The Mother, The Lover…This, That, and The Other: Interrogating Parental Exclusivity

by

Emma Austin
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Introduction

Melissa and Irene got married in California and lived together for several years. During a break from their relationship, Melissa became pregnant by a man named Jesús but shortly got back together with Irene. When the baby girl was born, Melissa and Irene primarily took care of the child together but Jesús visited frequently in addition to contributing financially. Eventually, Jesús moved out of state to pursue an employment opportunity but the child continued to spend time with his family, he visited when he could, and he regularly sent money to Melissa. A few months later, Melissa and Irene divorced, embroiling all three adults and the baby girl in a custody dispute. The case confronted the courts with an exceedingly complicated task of determining who the child’s legal parents were. All three parents contributed to raising the child emotionally and financially, and all three sought parental status. Who deserved legal recognition of this child?

A child may legally have a maximum of two parents at any given time. Traditionally interpreted in the United States as being one mother and one father, the law recognizes only one set of parents for a child. This is known as the “rule of two.”\textsuperscript{1} In the above scenario, one of the adults will not be deemed the child’s legal parent, and it is up to the courts to determine who that will be. Under the rule of two, parents receive an exclusive status to raise their children with complete

\textsuperscript{1} Marquardt, Elizabeth. “When 3 Really Is a Crowd.” New York Times, July 16, 2007. https://www.nytimes.com/2007/07/16/opinion/16marquardt.html (In defense of traditional parentage, the author first coined the term when they wrote, “Fortunate children have many people who love them as much as their parents do. But in the best interests of children, no court should break open the rule of two when assigning legal parenthood”).
autonomy and without fear of interference from outside individuals or the state.\textsuperscript{2} This exclusive status is given to the child’s two presumed parents, operating most effectively when those presumptions align with the traditional parents of a husband and wife. As such, the law, and its enforcing institutions, privilege nuclear families\textsuperscript{3}—the conjugal household consisting of a husband and wife in their first marriage, and their dependent children—in order to protect and maintain the exclusive family unit.

The concept of the traditional nuclear American family is no longer the most common family configuration in the United States. Once heralded as the gold standard, now fewer than half of U.S. children live in a nuclear family.\textsuperscript{4} In practice, the constitution of the family has expanded and transformed into a more liberal interpretation, but the legal system dawdles behind. Courts continue to impose and preserve the private, two-parent nuclear family despite hearing countless cases exposing the fallacy that most families fit into this mold. The incongruence between the law and reality often invalidates non-traditional families, rendering them dismantled and vulnerable without the option of legal recourse. While Melissa, Irene, and Jesus all act as the child’s parents, the Courts will forcefully reshape the family by imposing the standard and write one parent out of the legal family.

\begin{footnotes}
\item[3] Ibid.
\end{footnotes}
In the 1960s, at the height of the post-World War II baby boom, 73% of children were born into a home with a married family on their first marriage.\(^5\) Half of all mothers were stay-at-home moms.\(^6\) Identifying a child’s parents and the disaggregation of care responsibilities was much easier, since the majority of homes seemed to conform to the traditional family structure.\(^7\) The landscape of the American family today looks drastically different due to a decline in two-parent households and an increase in divorce, single parenting, remarriage, same-sex marriage, and other non-traditional families.\(^8\) With a large number of children growing up in households with single-parents\(^9\), unmarried parents\(^10\), step relatives\(^11\), and mothers who are the breadwinners of the household\(^12\), it begs the question: who is filling the parenting and caretaking roles that are legally designated for solely the mother and father?

The reality of the contemporary moment is that the majority of children are not raised by only a married mother and father. Step-parents, same-sex parents, unmarried parents, step relatives, and children who are not with their biological parents, all play roles in a child’s life.

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\(^6\) Ibid.


\(^8\) “Parenting in America: The American Family Today” supra note 5.


\(^10\) Ibid (One in four parents living with a child in the United States are unmarried).


\(^12\) “Parenting in America: The American Family Today” supra note 5 (40% of families with children under 18 at home include mothers who earn the majority of the family income).
grandparents, and many other caregivers form significant relationships with children that are not their maritally presumed children. These relationships are often rich, affectionate, devoted, and beneficial to the child.\(^\text{13}\) For example, more than 40% of all Americans have at least one step relative, the bonds with which develop between these non-legal kin can be quite deep and meaningful.\(^\text{14}\) In many instances the step-parent holds the child out to be their own, looks after the child, and provides for the child as a legal parent would.\(^\text{15}\)

The idea that the traditional, exclusive, nuclear family with a working father and stay-at-home mother can provide complete care for a child is fictitious for all but an upper-class, largely white minority.\(^\text{16}\) The family structure inscribed and expected by the legal system requires wealth and racial privilege, seeing as most families rely on outsourced caregiving of hired help and day-care programs.\(^\text{17}\) The public perceives single parents as needing help but assumes that two parents are sufficient.\(^\text{18}\) Parenthood, as it is practiced and implicitly understood today, is not unilateral. The duties of parenthood can be disaggregated and delegated such that several people can

\(^{13}\) *Looper v. McManus*, 581 P.2d 487, 488-89 (Okla. Ct. App. 1978) (In which relationships that are outside the child and the natural parent can be warm and provide a deep emotional attachment that would be in the best interest of the child to preserve.).


\(^{15}\) *In re Custody of B.M.H.*, 179 Wash. 2d 224, 229 (2013) (A case in which a stepfather wanted rights to his stepson after the child’s biological father. The child claimed to be closer to his step-father than his biological father).


\(^{18}\) Kavanagh, Matthew M. *supra* note 16 at 90.
contribute to child rearing. Hillary Clinton’s proverbial wisdom accurately represents many families, “it takes a village.”¹⁹

Families enlist a multitude of people to support in child rearing, and the relationships those people cultivate, as well as the role they play within in the family, should not be ignored. Adhering to parental exclusivity often denies these caregivers the legal narrative of family, ultimately acting against the best interest of the child. Legal recognition of one’s role in a child’s life can permanently shape parents’ and children’s experiences. Parental status confers the fundamental liberty interest of parents to direct their child’s future and make decisions, such as where the child will go to school and what medical care they will receive.²⁰ Innumerable financial benefits also accompany legal recognition of parent-child relationships, including child support, healthcare, inheritance, welfare and taxes, and special benefits from employers.²¹ Furthermore, unrecognized parents often feel less validated in their role as parent, since the outside world views their relationship as second-class to the child's legal parents.²²

The American family today takes many forms. The definition of family belongs wholly to those who define it themselves, often including a combination of marriage, biology, and intent. The larger part of children in the United States live in families that do not fit neatly into the box of a nuclear family. The parents of these

children manage to raise their children in creative and equally loving ways that defy what the state imposes to be the effective, tried and true ideal. As these families flourish on the ground, it is the law that serves as the restrictive boundary denying them sovereignty and inflicting injurious coercion. Due to the anxiety and paranoia around protecting the nuclear family and the rights of natural parents, many families go legally unprotected. The rule of two operates on the legally inscribed assumption that family formations outside of the exclusive model cannot succeed.

A key stepping stone to expanding parental exclusivity is first expanding the definition of parenthood from solely marriage and biology to include intent-based parenting. Recently, courts have legally validated intent-based relationships, notably through the creation of “functional parents.” “Functional parents” are caregivers who are not connected to children through marriage or biology but whose love, affection, financial support, and emotional support are vital to the child’s life. While echoing the sentiments behind expanding legal parentage, in most instances, the adjudication of “functional parents” does not expand the number of parents but only the definition of parent, meaning “functional parents” are mostly necessary when children do not have two fully legal parents. Thus, the adjudication does not infringe upon the rule of two. Even so, “functional parents” must meet specific, strict criteria in order to qualify legally, including taking a permanent, unequivocal, committed and responsible parental role in the child’s life with the initial consent of the child’s parent, and they must have lived with the child for a significant period of time. In

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some states functional parents may go beyond basic rights and also seek custody and visitation. Even a few states recognize functional parental relationships as legal parental relationships, protecting children from losing people who act as their parents. Finally, three states recognize “functional parents” in addition to two existing legal parents in “special” or “extraordinary circumstances,” often when the other two parents cannot take care of the child.

Recognizing “functional parents” is a revolutionary step in providing the possibility of legally preserving crucial non-traditional parent-child bonds. If parental obligation to children is independent of the adult relationship (by marriage or by biology) and instead based upon the relationship between the adult and the child, then the definition of that obligation must start with the recognition of parenthood. The next hurdle is to convince the state that these parent-child relationships are beneficial, even essential, in times of “stability” where a child has two fit legal parents and not just in times of crisis.

This is not to say that all close individuals and relatives outside of the nuclear family should be entitled to parental status. Expanding the number of parents changes our understanding of some of those “third parties,” whom the traditional regime has treated as non-parents, outsiders, or legal strangers but for whom the

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27 Uniform Parentage Act of 2017 highlights that functional parents do not have the same rights in all states. While most states do recognize functional parents, in some states they are recognized under equitable doctrines and in other states they are seen as full legal parents.
label “parent” is far more appropriate—without obliterating the non-parental status itself. Adjudicating legal parentage should be reserved for individuals whom a child relies upon as parents and whose status as legal parents would greatly benefit the child’s welfare. The parameters for defining legal parents must enable courts to distinguish between true parents and other non-parental caregivers.

Legal parental status is imperative to the parent-child relationship. It is one thing to have a loving and caring relationship with a child and another thing to have that relationship legally backed. Parental status confers parental rights and endows both the parent and child with constitutionally protected privileges such as parental autonomy and the ability to make decisions in the child’s life. Legal adjudication also comes with time to spend with the child over the objection of others. The parent also now has the legal responsibility to care for and support the child, relieving the state of any duty to ensure the child’s day-to-day wellbeing. On a more logistical level, legal parentage allows the parent to make decisions regarding education, health, religious, and other child rearing aspects. Without recognition, these parents are therefore rendered invisible and powerless in the child’s caregiving network. Additionally, there is large consensus that children develop best when they have stability and continuity in their youth, most importantly with their personal relationships. Prioritizing the individuals the child has meaningful and rich bonds to contributes to the overall welfare of the child.

30 Ibid.
In 2013, California became the first state in the U.S. to pass a statute legalizing the adjudication of more than two legal parents. The scenario from the beginning of the introduction with Melissa, Irene, and Jesús constitutes a snippet of the facts of the real case that incited the statute. The case, called *In re M.C.*, gained attention after the lower court found that all three individuals, Melissa, Irene, and Jesús were three presumed parents of their child. The ruling was unprecedented. In reversing and remanding the lower court’s decision, the Court of Appeals acknowledged the legitimacy of all three individual’s claims to parentage and called upon the legislature to address what they saw as a legal oversight neglecting more-than-two-parent families. California State Senator Mark Leno subsequently took up the issue and passed a state statute that incited a national movement, led by the Uniform Parentage Act Committee, towards providing legal recognition for three-or-more-parent families.

This thesis investigates parental exclusivity through the following: a historical glance, the politics and jurisprudence of the California case, *In re M.C.*, and its consequential statute, S.B. 274, as well as the legal obstacles facing the Uniform Parentage Act of 2017 in its wider campaign to expand the rule of two. In this thesis I argue first and foremost for the abandonment of parental exclusivity. Through scrutinizing the various contemporary efforts to actualize this goal, I further contend that these efforts do not adequately align the law with reality, leaving the vast majority of multiple-parent families unprotected.

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34 The term “multiple-parent” refers to families with more than two parents. The term “bi-parent” refers to families with only two.
Chapter one will first lay out the context of the parental exclusivity principle, locating its usage within the broader history of the “natural,” nuclear family. This chapter seeks to illuminate many limitations of the exclusive family model, utilizing specifically the Supreme Court case *Michael H. v Gerald D.* as well as other cases, to root these issues directly in the judicial system. Chapter two examines the case *In re M.C.* and the subsequent legislation passed in California allowing the adjudication of more than two legal parents. This chapter charts the evolution of the bill as it navigated opposition on both political and legal grounds to eventually become law. A large portion of the chapter centers on two diverging standards, the best interest standard and the detriment standard, that the bill’s author thoroughly contemplated for the basis of the statute before settling on the latter provision. I argue that the application of the detriment standard fundamentally diminishes the intended significance of the bill and ultimately safeguards the rule of two.

Finally, chapter three assesses the national landscape for relinquishing parents’ exclusive status that the Uniform Parentage Act of 2017 attempts to advance. The provision produced by the Act, like the California statute, does not go far enough. By claiming to protect vulnerable multiple-parent families, the Act still deeply subscribes to the rule of two. This chapter also explores the impacts that adjudicating more than two legal parents has on other legal jurisdictions including custody, child support, and probate. The thesis closes with a brief imagining of the wide-reaching possibilities of unraveling parental exclusivity.
Chapter 1: “Naturalizing” Exclusivity

Exclusivity is so ingrained in our understanding of family that it is hardly ever questioned. Predominant biological foundations guide our understanding of reproduction and conception such that every person has one mother and one father. Regardless of the disaggregation of parental duties that arise following birth, there is an underlying and somewhat comforting idea that everyone shares this common truth. In an age where fewer and fewer children live with their biological mothers and fathers, the knowledge of who those individuals are is still a fundamental component of one’s identity. It is a knowledge that shapes our experiences. The connection that a mother and father have with their child is held out to be one of the most primal inclinations of life. Parenthood is thought to be pure and innate, evoking images of mother lions fiercely defending their baby cubs and cats gently licking their kitten’s fur. These ubiquitous depictions of mother and father, egg and sperm, protector and womb, indoctrinate us into the rule of two.35

The exclusive, nuclear family is an imperative fixture of the state. The sacredness of creating and giving birth to a child endows the parents with the inalienable right, as well as duty, to care for and raise that child.36 The idea that a child belongs exclusively to two people structures the law and its enforcing institutions. The state benefits from bestowing the caretaking responsibilities exclusively on the child’s parents so that, and because, the state may thereby be

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absolved of any duty to support the child. By instilling a legally inscribed model that every family must conform to, the state establishes a surefire method of accounting for children based upon the premise that every child has a mother and a father. The evolution of family law now recognizes the existence and rights of single parents (overwhelmingly mothers) and more than one possibility for claiming fatherhood but the law has not granted the possibility of giving legal recognition of more than two parents. The rigidity of exclusivity is upheld by the variety of other entanglements that plague the nuclear family. The institution of marriage, the gender-differentiated, heterosexual standard, the marital and biological approaches to parenthood, and family privacy rights all intersect with the rule of two to ensure its enduring control.

This chapter charts how parental exclusivity garnered its perennial status in the legal structure of the United States. A brief history of parentage law exhibits how the idea of “natural” parents hardened as a lynchpin to the state while also uncovering the hollow and unfounded convictions of the construct itself. The legal definition of parent has evolved from solely the presumption of marriage to include biology and, more recently, intent. This expansion represents attempts by the Courts to adapt to the changing American family, yet without them contemporaneously adjusting parental exclusivity, several detrimental consequences ensued. In this chapter, a critical analysis of the Supreme Court case Michael H. v. Gerald D also helps illuminate the ongoing limitations of the rule of two. Much like naturalizing a foreigner to become a citizen of a country, parental exclusivity was not inborn but required great effort on behalf of the state to accomplish its assimilation.

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“Honor thy father and thy mother.” is one of the ten commandments.
The History Undoing “Natural”

The belief that the “natural” husband and wife parents are best suited to raise their child is deeply embedded in and reinforced by the legal system. Supporters of the exclusive family believe exclusive parenthood is a traditional, inherent right. The parent-child relationship is often regarded as a “natural” bond, imbued with the sanctity of love and affection. John Locke wrote in *The Second Treatise of Civil Government*, “[t]he affection and tenderness God hath planted in the breasts of parents toward their children make it evident that this is not intended to be a severe, arbitrary government, but only for the help, and preservation, of their offspring.” This conviction justifies exclusive parenthood by asserting that the legal family structure is “natural” and should be afforded inherent rights untouchable by the state.

According to the Parham presumption, originating from the 1979 Supreme Court case *Parham v. J. R.*, traditional parents are the best suited to raise their children owing to the fact that their “natural bonds of affection” impel them to act in the best interest of their child. The Court ruled that there is “normally...no reason for the State to inject itself into the private realm of the family to further question the

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38 *Parham v. J. R.*, 442 U.S. 602 (1979). (in which the Supreme Court reinforced that a parent will act in the best interest of their child and the State has normally no reason to interject.) See also *Michael H. v. Gerald D.*, 491 US 110 (1989). (in which the Supreme Court ruled in favor of the husband of the mother of a child over the biological father.)
41 *Troxel v. Granville*, 530 U.S. 57 (2000). Justice Scalia, in his unpopular opinion that parents have no enforceable rights because they are not spelled out in the Constitution, asserts, “a right of parents to direct the upbringing of their children is among the ‘unalienable Rights’ with which the Declaration of Independence proclaims, ‘all men...are endowed by their Creator.’” He essentially argues that the rights of parents are given by God as an innate right.
ability of that parent to make the best decisions concerning the rearing of that parent’s child.” In the eyes of the law, “natural” parents are the best suited to raise their children because they have a pure, organic connection that compels them to be invested in their child’s well-being, an idea now referred to as the parental rights doctrine.

However, dating back to American colonial and early settler-descendant society, the legal construction of the family wasn’t always so intimate. During this time, the law vested fathers with the right to control their household, regarding their wives and children as their property. The unit of focus was not the family but the household. Colonial law granted rights to households to serve as the locus of production, which included the family as an established self-sustaining and consistent site of labor and transfer of wealth, but also included slaves, indentured servants, apprentices, stepchildren, and relatives. The male head of the household received these vested rights, holding complete authority over the custody and care of his children. In their pursuit of shaping their children for production, the first priority of parenthood for fathers was discipline, rather than nurturant parenthood. Children had no individual rights: in fact, both Connecticut and Massachusetts had a law that

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44 Pfenson, Elizabeth. “Too Many Cooks in the Kitchen?: The Potential Concerns of Finding More Parents and Fewer Legal Strangers in California’s Recently-Proposed Multiple-Parents Bill.” The Notre Dame Law Review 88, no. 4 (2013): 2054. The parental rights doctrine is the culmination of the Supreme Court’s rulings on parental rights, upholding their almost complete control over their children. Also, “natural” in this context means biological or, as will be elaborated upon later, “biologically seeming.”
47 *Pierce v. Society of Sisters*, 268 U. S. 510, 268 U. S. 535 (1925). (parents "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.") Also, when the
allowed the death penalty for children who disobeyed their parents. With labor as the focal point of all interactions, there was hardly any distinction between the home and the market. Parental exclusivity therefore centered on its utility in controlling one’s property and less about the sacred parent-child bond.

The right to control one’s own children wasn’t universally distributed during the Colonial period either. The poor, including slaves, who did not have households of their own were not afforded the luxury of maintaining a family “units.” Family separation through sale was a constant threat since each individual was a property of their owner. Child slaves, a population which later became poor children more broadly, could be taken from their living situations to be used for labor in another household regardless of the parents’ wishes. This process became the seeds of the foster care system where poor children were sent to live with agricultural families to provide labor. The consecrated parent-child relationship believed to be immanent extended only to well-off white men.

Women during this time were also denied a legally protected role in their children’s lives. A woman had no separate legal identity from that of her husband; therefore, while she was the child’s legal mother, she would have no legal rights to

bible refers to parent-child relationships, it emphasizes a father’s duty to discipline his children. Proverbs 22:6, Ephesians 6:4, Proverbs 13:24, and several others.

48 Novoa, Ana, supra note 46 at 11.
49 Ibid.
that child.\textsuperscript{54} Sequestered to the domestic realm, women had laborious household responsibilities that limited the time they could devote to childcare. The belief that a mother was instinctually connected to her children took a backseat to her primary role of serving the needs of her husband.\textsuperscript{55} As the form and significance of the family evolved throughout the years, women became central to the parenting paradigm. Changing gender norms positioned a woman’s role within the private sphere of the family as the moral and emotional authority.\textsuperscript{56} What historians term the “cult of domesticity” of the nineteenth century emphasized the importance of the family and enlivened a deeper sense of purpose for women as mothers.\textsuperscript{57} The Courts followed, providing legal rights to mothers in custody disputes and expanding parental exclusivity to include mothers.\textsuperscript{58} At this point, the rule of two became enshrined as a legal assumption to apply to both the mother and the father. The iteration of the ideal family espoused today with a working husband and his stay-at-home wife on their first marriage only crystallized in the 1950s after centuries of modifications.\textsuperscript{59}

A myth its own history belies, the idea of the enduring nuclear, exclusive family is hardly “natural” or “traditional.” Not all parents were entitled to the right to raise their children, defying the widely held belief that the private, venerated family dwelling is a cornerstone of the American family. The exclusion of African

\textsuperscript{55} Ibid.
\textsuperscript{57} Ibid.
\textsuperscript{58} Mason, Mary Ann. \textit{supra} note 45. Ch 1.
Americans, women, and poor people from what soon became the constitutionally protected fundamental liberty interest of raising one’s children exposed the fact that parenthood was socially and legally defined, not defined by some essential God-given privilege. In fact, the preeminence of the rule of two was carefully designed and defined by the state.

Parental Exclusivity Is State-Sanctioned

There is an important state interest in preserving the exclusive, nuclear family, which the state sustains by emphasizing the prescribed “natural” family. The conviction that a maximum of two people should have full jurisdiction over their children is thought to be inscribed by the biological justification that it requires two people, a man and a woman, to conceive a child. Using this logic, proponents of the exclusive family model argue that children need one parent or a set of parents who have unequivocal and undivided parental authority over them.\(^60\) In order to properly discipline and rear, the parent must have distinguished command over their children. Pursuant to the Parham presumption, the “natural” parents are best suited to fill this role because they will act in the best interests of their children because of the “natural bonds” that entwine parents and their children. Reinforcing these “instincts,” the state grants “natural” parents rights and responsibilities, which at the same time exonerate it from the liability, and more importantly the cost, of looking after the children.

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The legal construct of the family based on the exclusive, nuclear model clearly identifies two individuals, a woman and her husband, as a child’s parents. Then, the state endows those parents with the duty to care for the child, which they must carry out or face legal punishments. The nuclear family effectively identifies who children belong to and ensures that the state isn’t overburdened with arbitrating and paying for caregiving.61

To ensure that parents continue to look after the well-being of their children, the state underscores that parenthood is indispensable to the continuation of society. Presented as a duty to the nation, parents are expected to properly raise their children to be principled, behaved, and productive citizens.62 Opining for the Court in Moore v. East Cleveland, Justice Powell wrote, “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”63 Justice Powell defends the rights of the private family but speaks using the collective “we” to fortify the notion that the family acts on behalf of society. Parenting is therefore presented as an essential foundation of American life as the locality of morality in perpetuity.64

Vesting these responsibilities in parents encourages them to live up to the lofty goal of successfully raising children but the state must provide parents specific

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62 Wisconsin v. Yoder, 406 U.S. 205 (1972) and Washington v. Glucksburg, 521 U.S. 702 (1997). (in these cases, the primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.).
64 These two cases explicitly mention the family as a foundation of American principles: Smith v. Organization of Foster Families, 431 U.S. 816 (1977) and Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).
rights to enable them to do so. Parents are afforded broad discretion and nearly complete authority over their children.\footnote{In the following cases, the State placed some restrictions on a parent’s power if concerns arise over the child’s health, education, or substantial harm. \textit{Meyer v. Nebraska}, 262 U.S. 390 (1923), \textit{Prince v. Massachusetts}, 321 U.S. 158 (1944), \textit{Wisconsin v. Yoder}, 406 U.S. 205 (1972) \textit{Parham v. J. R.}, 442 U.S. 602 (1979).} Courts use the Fourteenth Amendment to reinforce a natural parents’ fundamental liberty interest in the “care, custody, and management of their child” and ensure that outsiders cannot infringe upon this right.\footnote{\textit{Ibid} 455.} Only when a parent is deemed to be “unfit” can the state intervene and terminate a “natural” parents’ rights.\footnote{\textit{Santosky v. Kramer}, 455 U.S. 745 (1982) The opinion writes, “Until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”} Endowing the right of family privacy not only entrusts parents with the ability to rear their children, but also significantly limits the states’ interactions, effectually sideling a major encumbrance.

In order to maintain the successful operation of the family institution, the state must enforce the “natural” family. The Supreme Court wrote in the opinion of \textit{Smith v. Organization of Foster Families}, “The liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'”\footnote{431 U.S. 816 (1977) Quoting \textit{Moore v. East Cleveland} at the end of the quote.} Instead of acknowledging the immense role the state played in establishing the family ideal, America’s jurisprudential history depicts this particular construction of the family as discovered in nature, therefore warranting its protection. However, African Americans, women, and poor people in this nation’s history did not experience parenting as an “intrinsic human right.” The Court contends that the constitutional system itself rejects any notion that a child is “the
mere creature of the state,” yet ever-changing child custody laws demonstrate that the parent-child relationship is nothing more than a state creation.69 The gradual expansion of the right to parent was only afforded in the constricting framework of the exclusive, nuclear family, a crucial construction for the state guaranteeing that the child’s mother and father are legally responsible for all caretaking duties from the moment the child is born.

Complicating “Natural”: The Presumption of Marriage

One’s relationship with one’s child is constitutionally protected by the Fourteenth Amendment and decreed into the language of the law by the Supreme Court emphasizing the liberty interest of a child’s “parents.” Yet, in the early beginnings of America, well-to-do white men were the only people who legally fell under the category of “parent.” The Court regards the parental relationship as “intrinsic” but the individuals considered to be a child’s “natural” parents aren’t as obvious as it may appear. Biology would imply that the correct conclusion for a child’s “natural” parents are their genetic mother and father. Surprisingly, in the United States, both of the genetic parents are not the “natural” parents legally entitled to rights by the Constitution. Paternity is tied to marriage, meaning parentage is a legal, rather than a wholly biological, determination.

The presiding doctrine in determining legal parentage, pursuant to English Common Law, is the marital presumption (also known as the presumption of legitimacy), which determines that when a married woman gives birth to a child, the

law recognizes her husband as the child’s father. The presumption treats children born in wedlock as if they are the genetic offspring and ignores the veracity of that assumption. This structure secures the child’s legitimacy by avoiding questions of paternity and preserves the image that the father adequately controls his household and produces progeny. The organization of parenthood through marriage gave men the authority over women and children by insulating their property claims such that children born outside of the marriage could not claim inheritance. Once women began receiving legal rights to their children, the law found the mother who bore the child and her husband to be the child’s legal parents. Unwed mothers who bore children were given sole custody. Regardless of the child’s biological paternity, which historically only the mother or her husband could challenge, the presumption of marriage sought to keep the marital family intact and out of the courts to continue to minimize the state’s interactions with matters of the private family dwelling. The presumption of marriage functions as a guise for a biologically-related family construction while preserving the functionality of the married, nuclear, exclusive family. As long as the family could “pass” as genetic kin, the husband and wife receive full legal custody of the children.

71 NeJaime, Douglas supra note 53 at 2266 (Even if a mother had an adulterous relationship with another man or the father himself was infertile, the family could still depict a normal, nuclear family.).
72 Ibid.
Recently, biological paternity has gained gravity as nonmarital families continue to increase.\textsuperscript{75} Constantly defending the public pocket, only when the state became overburdened by unmarried mothers needing support to raise their children did the Courts intervene to hold biological fathers responsible.\textsuperscript{76} Unwed mothers struggled to provide for their children, an enterprise made exceptionally more difficult by the shame that accompanied having a child out of wedlock.\textsuperscript{77} Illegitimate children as well as their mothers faced discrimination under the law in regards to Social Security benefits, inheritance, survivor’s benefits, and general social stigma.\textsuperscript{78} The illegitimate child was also stigmatized as a proxy for race and was utilized most heavily when making policy decisions, particularly in the area of welfare.\textsuperscript{79} The nonmarital family, therefore, not only represented a deviation from the ideal, gender-differentiated, heterosexual, married family but also the white family.

Soon after, in the past 50 years, the law began holding fathers responsible for their children born out of wedlock through genetic evidence, setting legal precedent for biological parentage.\textsuperscript{80} These laws also provided unwed fathers who wanted to


\textsuperscript{78} The Uniform Parentage Act of 1973 was first promulgated to help states comply to constitutional mandates (see below) providing rights to unwed fathers as well as eliminate the status of illegitimacy. The Act shunned the term "illegitimate" in favor of the term "child with no presumed father."


\textsuperscript{80} Child support became a private responsibility enforced by the government designed to ensure that unmarried mothers and genetic fathers share the financial responsibility of their children. In this pursuit, genetic testing and scientific evidence became increasingly useful. See also, \textit{Elisa B. v. Superior...}
establish paternity with an opportunity to do so.\textsuperscript{81} In the 1973 case \textit{Stanley v. Illinois}, the Court struck down an Illinois law that excluded fathers of illegitimate children from their Fourteenth Amendment Due Process right to establish a legal relationship with their children.\textsuperscript{82} By repudiating parts of the Common Law regime, the parent-child relationship then extended to “every child and to every parent, despite the marital state of the parents.”\textsuperscript{83} However, the biological justification of parentage didn’t swiftly override the long-held, institutionalized presumption of marriage.

Following \textit{Stanley v. Illinois}, the Supreme Court sought to stabilize the presumption of marriage and reiterate the doctrine’s dominance in a series of several Supreme Court cases that wrestle with the relationship of biological fathers to their children. In 1978, \textit{Quilico v. Walcott}, a Georgia law required that only the mother’s consent is required for the adoption of an illegitimate child.\textsuperscript{84} An uninvolved biological father sought to stop the adoption of his child by the child’s stepfather. The Court found that while \textit{Stanley} provided rights to unmarried fathers, those rights held no merit when the father did not have a significant relationship with the child. The father must demonstrate that he is a nurturant parent. The biological father’s rights were terminated, and the stepfather adopted the child. A year later, \textit{Caban v. Mohammed} affirmed the previous ruling by holding that a biological father with a significant relationship to his illegitimate children was entitled to equal protection.


\textsuperscript{83} Uniform Parentage Act of 1973, Section 2.

\textsuperscript{84} \textit{Quilico v. Walcott}, 434 U.S. 246 (1978).
guarantees to object to an adoption of the children by their stepfather.\textsuperscript{35} Given the biological father’s relationship with the children, his rights take legal precedence over the stepfather’s relationship. This case also helped pave the way for protecting legal parentage for cohabitating partners since the children’s mother and biological father, while not married, were romantically involved and raised the children together for several years.\textsuperscript{36} In order to classify as a parent deserving of legal rights, these cases establish that a father needs to establish a connection beyond biological to his child.

In 1983, \textit{Lehr v. Robertson} clarified what it means to have what the earlier cases termed a “significant relationship” with the child. This case established that an unwed father must demonstrate a “full commitment to the responsibilities of parenthood” and “act as a father toward his children” under such conditions he will receive protection under the Due Process Clause.\textsuperscript{37} However, the Court insisted that “the mere existence of a biological link does not merit equivalent constitutional protection.”\textsuperscript{38} Recall the Parham presumption, which states that traditional parents are the best suited to raise their children owing to the fact that their “natural bonds of affection” impel them to act in the best interest of their child.\textsuperscript{39} Historically, the word “natural” in this context meant either genetic or “seemingly genetic” under the presumption of marriage. \textit{Lehr} redefined the implications of “natural” from an instinctual evolutionary survival mechanism to look after one’s child to the qualifier that to be a father one must prove one’s interest in raising the child. “Natural” now connotes biology \textit{plus} caregiving. Justice Stevens writes in the opinion of the Court,
[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship.90

The Court stresses that being a parent entails much more than simply a blood relationship, essentially abjuring the gender-differentiated, heterosexual genetically-based entitlement to parentage. The state intuited that parentage law would thrive using the exclusive, nuclear family model, meaning that biology simply could not be a basis for parentage claims. Allowing any biological father rights to their child would, for one, require increased arbitration and create a burden for the courts, but would also shatter the existing, clear-cut and reliable adjudication of parentage; the presumption of marriage. Biological claims, unsupported by substantial effort, would severely threaten many presumably genetic families, as we will see in the following case. Additionally, raising the threshold from biology to biology plus caregiving reiterates the aggressive defense of the exclusive family, which is apparent because a multi-parent solution went unacknowledged and unconsidered. Nevertheless, by explicitly including “emotional attachments” and “daily association” as parental signifiers, this case values acquired characteristics in addition to supposed parental instincts, laying crucial groundwork for broadening the definition of parent. When the title of “parent” applies to more people, it becomes explicitly clear that children often have many qualifying caregivers. However, the rule of two blocks both biological fathers and stepfathers from being seen as parents.

The concept of the “natural” family is a socially manufactured misapprehension that judges have adapted to fit the needs of the current moment and safeguard the state’s wallet. Eventually, two definitions of “natural” parent; the presumption of marriage and “biological plus caregiving”, conflicted.91

**Battle of the Bonds: Michael H. v. Gerald D.**

The 1988 the Supreme Court case *Michael H. v. Gerald D* forced the Court to decide among two presumed fathers who would receive legal parentage.92 This is the most recent case in the series, involving a father presumed by marriage and the competing interests of the biological father with a significant relationship with the child. The facts of the case illustrate the postmodern reality of blended, non-traditional families that cannot be ignored. While certainly atypical, the case brings to light the prevalence of family relationships outside of the nuclear family.

Carole and Gerald were married in 1976 and in 1981 Carol gave birth to Victoria while still married to and living with Gerald. Though Gerald’s name was listed as father on the birth certificate and he held Victoria out to be his own, Carole told another man named Michael that she believed he was the biological father of Victoria.93 Shortly thereafter, Gerald moved to New York City and Carole and Victoria lived with Michael, who established a relationship with Victoria and held her out as his own child. Over the course of the next few years, Carole and Victoria

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91 *Warren v. Richard*, 296 So. 2d 813, 815 (La. 1974). The first case happened in Louisiana in 1974 when a woman gave birth to a child and the biological father was not her husband, but the child had a relationship with both men. The court, shockingly, said there were two fathers in the first case of legalized dual paternity. The Louisiana courts, which have been reluctant to award custodial rights to more than one father at a time since the original case in 1974, have never treated three parents as having equal physical and legal custodial rights with respect to a child.

lived intermittently with both Michael and Gerald until permanently residing with Gerald in 1984. Michael proved his paternity through blood tests and after several rebuffed attempts, sought parental and visitation rights of Victoria. Victoria, through her appointed guardian ad litem, also filed, seeking to maintain her relationship with both Michael and Gerald.

A court-appointed psychologist recommended that Carole retain sole custody of Victoria while Michael be granted limited visitation, which the Superior Court agreed with and granted an order of visitation. However, Gerald objected and won a summary judgment based upon the presumption of marriage and California code stating that only the mother or husband may petition the court for a determination of paternity. The court further denied Michael visitation with Victoria because although California Code grants “reasonable visitation rights ... to any ... person having an interest in the [child's] welfare,” Victoria already had her primary presumptive father, Gerald. The California Court of Appeals affirmed the decision, upheld the statute, and declined to revisit the issue of visitation.

The Supreme Court also affirmed the lower court’s ruling and held that the biological father’s interest did not rise to the level of a fundamental right to obtain parental rights after the presumptive father has exercised significant responsibility over the child. Finding the biological father to be a legal parent would interrupt the married nuclear family. Justice Scalia wrote the opinion of the Court and

94 Ibid at 110. The California presumption of marriage code states, “that a child born to a married woman living with her husband, who is neither impotent nor sterile, is presumed to be a child of the marriage, and that this presumption may be rebutted only by the husband or wife, and then only in limited circumstances.”)
95 Ibid.
96 Ibid.
reemphasized the Court’s insistence on using the presumption of marriage over biological claims. Justice Scalia states, “While [the presumption of marriage] is phrased in terms of a presumption, that rule of evidence is the implementation of a substantive rule of law. California declares it to be, except in limited circumstances, irrelevant for paternity purposes whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband.”97 Michael is not entitled to protection under the Fourteenth Amendment Due Process Clause because the presumption of marriage is the reigning law and true paternity is disruptive to that law. Justice Scalia continues by declaring that “our traditions have protected the marital family...against the sort of claim Michael asserts.”98 To preserve the stability of marriage, an integral component of the state’s child custody framework, biological claims must be nullified.

In the case of unwed mothers and fathers, establishing biological paternity saves the state an extra penny by pinpointing those fiscally responsible for a child, but ironically the consecrated attention to “blood relationships” noted in Lehr vanishes when threatening the presumption of marriage. Justice Scalia recognizes and, indeed, validates this position by rooting his rationalization in the “historic practices of our society.”99 In his opinion, Justice Scalia takes note of the Court’s ruling in the previous cases in this series that biological fatherhood plus an established parental relationship creates a liberty interest. However, the rationale in those cases rested upon the specific context of unwed mothers. The biological claim can come to fruition in the absence of a nuclear family unit given the “historic

97 Ibid at 119.
98 Ibid at 124.
99 Ibid at 119.
respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.” Therefore, the Court seeks to protect, above all else, the marital family and the security it provides not only for the child but for the state. From the Court’s vantage point, biology does not authorize parentage or signify any inherent connection with a child deserving of constitutional protection.

Several members of the court disagreed with how Justice Scalia found a liberty interest. Two Justices concurring and three Justices dissenting all found that “historical traditions” is not a valid method of discovering fundamental rights and liberty interests. In his dissent, which is joined by Justice Marshall and Justice Blackmun, Justice Brennan highlighted that Justice Scalia’s interpretation ignores the realities of American society today. He writes:

In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice, moreover, the plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies. Even if we can agree, therefore, that “family” and “parenthood” are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, “liberty” must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.

The sheer fact that Victoria clearly has two fathers sheds light on how family formation has changed since the Constitution was written. Both Gerald and Michael have indispensable roles in Victoria’s life and by ignoring that actuality and

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100 Ibid at 123.
destroying one of those relationships, the Court vigorously imparts a societal ideal, exceeding the bounds of its role. The Constitution is a living document, meant to be updated as society changes. Justice Scalia’s narrow conception of “family” and “parentage” forces a prescribed vision, a “white picket fence line” (so to say), on what the Court itself has deemed to be an aspect of life endowed with authority and privacy. Historical precedent cannot solely determine matters of the present. The “historical tradition” Justice Scalia refers to is the marital relationship between the mother and her husband, a relationship that Justice Brennan points out is “decidedly anachronistic” and disregards the child. Marriage defines the relationship between the two adults but is not decisive in answering the question of the parental relationship between the adults and the child. Justice Scalia’s strict focus on the “unitary family” approaches the biological progenitor as a disruption to the marital household rather than a valuable, existing parental relationship.

The dissenters additionally disagreed with Justice Scalia’s interpretation of the previous findings on biological fathers, expounding instead that Michael did have a fundamental liberty interest because of the “biology, plus significant relationship” qualifier applied in the earlier cases. Justice Brennan acknowledges the state’s interest in protecting matrimonial privacy and maintaining the nuclear family model but writes that this interest “does not measure up to Michael’s and Victoria’s interest

101 Ibid at 132, 136-37.
102 Ibid at 141.
103 Ibid at 155 (“In this day and age, however, proving paternity by asking intimate and detailed questions about a couple’s relationship would be decidedly anachronistic. Who on earth would choose this method of establishing fatherhood when blood tests prove it with far more certainty and far less fuss?”).
104 Ibid at 144.
105 Ibid at 141.
in maintaining their relationship with each other.”\textsuperscript{106} This dissenting opinion stresses the pressing need for the Court to recognize shifts in family construction. These situations “repeat [themselves] every day in every corner of the country” and require protection, not disciplinary dismantling. At the same time, Justice Brennan, though raising crucial considerations, confined his views to the engrained exclusivity principle and finds Michael to be the rightful father, neglecting Gerald’s relationship with Victoria.

Considering the prevalence of exclusivity rhetoric in this case, Justice Stevens is the only Justice to entertain the possibility of providing legal recognition for more than two parents. While concurring with the decision, he suggests that Michael may not have claim to a “parent” status but that under the California code of visitation rests a compelling argument. Justice Stevens finds that the code that originally denied visitation to Michael should, instead, grant Michael visitation because it would be “detrimental to the best interests of the child” if he did not receive visitation rights.\textsuperscript{107} This action would protect Michael and Victoria’s relationship regardless of Carole and Gerald’s wishes. Justice Stevens is the only member of the court wary of renouncing one of Victoria’s fathers, introducing an alternative to exclusive parenthood, though his opinion is notably brief and theoretical.

In the eyes of the Court, Gerald is the rightful father. However, it’s clear that this conclusion is only a result of arbitrary valuation of the marital unit over “intrinsic” connections. Through her guardian \textit{ad litem}, Victoria sought to retain her relationships with both fathers, but the Court opted to pull apart her family situation.

\textsuperscript{106} Ibid 155.
\textsuperscript{107} Ibid 133.
and force it into a preconceived mold of two parents. The most damaging element of this case for the child is the Court’s strict adherence to the rule of two. Both fathers demonstrated continued interest in raising their daughter, yet the family spousal dyad prohibited them from both receiving a legally protected relationship with their daughter. Fatherhood is all-or-nothing. Justice Scalia contradicts himself when he claims that “California law like nature itself, makes no provision for dual fatherhood.” 108 The “nature” Justice Scalia refers to is a biological connection, yet, as he himself elucidated, genetic connections do not constitute fatherhood. Nevertheless, this is an either-or situation where recognizing the biological father invalidates the marital father, and vice versa. In the end, Victoria lost a father.

The concept of parental exclusivity is so entrenched in the legal system that it effectively barred this child from maintaining her existing relationships with the three parents in her life who love, care, and support her. As families expand and reshape, the Courts’ adjudications of legal parentage seem increasingly rigid and capricious. In claiming to fortify the sanctity of parenthood, the Court blatantly ignores the child’s best interest and only further reifies the rule of two.

**Defining Parent**

The state of flux in regard to determining paternity solidified an assumption that counters patriarchal society: the mother is always a legal parent. 109 Operating legally as a conclusive fact, when a child is born, the woman who bore them is their legal parent. The inconsistencies with the marital versus biological child positioned

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108 Ibid at 118.
109 Mason, Mary Ann supra note 45, Ch. 1.
the mother as the (seemingly) undeniable parent of the child. This supposition arose from the marital presumption of mother and husband but then extended to families with nonmarital children, holding that the mother is the only legal parent. Gestation and birth evidenced a parent-child relationship both biologically and functionally, justifying legal protection for mothers. However, to receive the same rights, unwed fathers needed to demonstrate commitment to the child.\textsuperscript{110} Perpetuating gender differentiation, the Court demanded “social performance of parenthood” from unmarried fathers to gain constitutional rights but women were assumed to inevitably hold social parenthood from their biological composition.\textsuperscript{111} As the Court stated in \textit{Caban v. Mohammed}, “The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father’s parental claims must be gauged by other measures.”\textsuperscript{112}

Traditionally, gestation defines the mother as a legal parent and the presumption of marriage defines the father, with more recent developments including the biological father in nonmarital cases. The Court often highlights their concern for children’s welfare when determining legal parentage.\textsuperscript{113} While the Court’s overt outlook remains that the exclusive, nuclear family is the best situation for the child, more and more children are raised in homes outside of this standard.\textsuperscript{114} Parentage can be revoked, broken, or even transferred from one adult to another. In pursuit of maintaining stability for the child and ensuring an exclusive two-parent structure that

\begin{itemize}
\item \textsuperscript{110} NeJaime, Douglas \textit{supra} note 53 at 2267.
\item \textsuperscript{111} Ibid.
\item \textsuperscript{112} \textit{Caban v. Mohammed}, 441 U.S. 380 (1979).
\item \textsuperscript{113} Ibid. See also \textit{Obergefell v. Hodges} 135 S. Ct. 2584 (2015).
\item \textsuperscript{114} Ibid. (“We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home”).
\end{itemize}
identifies those responsible for the child, the state has had to alter its definition of
parent.

Since the nuclear family peak in the 1950s, the legal system has only fitfully
adjusted to the protean family by adding exceptions to the marital presumption and
allowing more individuals to become legal parents based off of their intent to parent.
An obvious example is adoptive parents, a statutory creation recognizing the social
once practiced as a mode of imitating the natural family such that adopters and
children would “pass” as being a genetic family.\footnote{Appleton, Susan Frelich (2006) supra note 76 at 3.} Today, adoption serves
a judicial process requiring a court to determine that a child does not have two legal
parents and that a substitution of parentage may be granted. The state acknowledges
that adoptive families qualify for deference because they provide care and love for a
child while also perpetuating the exclusive, nuclear family. Additionally, as explicated
in the introduction, courts have recognized “functional parents” in the last 25 years
and afforded them legal rights, serving as another form of intentional parentage.\footnote{In re Custody of H.S.H.K 533 N.W.2d 419 (Wis, 1995) was a particularly seminal case that set the standards for how to qualify “functional parents.”}

Intent-based parenting received legal backing in the 1993 California Supreme
Court case \textit{Johnson v. Calvert}\footnote{Johnson v. Calvert, 100 Cal. Rptr. 3d 635 (Cal., 1993)}. whose landmark decision changed the course of
intentional parenthood across the country. The Court in that case recognized a
child’s genetic intended mother as the legal mother, over the objection of the
gestational surrogate. The intended mother, while not the gestational mother, provided the egg and therefore had genetic consanguinity. The Court wrote, “when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.” An intent-based rule, the court concluded, would “best promote certainty and stability for the child.”\textsuperscript{120} Motherhood could be separated from gestation if the biological connection remained. But the courts now assess intent to determine which biological mother is the legal mother.\textsuperscript{121}

This case further complicated our understanding of “natural” mother. The Court of Appeal interpreted California Civil Code section 7003 to mean that only a “natural” mother can establish a mother-child relationship if she gave birth to the child. The California Supreme Court disagreed and found that the term “natural” as used in the Code “simply refers to a mother who is not an adoptive mother.”\textsuperscript{122} Both mothers, then, qualify as “natural” mothers and Section 7003 does not assist in determining who the legal mother should be. Once again, the concept of “natural” ebbs and flows with the varying interpretations of judges.\textsuperscript{123} While these women are both still the biological mothers, this case brings intent closer to the heart of parenting.

The trends in defining parenthood in new ways confront our very understanding of what it means to be a parent. Should parentage be based on

\textsuperscript{119} 851 P.2d 776, 782 (Cal. 1993).
\textsuperscript{120} Ibid at 783.
\textsuperscript{121} Ibid 781.
\textsuperscript{122} Ibid footnote 9.
\textsuperscript{123} Doe v. Doe, 710 A.2d 1297 (Conn. 1998).
marriage, biology, intent? Courts and legislatures continue to debate what exactly constitutes a legal parent but nevertheless resort first and foremost to the presumption of marriage. Unless parentage is adjudicated by a court, usually in cases of family dissolution, the default is that the legal parents are the child’s gestational mother and her husband. In an epoch of same-sex marriage, assisted reproductive technologies (ART), and a burgeoning segment of nontraditional families, the presumption of marriage often does not accurately reflect the disaggregation of parenting and caretaking duties. The presumption proves in many cases to be antiquated and sometimes destructive as the law continues to privilege “natural” parents over other individuals who may better serve the child’s best interest.

Following the historic Supreme Court case Obergefell v. Hodges legalizing same-sex marriage, the presumption of marriage now extended to married same-sex couples to protect not only romantic bonds but parent-child bonds as well. However, in its application, women can gain access to parentage through marriage in same-sex

124 Swanson, Kara W. Banking on the Body: The Market in Blood, Milk, and Sperm in Modern America. Cambridge, Mass.: Harvard University Press, 2014. Ch 6. The presumption of marriage was incredibly helpful to men in married couples who were infertile and used sperm donations to produce offspring that were still his legal offspring and presumed to be his genetic offspring. The first attempts at artificial insemination happened in 1866.

125 The Uniform Probate Code of 2010 under the section “Definitions” defines a genetic father as “the man whose sperm fertilized the egg of a child’s genetic mother” and a genetic mother is defined as “the woman whose egg was fertilized by the sperm of a child’s genetic father.” See also NeJaime, Douglas, supra note 53. (NeJaime explains that biological mothers may also be based on gestation and birth.)


127 Ibid. See also Appleton, Susan Frelch, supra note 76. See also In re Baby M, 537 A.2d 1227, 109 N.J. 396 (N.J. 1988) (in which a couple used a traditional surrogate and the father’s sperm to have a baby but when it came time for the surrogate to relinquish her parental rights to the intended mother she refused to comply.).

couples, but men cannot. The woman married to the biological mother is the legal mother through the presumption of marriage. Yet, a man married to the biological father is not afforded that same privilege because the presumption of marriage rests on the gestational mother. In the absence of a biological connection to the child the same-sex father receives no rights while the genetic mother with possibly no desire to raise the child is automatically given legal parentage status. Moreover, if the couple isn’t married and the gestational mother has not terminated her parental rights, the likelihood of attaining legal parentage is almost impossible. Undoubtedly, the Courts continue to structure the legal family around the biological mother.

A woman who has neither a gestational nor genetic connection to her child risks losing her children to the biological mother. In a 1998 Connecticut Supreme Court cases, a married different-sex couple had a child through surrogacy and raised the child together until the child was fourteen. When the couple divorced, the court deemed the mother, who had neither a gestational nor genetic connection to the child, a legal stranger to her child. Though the mother and father were married, the presumption of marriage was inapplicable because it unilaterally applies to the biological mother. The Court instead ruled that without a biological or marital connection, the plaintiff mother could seek custody as a third party. The presumption of marriage simply fails to cover the many parent-child relationships

130 NeJaime, Douglas supra note 76 at 2297. The presumption of marriage is imperative here. Without it, a non-biological lesbian co-parent in an unmarried same-sex couple is treated the same as a non-biological father in an unmarried different-sex couple, neither enjoy parentage without adoption.
132 Massachusetts. Partanen v. Gallagher, 475 Mass. 632 (2016). The only case in the country to afford rights in this scenario. The Supreme Judicial Court of Massachusetts held that a person may establish herself as a child’s presumptive parent in the absence of a biological relationship with the child or marital relationship with the child’s biological mother.
133 Doe v. Doe, 710 A.2d 1297 (Conn. 1998).
that develop outside of the nuclear family and nonrecognition of these bonds lead to devastating effects for the child.\textsuperscript{134} The intended mother is further blocked from her children by the rule of two, which refuses to grant legal parentage beyond two people.

**Exploitative Exclusivity**

A consequence of parental exclusivity is that non-traditional parents may only gain legal status once the nuclear family has failed and the two people in the marriage no longer have legal parentage. For example, adoptive parents may acquire parental status of a child only after termination of the parental rights of the child’s natural parents.\textsuperscript{135} Similarly, if a step-parent seeks custody of a child, a natural parent’s status must be terminated beforehand even if the step-parent has raised the child and held the child out to be their own.\textsuperscript{136} Step-parents have no legal rights under the law, even if the child’s natural parent and step-parent divorce or if the natural parent dies.\textsuperscript{137} In order to gain legal status, the step-parent would have to adopt the child, requiring first that the child does not already have two legal parents and second that the step-parent must have the financial means to do so. In *Michael H. v. Gerald D*, both men could not be the child’s legal father because the Courts arbitrate two-and-only-two as a hard line in matters of custody, ignoring the existent

\textsuperscript{134} *In re Custody of C.C.R.S.*, 892 P.2d 246, 258 (Colo. 1995) (termination of significant relationships that are not legally recognized can “prove devastating to [a] child and [c]ould result in long-term, adverse psychological effects to [a] child.”).


modes of care. The state acknowledges that these non-traditional, parent-like relationships are paramount to a child, but only after the natural parents are found to be unfit.

Yet, the relationships broken by the state’s non-recognition aren’t always “parent-like”: they also include other caretaker demographics such as grandparents. The proportion of children living in households with their grandparents has doubled in the U.S. since 1970 and has increased by 7 percent in the past five years alone. Despite the significant role grandparents play in many children’s lives, the law affords them no rights to their grandchildren. As will be discussed in Chapter 2, the 2000 Supreme Court case *Troxel v. Granville*, limited the rights of grandparents and all third-party caregivers. In one fell swoop, the Court strengthened the authority legal parents have over their children and barred the continuation of outside meaningful relationships. Grandparents and other relatives may provide substantial care for children, but the law erases their existence by instilling the authoritative order of the domineering parental status. To this end, the Court’s view of the family is that it cannot possibly include outsiders in the central caregiving responsibilities. This is not to say that grandparents should receive greater authority than the child’s parents, only that their relationships with the child should be preserved. Perhaps

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other forms of legal recognition could help secure these relationships without going so far as to confer parentage.

In all of the aforementioned cases the child’s voice is curiously absent. Though each case pertains to the child’s well-being, the decisions revolve around the protection of the legal parents. In child custody cases, the law focuses on the relationship between the adults rather than the nature of the relationship between the parent and the child. Author bell hooks wrote in her book *All About Love*, “In our culture the private family dwelling is the one institutionalized sphere of power that can easily be autocratic and fascistic. As absolute rulers, parents can usually decide without any intervention what is best for their children.”\(^{141}\) Parental exclusivity evokes the ingrained notion of children as property, refusing a child’s input as to what they believe is in their own best interest. The child’s welfare is thus overshadowed by parents’ rights.\(^{142}\) Today the Courts elide explicit property interests when referring to a parent’s right to their child, but the implications are that the courts still consider children as such. The Constitution forefronts family-privacy rights, which are centered on parents and consider children as an afterthought.\(^{143}\) There is strong social consensus that parent’s rights deserve security and consistency to ensure that parents will retain possession of their children. As such, any reform to


\(^{142}\) Colorado Family Code Section 19-1-104(6), C.R.S. In Colorado, joint legal custody is highly preferred in marriage dissolution cases. The earliest age a child can express their opinion in court is 12 years old. In many cases, families are split up when children old enough to choose to go with one parent while the younger children have to split custody.

the rule of two is met with fierce opposition and the concept of the nuclear families remains the guiding legal paradigm.144

The idea that throughout history there has been a consistent, natural, exclusive, nuclear family unit guiding society’s children is a false notion. The Courts’ legal insistence on perpetuating this family ideals marks the majority of families in the United States who do not fit the model of a gender-differentiated, heterosexual, married, on their first marriage household, as failures. The concept of “naturalness,” while purporting to be organic, ironically underwent considerable changes that produced several legal iterations. Now, a myriad of individuals can become parents not only based on biology and marriage but given the love, time, and care they have put into a child. Nevertheless, the rule of two obstructs the new changes in the definition of parentage from being wholly beneficial. The state acknowledges the immense role many non-marital, non-biological parents play in a child’s life by allowing them to gain parentage status when a child does not already have two legal parents. But limiting legal parentage to only two people leaves these crucial relationships unrecognized in settings where the child has two legal parents, regardless of whether they intended to have the child.

Parental exclusivity is not “natural.” It, instead, is “naturalized” by the state to establish a consistent method of marking parenthood and bestowing complete autonomy to a private unit such that the state is absolved of responsibility. Parental exclusivity is effective, structuring all enforcing institutions on the basis that a child

144 There were countless articles written when the California bill sought to adjudicate more than two legal parents and I can only imagine how many more articles exist opposing multiple-parenting. Here’s one for example, Grossman, Joanna. “California Allows Children to Have More Than Two Legal Parents.” Verdict: Legal Analysis and Commentary. Justia. October 12, 2013.
has a maximum of two legal caretakers. Despite its logistical ease, the rule cannot coexist with the changing landscape of the American family without harming children and their relationships to significant caregivers. Neglecting to legally recognize parental connections leaves the latter group vulnerable to losing their children and the former vulnerable to losing their parents. The current legal framework of exclusive parenthood ignores children’s needs to preserve contact with their parental figures and belittles their ability to manage multiple-parent relationships.

Chapter 2: The “Three Parent Rule”

Recall the three-parent scenario from the introduction with Melissa, Irene, and Jesús; all of whom established a relationship with the child and supported her emotionally and financially. Under the rule of two, the three adults had conflicting parentage presumptions. Melissa was the gestational and genetic mother, Irene was married to Melissa when the baby was born and therefore was the mother presumed by marriage, and Jesus was the biological father who developed a significant relationship with the child. When their family situation reached the court, it became the landmark case that set in motion a national movement to allow the adjudication of more than two parents holding the California provision as the gold standard. While the established rule of two precluded the court from finding all three parents to be the child’s legal parents, the court did recognize that the current law neglected a large number of families. In response, they called upon the legislature to appropriately address this extralegal issue. The opinion of the court powerfully states, “California’s existing statutory framework is ill-equipped to resolve [adjudicating more than two legal parents] ... Such important policy determinations, which will profoundly impact families, children and society, are best left to the Legislature.” Several courts across the United States have suspended the rule of

145 Cal.Fam.Code. §§ 7610. In California law, a mother is deemed the natural mother “by proof of her having given birth to the child.”
146 In re M.C., 123 Cal. Rptr. 3 (Cal. 2011).
147 The Uniform Parentage Act of 2017 used this California statute to base Section 613, “Adjudicating Competing Claims of Parentage” according to a memorandum from Mary Louise Fellows to the reporter, Courtney Joslin, on October 17th, 2016.
148 In re M.C., 123 Cal. Rptr. 3 (Cal. 2011) at 869-870.
two in specific cases but none of those rulings transpired into law or set a precedent commonly called upon.\textsuperscript{149}

California State Senator Mark Leno responded to the courts’ ask and used \textit{In re M.C.} to incite and pass a revolutionary California statute, nicknamed the “three parent rule,”\textsuperscript{150} permitting the adjudication of more than two legal parents. But the statute had a turbulent path to passage. The initial iteration proposed by Mark Leno received weighty political and legal opposition. The legal argument primarily focused on the bill’s use of the “best interest standard,” which stipulated that a child could have more than two legal parents if the judge found that situation to be in the “best interest of the child.”\textsuperscript{151} Family law specialists found that the use of the standard in the context of adjudicating parentage placed too much power in the hands of judges to determine the makeup of the family, instilling a fear that anyone, especially those who aren’t the “natural” parents, could petition for parentage rights. This argument bears resemblance to “natural” family and family privacy explanations for preserving parental exclusivity. The rationalization that the “best interest standard” threatens parental exclusivity is shown most notably in the Supreme Court case \textit{Troxel v. Granville}, which presents a backdrop for this statute. The standard was the downfall of the first iteration of Senator Leno’s bill when the governor cited it to veto the measure. The bill came back a second time replacing the best interest standard with the detriment standard, finally passing in 2014.\textsuperscript{152} Though California may now adjudicate more than two legal parents, by compromising the best interest standard


\textsuperscript{150} De Jesus, Jason. “When It Comes to Parents, Three’s No Longer A Crowd: California’s Answer to In Re M.C.” \textit{Loyola of Los Angeles Law Review} 49, no. 4 (2017): 784.

the bill does not fully achieve its objective of emphasizing children’s welfare and legally protecting vulnerable families.

This chapter analyzes the initiatory case, *In re M.C.*, which illuminates the crux of the tension between reality and the legal system but in no way exemplifies the scope of the matter. Next, concentrating on the succeeding California bill, I first highlight the public’s reception to a bill permitting more-than-two-legal-parent families. Then, I thoroughly examine the switch from the best interest standard to the detriment standard by calling attention to each standards’ current uses and their limitations as applied to adjudicating legal parentage. Senate Bill 274 ultimately employs the detriment standard, which I argue significantly diminishes the impact of the pioneering statute.

**The Judiciary and The Legislature**

Melissa, Irene, and Jesús are all three, in effect, the parents of a baby girl. The specifics of this case exemplify an important situation in which having three parents would benefit a child. Melissa and Irene became registered domestic partners in February 2008 but briefly separated in May. During this time, Melissa became pregnant with baby M.C. as a result of an intimate relationship with Jesús.153 During the first few months of the pregnancy, Melissa lived with Jesús and his family, and Jesús provided financial support and ensured Melissa received prenatal medical care.154 Melissa and Irene got back together and married in October of 2008 before the birth of M.C. in March 2009. Melissa and Irene were baby M.C.’s legal parents,

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153 *In re M.C.*, 123 Cal. Rptr. 3d (Cal. 2011) at 861.
as stated on her birth certificate. Unfortunately, the couple split shortly thereafter but Irene was granted weekly monitored visitation from a court order. Jesús had moved to Oklahoma for an employment opportunity but frequently visited M.C., regularly sent money, and connected Melissa with his family, which Melissa frequently brought M.C. to visit. Jesús, however, was not yet a legal parent but held the child out to be his daughter.

When the parents brought the custody battle to the judiciary, the juvenile dependency court ultimately found all three to be M.C. legal parents. This ruling went against California law that requires the court to follow the prevailing Uniform Parentage Act of 1973 (UPA 1973), which specifies that “If two or more presumptions arise under [sections adjudicating parentage] that conflict with each other... the presumption which on the facts is founded on the weightier considerations of policy and logic controls,” requiring the court to find only two people at maximum to be parents. This ruling prompted appeals by all three parties, bringing the case to the California Court of Appeals.

154 Ibid.
155 Ibid at 864.
156 Ibid at 862.
157 Cal.Fam.Code. §§ 7611., a “quasi-presumed father,” also known as a “Kelsey S. father,” is an unwed biological father who comes forward and asserts his parental rights after learning about the child. However, he has been prevented from becoming a presumed father by either the child’s mother or a third party’s interference. He is entitled to constitutional paternity rights. In this case, the family hadn’t taken their parentage to court and therefore Jesús did not have legal parentage status.
158 In re M.C., 123 Cal. Rptr. 3d (Cal. 2011) at 865.
160 In re Jesusa V. 10 Cal. Rptr. 3d 205 (Cal. 2004), emphasis added. The phrase comes directly from this case. When the court was faced with conflicting presumptions of paternity, they reverted to the rule of two based on whom they found most appropriate to parent the child. The term “policy and logic controls” remains undefined in the California Family Code, impelling the judge to assess each adult’s relationship with the child and its nature, quality, and benefit to the child. This is a significant win for “intentional” parents as the courts continue to consider non-maritally related and non-biological relationships more heavily.
The juvenile court’s decision was shockingly abnormal. While the appellate court found that the juvenile court blundered in finding three presumed parents under the UPA 1973, it agreed with the reasoning behind the lower court’s decision that all three parents should be afforded legal status.\textsuperscript{162} The court writes, “Increasingly, as aptly illustrated here, the complicated pattern of human relations and changing familial patterns gives rise to more than one legitimate claimant to the status of presumed parent, and the juvenile court must resolve the competing claims…. [The case] highlights the inadequacies of the antiquated UPA from 1973 to accommodate rapidly changing familial structures, and the need to recognize and accommodate novel parenting relationships.”\textsuperscript{163} In so saying, the court validated the parent-like relationships M.C. has with each of these three adults, emphasized the necessity of finding that the child has three parents, and cautioned that the law is insufficient as it currently stands.

The most stabilizing action would be to preserve the relationships baby M.C. has with all of her parents.\textsuperscript{164} Instead, the court adjudicated competing claims of parentage and forcibly found only two parents to be presumed. Jesús was barred substantial rights to baby M.C. including custody and visitation, access to school and medical records, the right to determine the child’s residence and education, and the right to authorize medical care.\textsuperscript{165} On a practical level, legal parentage works to

\textsuperscript{161} \textit{In re M.C.}, 123 Cal. Rptr. 3d at 865. Melissa and Irene separately appealed because they believed that the trial court erred when it found Jesus to be a legal parent. Jesús appealed because the court provided him legal status but not custody and he believed he was entitled to custody of M.C.

\textsuperscript{162} Ibid at 869.

\textsuperscript{163} Ibid.

\textsuperscript{164} Ibid at 877, The court notes that losing access to a person who is, for all intents and purposes, one’s parent can have detrimental consequences on the child psychologically, emotionally, and financially. Therefore, stability is imperative.

\textsuperscript{165} De Jesus, Jason, \textit{supra} note 150 at 812.
ensure that every child is supported, at the very least with regards to health, safety, and welfare, but the rule of two views Jesús’ presence as extraneous.

In many cases, three or more individuals are unwavering, caring adults whose overwhelming intent to parent the child results in a predicament of abundance. The judges of *In re M.C.* nod to this scenario writing, “In the abstract, it is not difficult to opine a child might be well served by judicial recognition and preservation of a relationship with three legal ‘parents,’ all of whom love and care for her, and each of whom has evinced a commitment to providing her a safe and stable family environment.” Baby M.C. has three parents who love her, but only two who are legally permitted to do so; if either of baby M.C.’s mothers wish to end her contact with Jesús, they have every right to do so. By ruminating on this particular situation and its legal pitfalls, the court was able to envision countless scenarios where adjudicating three or more legal parents would be beneficial to a child. After hearing about this case, Mark Leno decided to find a way to protect children like baby M.C. and provide legal security to families with more than two functional parents.

Answering the judiciary’s call-to-action, California State Senator Mark Leno proposed a Senate bill, SB 1476, in February 2012 authorizing courts to find that a child has more than two legal parents. Introducing the bill to the Senate Judiciary Committee (SJC), Leno specifically highlighted the conundrum raised by *In re M.C.* and the judges’ pleas for legislative efforts as the impetus for authoring the bill, using the case to illustrate where the critical juncture lies. Leno framed the problematic

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166 *In re M.C.*, 123 Cal. Rptr. 3d at 870.
lack of legal recognition for families with more than two parents using baby M.C.’s situation emblematically, while simultaneously noting the multitude of differing cases that encounter the same problem. Mark Leno realized how impactful legally recognizing a child’s parents could be for over 50% of American families that are non-traditional. In the written proposal to the SJC, Leno stated that the current parentage laws did not anticipate the plethora of ways families are formed, but courts hear these situations “on a daily basis.”

When speaking about the bill to the New York Times, Leno remarked that “there are literally scores of different families and circumstances [with this issue]. This is about putting the welfare of the child above all else.” By emphasizing child welfare, Leno centers the child in the issue of parental exclusivity, marking a shift from the traditional parental rights doctrine that privileges parents over children.

Leno defended this decision saying, “This bill does not change the legal definition of a parent. All it does is authorize a court to recognize the simple facts in that child’s life, that a child has more than two legal parents if it is necessary to protect the child’s best interest. It’s all about the child, this is not about expanding the definition of relationships, it is about protecting the child.” The bill intended to bolster children’s liberty interests by legally recognizing more than two beneficial parent

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169 Joslin, Courtney (2018), supra note 22.
170 Proposal for Senate bill 1476 to the Senate Judiciary Committee on May 8th, 2012.
173 Hearing on S.B. 1476 at the California Senate Judiciary Committee. (May 8, 2012) This Bill does not expand the legal definition of a parent. Senator Leno ensured several times during the Senate Judiciary Committee hearing that the Bill will amend California’s heritage laws to provide that if there are more than two people that meets the legal definition, a child could be found to have more than two parents, but the criteria for the legal definition of a parent remains the same.
relationships, even in the face of disapproval from the standing legal parents. While Senator Leno and several others lauded the bill as a wholly-positive step in the right direction, many others vehemently opposed the bill as well as the idea of obstructing parental exclusivity. 174

**Concerned Citizens**

When Senator Leno attempted to pass both bills, many opponents raised several concerns regarding the implications of extending parentage to more than two people. The resistance emerged from both political and legal misgivings. As the guinea pig case, the discourse surrounding the bill invaluably highlights public perception, points out pitfalls, and prepares future legislators with a mapping of what to expect if they chose to follow in California’s footsteps. The criticisms included beliefs that eliminating parental exclusivity would lead to less stability for children, the demise of the “natural” family, unilateral benefits for same-sex couples, as well as unintended consequences in other legal areas.

For both Senate Bills 1476 and 274, the Association of Family and Conciliation Courts (AFCC) wrote letters to the Judiciary Committee vehemently objecting the passage of the bills. One of their considerations invokes the “too many cooks in the kitchen” argument that more parents will create innumerable problems leading to less stability for the child. 175 The AFCC wrote to express their concern that “this bill does not provide for any limitation of these potential parents. A child’s time can barely be handled


effectively between two conflicted parents, and often the children are caught in the middle. If three or four different people with ‘parental’ claims have differing perspectives regarding the child we will have created an untenable situation for the child and an even greater degree of conflict.”  

Several individuals noted this potential “slippery slope” in questioning the efficacy of the bill. The final bill’s election for the detriment standard, which mandates parental scantiness, essentially mitigates this issue. However, in cases of parental abundance, there is more to gain from having more parents than there is to lose. Since the state prefers private support of children, increasing the number of recognized parents increases the responsibilities of care and support for the child and offers another layer preventing dependence on the state. The California Supreme Court ruled in Elisa B. v. Superior Court that financial objectives constitute cause for recognizing more individuals as legal parents, finding value in having more adults care for a child. There is a limit to how many parents will continue to be efficient, of course, but if deliberated under the liberal best interest standard the judge could recognize this limit.

Briefly, the criticism that the statute destroys the “natural” family follows the same arguments mentioned earlier regarding the protection of the rule of two. Much of the fear regarding compromising parental exclusivity stems from a refusal to alter one’s definition of the family. Randy Thomasson, a blogger who calls himself a “pro-

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family leader”\textsuperscript{180} writes in his cantankerous “SaveCalifornia.com” blog, "Now even the word 'parent' has lost its unique meaning in the law. SB 274 blows up the family unit by redefining 'natural parent' to mean 'a nonadoptive parent...whether biologically related to the child or not.”\textsuperscript{181} Though this comment doesn’t attack the rule of two, it exposes how entangled the conceptions of “natural” parents and parental exclusivity are to nuclear family enthusiasts. Rush Limbaugh, a radio talk show host and self-proclaimed “Doctor of Democracy,”\textsuperscript{182} similarly weighed in on a blog post as well: “How does a kid have more than two parents?... Well, I don’t know. I’m being asked if polygamy is legal.”\textsuperscript{183} The conception of the nuclear family with its fixed view of procreation is, for many people, tied to ethical principles.\textsuperscript{184} Rush Limbaugh’s quip insinuating that the bill legalizes polygamy displays how conventional family forms are defended as “right” not only from a legal standpoint but also as a hegemonic social code of behavior. Any tampering with the “historical” family model contradicts family values and indicates a decline of morality.

Curiously, the bill, as well as the issue of more than two legal parents in general, acquired a reputation of being a specifically LGBTQ+ rights issue, a

\textsuperscript{180} Randy Thomasson. “Meet Randy Thomasson.” SaveCalifornia.com \url{https://savecalifornia.com/randy-thomasson-bio.html}.
\textsuperscript{182} Rush Limbaugh. “America’s Anchorman.” RushLimbaugh.com \url{https://www.rushlimbaugh.com/americas-anchorman/}.
\textsuperscript{183} Rush Limbaugh, “Bill to Allow for More Than Two Parents”, RUSH LIMBAUGH SHOW (Jul. 2, 2012), \url{http://www.rushlimbaugh.com/daily/2012/07/02/bill_to_allow_for_more_than_two_parents}.
\textsuperscript{184} Brighouse, Harry, and Adam Swift. Family Values: The Ethics of Parent-Child Relationships. Princeton University Press, 2014. See also supra note 7. In addition, Rush Limbaugh’s comment reflects largely white notions regarding the construction of the family. Black, Indigenous, Hispanic, and queer families have viewed family in a far more inclusive and fluidly without the fixed confines of the nuclear family.
proclamation far from the truth. In the memorandum from the AFCC, Diane Wasznicky wrote that the bill had an “implied perception that the statute is only for LGBTQ families.” Additionally, much of the news coverage of the Senate bill focused on the fact that the two mothers in the In re M.C. case were married and used same-sex couples as their primary anecdotes, framing legal recognition for more than two parents as an LGBTQ+ only matter. Perhaps because the bill was introduced in 2012, three years before the Obergefell v. Hodges Supreme Court decision made same-sex marriage nationally legal, same-sex support for the bill was considerably louder. Many same-sex families searched for possibilities to separate parentage from both the presumption of marriage and from biological parentage, since both were implausible for same-sex couples. The idea of “families of choice” spurred from the LGBTQ+ movement to recognize alternative families based on function (and ART) rather than biology or marriage, which could possibly lead to the conflation that legal parentage for three-or-more-parent families is solely for LGBTQ+ parents.

Peter Sprigg, a senior fellow at the Family Research Council, called the Senate bill a “Trojan horse for the same-sex marriage agenda” implying that adjudicating more than two legal parents was a legal loophole for same-sex couples. The Capitol Resource Institute (CRI) wrote a letter in opposition to the

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185 Memorandum to Senator Leno from Diane Wasznicky on behalf of the Association of Family and Conciliation Courts. April 17, 2013. http://www.afcc-ca.org/pdfs/AFCC_SB_274.pdf. “The bill has an implied perception that the statute is only for LGBTQ families.”
186 Ibid.
statute because “[c]hildren thrive in consistent settings and in homes with their biological mother and father, or with adoptive parents, being male and female role models.”\textsuperscript{190} By emphasizing heterosexual couples, the CRI insinuates that the only beneficiaries of this statute are same-sex couples. CRI did not object on the grounds of expanding legal parentage, but on keeping children in gender-differentiated, heterosexual parents, another nod to the moral panic of non-nuclear families. While certainly beneficial for some LGBTQ+ families, the bill was originally intended to serve a wide variety of family formations.

Lastly, the Association of Certified Family Law Specialists, the Association of Family and Conciliation Courts, and the Capitol Resource Institute all cautioned against the statute because they did not believe that it “thoughtfully considered the numerous areas of law affected by such a redefinition of parenthood.”\textsuperscript{191} These groups insisted that the statute complicated proceedings far beyond its intended reach. This will be further discussed in the third chapter.

Despite some overall pushback, Senate Bill 1476 passed in both the House and the Senate by August of 2012. However, Governor Brown vetoed the bill citing concerns raised by the bill’s opposition, not related to the above points, but hinging primarily upon the bill’s use of the best interest standard.\textsuperscript{192} In order to legalize the statute, Senator Leno had to initiate a new bill, Senate Bill 274, in February 2013 replacing the best interest standard with the detriment standard, which raises the threshold such that the court could only grant legal parentage to more than two

\textsuperscript{190} Hearing on S.B. 274.
\textsuperscript{191} Hearing on S.B. 1476 at the California Senate Judiciary Committee. (May 8, 2012).
\textsuperscript{192} California Governor Jerry Brown’s Veto Memorandum on SB 1476.
people if not granting it would be especially harmful for the child. This alteration of standards drastically changes the bill, severely limiting the agency awarded to children as well as caregivers outside the “natural” family that the first bill ensured. The political maneuvering and dilution required of Mark Leno for the passage of this bill is a result of the intense protection of the rule of two. The best interest standard directly challenges the power and privacy conferred by parental exclusivity.

The following two sections examine these standards’ current usages, which considerably differ, so as to provide insight for why each standard was chosen for the previously unexplored realm of adjudicating more than two parents.

**The Best Interest Standard**

“Until we live in a culture that not only respects but also upholds basic civil rights for children, most children will not know love,” - bell hooks

The best interest standard is most used in custody and visitation cases as a legal guide for courts to determine what familial situation most benefits the child. The standard gained prominence in the 1960s amid changing child custody laws but only recently crystallized after almost 50 years. The ideology of acting in the child’s “best interest” is the historical legal signpost in family law functioning under the Parham presumption that a child’s two “natural” parents will best serve their interest. While this method allows the state to stay out of the private family sphere, it grants parents an excess of power and leaves children with no rights, often at the

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194 hooks, bell, supra note 141.
expense of what is truly in the child’s best interest. The introduction of the best interest standard curtailed the parents’ power in custody and visitation and instead vested it in the courts, interfering with the expected and much-defended right to parental autonomy.

The standard came at the end of a long evolution in child custody proceedings following divorce dating back to the American colonial period. The dissolution of a marriage fractured not only the nuclear family but the state’s method of locating parental responsibilities within the two-parent unit. In an attempt to maintain stability and avoid additional complications, the courts opted to grant custody to only one parent in a divorce. Common Law during this time automatically mandated that children be placed with their father following disputes concerning their care and control because the father legally owned the child. As women gained political and cultural standing, they acquired more rights to their children and ironically, cemented the essentialist conviction that mothers and children share a “special bond.” Gradually into the twentieth century, the law more formally developed a maternal preference and gave mothers sole custody in most divorce cases. Women’s superior moral and nurturing skills were thought to be the most important elements of child rearing, replacing the notion of children as

197 Mason, Mary Ann, supra note 45. Ch. 4.
198 Peskind, Steven, supra note 73 at 452.
199 Ibid. “As women began to obtain greater social and economic power, their ability to provide for their children’s maintenance and education increased proportionately.”
200 Mason, Mary Ann, supra note 45 at Ch. 4. See also Santosky v. Kramer, 455 U.S. 745 (1982), Oral Argument by the petitioner, Guggenheim. "We are, of course, dealing here with rights far more precious than property rights, our most significant and fundamental rights of all, the rights to be with
economic tools of their father. While custody battles resulted in all-or-nothing rights for the parents, the outcome was typically understood and societally respected.

The maternal custody era marked a paradigm shift implicitly recognizing the importance of children’s interests distinct from the needs of the parents, a pivotal element of the best interest standard. Scholar Linda Gordon explains that central to the early women’s-rights movement was a children-first perspective that placed women as children’s tender, primary caretakers. The feminist movement in the 1960s and 1970s challenged the assumption that women were better suited for child-rearing and advocated instead for an equal rights agenda that engendered gender-neutrality in child custody. The best interest standard (as well as joint custody agreements) resulted from these efforts, opting to privilege the child’s welfare over either parent’s desires and excise any stereotypical gender-based bias.

The best interest standard legally places the power to determine a child’s custody with the courts and guides the judge on the premise of the child’s best interest, not solely on the parent’s wants or gendered interpretations. Allowing the courts to determine a child’s best interest disrupts the traditional parental prerogative
by upending the Parham presumption that the two “natural” parents will always act in the child’s best interest. That is not to say that a parent’s wishes are not considered—indeed the standard prioritizes parents’ desires; but these wishes are not the only considerations. The judge could very well find a child’s interest to be best served by one parent over another, by the state, or even allow visitation to people outside the nuclear family.

The standard is ill-defined by design in order to allow for the plethora of family situations while still centering the child (counter-arguments will be addressed shortly). This model places overwhelming power in the hands of the judge who must first parse through the myriad of intricate details that comprise a child’s life, rank their importance, and determine the future of the child’s life. Love and intention, heralded as the most sacred elements for a parent to possess may take a backseat to other equally vital concerns such as stable and safe housing, a secure source of income, a consistent supply of sustenance, and access to healthcare and education. The judge must weigh emotional, physical, and financial concerns on the same scale in order to discern who deserves custody of the child, not based on

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205 Mason, Mary Ann. *supra* note 45. Ch. 4.
206 *Indian Child Welfare Act of 1978* (25 U.S.C. § 1902). In one particular case, the state employed the best interest standard to protect Native families and the “natural” parents. “The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families…”
207 Uniform Marriage and Divorce Act of 1970 Section 402. This definition of the standard even placed parent’s wishes above children’s wishes. “The court shall consider all relevant factors including: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved. The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.”
208 Peskind, Steven, *supra* note 73 at 457. See also Mason, Mary Ann. *supra* note 45. Ch. 4..
“natural” connections, but holistically what would most benefit the child. In custody proceedings, California Family Code insists that “the health, safety, and welfare of children shall be the court’s primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children.”

Many ardent challengers disparage the standard and question its continued efficacy. One particularly notable critic, The American Law Institute, raised three primary objections to the standard in Principles of the Law of Family Dissolution: Analysis and Recommendations: the standard is indeterminate and unpredictable, impossible to adjudicate, and unjust. They describe, “Predictable standards encourage settlement, expedite resolution of contested custody cases and constrain both conscious and subconscious rogue and subjective rulings based upon fact-finder biases.” The best interest standard by its nature is not rule-bound, providing the judge with the administrative discretion to decide with no precise legal basis. Therefore, the ultimate ruling falls on the subjective interpretation of the judge, which eliminates parental privacy and authority. In addition to scholarly critics, initially some courts found that the standard unjustly infringes upon the

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209 Ibid at 456.
211 Annette R. Appell & Bruce A. Boyer, Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption, 2 Duke Journal of Gender Law & Policy (Spring 1995): 66. These critics’ concerns include, “Although it is important for courts to consider children’s interests, this standard is exceptionally vulnerable to arbitrary decision-making. The lack of a uniform understanding of the term ‘best interests,’ coupled with the uncertainty inherent in its use, raises significant concerns about ‘social engineering.’”
212 American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations 2 (2002). “the unpredictability of results encourages parents to engage in strategic behavior, take their chances in litigation, and hire expensive experts to highlight each other's shortcomings rather than work together to make the best of the inevitable.”
213 Ibid 440-44.
fundamental liberty interests of parents. However, the most resounding ruling on the best interest standard came from a recent Supreme Court case in 2000 called *Troxel v Granville*.

**Troxel v. Granville**

The case contemplated whether the best interest principle, when exercised by non-custodial non-parents seeking visitation, interferes with the fundamental right of parents to rear their children. This case involves the Troxel grandparents and their granddaughters, born to Tommie Granville and Brad Troxel. Tommie and Brad were together when they had two daughters but never married. They separated in 1991 and Tommie received primary custody, but the girls would frequently visit Brad’s house, where he lived with his parents. In 1993, Brad committed suicide.

The Troxel grandparents continued to see their grandchildren until a few months later when Tommie informed them that she wished to limit their visitation with the children to once a month. The Troxels filed for a petition for visitation under a Washington statute that: “permits any person to petition for visitation rights at any time, even against the wishes of the custodial parent, and authorizes courts to grant such rights if the visitation would serve a child’s best interest.” The Troxels asked for two weekend visits per month and two weeks in the summer.

The lower court ruled that the Troxels had a right to visitation under the statute and that visitation would be in the children’s best interest. On appeal the case made it to the Washington Supreme Court, which held that the Troxels did have standing under the statute but the statute itself unconstitutionally infringes on a

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216 Ibid at 2055.
parent’s fundamental right to rear their children under the Fourteenth Amendment because the best interests standard swept too broadly. The Supreme Court upheld the Washington Supreme Court’s ruling in a 6-3 decision that produced six separate opinions. The Court found that the Washington Statute did violate the liberty interest of parents to make decisions concerning the “care, custody, and control of their children...perhaps the oldest of the fundamental liberty interests recognized by this Court.”

The opinion of the Court interpreted the best interest standard to be a “breathtakingly broad statute” that “effectively permits a court to disregard and overturn any decision by a fit custodial parent.” Citing several precedents regarding the inviolability of a parent’s rights, the opinion asserts that the application of the Washington statute in this case is unconstitutional because it infringes upon the parental rights doctrine and affords judges the precarious and undeserved power to override a parent. Justice O’Connor uses the Parham presumption to deny third-party visitation and, in doing so, applies problematic visions of parental exclusivity to grandparent visitation. The assertion that “the ‘natural’ parents will always do what’s best for their children” by itself serves the practical purpose of entrusting parents to raise their children. However, in practice, the assertion subtextually implies the rule of two—if a child has two ‘natural’ (or adopted) parents,
none of the child’s other relationships deserve legal protection or remain necessary without the consent of the parents. Justice O’Connor’s opinion pits the rights of non-parents against the rights of parents, denying the interdependency of real family lives and neglecting the relationship the children have with the grandparents. Justice Kennedy dissents on the grounds that the plurality effectively limits one’s interest in favor of another. He writes:

My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households.223

The plurality ruled on the false belief that the nuclear family continues to structure the majority of American families. In reality, American families do not fit into a mold that clearly spells out the disaggregation of care and thus the significance of third-party relationships cannot be assumed, and especially not in opposition to the parents’ significance. The Court exerted a generalized view of family that refuses to see “outsiders” as central caregivers.

Despite concluding that granting the Troxels increased visitation under the Washington statute violated Tommie Granville’s fundamental liberty interest, the plurality did not find the best interest statute to be unconstitutional and did not institute another standard in its place. The opinion of the Court stated, “We do not, and need not, define today the precise scope of the parental due process right in the visitation context...Because much state-court adjudication in this context occurs on a
case-by-case basis, we would be hesitant to hold that specific non-parental visitation statutes violate the Due Process Clause as a per se matter.”224 Recognizing the plurality of visitation cases, the opinion intentionally maintains the flexibility of the code. The opinion criticizes the best interest standard but, ultimately, does not strike it down. Instead, the Court cautions against the unlimited oversight best interest yields but concludes that its application was unconstitutional only in this particular case because Tommie Granville already allowed the Troxel grandparents visitation and petitioning for more gave too little deference to the mother’s views.225 Nevertheless, the Court did not find the best interest standard to be a reliable and respectable rule. In fact, the Court barely stops short of finding the best interest standard altogether impermissible in non-parent visitation cases.226

The best interest of parents has historically been protected over the best interest of their children. Troxel, though instating an aversion to third-party rights, opened the door to a legally flexible approach where courts can use the best interest standard so long as the judges give substantial deference to the concerns of parents in assessing the interests of children. Initial hesitation notwithstanding, the best interest standard is the nationally preferred paradigm today, ubiquitous in child custody and visitation proceedings.227 What is important here is that the best interest standard is the best method for centering the child because it allows ample latitude for

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224 Ibid 2064.
226 *In re Parentage of L.B.* 122 P.3d 161 (Wash. 2005). In this case, after the break-up of a biological mother and her partner who jointly agreed to conceive and raise a child together, the biological mother sought full custody of their child. The ex-partner did not have legal parental recognition. When the ex-partner petitioned, the court ruled that if, upon remand, the ex-parent could prove de facto status and not third-party status, they could receive custody. Thus, the status “parent” is the crucial identifier for seeking legal rights.
227 Peskind, Steven, supra note 73 at 456.
determining custody that privileges the child’s perspective and not the parents’ autocratic wishes.

**The Detriment Standard**

In contrast with the best interest standard, the detriment standard has a considerably shorter record and is stipulated in termination of parental rights cases. In order to protect parents’ constitutionally protected rights to the fullest extent, the detriment standard ensures that the state can only impinge in extenuating circumstances following proof of maltreatment. The state’s interest in maintaining the nuclear family compels its vigorous protection of parents’ rights so that finding parents to be unfit is disfavorable. The Supreme Court held in *Santosky vs. Kramer* that actions seeking to terminate parental rights requires “clear and convincing evidence” substantiating heightened procedural protection. Emphasizing parents’ constitutional rights the Court wrote, “The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.” Even when the Court recognized that placing the child in the custody of the “natural” parent may not be in the child’s best interest, they are disinclined to revoke a parent’s legal status. The state institutes parental autonomy not only because it wants to eliminate case-by-case conflicts but also because affirming parents’ responsibility of

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230 Ibid 455.
their children makes parents more responsible.\textsuperscript{231} The courts unequivocally privilege and protect the rights of parents by constructing the law on the Parham presumption. The parental rights doctrine entrenched in the jurisprudence equips parents with uninterrupted authority over their children and protection just shy of impunity.

Though the detriment standard neglects the child’s voice, in this particular area of family law, both conservative nuclear family followers and family-flexible progressives alike opt for this standard over best interest because it limits intrusive state action. In safeguarding the “natural” parent’s rights, granting to rescind parentage under the best interest standard surely collides with constitutional doctrine.\textsuperscript{232} Additionally, from a liberal standpoint, the more leniency in the state’s guidelines for revoking parentage, the higher the consequences are for people of color, the poor, the uneducated, and the otherwise marginal.

The parental rights doctrine does not extend, in large part, to these populations. Instead, these individuals are afforded the exact opposite assumption and must prove that they are fit parents.\textsuperscript{233} Child Protective Services (CPS) so oversurveil these populations that scholars and the individuals themselves have

\begin{itemize}
  \item \textsuperscript{232} In re J.P., 648 P.2d 1364, (Utah 1982) at 1374-77. In 1990, the Utah Legislature attempted to shift the focus from safeguarding parents’ rights to securing the well-being of children by using the best interest principle in termination of parentage cases. The Utah Court of Appeals struck it down citing a collision with constitutional doctrine contending that the statute does not provide equivalent protection for parental rights.” This ruling reinforced the precedent that so long as the child’s basic needs are met, the child’s interest may be subordinated to the interest of the parents themselves. See also Reno v. Flores, 507 U.S. 292 (1993). “The ‘best interests of the child’ is not the legal standard that governs parents’ or guardians’ exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.”
  \item \textsuperscript{233} Novoa, Ana, supra note 46 at 17. Not all parents receive the same indemnity.
\end{itemize}
questioned the intentions of CPS and their purported goal of protecting children.\textsuperscript{234} Black children are twice as likely to end up in foster care as White children and the vast majority of children entering foster care live at or below the poverty line.\textsuperscript{235} In the case \textit{Santosky vs Kramer}, the Court attempted to protect these targeted families by elevating the bar for state interference.\textsuperscript{236} The opinion of the Court wrote, “parents subject to termination proceedings are often poor, uneducated, or members of minority groups, [sic] such proceedings are often vulnerable to judgements based on cultural or class bias.”\textsuperscript{237} In their decision, the Court actually \textit{raised} the previous threshold of “fair preponderance of the evidence”\textsuperscript{238} to “clear and convincing evidence” of showing harm against a child in order to deem a parent unfit in an effort to protect these groups. Termination of parentage cases appropriately employ the detriment standard to keep families intact as much as possible.

Critically, parental termination is a consequence of the legislatively constructed dichotomy between “fit” parents and “unfit” parents that manifests largely along racial and class lines. The Parham presumption extends only to “fit” parents and therefore the state justifies its overzealous efforts by remedying “unfitness” through the language of detriment. What is notable here is that the detriment standard is useful in termination of parentage cases even though it safeguards the “natural” parents interests because the alternative situation is that the children are placed under the supervision of the state. Conversely, in custody and

\textsuperscript{234} Roberts, Dorothy E., \textit{supra} note 51.
\textsuperscript{236} 455 U.S. 745 (1982).
\textsuperscript{237} Ibid at 455.
visitation cases where either the family “unit” dissolves or outside individuals petition for authorized time, these parties are all deemed “fit” and want to take care of the child. There is a plethora of individuals who care and love the child. But in termination of parentage, the detriment standard’s high bar secures that the child stays with their parents, whom we afford the Parham presumption, and out of the foster care system. In their respective purviews, each of these standards is aptly applied.

When Leno crafts the “third parent rule” bill forging previously uncharted territory to adjudicate more than two legal parents, he initially chose the best interest standard to form the basis of the bill. Similar to child custody and dissimilar to termination of parentage, the issue of having more than two parent-like caregivers involves multiple “fit” caregivers vying for a child.

The Predicament of Abundance

Mark Leno’s proposed Bill 1476 applied the best interest standard to adjudicating parentage, a decision he believed to center the child and provide legal recognition to a legion of families. Legal scholar David Meyer wrote, “If the Court in Troxel was distressed over the breadth and novelty of a law that permitted ‘best interests’ visits over a parent's objection, how much more shocking would it find a scheme that allowed the reassignment of parenthood on the same basis?”\(^{239}\) While Troxel did not “place any constitutional limitations on the ability of states to legislatively, or through their common law, define a parent or family,” its cautions...

against the best interest standard reinforced parent’s rights and certainly discouraged expansion of the standard.\textsuperscript{240}

Several legal pundits advised Governor Brown’s veto, citing dangers of using the best interest standard in the context of adjudicating parentage.\textsuperscript{241} Legal scholar Elizabeth Pfenson warns that the statute would increase judicial purview and impede upon the inherent rights of the traditional family.\textsuperscript{242} Pfenson states that the increased bureaucratic involvement would upset the natural order of parentage, writing:

\begin{quote}
Movement away from objective markers to determine paternity and maternity toward flexible standards like the best interest standard leads to increased judicial discretion, which may result in abuse of that discretion in violation of the concept of fundamental parental rights.... In a fundamental way, applying the best interest standard to determinations of parenthood rather than adjudications between parents rejects the Parham presumption that the “natural bonds of affection” lead parents to act in the “best interest of their children.”\textsuperscript{243}
\end{quote}

Pfenson argues that implementing the best interest standard would give judges too much power to decide for themselves when to break the rule of two, disrupt the current parentage presumptions, and greatly undermine the hegemonic conception of (biological or biologically-passing) “parent” and their reliably protected rights.

While this argument’s sentiments align with those raised in the plurality in \textit{Troxel}, Pfenson invokes a stronger defense of the rule of two, first insisting on the existence

\textsuperscript{240} \textit{In re Parentage of L.B.}, 122 P.3d (2005) at 178. “Troxel did not address the issue state law determinations of ‘parents’ and ‘families,’ [but] rather simply disapproved of the grant of visitation in that case, narrowly holding that [t]he problem... is not that the [trial court] intervened but that, when it did so, ‘it gave no special weight at all’ to the parents’ determination regarding the grandparents’ visitation.” (quoting Troxel, 530 U.S. at 69) (emphasis in original). See also Meyer, David D. (2006), supra note 77 at 867.

\textsuperscript{241} California Governor Jerry Brown’s Veto Memorandum on SB 1476. In the explanation for the veto he wrote, "I am sympathetic to the author's interest in protecting children. But I am troubled by the fact that some family law specialists believe the bill's ambiguities may have unintended consequences.”

\textsuperscript{242} Pfenson, Elizabeth, supra note 44 at 2053.

\textsuperscript{243} Ibid 2053-54.
of “objective markers” of parentage and then places “natural” parents in opposition to other parent-like figures, neglecting the complexity of caregiving relationships. Pfenson is also concerned with the burden the statute would place on the state because requiring more than the presumption of marriage to adjudicate legal parentage, the courts face an increased caseload. According to Pfenson, SB 1476 disrupts the sanctity of the traditional parent-child relationship and does so easily by ceding power to the judges’ subjective rulings, further encumbering the state.

The Association of Certified Family Law Specialists (ACFS) also opposed SB 1476 on the grounds of the best interest standard, pivoting on its logistical impact. ACFS argued against the imprecise nature of the best interest standard stating that “parentage can be litigated in all sorts of proceedings and legal parentage may include different rights in other areas of federal and state law, including citizenship, tax deductions, social security, educational proceedings, probate, wrongful death, and so on. A statute expanding legal parenthood has to thoughtfully consider the implications in these myriads of other contexts.” According to the ACFS, the vague and interpretative disposition of the standard lacks consistency in pronouncing parentage, which would profoundly affect other jurisdictions with which legal parentage intersects. A detailed plan for how the ambiguity of the best interest standard could maintain stability in these other areas must be thoughtfully laid out. The state requires a swift and dependable method of identifying a child’s legal caregiver(s).

Governor Brown’s veto of SB 1476 sent Mark Leno back to the drawing board to draft a new bill, Senate Bill 274, that replaced the best interest standard.
with the detriment standard and left the rest of the statute mostly unchanged. The detriment standard raises the threshold for adjudicating legal parentage by requiring a showing of potential harm as opposed to benefit. The new bill reads, “in an appropriate action, a court may find that more than two persons with a claim for parentage are parents if the court finds that recognizing only two parents would be detrimental to the child.” In the Senate Judiciary Committee for SB 274 Mark Leno considerably changed his tune on the bill. When asked to summarize the bill, Senator Leno said, “This is, in fact, to be used quite rarely when the child is not at risk of having too many parents, but when the child is at risk of having too few so that we can keep children out of our foster care system...We think by stating that if recognizing only two parents would be detrimental to the child, this could impact the governor’s decision-making.” Pandering to the Governor and the path of least resistance, the new bill drastically narrows the scope of impact from the original objective of legally recognizing all families with more than two parents to a last-ditch effort to keep children out of foster care.

Rather than push the boundaries of existing law to support the copious familial situations searching for a solution, SB 274 creates a statute designed to help few in a manner inappropriate for the task at hand. The detriment standard, applied in the context of adjudicating parentage, differs greatly from its utilization in parental termination, which the standard was originally based off of. In adjudicating parentage, judges must apply the detriment principle hypothetically, not based on

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244 S.B. 1476 Senate Floor Analysis (August 28th, 2012).
246 S.B. 274 Senate Floor Analysis (June 18, 2013).
current and concrete proof as in termination of parentage, effectively safeguarding
the “natural” parents’ rights. The legally unrecognized parent must prove that their
lack of legal status would cause harm to the child in order to receive legal recognition.
By placing the overwhelming burden of proof on potential negative consequences
without any method of tangible verification the detriment standard makes legal
parentage absurdly inaccessible.

In his dissent in *Troxel*, Justice Stevens warns against the harm standard and
its unconcern for valuable relationships outside the nuclear family and disregard for
the child’s voice. He writes, “We should recognize that there may be circumstances
in which a child has a stronger interest at stake than mere protection from serious
harm caused by the termination of visitation by a ‘person’ other than a parent.”

Demonstrating potential serious harm is a challenging threshold to meet. The law
should privilege beneficial relationships instead of striving to merely avoid traumainducing situations for children.

Justice Stevens also advocates for an greater emphasis of children’s liberties,
stating that under the detriment standard “children are so much chattel.” He
continues, “The constitutional protection against arbitrary state interference with
parental rights should not be extended to prevent the States from protecting children
against the arbitrary exercise of parental authority that is not in fact motivated by an
interest in the welfare of the child.” In this child-centered approach, Justice
Stevens counters the Parham presumption to suggest that parents may not always act
in their child’s best interest. What the child believes to be their own best interest

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249 Ibid 2072.
250 Ibid 2072.
should, at the very least, be a contributing factor in these cases. Setting the bar at harm denies a child’s fundamental liberty interests in preserving established bonds.

Additionally, the move from best interest to detriment counterintuitively relies more heavily on the judge’s subjective intuitions because a child’s best interest can be easily determined in the present by evaluating the current parent-child relationship but proving detriment requires unpredictable speculation. As the negative reflection of the best interest standard, the detriment standard does stimulate debate surrounding priorities for children but primes litigation to become focused more on characterological flaws in deciding who will be more hazardous to the child.\textsuperscript{251} The judge may only award parental status to those that reflect the state-sanctioned parenting ideal: that is to say, to parents that share equal responsibility, live in the same house, are gender-differentiated and heteronormative, or more than two parents that are genetically or biologically connected to the child.\textsuperscript{252} This bill may very well ignore more common familial constructions such as stepparents, same-sex parents, and parents using assisted reproductive technologies because the judge may not find them to fit the meaning of “rare cases” described in the bill.\textsuperscript{253}

The detriment standard still affords the judge incredible power to shape these family situations, assuring no more determinacy than the best interest standard. The

\textsuperscript{251} Peskind, Steven, supra note 73 at 471.
\textsuperscript{252} Abraham, Haim. “A Family Is What You Make It? Legal Recognition and Regulation of Multiple Parents.” American University Journal of Gender, Social Policy, and the Law Vol 25:405. (2017): 433. See also Michael H. v. Gerald D. 491 US 110 (1989). The best interest standard is also subject to this critique. In this case, even though the decision was not based off of the best interest of the child, Justice Scalia did not believe that it would have been in Victoria’s best interest to receive dual paternity, “the existence of two (2) ‘fathers’ as male authority figures will confuse the child and be counter-productive to her best interests.” One could argue that this kind of confinement would be especially common under the detriment standard because the lens is already narrowed significantly.
\textsuperscript{253} S.B. 274, 2013-2014 Reg. Sess. (Cal. 2013). See also Polikoff, Nancy (2008), supra note 1. “The law operates to require that a child have one parent of each sex.” Courts might only want to continue to keep the standard practice of legally recognizing gender-differentiated, heterosexual parents.
imprecise definition will similarly increase litigation and affect other legal realms. What the detriment does, though, is preserve the rule of two. This bill is framed so as to be only applicable to the most unusual of circumstances and sets the qualifications for attainment so high that it effectively bars the vast majority of multiple-parent families who need legal parentage. Leora Gershenzon, the Deputy Chief Counsel of the California Committee on Judiciary, stated that since the bill passed, the statute is exercised as sporadically as intended with only a handful of cases seeing official parentage of three individuals. The California Courts of Appeal have decided at least two cases involving the SB 274 statute but did not conclusively find either of them to have more than two parents. The vision of parental numerosity should not be confined to only three parents; expanding the rule of two should not default to the rule of three (or the “three parent rule”). With this bill, Senator Leno abandons his original vision of a world that prioritizes care in countless families for the negligible guidepost of avoiding harm in scarcely any cases. The absence of the best interest standard causes the bill to fall short of its goal of protecting the interests of children and their meaningful relationships with unrecognized parents. The parental exclusivity stronghold co-opted the statute to suppress the imminent possibility of truly expanding beyond the rule of two.

To retrace the evolution of this statute, it began with the In re M.C. case when a family entered the judicial system requiring assistance for a problem that the legal structure was unequipped to adequately solve. Taking up the issue, Senator Leno

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254 Leora Gershenzon, phone conversation with Deputy Chief Counsel of California Committee on Judiciary on February 19, 2019.

drafted a bill intended to address what he saw as an incongruence between the law and reality that left many American families, especially children, defenseless. This bill utilized the best interest standard to center the child’s welfare and legally recognize all caregiving parent-like relationships beneficial to the child. This standard, as the Supreme Court dangerously decided in *Troxel*, overturns the Parham presumption in visitation cases, and therefore applying the standard in cases adjudicating parentage would interfere with the “natural” parents’ constitutionally protected rights. The governor vetoed the bill, prompting Senator Leno to swap the best interest standard for the detriment standard, which substantially altered its impact. With this switch, the new bill now California state law, permits the adjudication of more than two legal parents only in rare cases where finding only two parents would be detrimental for the child.

Parental autonomy and family privacy rights secured as is under the legal system uphold, then, the rule of two and obstruct any serious attempts to alter the power structure by placing the child at the center. The proclaimed permanency of these rights is so entrenched in our understanding of parenthood that alternative legal and social structures of the family are, for many, astonishingly inconceivable and frankly impudent. In a memo regarding Senate Bill 274, a member of the Association of Family Conciliation Courts wrote, "We do not believe society in general is ready for the new legal landscape in 'parenthood.' We’re not ready."\(^{256}\)

Though Senate Bill 274 does not achieve the ultimate goal of protecting all

\(^{256}\) Letter from Diane Wasznicky on behalf of the Association of Family and Conciliation Courts to Senator Leno. April 17, 2013.
meaningful, parent-like relationships in a child’s life, it nevertheless is a fundamental legal step towards defending families who lacks protection under parental exclusivity.
Chapter 3: Rooted in Reality

The passage of the “three parent rule” bill both recognized and validated the vulnerability three-or-more-parent families face due to non-recognition, representing a symbolic shift towards increased societal acceptance of non-nuclear families, though its execution was destructively partial. Nevertheless, the victory of the California statute served as the impetus for a national movement urging legislatures to ratify laws permitting the adjudication of more than two legal parents.

The group leading this nationwide effort is a small cohort of attorneys constituting the Uniform Parentage Act Committee, a subset of the Uniform Law Commission (ULC). The ULC is a non-profit association established in 1892 which “provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.”257 The Committee’s purpose is to amend the Uniform Parentage Act (UPA) (originally promulgated in 1973 but revised in 2002), by updating laws surrounding parentage to reflect current practices.258 After two years of drafting and editing, the Committee passed the Uniform Parentage Act of 2017 which included a provision that would allow courts to adjudicate more than two legal parents. Yet, much like the California bill, the UPA could not muster full support for a statute that truly protected three-or-more-parent families and therefore compromised by including a caveat that substantially hindered the impact of the provision.

The Committee struggled considerably with the provision, debating for months over its importance, potential ramifications, and specifics as a written law. In the end, the Committee reached a disappointing “agree to disagree” conclusion. The final version of the UPA contains a section titled, “Adjudicating Competing Claims of Parentage,” which delineates two alternatives for families with more than two parents for states to choose from. One alternative, “Alternative A,” stipulates that “a child cannot have more than two legal parents but the other alternative,” and “Alternative B,” stipulates that “a child can have more than two legal parents.” The inclusion of the Alternative A effectively renders the protection of non-recognized parental relationships artificial and void because states may opt to simply maintain the status quo and avoid confronting the rule of two altogether. Even if states do choose the Alternative B, the UPA based the provision off of the California law using the detriment standard, meaning the law is only intended to be called forth in rare situations.261

Despite the initial intentions of many members on the Uniform Parentage Act Committee to keep the clause at only Alternative B, the UPA succumbed to the same fate as Senate Bill 274 and became an emblematic move that nods to the changes in the American family but carries hardly any legal weight. This chapter studies the development of the provision on adjudicating more than two legal parents in the Uniform Parentage Act of 2017 from its inception, which appeared as a somewhat extraneous add-on to the original goals of the Act, to its final iteration involving two opposing statutes. Throughout this process, the Committee deliberated

260 Ibid.
many of the same questions and arguments that surfaced in discussions about the California bill such as the “too many cooks in the kitchen” argument, the hindrance on the “natural,” nuclear family, and the burden more than two legal parents would have on other legal areas. This chapter investigates the last bone of contention to assess how three-or-more-parent families would fit into the wider legal structure including custody, child support, and probate. In attempting to match law with reality, lawmakers must confront that the legal meaning of “parent” extends past a symbolic identifier and permeates into established systems institutionalized under the rule of two.

The “Uniform” Parentage Act

The Uniform Law Commission is a nationally-supported organization that consists of approximately 350 commissioners appointed from each state, all of whom must be attorneys chosen by the government of their respective state or territory.262 Here, members come together to study and review state laws and write recommendations for which areas of law should be uniform. Once the Commission chooses to work on a section of American jurisprudence, the Commission executives assign commissioners with the most legal expertise in that particular area to draft or amend an act.263 To date, the ULC has produced more than 300 uniform acts.264 While the Commission’s acts alone hold no legal standing and do not serve as federal law, the ULC promotes the enactment of the acts across the states, often encouraging

261 Ibid at Section 613 under “Comment”.
and enlisting commissioners to push for legislative action in their home states so that the acts become uniformly adopted under state law.

The first Uniform Parentage Act was published in 1973 with the goal of standardizing the legalities of parent and child relationships across the nation. The UPA 1973 focused heavily on the legal status of “illegitimate” children and, as noted in chapter 1, helped enact parent’s rights beyond the presumption of marriage.\(^{265}\) This Act provided a much-needed framework for determining a child’s legal parentage and spearheaded the curve for legitimizing children born out of wedlock. Ultimately, 14 states ratified the Act. Shortly after, the Supreme Court recognized biological connections as a basis for constitutional protection in nonmarital parent-child relationships.\(^{266}\) This unprecedented stance on parentage gave the Uniform Parentage Act a reputation of progressiveness.\(^{267}\)

Maintaining its status as a pioneering voice in family law, the ULC administered a committee to revise the UPA 1973 and promulgated a new version of the Act in 2002.\(^{268}\) This Act is known for establishing non-judicial acknowledgments of paternity that equates adjudication of parentage in court to reduce state involvement, adding provisions for determining the parentage of children born through assisted reproductive technologies, and authorizing surrogacy agreements.\(^{269}\)


\(^{265}\) Uniform Parentage Act (1973).


\(^{267}\) Meyer, David D. (2006), supra note 77 at129.


The amended 2002 UPA pushed the existing boundaries of parentage law and set new precedents, which would soon after become nationally adopted.270

In late 2014, the Uniform Law Commission convened a “Study Committee” to evaluate the Uniform Parentage Act once again and compare it to recent familial trends, particularly in light of the potential Supreme Court decision concerning same-sex marriage in *Obergefell v. Hodges*.271 Chaired by Washington state Senator Jamie Pedersen, the Study Committee recommended the formation of a committee to draft amendments to the UPA writing, “given the widespread reality of legally married same-sex couples across the United States, the Study Committee believes that establishment of a drafting committee is both necessary and urgent.”272 They worried that without an update, the current gender-specific language of the UPA might allow courts to take a literal approach and refuse to apply the marital presumption and other marriage-dependent doctrines to same-sex spouses.273 When the ULC established the new UPA Committee, its primary goal was to update the 2002 Act to ensure the equal treatment of children born to same-sex couples and remove heterosexual and gendered implications, whether explicit or implicit, from all parenting documents.274

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272 Ibid. At the time of this memorandum, same-sex couples have the legal right to marry in 35 states.
273 Ibid.
274 Ibid. See also Jamie Pedersen, phone conversation with Uniform Parentage Act Committee Chair on January 21st, 2019 [hereinafter known as “Jamie Pedersen, phone conversation.”]. Jamie mentioned that the executive committee originally did not approve the formation of the UPA drafting committee right away because the commissioners from Tennessee said that their state would stop paying dues to the ULC if they made an act to work on same-sex recognition in parentage.
Comparing the inceptive intention to the final product reveals the grand evolution of the Uniform Parentage Act over the two years the Committee revised. Unquestionably, the scope and content developed far beyond the primary objective.\textsuperscript{275} The new UPA Committee consisted of 18 members spanning the nation, all of whom were commissioners of the ULC and therefore also attorneys by training but not necessarily by profession. The Committee included several state officials, justices, professors, American Bar Association advisors, and private-practice lawyers. The Chair of the Committee was once again state Senator Jamie Pedersen and the reporter was Courtney Joslin, a Professor at University of California Davis School of Law who specializes in family and relationship recognition for same-sex and nonmarital couples.\textsuperscript{276} In a memo to the ULC Committee on Scope and Program, Senator Pedersen wrote that the UPA Committee believed that the nature of amendments must be widened to more than same-sex couples’ parent and child relationships. As he explains, “the fundamental question for a drafting committee to consider in revising the UPA is whether (and if so, how) to establish legal parentage based on the intent or conduct of the parents, separate and apart from parentage based on a genetic or biological connection or adoption of the child.”\textsuperscript{277} Though this sounds like Senator Pedersen is speaking directly to the issue of non-recognition of three-or-more-parent families, the new expanded vision did not immediately provide

\textsuperscript{275} Uniform Parentage Act (2017). “Prefatory Note.” The finalized Act begins by describing the five major changes this edition makes to the 2002 Act: the equal treatment of children born to same-sex couples, establishment of a de facto parent as a legal parent of a child, includes provisions precluding the establishment of a parent-child relationship by the perpetrator of a sexual assault that resulted in the conception of the child, updates the surrogacy provisions to reflect developments in that area, and a new article that addresses the right of children born through assisted reproductive technology to access medical and identifying information regarding any gamete providers.

\textsuperscript{276} “Courtney G. Joslin” UC Davis Law Faculty. https://law.ucdavis.edu/faculty/joslin/.
space for adjudicating more than two legal parents because the matter was not yet considered to fall under the jurisdiction of parentage law.

As the UPA went through several early drafts, the committee revising the Uniform Non-Parent Custody and Visitation Act (NCCVA) was also working concurrently through versions of its own Act, which included a section on people who had a parent-like relationship with a child but no legal rights.278 The NCCVA placed these individuals in the category of “de facto” (or “functional”) parents, which as explained earlier in the introduction, demands in turn a heightened set of parameters to deem non-biological caregivers and caregivers-not-presumed-by-marriage to be legal “parents” of a child. At the annual ULC conference where the commissioners assemble to hear and vote on acts, several commissioners questioned why people who have been performing the parent role and are legal regarded as “parents” under the “de facto” label are shrouded under the “non-parent” act.279 Many commissioners interpreted the NCCVA’s elucidation of “de facto” parents to be an intentional sidestepping of the strict requirements placed on third-party caregivers in *Troxel*. By considering “de facto” parents to be “parents” and not merely “third-party outsiders,” this label bolsters the rights of outsiders such that they can dismiss the existing parents’ wishes.280 Following this conversation, the ULC decided to move “de facto” parentage under the purview of the Uniform Parentage Act.281

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277 Pedersen, J. Memo to Uniform Law Commission Committee on Scope and Program. October 5, 2015. In this request to expand the scope of the UPA, the Committee gained the right to revise the Act and not simply make amendments.


279 Transcript of the Eighth Session at the Uniform Law Commission Annual Conference July 12, 2016. Pg 76. See also “ULC Constitution and Bylaws.” Every Act must be read in its entirety to the entire body of commissioners twice at two separate conferences before the Committee may vote on it.

280 Ibid at 50. Commissioner Harry Tindall said, “It just seems to me that you are running awfully close to violating the grand pronouncements of *Troxel* and you are allowing the creation of non-parents who now ripen into de facto parents to virtually become parents without conforming to
In the NCCVA draft, “de facto” parents may be adjudicated in addition to two pre-existing legal parents if one of the three individuals either is absent or does not hold custody rights, meaning that three “parents” may all have parentage but in limited ways. 282 “De facto” parentage, once again, does not solve the predicament of abundance when three fit parents have competing claims to parentage. Neither the original UPA nor the NCCVA considered provisions permitting the adjudication of more than two legal parents, but the members of the NCCVA Committee noted the conundrum expressing,

We are struggling with how to acknowledge that [people who have parent-like relationships with a child and whom the child believes to be their parent] have been so significant in the child’s life, they are in effect parents, to give them some leeway, some access to the child without running over the hurdle of the parent saying, no, you can’t have this. 283

After “de facto” parentage fell in the hands of the UPA Committee, Courtney Joslin, the reporter for the Committee and legal expert in relationship recognition, brought up the California statute, as well as a recent Maine statute, suggesting the Committee consider including the possibility of increasing numerosity in parentage outside of “de facto” parentage. 284 In other words, Professor Joslin saw the natural connection from “de facto” parents’ intention-based parentage to legalizing multiple-parenting.

The 2015 Maine statute is the most liberal approach to adjudicating more than two legal parents to date. The statute provides, “[c]onsistent with the establishment of parentage under this chapter, a court may determine that a child

adoption laws or guardianship laws. Once you arrive at de facto parent, you are a legal parent by all intents and purposes.”

283 Transcript of the Eighth Session at the Uniform Law Commission Annual Conference July 12, 2016. Pg 89. See also pg 103, “We certainly did not intend to recognize more than two parents.”
has more than 2 parents.”

Meaning, the court may simply decide whether or not the child has more than two parents, unconcerned by the thwarting detriment standard. Joslin presented both the California and Maine statutes as different ends to accomplish an expansion of the total number of parents beyond two, should the Committee choose to do so.

Prior to voting on the UPA at the annual ULC conference in 2017, Jamie Pedersen and Courtney Joslin sent a memo to the Commission outlining the belabored “thorny issues” that the Committee worked through. Among these issues was whether to limit the number of legal parents a child may have. Through phone conversations with several Committee members, the divisiveness of this matter became acutely evident but the Committee itself seemed to be in consensus. In the idiosyncratic world of the Uniform Law Commission, the success of an act is measured by how many states enact it. Assuring enactability requires an in-depth understanding of the contexts of each state and their legislature’s comfort with each element of the act. For the more-than-two-parents provision there are two incompatible stances among the states. On one hand, California and Maine already have defined laws permitting more than two parents and thus if the UPA limited the number of parents to two, the Act would be dismissed in these states. On the other hand, many states are so inimical to the possibility of more than two legal parents that Senator Pedersen remarked that several states warned the Committee that if the new UPA mandated having more than two parents, it would be dead on arrival.

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285 ME. STAT. REV. tit. 19-a, § 1853(2).
287 Pedersen, Jamie and Joslin, Courtney G. Memo to Uniform Law Commissioners on June 9, 2017.
288 Jamie Pedersen, phone conversation.
No matter how the Committee would decide to proceed, they were certain they couldn’t take a hard stance either way.

Many UPA Committee members noted this clear split across the states was primarily ideological. Jamie Pedersen mentioned a “blue state, red state effect,” implying that the response to expanding the numerosity of parentage is a partisan issue. The Committee used this assumption to predict a state’s likelihood of ratifying the Act based on the political stance of the state’s legislature regarding non-traditional families. During the ULC conference discussion of the NCCVA, several states with conservative legislatures expressed apprehensiveness that “de facto” parentage upends the Parham presumption because it oversteps the rights of the “natural” parents. According to these ULC commissioners, by establishing intent-based parentage and allowing more than two individuals legal access to the child, these new forms of legal parentage dilute the meaning and power of being a parent. Speaking on the subject, Commissioner Harry Tindall said, “For those states opposed to three parents, we have to give them the option to keep with their traditions.” Of course, the vision of “tradition” excludes the majority of American families that do not conform to the state-imposed ideal. Nevertheless, responding to criticisms of “de facto” parenting as well as acknowledging many states’ legal

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289 Ibid. See also, Courtney Joslin, phone conversation with Uniform Parentage Act Committee Reporter on February 1st, 2019. See also, Claire Levy, phone conversation with Uniform Parentage Act Committee member on January 23rd, 2019.
290 Jamie Pedersen, phone conversation.
291 Transcript of the Eighth Session at the Uniform Law Commission Annual Conference July 12, 2016, Pg and 26.
292 Ibid. Harry Tindall from Texas and Charles Trost from Tennessee were the most outspoken.
293 Harry Tindall, phone conversation with Uniform Parentage Act Committee member on January 18th, 2019 [hereinafter known as “Harry Tindall, phone conversation”].
adherence to the traditional, nuclear family, the Committee opted for alternatives to the number of parents a child can legally have.294

Like all acts drafted by the Uniform Law Commission, the main goal of the Uniform Parentage Act of 2017 is to unite all states by “providing rules and procedures that are consistent from state to state.”295 The decision to include alternatives that inherently contradict each other contradicts the mission of the organization. In practice, states would operate under two entirely different sets of laws, giving rights to non-traditional families in one and leaving them powerless in another. The inclusion of alternatives both defeats the purpose of the “Uniform” Parentage Act and tarnishes its well-established reformist reputation. Though the more-than-two-parents question was one of a few other “thorny issues,” the “Adjudicating Competing Claims of Parentage” section is the only part in the entire UPA where there are alternatives. According to a long-standing commissioner, the use of alternatives in any Uniform Law Commission Act is “very unusual,” thus showcasing the intense schismatic response to renouncing parental exclusivity.296

Yet even proponents of Alternative B stop short of completely abandoning the rule of two. The Committee deliberately adopted the language of the California statute instead of the Maine statute because the defined restriction of detriment curtails the “slippery slope” fear that a child will have three, four, eight parents and also limits the usage of the provision, as it intended.297 Following in the footsteps of the California statute, instead of outlining ways to ensure all three-or-more-parent

294 Jamie Pedersen, phone conversation. Jamie noted that one measure was a state’s laws regarding same-sex couples.
296 Barbara Atwood, phone conversation with Uniform Parentage Act Committee member on January 21st, 2019. Barbara Atwood has sat on the ULC for 11 years.
families have access to legal standing, Alternative B, once more, “stakes out a narrow, limited approach to the issue by erecting a high substantive hurdle before the court can reach [the conclusion that a child has more than two legal parents]: a court can determine that a child has more than two legal parents only when failure to do so would cause detriment to the child.”298

Notably, the alternatives fabricate a false binary that carries inherent biases towards parental exclusivity. The provision reads, “A state should enact Alternative A if the state does not wish a child to have more than two parents. A state should enact Alternative B if the state wishes to authorize a court in certain circumstances to establish more than two parents for a child.”299 Alternative B specifies the detriment standard in its strategy to allow more than two parents and by framing this tactic in opposition to the prevailing rule of two, the UPA presents Alternative B, and especially the detriment standard, as the only way to adjudicate more than two parents. This action erases the multitude of techniques a state could employ to protect more-than-two-parent families such as the best interest standard—or, like in Maine, no standard at all. The UPA allows states that are hell-bent on preserving the rule of two to choose Alternative A and continue to neglect unconforming families while simultaneously harshly regulating the methods that jurisdictions can take to protect multiple-parenting families if they opt for Alternative B. The inclusion of alternatives stifle jurisdictions that might recognize the continued vulnerability of three-or-more-parent families and elect to take a more liberal approach. Maine, with

298 Uniform Parentage Act 2017. Section 613 “Comment”.
299 Uniform Parentage Act 2017. Section 613 “Comment.” See also, Harry Tindall, phone conversation. Tindall stated that “the two parent is prevailing rule of law and should be listed as the first option,” which is why it is the first alternative.
a statute far more progressive than the radically-purported Alternative B, refuses to enact the 2017 version of the UPA on the grounds that doing so would nullify their existing laws.\textsuperscript{300} Therefore, the UPA not only restrains the utilization of Alternative B because of the detriment standard, but also perpetuates the dominance of parental exclusivity and its stronghold on parentage law by constricting a state’s ability to fully recognize significant parent-child relationships.

The 2017 UPA passed with 44 states/jurisdictions in favor, 5 opposing, and 5 abstaining.\textsuperscript{301} Up to 2019, Washington, Vermont, and California enacted the 2017 Uniform Parentage Act, all selecting Alternative B, and a bill containing the Act has been introduced in Pennsylvania, Rhode Island, Connecticut, and Massachusetts, also all selecting Alternative B.\textsuperscript{302} In charting a new law, the UPA had the power to set the norm for states to abide by. Perhaps if the UPA wrote Alternative B using the best interest standard or no standard (like Maine), at least the states choosing Alternative B would be as inclusive as possible for three-or-more-parent families.

The UPA claims that it “recognizes and reflects [the emerging trend] in favor of recognizing the possibility that a child may have more than two legal parents,” but, unfortunately, it only does that.\textsuperscript{303} Apart from the inclusion of the alternatives, the decision to use California’s statute, particularly the detriment standard, stemmed from apprehension surrounding the scope of impact adjudicating more than two

\textsuperscript{300} Lindsay Beaver, phone conversation with Legislative Counsel to the Uniform Law Commission on January 22nd, 2019.
\textsuperscript{301} Transcript of the Fifth Session at the Uniform Law Commission Annual Conference July 16, 2017.
\textsuperscript{303} Uniform Parentage Act 2017. Section 613 “Comment.”
parents would have on other legal realms. The high threshold would bar most people from using the statute, effectively attenuating the impact of any major changes. These considerations dominated many of the Committee’s conversations regarding the statute, shifting the concerns from ideological and moral unease to logistical practicalities.

**More Than A Label**

The sentimental reward of legal parenthood—that the parent-like caretaker finally receives a guaranteed relationship with the child they love, care, and share an emotional connection with—tugs at our heartstrings enough to briefly fixate on the sanctity of parenthood. Indeed, the emotional attachment children have to their parents deserves protection for its stability, nurturant properties, and permanency. Nevertheless, as we’ve glossed over before, parentage is first and foremost a legal duty imposed (or rather, “gifted” by the fundamental liberty rights in the constitution) by the state that requires one to support one’s child. Accompanying legal parentage are financial and medical responsibilities as well as a commitment to provide for the child and ensure their well-being. The rule of two structures the current system of parental responsibilities such that custody and child support operate off the assumption that there are only two parties involved. The introduction of a third legal parent throws the existing procedures into disarray, thus requiring thoughtful plans for the administration of obligations beyond the designated title of “parent.”

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304 Fellows, Mary Louise Memo to Joslin, Courtney G. October 17th, 2016.
305 Abraham, Haim, *supra* note 252 at 443.
California Bill 274 outlined specific provisions to guide courts in awarding custody, visitation, and support in the event that the court has found that a child has more than two parents.\(^{307}\) In regards to custody, the statute requires courts to apply the same rule that they apply in custody disputes between only two parents but depart from California’s preference for joint custody to allow for the three parents to have unequal custody awards.\(^{308}\) When the UPA decided to use the California statute as its basis for adjudicating more than two legal parents, Mary Louise Fellows, a professor at the University of Minnesota Law School who specializes in trusts and estates, warned against what she saw as jamming three parents into a two-parent custody mold. She writes:

I am troubled by California’s approach. A finding of a third legal parent does not mean that the child’s custody or support rights would necessarily change. I have in mind the facts of *Michael H v. Gerald D*, 491 U.S. 110 (1989). In that case, recognition of the genetic father as the father, rather than the genetic mother’s husband, would not have removed necessarily the child from the marital household...In this regard, I believe [in] a statutory provision modeled on [the Maine statute].\(^{309}\)

Fellows highlights the reality that rigid expectations for custody and other parental duties determined concomitantly with adjudicating parentage could have damaging effects if the family’s current situation already supports the best interest of the child. Ironically, amid apprehensions about how the specifics of a more-than-two-parent statute would actualize, Fellows commends Maine’s unspecified statute for its case-by-case, open ended guideline that legally tailors to each familial situation. As the

\(^{307}\) Hearing on S.B. 274.
\(^{308}\) CAL. FAM. CODE § 3040(d).
American family extends beyond the “one size fits all” nuclear family expectation, these increasingly intricate and distinctive families should be sorted out without preconceived notions of an ideal custody agreement, especially not joint custody induced by the rule of two. After much debate, the UPA Committee omitted the California bill’s custody, visitation, and support terms, leaving the orchestration of implementation to the states.310

In the U.S. today, most states express a preference for joint legal custody and some states employ it as a presumption.311 The culmination of joint custody after a history of gendered custody settlements not only removes gender bias, but also legitimizes non-exclusive parenting by enabling shared parenting outside of a nuclear family unit and in multiple households.312 The joint custody model certainly lays the foundation for viewing parenthood as divisible and able to be shared, but it is not a reasonable model for families with more than two parents.313 Most courts use directions similar to “allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child’s need for continuity and stability by preserving established patterns of care and emotional bonds.”314 To this end, courts should prioritize custody awards that minimize conflict and change. Most cases to date that address three (or more) parents involve an ebb and flow of parents who appear in a child’s life at different times and thus these

309 Fellows, Mary Louise Memo to Joslin, Courtney G. October 17th, 2016.
310 Uniform Parentage Act of 2017 “Section 613.”
311 Appleton, Susan Frelch (2006), supra note 31 at 43-44.
313 Appleton, Susan Frelch (2006), supra note 31 at 45.
314 CAL. FAM. CODE § 3040(d).
children have rarely lived consistently with all three (or more) parents.\textsuperscript{315} Equitable custody among three parents seldom accurately reflects the child’s current residential pattern and often neglects the child’s best interest of maintaining a steady living situation. Rather than force an insufficient exemplar, custody and child support allotments for three-or-more-parent families would greatly benefit from a framework that disaggregates rights and responsibilities.

Several scholars contend that while attempting to fit families with three (or more) parents into the current custody practices produces fragmented results, the division of parental duties provides a lead-in for a scheme amenable to all family situations, especially beyond bi-parenting.\textsuperscript{316} Child custody laws today permit agreements allowing partial-custody, visitation, or no other rights if joint custody is not in the child’s best interest.\textsuperscript{317} The new custody arrangement would build upon the emergence of relative rights, depending upon the adult’s relationship with and contributions to the child.\textsuperscript{318} Custody would no longer be bifurcated, but would splinter in jagged, yet logical ways that intentionally respond to the active functions of each parent. For example, a parent who engages in the bulk of daily responsibility for the child should have greater rights regarding the raising of the child than a parent who contributes less emotional support and continued contact. Scholar Melanie Jacobs proposes that the courts recognize this parent as the “primary

\begin{Verbatim}
\textsuperscript{315} Cahn, Naomi and Carbone, June (2018), \textit{supra} note 188 at 406. Including step-parents and parents found out to be genetic later on, etc.
\textsuperscript{317} Uniform Child Custody Jurisdiction and Enforcement Act 2013.
\textsuperscript{318} See all of the scholars cited in \textit{supra} note 55.
\end{Verbatim}
parent” and divvy up other rights and responsibilities to additional parents.319 The “primary parent” provides dependability for the child while also ensuring that other meaningful parent-child relationships receive legal preservation. Though counter to the constitutional protection of the “natural” parents’ autonomy that views parentage as “all or nothing,” granting differing and unequal rights to those deemed to be parents actually aligns better with current practices in the division of caregiving duties.320 Not only do non-traditional families share parental responsibilities unequally, but nuclear families do as well. Parents often organically take on an uneven division of parenting obligations both within the nuclear family unit as well as across households.321 While courts laud joint custody as the ultimate standard, the equal division of responsibilities expected in joint custody is far less common.322 Under the new template, the particular nature of the custodial/visitation relationship between the parent and the child will be taken into consideration and accurately reflected. For instance, let’s say a lesbian couple have a child through a sperm donor and the couple recognizes the benefits in having the child’s genetic father in their life. The couple may receive status as the child’s “primary parents” and the biological father may receive limited visitation. All three parents gain recognition as legal parents but interact with the child on varying levels. The switch to this more deliberate approach would merely be an extension of the individualized child custody proceedings currently used to include a wider variety of

319 Jacobs, Melanie B. (2010), supra note 315 at 224.
legal rights. Despite the potential difficulties of spreading parental duties across multiple people (the “too many cooks in the kitchen” argument), the continuity and security of caregiving relationships for the child outweigh the costs.

Child support, unlike custody, is primed for a “more the merrier” addition. As has been thoroughly established, the state’s primary goal in identifying parents is to administer liability such that the state releases itself from the financial burden of maintaining the well-being of the child. California Family Code summarizes this point proclaiming, “There is a compelling state interest in establishing [parentage] for all children. Establishing [parentage] is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors’ benefits, military benefits, and inheritance rights.” In many cases, the child would benefit from the financial support of more than two parents.

The most commonly used child support equations, however, function on a strictly two-parent basis and thus are not suited for expanding parental exclusivity. The current models are the income-sharing model, which reviews the income of two parents, and the percentage-of-income model where the non-custodial parent’s income becomes the focus. The former appears in joint custody cases while the latter mandates full financial contributions from the non-custodial parent. Most three-or-more-parent families will not share equal custody, so it doesn’t make sense for them to each contribute a third of the financial support and sharing a large

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portion of one’s salary when one has limited custody with the child and the child has two other benefactors also doesn’t quite feel appropriate.

By employing the new custody paradigm above, child support determinations can seamlessly accord with custody by pairing financial obligations relative to the allotted custody. Primary parents would shoulder greater financial responsibility while the other parents would also contribute congruently with their custody determination and consideration for all parents’ incomes and benefits. The final custody and child support agreement must be legally binding so as to ensure that the state can continue to hold parents legally responsible and also safeguard against the unwilling parent who neglects child support payments without repercussions. Courts could realistically immediately implement this flexible template for disaggregating parental rights and responsibilities under the best interest standard because the system already allows for alternatives to joint custody. The challenge, therefore, lies in normalizing the conception of parentage as divisible and admitting of partial rights.

**A Parentage Loophole In Probate**

The final factor that concerned legal experts as to how adjudication of more than two parents would actualize in wider legal system is probate. Prior to the California statute, the Maine statute, or the passage of the 2017 Uniform Parentage Act, a child could legally claim that they had three (or more) parents—in probate law. The claims to parentage in probate law operate outside of a parent’s present *legal* status to a child, allowing a child to claim three parents without all of those
individuals being her legal parents simultaneously. Legal experts warned that
inheritance law is not positioned to handle more than two legal parents. However,
the loophole in probate law permitting a child to claim inheritance from more than
two parents calls attention to the ways in which three (or more) legal parentage can
work in the inheritance context, since a non-legal version already is.

The Uniform Probate Code (UPC) permits a child to inherit from a person
whose initial parental rights have been terminated. Thus, under the UPC, if a
child was adopted after their parent’s rights were terminated, that child can inherit
from three parents, even though the Act only recognizes two of those people as legal
parents. Moreover, when a child is adopted by a stepparent, the child still maintains
the right to inherit through the other biological parent. So, if a child is adopted by
her stepfather, she may inherit from her mother, stepfather, and biological father.
Even if the child was “in the process of being adopted” by a stepparent, which the
statute explicitly states is not intended to be limited to specific legalities, the child can
claim inheritance from the stepparent.

The Maine and UPC statutes serve the purpose of maintaining that a parent-
child relationship exists for purposes of intestate succession between a child and his
or her genetic parent even after that parent’s rights are terminated. If a child can
prove that they are the biological child/parent of the deceased, they can be entitled
to the inheritance. In the Michael H v. Gerald D. case, the daughter could claim

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325 Ibid. See also, Carbone, June and Cahn, Naomi (2017), supra note 319 at 330.
326 Tobisman, Cynthia E. "The Post-Nuclear Family: Changing Definitions of What Constitutes A
Familial Relationship" in Strategies for Family Law in California: Leading Lawyers on Understanding
327 Uniform Probate Code 2010 Section 2-119.
328 Ibid.
329 Ibid. Section 2-118.
inheritance from her biological father, Michael, even though he has no legal parentage rights.

Mary Louise Fellows, who was a member of the UPA Committee and also sits on the UPC Committee, is currently amending the UPC from its last iteration in 2010. Fellows announced that the upcoming version of the UPC removes the assumption that families have only two parents and completely rewrites the intestacy statute in a manner that allows for more than two legal parents.\textsuperscript{331} She remarked, “Every way that someone could create a family should be recognized. We don’t want to reproduce a norm that doesn’t account for all families. We want to create an inheritance statute that screams, ‘We’ve thought about this! We’re ready for this!’”\textsuperscript{332} The updated UPC should alleviate all concerns regarding how inheritance law will manage more than two legal parents. Fascinatingly, this determination of more than two parents in probate law cannot use harm discourse such as the detriment standard because the addition of legal parentage in these instances are financially beneficial, not harmful, thus manifesting as a pseudo-best interest standard. Perhaps the rule of two cannot wield its power when it interferes with one’s proclaimed right to one’s money. The legal realms that deal with parentage are, in short, surprisingly well-suited to receive families with more than two legal parents. The particular details will need to be ironed out but the framework contains liberal wiggle room for non-exclusive families, provided that the guidelines remain open and individualized to each familial situation. In tandem with expanding the number of parents a child can

\textsuperscript{330} Ibid. Section 2-119.
\textsuperscript{331} Mary Louise Fellows, phone conversation with Uniform Parentage Act Committee member and Uniform Probate Code Committee member on January 22, 2019.
have, the legal system will similarly have to expand its practices, first requiring an expansion of what it means to be a “parent.”

Alison Harvison Young, a prominent voice in “challenging the paradigm of the exclusive family” expressed, “[A] more inclusive notion of family does not mean simply adding to the number of 'parents' which law and society recognize. The challenge is to approach the task with a greater degree of imagination, so that different types of degrees of contribution and potential contribution may be fostered.” The Uniform Parentage Act legally recognizes families with more than two parents but does so only in name. Both the alternatives as well as the detriment standard obstruct the Act from instituting a fully protective statute reflective of reality.

Adjudicating parentage for more than two legal parents must become a permanent fixture in our legal system. In addition to providing legal protection for cherished parent-child relationships, the state also needs to identify "parents" in order to dole out support obligations, decision-making authorities, and testamentary considerations. The possibility of renouncing parental exclusivity does require forethought for specifying amendments and elaborations to the rule of two foundation of the current legal system. Fortunately, the practices of custody and visitation, child support, and inheritance are amenable to more than two parents

332 Ibid. After my conversation with Professor Fellows, she sent me the current draft of the UPC with said changes and, indeed, it remarkably accounts for families with more than two legal parents. The updated UPC is set to be voted on at the annual ULC conference this upcoming summer.

333 The other “systematic” considerations include medical determinations, education, tax benefits, financial aid, social security benefits, etc. In these areas of law, the change will largely be administrative with updating forms and legal documents but would not require a complete shift in perspective.

334 Young, Harvison Allison, supra note 311 at 515.
once we alter our conception of parent from one of exclusive, absolutist control towards an understanding of sharing and divisibility of parental responsibilities.
Conclusion

In some places in the U.S., a child can have more than two legal parents. While the statutes detailing the legalities of the revolutionary step towards protecting three-or-more-parent families have certainly not been a panacea for the issue, they nevertheless mark a historic moment in becoming closer to dismantling parental exclusivity. For the first time, envisioning a legal system without the prevailing and pigeonholing rule of two does not feel so far-fetched.

There are immediate improvements that legislatures that are considering introducing a statute permitting more than two legal parents can begin modifying. The first is to remove the detriment standard and begin using the best interest standard, or no standard, in order to encapsulate all three-or-more parent families. This small policy language shift will drastically increase the number of families who meet the qualifications to receive legal parentage. In doing so, legislators must omit the phrasing “in rare cases” because it invalidates the many families who are disregarded by the law and are then told they may not seek legal assistance.

Secondly, I urge states to consider the heavy presence of the state in adjudicating parentage in three-or-more-parent families. Under the existing model of both the California, UPA, and Maine statutes the individual seeking third parentage must prove that they have “assumed the role for a substantial period” after the child is born.\textsuperscript{335} Thus, parentage of a third parent cannot be conferred prior to a child’s birth and necessitates appealing to the legal system for assistance. The families seeking recognition for three (or more) parents are not often the ones privileged by

\textsuperscript{335} Uniform Parentage Act 2017. Section 613 “Alternative B.”
the state. In other words, these families require legal assistance because they already occupy a non-conforming position and therefore are less likely to fit the gender-differentiated, heterosexual, married, household ideal propagated and upheld by the state (not to mention other privileged identifiers). The forced interaction with the state may be anxiety-producing and dissuade those who need it most from attaining legal recognition.

In thinking through responsive solutions, perhaps a structure akin to the putative father registry (established by the UPA 1973) where all of the child’s parents can establish parentage through a signed and notarized acknowledgment of the parentage agreement could minimize contact with the state. This method also reduces the case-load for courts, saving the state time and money.

Beyond these relatively quick policy fixes, the renouncement of the rule of two in the legal system necessitates a change in our societal convictions. In order to convince those wielding state power of the numerous advantages of multiple-parenting we must address the roots sustaining parental exclusivity. The first step in doing so requires confronting the hegemonic conception of “parenthood,” including the view of children as property and parents as their autonomous owners, the idea that outside caregiving competes with a parent’s rights to raise their child, and the expectation that a parent must fulfill all parenting responsibilities. In exposing the contradictions of the “natural,” enduring nuclear family, the idea of “parent” begins to take on new meaning, one that can be shaped and understood to account for all laborious caregivers.

Throughout this project I have ruminated over the countless ways that rejecting the legal rule of two would positively contribute to society. I believe that in
broadening our legal conception of care and blending the current hard and fast line between “natural” parents and “outsiders,” we will prioritize sharing and be better equipped to support one another. Besides a tender aspiration of what some might deem “radical love,” I foresee a reality where all families including same-sex families, step-parents, families formed using assisted reproductive technologies, biological, marital, and all intended families can construct themselves organically without fear of losing their most cherished relationships. When half of all families in the U.S. do not adhere to the legally expected family and continue to go unprotected by the law, can think of no other alternative but to abandon parental exclusivity. “We’re ready.”
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