of Appeals held that the marital presumption of parentage rightfully includes female spouses because paternity "encompasses the notion of parenthood . . . voluntarily established without regard to biology."[79] Even though the other mother did not carry the child, she may assert relational rights through marriage.[80]

IV. GESTATION

The difficult question is whether maternity alone should shield genetic birth mothers from challenges to their authority over children. Does the physical act of carrying the child to term bestow superior rights? Surrogacy cases provide some insight into this question.

Gestation alone does not automatically qualify the carrier as a mother. Under traditional surrogacy, which has recently become disfavored by intended parents,[81] the gestational carrier uses her own ova, which gives her a genetic link to the child. By contrast, gestational surrogacy is distinguished by the lack of a genetic link to the child.

In the well-known New Jersey case *In re Baby M*,[82] the intended parents, William and Elizabeth Stern, paid $10,000 to Mary Beth Whitehead to

73. 382 P.3d 118 (Ariz. Ct. App. 2016).
74. *Id.* at 119.
75. *Id.*
76. *Id.* at 124. The agreement also stated that the nonbiological mother would "participate in a second parent adoption of the child if and when the parties reside in a jurisdiction that permits second parent adoptions." *Id.*
77. *Id.* at 119–20.
78. *Id.* at 121.
79. *Id.* at 123.
80. *Id.*
81. *See In re* Baby M., 537 A.2d 1227, 1248 (N.J. 1988) (describing this form of surrogacy in negative terms).
82. 537 A.2d 1227 (N.J. 1988).

become pregnant through artificial insemination with William's sperm.[83] They did not use donor ova, making Whitehead the biological mother of the child.[84] The parties entered into a contract where Whitehead would give birth and then surrender her maternal rights to the adoptive parents.[85] But after the birth, Whitehead changed her mind and insisted upon keeping the child.[86]

The New Jersey Supreme Court reversed a lower court decision to enforce the contract.[87] Recognizing the conflict between the parties as an "escalating dispute about rights, morality, and power," the court viewed the surrogacy agreement as the "sale of a mother's right to her child."[88] Indeed, the court described the monetary payment to Whitehead as a form of "loathsome" baby bartering.[89] Still, the court found that placing the child with the Sterns was in the child's best interests; Baby M would be raised by the intended parents.[90]

The California Supreme Court took a substantively different approach in *Johnson v. Calvert*.[91] In 1990, Mark and Crispina Calvert signed a surrogacy contract with Anna Johnson.[92] Johnson was implanted with an embryo created with Mark's sperm and Crispina's egg.[93] The Calverts agreed to pay Johnson $10,000, plus a $200,000 life insurance policy.[94] The relationship between the parties broke down, and Johnson threatened to keep the child unless she received full payment of her fee.[95] The Calverts responded with a lawsuit seeking a declaratory judgment that they were the legal parents.[96] The trial court held that the surrogacy contract was valid and the Calverts were the "genetic, biological, and natural" parents.[97]

On appeal, the court determined that the UPA, adopted by California in 1975, encompassed parental intention in surrogacy contracts and other alternative reproductions.[98] When genetics and gestation do not coincide within the same woman, then the woman who "intended to bring about the birth of a child that she intended to raise as her own" is the natural mother.[99] This purposeful reproduction denies the gestational carrier of any constitutional rights under California law.

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83. *Id.* at 1235.
84. *Id.*
85. *Id.*
86. *Id.* at 1236.
87. *Id.* at 1235.
88. *Id.* at 1248.
89. *Id.* at 1241.
90. *Id.*
91. 851 P.2d 776 (Cal. 1993).
92. *Id.* at 778.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. Anna J. v. Mark C., 286 Cal. Rptr. 369, 373 (Ct. App. 1991).
99. *Calvert*, 851 P.2d at 782.

Courts have taken a significantly different approach to maternity when both mothers have a biological role in gestation. One mother may donate her ova to her female partner with the intent of conceiving a child.[100] Like the distinction between traditional and gestational surrogacy, the donor's rights are not securely protected without clear statutory articulations of her maternal rights. Biology alone is insufficient to declare her an intended parent.

In *K.M. v. E.G.*,[101] a couple who had registered as domestic partners decided to conceive a child to raise together.[102] K.M. donated ova to E.G. and signed a consent form in March 1995 acknowledging her donation and waiving her rights to the ova or any child resulting from pregnancy.[103] K.M.'s form stated, "I specifically disclaim and waive any right in or any child that may be conceived as a result of the use of any ovum or egg of mine, and I agree not to attempt to discover the identity of the recipient thereof."[104] Similarly, E.G. signed a separate consent form that read, "I acknowledge that the child or children produced by the IVF procedure is and shall be my own legitimate child or children and the heir or heirs of my body with all rights and privileges accompanying such status."[105] K.M. testified that she believed the language to be inapplicable because she was the intended, identifiable parent.[106] E.G. gave birth to twins in December 1995.[107]

The couple raised the children together, but the relationship dissolved in 2001.[108] E.G. argued that she never intended for K.M. to be a mother and that she intended to raise the children as her own.[109] Under California law, "true 'egg donation'" with an anonymous donor and a gestational carrier with intent to parent deems the birth mother the natural mother.[110]

But the California Supreme Court recognized K.M.'s relationship to the children under the UPA. Regardless of the disagreement between the women as to how to define who was the parent, the women both intended for the child to be raised in their joint home.[111] Clarifying the intent rule laid down in *Calvert*, the court made room for both birth and biology as definitive evidence of a mother-child relationship.[112] Finding that intent

100. One commentator has called this mother the "ova mother." Catherine Villareale, Note, *The Case of Two Biological Intended Mothers: Illustrating the Need to Statutorily Define Maternity in Maryland*, 42 U. BALT. L. REV. 365, 373 (2013).
101. 117 P.3d 673 (Cal. 2005).
102. *Id.* at 676.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 675.
109. *Id.* at 683 (Werdegar, J., dissenting).
110. *Id.* at 684.
111. *Id.* at 680 (majority opinion).
112. *Id.*

and biology took precedence over boilerplate language, the court dismissed the effect of K.M.'s waiver and declared her a parent.[113]

V. DEFENSES AND CRITIQUES OF MATERNITY

The question remains as to whether the "mother's" status deserves exceptional treatment and deference. This conversation is complicated by the multiple forms of maternal claims currently available. The dissent in *K.M.* urges caution in declaring ova donors' rights as equal to those of the partners' because it interferes with the constitutional rights of the birth mother.[114] Viewing maternal rights in this way, as a distinct and finite commodity, cannot account for multiple mothers in one family. This view can exist only in the absence of—not coexistence with—other mothers.

Other commentators have expressed similar views of maternal exceptionalism. Scholar Martha Fineman argues that gender-neutral language in family law devalues women's roles in mothering.[115] The failure to view motherhood as a unique concept sacrifices the highly gendered contributions of women to childbirth and child rearing to the "legal[ly] generic category of 'Parent.'"[116] Explaining that the "Mother/Child dyad . . . [is] '[t]he most vivid and shared image of connection,'"[117] Fineman rejects decentering motherhood in the interest of supporting "those who have constructed their lives around gendered roles."[118]

Fineman's nuanced position regarding the exceptionalism of motherhood stands in contrast to the standard of maternal deference advocated for by other commentators.[119] Scholar Rena K. Uviller argued that the adoption of gender equality in custody disputes fails to "take into account the mother's disproportionate child rearing responsibilities in the early years."[120] Uviller also viewed fathers' rights and parental neutrality as "indictment[s] against American feminism" that run counter to the majority of women's interests.[121] Similarly, Mary Becker contended that mothers have closer bonds to children because of "emotional consequences of the reproductive labor—pregnancy, labor, nursing—done only by women."[122] Under this

113. *Id.* at 682.

114. "We cannot recognize K.M. as a parent without diminishing E.G.'s existing parental rights." *Id.* at 688 (Werdegar, J., dissenting).

115. Fineman, *supra* note 22, at 660.

116. *Id.*

117. Dorothy E. Roberts, *The Unrealized Power of Mother*, 5 COLUM. J. GENDER & L. 141, 145 (1995) (citing MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 234 (1995)).

118. Fineman, *supra* note 22, at 666.

119. Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992) (arguing for judicial deference to fit mothers); Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 116 (1978) (rejecting the equal footing of mothers and fathers for custody decisions).

120. Uviller, *supra* note 119, at 112.

121. *Id.* at 121.

122. Becker, *supra* note 119, at 142.

view, women have more intense attachments to children that advantage them in determining the best interests of children.[123]

Adopting a "lesbian ethic,"[124] in the words of the late Paula Ettelbrick, complicates this dialogue venerating childbirth and genetics as incomparable qualifiers of parenthood. Additionally, this disrupts the use of gender as a predictable shorthand for the division of domestic labor and the determination of parentage. Instead, Ettelbrick advocated a "functional indicia" of parenthood to replace blind adherence to biology and birth: emotional attachment, financial support, and physical custody of the child.[125]

Newly inclusive concepts of family construction demand a transformation of the statutory frameworks that have long shaped a collective understanding of reproduction and kinship. States must change to reflect a new articulation of maternity. While marriage serves to clarify the ambiguities of determining parentage, nonmarital parenting and nonbiological "paternity" is much less secure and in need of explication. This legal lacuna allows birth mothers to capitalize upon and benefit from heteronormative constructions of parent-child relationships.

The challenges other mothers face expose deep-seated assumptions about biology, gender, and parenting. If nongestational mothers, such as adoptive or intended mothers, do not give birth, should they have weaker parental rights than birth mothers?[126] In male-female dyads, considering mothers as inherently bonded to children cements the status of women as superior nurturers and caregivers. This also presupposes pregnancy and biological function as defining maternal characteristics.

This presupposition leaves other mothers with no rights in opposition to birth mothers' exclusionary right to govern access to children. If performance and labor were authoritative indicia of asserting parental rights, other mothers would qualify based on their intentionality. The tenuous rights of other mothers, dependent on consent by the birth mother, demonstrate the inability of the current legal system to effectuate the traditionally nonnormative interests of newly normative families.

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123. *Id.* at 142–43.

124. Paula L. Ettelbrick, *Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513, 547 (1993).

125. *Id.* at 528.

126. *See* Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of* Alison D. v. Virginia M., 17 COLUM. J. GENDER & L. 307, 307 (2008) (describing law's disinterest in love and attachment).