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Rethinking Children as Property

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Rethinking Children as Property: the Complex Family

ABSTRACT

Despite the collective view in law and social practice that it is intrinsically taboo to consider human beings as chattel, the law persists in treating children as property. Applying principles of property, this Article examines paternity disputes to explain and critique the law's view of children as property of their parents. As evidenced in these conflicts, I demonstrate that legal paternity exposes a rhetoric of ownership, possession, and exchange. The law presumes that a child born to a married woman is fathered by her husband, even when irrefutable proof exists that another man fathered the child. Attempts by the non-marital biological father to assert parental rights regularly fail, as states allow only one father to "claim" the child. This approach treats the nonmarital father as a trespasser and categorically favors the fundamental due process rights of the marital father.

Analyzing these family law cases along a property framework offers a rethinking of the law's imbalanced treatment of unmarried fathers. The law's current approach to paternity disputes reflects a classic model of property rights and ownership rooted in static, rigid, and exclusive claims. This framework ignores the interests of children in their biological fathers while overestimating the reproductive normativity of marriage.

This Article joins in recent discussions of "stewardship" models of property that engage the complexities of nontitled claims to property. It draws upon constitutional law, property theory, and political philosophy to assert the possibility that the interests of children are better served by protecting and nurturing those relationships (i.e., those with the biological father) that are normally defeated by traditional appeals to substantive due process. By highlighting the claims of nonmarital, biological fathers divested of standing to assert paternal rights, I suggest a turn to a fiduciary ethic that entertains the unique legal status of what I call the "complex family." This engagement of a textured—as opposed to flat and conclusory—model of the hybrid marital/nonmarital family recognizes the unwed father's property rights in the child as nontitled, while the marital unit acts as a fiduciary caregiver with legal rights to the child. By embracing the counterintuitive notion of children as property, I argue for a redirection of the existing framework of property theory to a productive model for the family that champions the best interests

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of the child in tandem with the constitutional interests of marital and nonmarital parents.

INTRODUCTION

Conceptualizing children as property invites trouble, but for unexpected reasons. Although some consider it “patently unthinkable”¹ to characterize parent/child relationships within a classic rhetoric of ownership and possession,² these expected reactions make up a small part of a much larger conversation.³ Judges, lawyers, and litigants employ the language of property when adjudicating legal parenthood;⁴ parental “interests” are “deserving of protection”⁵; mothers of nonmarital children are “entitled to possession”⁶; children “belong” to either parents or the

* Associate Professor. This Article benefited from workshops and presentations at University of Richmond School of Law, the Emerging Family Law Scholars Group, Brown University, and Hofstra Law School. I am also very thankful of the supportive intellectual community around me of Rose Cuison Villazor, Sonia Kaytal, Melissa Murray, Zanita Fenton, Robin Paul Malloy, Nina Kohn, Peter Bell, Richard Ellison, Janis McDonald, Paula Johnson, Kristen Carpenter, Angela Riley, Herbie DiFonzo, Janet Dolgin, Hillary Burgess, Akilah Folami, James Sample, Marc Poirier, Serena Mayeri, David Rubenstein, Ammon Allred, Linda Ayers, Solangel Maldonado, Ed Stein, Dan Greenwood, Liz Glazer, Doug Rennie, Meredith Johnson Harbach, Katherine Franke, Laura Rosenbury, Adrienne Davis, Jeff Redding, Angela Onwuachi-Willig, Bennett Capers, Tucker Culbertson, Camille Nelson, Mr. George, and Iris Chiu. Many thanks also to Brenda Guiliano for last minute research assistance.

¹ Kristen Carpenter, Angela Riley, and Sonia Katyal, *In Defense Of Property*, 118 Yale L.J., 1031 (2009) [hereinafter ‘CARPENTER ET AL.’] (“It seems patently unthinkable that property law should govern such an intimate domain.”)

² At common law, children did not enjoy the same legal protection as adults, but instead had the same legal privileges as livestock and pets. Judith Areen points out that children in Victorian New York were protected by the Society for the Prevention of Cruelty to Animals (now known as the SPCA). See Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 894 (1975).

³ See, e.g., Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 Duke J. Gender L. & Pol’y 1 (2009); Justin Witkin, *A Time for Change: Reevaluating the Constitutional Status of Minors*, 47 FLA. L. REV. 113, 116 (1995); Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187, 1217 (1993); James G. O’Keefe, *The Need to Consider Children’s Rights in Biological Parents v. Third Party Custody Disputes*, 67 CHI.-KENT L. REV. 1077 (1991).

⁴ See, Barbara Bennett Woodhouse, *Who Owns the Child: Meyer and Pierce and the Child as Property*, 33 WM. AND MARY L. REV. 995 (1992) [hereinafter ‘WOODHOUSE’] (discussing the legal language of property in regards to children).

⁵ *Caban v. Mohammed*, 441 U.S. 380, 399 (1979) (diss.)

⁶ *Quilloin v. Walcott*, 434 U.S. 246, 249 n.5 (1978).

state;⁷ and fathers may be “deprived of access to their children.”⁸ These exclusive and possessive claims to children reveal a solid linguistics of entitlement that resemble property law doctrines of dominion, exclusion, and tenancy.

But the unexpected trouble of the family/property discourse stems from property’s fundamental rigidity that narrows the possibility of who qualifies as family. The traditional concept of property is binary and definitive—it conclusively determines ownership and it efficiently delineates holder from non-holder.⁹ This classic approach to property couples dominion with title. With an identification of the owner and a clear chain of title, a court may discover the legal holder of the property. Those without title find difficulty in asserting a legitimate interest in property.

This Essay proposes a rethinking of existing property theories in the context of marital children born to unmarried fathers. Specifically, I re-examine the normative desirability of a property-based exclusion of biological fathers from pre-established marital dyads. With states presuming marital fathers as legal fathers,¹⁰ this inevitably deprives biological fathers of formal rights to children, vis-à-vis the tautological impossibility of not being married to the mother. Without articulated rights to the child, this renders the extramarital, biological father as

⁷ WOODHOUSE at 1047.

⁸ *Stanley v. Illinois*, 405 U.S. 645, 646 (1972).

⁹ CARPENTER ET AL at 1027.

¹⁰ In some states, the marital presumption can be rebutted, but no natural right exists in the biological father that gives him standing. California’s Family Code section 7630 creates a standing rule for challenging paternity. The only parties entitled to bring an action are the child, the biological mother, and the presumed father. Within this statute, the “father” of the child is determined as the man who married or attempted to marry the mother. Section 7630, subdivision (a), provides:

“A child, the child’s natural mother, or a man presumed to be the child’s father under subdivision (a), (b), or (c) of Section 7611, may bring an action as follows: [P] (1) At any time for the purpose of declaring the existence of the father and child relationship presumed under subdivision (a), (b), or (c) of Section 7611. [P] (2) For the purpose of declaring the nonexistence of the father and child relationship presumed under subdivision (a), (b), or (c) of Section 7611 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.”

(citing CAL. FAM. CODE § 7631 (West 2004).

“untitled” in relation to the “titled” status of the mother’s husband.¹¹

Children are property in the sense that classic ownership theory rigidly allows only one father.¹² For claims of maternity, law defers to nature by declaring the biological mother¹³ the legal mother of the child, regardless of her marital status.¹⁴ Titled fathers with established legal rights to the child have protected interests of custody or visitation, and these interests most often stem from his relation by blood or marriage, absent a competing interest from a married man.¹⁵ However, the success of the father’s interest reveals a market value of marriage in establishing parental rights.¹⁶ On one hand, unmarried men cannot exercise paternal rights in the child solely based on a genetic link,¹⁷ because courts require a substantive development of a father-child relationship to establish due process rights.¹⁸ Thus, even though a biological link exists between unmarried man and child, this alone fails to qualify him as a father.¹⁹ On the other hand, married men, regardless of a biological connection, are presumed as fathers of children born into the marriage.²⁰

In complex families, traditional theory cannot adequately

¹¹ *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) (“state laws almost universally express an appropriate preference for the formal family.”)

¹² *Michael H. v. Gerald D.*, 491 U.S. 110 [hereinafter *MICHAEL H.*] (California law, like nature itself, makes no provision for dual fatherhood.”)

¹³ See Megan S. Calvo, *Uniform Parentage Act—Say Goodbye to Donna Reed: Recognizing Stepmother’s Rights*, 30 W. NEW ENG. L. REV. 773, 780-82(2008) (citing UNIF. PARENTAGE ACT § 201 (2002), 9B U.L.A. 15). Here, I limit my analysis to children of biological mothers who give birth and intend to keep the child. This does not include biological mothers who relinquish their parental rights, or surrogates who have contracted to bring the child to term.

¹⁴ Compare UNIF. PARENTAGE ACT § 201(a) (2000 & Supp. 2002), 9B U.L.A. 15 (establishing the “mother-child relationship between a woman and a child”) with UNIF. PARENTAGE ACT § 204 (2000 & Supp. 2002), 9B U.L.A. 15 (presuming paternity based on marital status in father-child relationships).

¹⁵ *MICHAEL H.* at 132; *Lehr v. Robertson*, 463 U.S. 248 (1983); *Evans v. Wilson*, 856 A.2d 679, 696 (Md. 2004); *Girard v. Wagenmaker*, 470 N.W.2d 372, 381 (Mich. 1991); *B.H. v. K.D.*, 506 N.W.2d 368 (N.D. 1993); *N.A.H. v. S.L.S.*, 9 P.3d 354 (Colo. 2000).

¹⁶ Stanley *supra* note 8 at 645 (1972). See also Radin, at note 49, at 1862-63 (citing Richard A. Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193, 1199 (1985)).

¹⁷ Quilloin *supra* note 6 at 249 n.5 (1978); *Caban supra* note 5 at 397 (1979).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *MICHAEL H.* at 110.

reflect nuanced webs of possession and exclusion that complicate a simple delineation of owner and nonowner. Complex families have disunified articulations of group construction and varied interpretations of the validity of extramarital interconnectedness.²¹ In property disputes, multiple claimants each attest to a valid interest in property, yet their failure to produce convincing and recognized forms of evidence precludes them from obtaining standing.²² Nontitled litigants with legitimate interests in the contested property nevertheless do not fit into the existing visions of ownership.²³ Quite literally, they fail to conform.

This Essay redirects the property/family discourse from constitutional exclusion to fiduciary inclusion.²⁴ It joins in recent discussions of “stewardship” models of property that engage the complexities of nontitled claims to property, and it intends to start and continue a conversation on the conflict of parental rights and children’s best interests.²⁵ While the traditional model of ownership is “fixed, possessed, controlled,” the stewardship model facilitates a “human and messy” assessment of property.²⁶ By highlighting the tangible claims of unwed fathers divested of standing to assert paternal rights, I suggest a turn to a fiduciary ethic that entertains the unique legal status of what I call the

²¹ Complex families are unified by one element—the claim to a common child. The mother’s status is not questioned, and the two fathers, both biological and legal/marital each assert an interest to parenthood. Disagreement exists as to whether such a structure is a *family*, at least from the perspective of the adults, but for the child, this conglomeration of relatives comprises a group of legal and genealogical relations, each maintaining an interest.

²² Standing grants parties within the marital unit the ability to declare either the existence or nonexistence of the father-child relationship. If and only if the named parties rebut the paternity presumption can another man be named a party to determine paternity.

²³ Dawn D. separated from her spouse, Frank F. in January 1995 and that same month, moved in with Jerry K. In February, Dawn became pregnant and remained with Jerry until returning to her marital home with Frank in April 1995. Jerry, the biological father of her child, attempted to secure his parental rights in August 1995 by filing a complaint to establish a parent-child relationship and obtain visitation rights. The court ruled that Jerry did not have standing to challenge paternity because he had not developed a relationship with his biological child. *Dawn D. v. Superior Court*, 952 P.2d 1139, 1142 & n. 5 (Cal. 1998).

²⁴ See Elizabeth Scott and Robert Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995) (proposing a fiduciary ethic between parents and children).

²⁵ CARPENTER ET AL at 1028.

²⁶ *Id.* at 1109.

“complex family.” This engagement of a textured—as opposed to flat and pedantic—model of the hybrid marital/nonmarital family recognizes the unwed father’s property rights in the child as untitled, while the marital unit acts as a fiduciary caregiver with legal rights to the child. This model gives consideration to both biological and marital claims upon the child, while opening a possibility for other unrelated, nontitled interests.²⁷ As my research shows, the best interests of children may be counterintuitively defeated by constitutional appeals that favor parents rather than children.

This Essay has three parts. In Part I, I address the traditional model of property which is rooted in tenets of dominion and exclusion. By examining canonical texts of Hobbes, Locke, and Jefferson, I offer the classic viewpoint of property as protective of stability. I also introduce legal approaches on property by engaging the “property as personhood” theories of Laura Underkuffler and Margaret Jane Radin. By demonstrating the link between person, property, and the state, I argue that the due process right of parents to make decisions about children (*Troxel v. Granville*) offers protection to recognized family forms. But this rigid rubric oversimplifies complex family structures that deserve a more nuanced and textured analysis of the child’s best interests.

Part II approaches the problem of the marital presumption of paternity. By examining Supreme Court dicta regarding the rights of unmarried fathers (*Michael H. v. Gerald D.*) and biological parents (*Troxel v. Granville*), I make the case for complex families as liminal sites for balancing the best interests of children with the constitutional liberties of parents. Biology does not grant one automatic standing for securing a legal interest in a child, which positively creates possibilities for variances based on relationship development. But as case law demonstrates, this paves an overbroad opportunity for marriage to trump valid biological claims by controlling legal access to children, which impinges the opportunities of unwed fathers to develop necessary relationships.

Part III is the heart of the argument. Here, I call for a stewardship model of property as a possibility for encompassing the intricate predicament of the complex family. This fiduciary

²⁷ See Laura Rosenbury, *Friends With Benefits*, 106 MICH. L. REV. 189 (considering friendship as a valid basis for family formation).

ethic aims to sidestep the binary problem of “untitled” unmarrieds and “titled” marrieds by assessing the needs of the child in tandem with the liberty interests of the parents. At stake is the child’s interest in maintaining a beneficial relationship with her biological father.²⁸ This model views the custodial, married parent as a fiduciary owing duties to both the child and the biological father.²⁹ This accommodating model invokes a “web of interests”³⁰ that displaces a traditional model of exclusivity and possession³¹ to present a more ethically sound interpretation of property and parenthood that accommodates the valid claims of biological fathers rather than dismissing them according to a statutory fiction.

I. THE PRESERVATION OF PROPERTY

“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property,” wrote Blackstone.³² It is an unquestionable fact that the concept of property lies at the center of the foundation of political societies. The rhetorical force and mythical fascination with the ownership of land and things begins with a delineation of “mine and thine”³³ but ultimately assembles the rights and responsibilities of individuals within civil society.³⁴ Commentators have struggled and debated over countless aspects of property discourse, from private property to communal

²⁸ In *Michael H.*, the plaintiff’s procedural due process claim was rejected because the majority saw no liberty interest present to be protected. In oral argument, when plaintiff’s counsel asserted that he would have had a right to be heard were he classified as a parent, the justices replied, “You’re asking the state to create a liberty interest that he doesn’t now have.” Oral Argument, *Michael H. and Victoria D.*, Lexsee 1988 U.S. Trans Lexis 13.

²⁹ See Scott, *supra* note 24.

³⁰ CARPENTER AT AL at 1080 (citing Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 *Harv. Envtl. L. Rev.* 281 (2002)).

³¹ *Id.* at 1125.

³² 2 WILLIAM BLACKSTONE, *COMMENTARIES* *2.

³³ See THOMAS HOBBS, *LEVIATHAN* 58-59 (Penguin Classics 1985) (1651) (“There is no such thing as ownership, no legal control, no distinction between *mine* and *thine*. Rather, anything that a man can get is his for as long as he can keep it.”).

³⁴ Laura S. Underkuffler, *On Property: An Essay*, 100 *YALE L.J.* 127, 146 (1990).

property and to human property.³⁵ Jennifer Nedelsky argues that property has a rhetorical power that distinguishes it from other legal entitlements.³⁶ She notes that this concern is based upon a myth of property as the “quintessential instance of individual rights as limits to governmental power.”³⁷ But property itself is hard to conceptualize under one single theory. “The idea of property is rather like an iceberg,” writes Kenneth Minogue. “It is more complicated than it looks, and much of its significance is submerged.”³⁸

This significance is overlooked in the context of the family. Recognizing elements of property within the family generates uncomfortable discussions of people as chattel, and even more counterintuitive difficulties of children as property. But statutory language, court opinions, and social rhetoric each articulate concepts of possession, protection, and exclusion that provoke elements of property. Ownership of property comes with a bundle of rights and expectations. With this outlook, law provides safety and assurance of ownership to protect one’s holdings and to legitimate the basis of dominion. Yet in the context of the family, marriage secures this property interest. Marriage establishes legal rights between unrelated adults, and in turn, it incites classifications of legitimate and illegitimate.³⁹ Thus, blood and genetics alone do not determine paternity—law does.⁴⁰ Family relationships existing beyond the recognition of law may exist in equity, but assertions of the rights and privileges that accompany

³⁵ See generally CARPENTER at 1022; Eduardo M. Penalver, *Property as Entrance*, 91 Va. L. Rev. 1889 (2005); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Carol M. Rose, 52 U. CHI. L. REV. 73 (1985); Underkuffler, *supra* note 34.

³⁶ Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, in CONSTITUTIONALISM AND DEMOCRACY 241, 253 (John Elster & Rune Slagstad eds., 1988) (arguing for the mythical status that is awarded to the concept of property, and its relationship to changing notions of constitutionalism).

³⁷ *Id.* at 241.

³⁸ Kenneth R. Minogue, *The Concept of Property and its Significance*, in PROPERTY: NOMOS XXII 1, 10 (J. Roland Pennock & John W. Chapman eds., 1980).

³⁹ Traci Dallas, Note, *Rebutting the Marriage Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 370-73 (1988); see also John G. Culhane, *Marriage Equality: First Justify Marriage If You Can*, 1 DREXEL L. REV. 485, 499-501(2009).

⁴⁰ Cheryl Harris, *infra* note 80, at 1730; Dallas, *id.* at 371; Culhane, *id.* at 500.

paternity can only be acquired through marriage or filiation.⁴¹ Technically speaking, paternity is positivistic rather than natural.⁴² To apply Cheryl Harris's concept, the legal relationship marks the essential characteristic of family rights.⁴³

A. Canonical Views

The beguiling force of property is so strong that the American founding fathers employed it as a reference point for the formation of the republic. During the 1787 Federal Convention, Alexander Hamilton said that "the [o]ne great obj[ect] of Gov[ernment] is personal protection and the security of Property."⁴⁴ Its stronghold on political consciousness influenced the standard for which a person is inducted as a member into a political society. Thomas Jefferson, the quintessential supporter of the agrarian state, shared this import. Jefferson's democratic dream idealized the small farm owner, envisioning the influential power of land as a means for instilling self-reliance and independence on the citizenry.

Those who labor in the earth are the chosen people of God, if ever He had a chosen people, whose breasts He has made his peculiar deposit for substantial and genuine virtue. It is the focus in which he keeps alive that sacred fire, which otherwise might escape from the face of the earth. Corruption of morals in the mass of cultivators is a phenomenon of which no age nor nation has furnished an example.⁴⁵

Jefferson believed that political virtues could be transmitted more easily to people on small farms, "looking up to heaven, to their own soil and industry."⁴⁶ Such environments provided fertile grounds for elevating ordinary citizens into enlightened self-government.⁴⁷ These Arcadian communities comprised of

⁴¹ Dallas, *id.*, at 371-72; 381.

⁴² *Id.* at 376-77; see also Harris, *infra* note 80, at 1731.

⁴³ Harris, *infra* note 80, at 1730.

⁴⁴ Underkuffler, *supra* note 34, at 133-34 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (M. Farrand ed., 1911)).

⁴⁵ Thomas Jefferson, *Notes on the State of Virginia*, ch. XIX, 259, in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON (A. Koch & W. Peden, eds. 1993) [hereinafter JEFFERSON].

⁴⁶ *Id.*

⁴⁷ A. Whitney Griswold, *The Agrarian Democracy of Thomas Jefferson*, 40 AM. POL. SCI. REV. Vol. 657, 672 (1995).

independent, upstanding yeoman farmers would permit minimal governmental influence.⁴⁸ Such self-sufficient communities would be tightly knit, well informed, and well intentioned. Under both Hamilton and Jefferson's schemes, property serves as the conduit between citizen and the state.

Certainly in social contract theory, the preservation of one's property serves as the chief reason for leaving the state of nature and entering civil society. Such sentiment commences in Hobbes, who posits the imposition of the sovereign ("the Great Leviathan"⁴⁹) as the decisive force of prevention of the natural passions of humankind. "The finall Cause, End, or Designe of...in the introduction of that restraint upon themselves...is the foresight of their own preservation, and of a more contented life thereby..."⁵⁰ He advocates this protective model of civil society as a talisman for curtailing domestic injury and preventing foreign invasion.⁵¹ To leave the state of nature, where life is "nasty, brutish, and short," humankind must submit to the state which imposes order on competition and chaos.⁵² As the original social contractarian, Hobbes' work sets the foundation upon which theories of the protection of "things" rests.

As a foil to Hobbes's brutish vision of self-preservation, Locke offers a version of the social contract that posits preservation of property is its objective. Nothing in the *Second Treatise* commands the assiduous and deliberate attention as the concentration on property. "The great and chief end, therefore, of men's uniting into commonwealths and putting themselves under government is the *preservation of their property*."⁵³ Locke elevates the concept to a rather deific level, depicting property as a present from God to humankind. "God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience."⁵⁴ Other political literature supported a divine right to property ownership. A 1644 English pamphlet declared that "God...hath...made us absolute

⁴⁸ Carl Becker, *What is Still Living in the Political Philosophy of Thomas Jefferson*, 48 AM. HIST. REV. 691, 698 (1943).

⁴⁹ HOBBS, *supra* note 33, at 227.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*, at Ch. XIII.

⁵³ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, 66 (C.B. Macpherson, ed 1980.) (author's emphasis) [hereinafter *SECOND TREATISE*].

⁵⁴ *Id.* at 18

proprietors of what we enjoy, so that our lives, liberties, and estates do not depend upon, nor are subject to, the sole breath or arbitrary will of our Sovereign."⁵⁵ But Locke believes that the proper way to give thanks for this benevolent gift was the use of the land. Property becomes one's own through labor, which extracts the land or object from the common and reassigns it to the individual.⁵⁶ Although efficiency and waste concerned him as well, his initial concern was manifest destiny. "The earth, and all that is therein, is given to men for the support and comfort of their being."⁵⁷ Armed with this divine mission, Locke's political actor was justified in making use of land.

Ownership of things necessitates a fundamental and initial ownership of personhood. To own property marks the antithesis of being its object.⁵⁸ The person, for Locke, formed the central tenet of property, in that objects and things could not exist without the primary ownership of oneself.⁵⁹ This embodiment theory of personhood melds individual and collective interests by centering the very possibility of ownership in one's own body. As the following sections demonstrate, the embodiment theory extends to the makeup of the family.

B. Personhood and Property

The integration of political and personal rights makes sense in light of individual needs to recognize the interests of others in a common effort to secure property. Laura Underkuffler argues that ultimately, property rights demand a confrontation between "competing selves and competing collectivities."⁶⁰ In her argument, absolute individual and group property rights cannot coexist. In consideration of this fundamental conflict, one set of rights must concede to another. The recognition of others' rights allows for the development of "self in a context of relatedness to others."⁶¹ In this respect, an individual right to property may only

⁵⁵ Underkuffler, *supra* note 34, at 138 (citing ENGLAND'S MONARCH OR A CONVICTION AND REFUTATION BY THE COMMON LAW OF THOSE FALSE PRINCIPLES...OF ALBERICUS...ETC. (London, 1644)).

⁵⁶ SECOND TREATISE, *supra* note 25, at ch. V, § 27.

⁵⁷ *Id.*

⁵⁸ *Id.* at ch. IV.

⁵⁹ Locke argued that property began in oneself: "every man has a property in his own person." *Id.* at ch. V, § 27, at 134.

⁶⁰ Underkuffler, *supra* note 34, at 147.

⁶¹ *Id.*

be reconciled with collective interests upon the revelation of the surrounding context which granted authority upon those rights.⁶² Thus, the concept of absolute right contrasts with both the individual and the collective, which necessitates a comprehensive, integrated approach to property rights.

Families operate in a similar structure. Conflict may exist on two levels. First, individual families do not exist independently of state regulation. States continue to restrict who may marry, setting absolute prohibitions on age,⁶³ consanguinity,⁶⁴ and in the majority of states, sex.⁶⁵ States also may terminate parental rights for not supporting⁶⁶ or educating their children⁶⁷ and also punish partners and cohabitants for spousal abuse.⁶⁸ Yet individual family decisions are protected by a zone of privacy⁶⁹ that provides a constitutional guarantee of due process. Individuals may purchase and use contraception⁷⁰, maintain privacy of sexual intimacy⁷¹, and determine their own marital support.⁷² Each of these tiers of absolute rights would not coexist while sustaining their respective political identities. States do not completely own families and families certainly do not have dominion over the state. But in their mutual antagonism, rights of personal and political property constrain the encroachment of the other.

⁶² *Id.*

⁶³ HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 89 (2d. ed. 1988).

⁶⁴ *Id.* at 82.

⁶⁵ *Id.* at 75-80. *But see* Ian Urbina, *Gay Marriage is Legal in U.S. Capital*, N.Y. TIMES, Mar. 3, 2010, available at <http://www.nytimes.com/2010/03/04/us/04marriage.html>.

⁶⁶ CLARK, *supra* note 35, at 897.

⁶⁷ *Id.* at 898.

⁶⁸ *Id.* at 308.

⁶⁹ The concept of the penumbra of privacy was first articulated in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), where the Supreme Court opined, "that specific guarantees in the Bill of Rights have penumbras, formed from those guarantees that help give them life and substance [and] . . . create zones of privacy."

⁷⁰ *Id.* at 485-86; *see also* *Eisenstadt v. Baird*, 405 U.S. 438, 454-55(1972).

⁷¹ *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964); *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

⁷² *See* *In re Marriage of Graham*, 574 P.2d 75 (Colo. 1977); *see also* *Rothman v. Rothman*, 320 A.2d 496, 501-02 (N.J. 1974) (recognizing "the essential supportive role played by the wife in the home" and stating that she is "entitled to a share of family assets accumulated during the marriage").

Secondly, the embodiment theory benefits families that accede to the law's recognition of conjugality. Through marriage, the legally recognized couple may engage in the state-recognized labor of marriage to declare themselves a family unit. This effort gives the couple dominion over their conjugal relationship, to the exclusion of individuals in the outside world. Although states, as discussed above, may regulate the rights and duties of husbands and wives, the family itself is left on its own. Much like the state that envelops them, the family supersedes its smaller subjects. In the effort to define a family, nonmarital labor is routinely outweighed by marital labor.

C. Property in the Family

While ancestry may create blood ties between individuals and groups, it fails to achieve equal recognition unless a legal acknowledgement confers a status of "related."⁷³ Legitimacy is a property interest entirely bestowed by law.⁷⁴ It narrows a state definition of family by dictating the legal possibilities of family relationships upon which rights may be distributed. Subject to state regulation, legitimacy has been denied to families based on sex⁷⁵, ancestry⁷⁶, and marital status.⁷⁷ While legitimate, married

⁷³ Dallas, *supra* note 55, at 372-73.

⁷⁴ *See id.* at 1724.

⁷⁵ Same sex couples who cannot marry face trouble in securing second parent adoptions, where the nonmarital partner (usually the nonbiological parent) adopts the child after the other adult partner has secured their legal rights to the child. *See* Suzanne B. Goldberg, *Intuition, Morals, and the Legal Conversation About Gay Rights*, 32 NOVA L. REV. 523, 531-32 (2008); *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989); *In re Kaufmann's Will*, 20 N.Y.S. 2d 664 (1964).

⁷⁶ Kevin Noble Maillard, *The Color of Testamentary Freedom*, 62 SMU L. REV. 1783 (forthcoming 2009); *see also* Adrienne Davis, *Slavery and the Roots of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 459-60 (C. MacKinnon & R. Siegel eds., 2006); Tanya Hernandez, *The Racism of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 479 (C. MacKinnon & R. Siegel eds., 2004); Jason Gillmer, *Poor Whites, Benevolent Masters, and the Ideologies of Slavery: The Local Trial of a Slave Accused of Rape*, 85 N.C. L. REV. 489, 541-42 (2007).

⁷⁷ Legitimacy is not an end goal for all. Marriage-free couples and single persons may deliberately avoid state involvement in the act of labeling their intimate lives. *See generally* NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008); Bella DiPaulo, *Singled Out: How Singles Are Stereotyped, Stigmatized, and Ignored, and Still Live Happily Ever After* (2007); *The Alternatives to Marriage Project*, <http://www.unmarried.org.html>.

families receive state and social recognition as a stable unit, unrecognized families default as illegitimate and legally nonexistent, which places value on marriage as the preferred method for constructing a family and relating to children.

Conceptualizing marital family relationships as subjects of protection and preservation forces a review of competing rights. In addition to her work elucidating the subjectivity of property rights, Margaret Jane Radin attests to a hierarchy of property protection resulting from a social consensus of the importance of the property.⁷⁸ Such a critique recognizes the moral import placed upon property as personhood, which could explain the conflicts of family composition as a property right. Marriage, as the presumed means of reproduction, enables a redirection of biologically nonexistent relationships. Biological fathers of children whose mother is married to another man traditionally lose attempts to gain parental rights. If the unmarried father wishes to claim a right to the child—a property right—he cannot because statutory presumptions automatically assign paternity to the married father.⁷⁹ This pretext disallows biological truth—it renders the unmarried father a legal stranger to the child. Because this father has no marital family property, he has no personhood as a parent. He has been alienated⁸⁰ from the product of his labor.

1. Property in People

At common law, children were treated as chattel. As Barbara Woodhouse argues, dominion over children is a “paradigmatic American right”⁸¹ because it supports a notion of ownership that underscores the sovereignty of the family. Like a piece of livestock, a pet, or a slave, judges treated living creatures as objects of exchange.⁸² Fathers “gave, assigned, and transferred”

⁷⁸ Radin, *supra* note 13, at 978.

⁷⁹ CAL. FAM. CODE § 7611(a) (West 2004).

⁸⁰ See MICHAEL H. at 119-26; see *als* Laura S. Underkuffler-Freund, *RESPONSE: Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1038 (1996). For further discussion of alienation and property rights see Cheryl Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1731-34 (1995).

⁸¹ WOODHOUSE AT 995.

⁸² Property can be conceived of as “everything that has an exchangeable value.” AMJUR PROPERTY § 4 Pets are classified as personal property. Additionally, restitution damages are accorded to the owner for bearing the loss of the animal. AMJUR ANIMALS § 117. See *generally*, *Scott v. Sandford*, 60 U.S. 393 (1856) (ruling that a slave owner is entitled to recovery of slave

infants; mothers “bequeathed” children; and plaintiffs recovered children “possess[ed]” by others.⁸³ As a human commodity, children’s’ rights receded behind the interests of parents. For adults wanting to dispose, gain, or trade in the family market,⁸⁴ states deferred to the wishes of adults within their own domestic spheres.

This allows men to claim children as property.⁸⁵ The use of “access” as a historical ground for presuming paternity invokes a property interest in marriage. “Access” does not assign sexual agency to the wife. Rather, it secures the expectation interests of husbands that interlopers cannot displace them as the sovereign of their private domain.⁸⁶ Thinking of a man’s “home as a castle” assigns power to the domestic sovereign—the husband within the marital household—as a “king[] like fathers over their families.”⁸⁷

State deference to resolving family matters highlights the political distinction between the public and private realm—a heavily gendered dichotomy that delineates the proper roles of men and women. Stereotypically, men lived as public creatures.⁸⁸ They worked outside the home, ran for public office, and represented their families to the outside world.⁸⁹ The existence of a man in the public sphere enables and necessitates regulation of his interactions with others.⁹⁰ Rights colliding with other rights

property.)

⁸³ WOODHOUSE *supra* note 67 at 1049.

⁸⁴ See generally, MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985); STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* (1988).

⁸⁵ To illustrate the rooted concept of market in family, English common law literally considered children to be personal property of their fathers. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *452-53 (cited in Jill Moore, Comment, *Charting A Course Between Scylla And Charybdis: Child Abuse Registries And Procedural Due Process*, 73 N.C. L. Rev. 2063, 2121 (1995).

⁸⁶ See MICHAEL H. at 124-27.

⁸⁷ WOODHOUSE at 1044.

⁸⁸ “The ideal to which women should strive was “Republican Motherhood,” in which women played the important role of breeding and rearing the men who performed in the public realm, in the process becoming guardians of the nation’s morals.” Orlando Patterson, *On the Provenance of Diversity*, 23 YALE L. & POL’Y REV. 51, 56 (Winter 2005)

⁸⁹ See generally, NANCY F. COTT, *THE BONDS OF WOMANHOOD* (2d ed. 1997). See also JEAN BETHKE ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN* (1993).

⁹⁰ This type of mutual and communal agreement forms the basis of most social contract theory.

forces the intervention of the referee state.⁹¹

But the domestic sphere conceivably has no competing interests within, so states feel less of a need to regulate. Men retreat to this private realm to escape the competition of public life⁹², which makes home life possible. Both public and private realms depend on each other for mutual support. Yet domestic life is left alone by state control, leaving families subject to the individual desires of the household. Independence for household activities purported to facilitate marital harmony by disallowing legal intervention between husband and wife at common law⁹³: wives cannot sue husbands for financial support⁹⁴; spouses cannot testify against each other⁹⁵; and men can rape their wives.⁹⁶ Without standing to hold men—that they are married to—accountable for actions that others would be jailed for, women sit as prisoners of the protective immunity that supposedly promotes harmony.⁹⁷

At common law, the separate existence of women was unknown,⁹⁸ which legally precluded a man from granting any property to his wife, or even contracting with her.⁹⁹ Under *coverture*, married women have no legal rights apart from men, and some commentators argue that they are seen as children of their husbands.¹⁰⁰ Husbands took responsibility for women's domestic and legal lives, which included management of their property, money, rights, and children.¹⁰¹ Middle class married women¹⁰² lived in a marked state of total economic dependency, a

⁹¹ See HOBBS, *LEVIATHAN*, *infra* note.

⁹² MAEVE DOGGETT, *MARRIAGE, WIFE-BEATING AND THE LAW IN VICTORIAN ENGLAND* 90 (1993)

⁹³ *Id.* at 79.

⁹⁴ *McGuire v. McGuire*, 157 Neb. 226 (1953) (holding that spouses must separate or divorce to recover support, but not during the marriage)

⁹⁵ Dan Markel, Jennifer Collins, Ethan Leib, *Criminal Justice And The Challenge Of Family Ties*, 2007 UILLR 1147 (2007). *See also*, Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 *Nw. U. L. Rev.* 1032

⁹⁶ Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 *CALIF. L. REV.* 1375 (2000).

⁹⁷ *Id.*

⁹⁸ 2 WILLIAM BLACKSTONE, *COMMENTARIES*, at 441.

⁹⁹ *Id.* at 442.

¹⁰⁰ DOROTHY M. STETSON, *A WOMAN'S ISSUE: THE POLITICS OF FAMILY LAW REFORM IN ENGLAND* 5 (1982).

¹⁰¹ *Id.* at 3.

¹⁰² Elite women in England often exhibited independence from their

fact which Jane Lewis argues “made the denial of autonomy logical.”¹⁰³ In this sense, married women exist as counterparts of a primary male figure within their domestic sphere. Because her property became his property, and systems of patriarchy prioritized his rights over hers, the woman could not dispose of her lands without her husband’s consent.¹⁰⁴ If the wife had any chattels entering into the marriage, these objects became the husband’s, who was entitled to make them his own.¹⁰⁵ The wife was entitled to land in fee simple, although this property became the husband’s, who “thereupon [was] entitled to take the fruits and profits of the land during the marriage, and this right he [could] alienate to another.”¹⁰⁶ As “guardians of the vestal flame,” men enjoyed the domestic supremacy which secured their position as legally-empowered rulers of the home.¹⁰⁷ One historian claims that “Her liberation would be an infringement of his rights.”¹⁰⁸

This allusion to the Roman *paterfamilias* favors male interests in marriage.¹⁰⁹ In ancient Rome, the head of house, alone, assumed the legal identity of the entire family,¹¹⁰ and the state deferred to the authority of the *paterfamilias* in the regulation of the domestic sphere.¹¹¹ At the head of the family, the *paterfamilias* represents himself, women, and children, as a unitary domestic entity with undivided interests. There, the civil

husbands in maintaining their separate property. Upper-class women were the exception to the traditional, legally authoritative rule. For further reading on the history of married women and separate property, see e.g., SUSAN STAVES, *MARRIED WOMEN’S SEPARATE PROPERTY IN ENGLAND, 1660-1833* (1990).

¹⁰³ JANE LEWIS, *WOMEN IN ENGLAND 1870-1950: SEXUAL DIVISIONS AND SOCIAL CHANGE* 119 (1984).

¹⁰⁴ LEWIS, *WOMEN IN ENGLAND* AT 121. Also, Pollock notes that, at common law, “The wife ha[d] during the marriage no power to alienate her land without her husband’s concurrence.” FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, ch. VII § 2, at 404 (2d ed. 1899).

¹⁰⁵ POLLOCK & MAITLAND, *supra* note 93, at 404.

¹⁰⁶ *Id.* at 407.

¹⁰⁷ ROBERT CECIL, *LIFE IN EDWARDIAN ENGLAND* 158 (1969).

¹⁰⁸ *Id.*

¹⁰⁹ WOODHOUSE at 1044.

¹¹⁰ Thus, single women remained under their father’s care until marriage. See, WOODHOUSE.

¹¹¹ Thomas Tucker, *Sources of Louisiana’s Law of Persons: Blackstone, Domat, and the French Codes*, 44 Tul. L. Rev 264, 267 (1970).

domain ended, and the private unit of the family began.¹¹² Distinguished by his complete ownership of everything within the household, the *paterfamilias* could sell personal, real, and human property, which includes wives, children, and slaves.¹¹³

Middle-class married women¹¹⁴, as subjects in the private realm of their husbands, did not participate in the marketplace (or the court, for that matter) on the same footing as men. In this sense, women exist as counterparts of a primary male figure within their domestic sphere.

“By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything[.]”¹¹⁵

Centralization of power within a single person simplified what may have been a complex network of persons. Robert Ellickson notes that this illiberal, hierarchical structure reduced transaction costs of managing family and domestic affairs, while expediting exchanges with third parties.¹¹⁶ Although contemporary liberal societies no longer rest upon this feudal scheme, American norms of marriage and family reify the notions of kinship organization and structural clarity. Within the structure of the *paterfamilias*, dealings with outsiders were lateral—that is, they occurred through the consent of the family unit, which culminated within a single person. Of course, contemporary American society objects to the selling of human beings, but the independence accorded to the family engenders rights of possession and exclusion that facilitate the regulation of access to the individual domestic sphere.

¹¹² *Id.* at 267.

¹¹³ Boris Kozolchyk, *Transfer Of Personal Property By A Nonowner: Its Future In Light Of Its Past*, 61 TUL. L. REV. 1453, 1462 (1987).

¹¹⁴ Elite women in England often exhibited independence from their husbands in maintaining their separate property. Although the Schlegels and the Wilcoxes may be considered elite, it is the symbolic masculinity of property that Forster critiques, which applies generally to the English resistance of married women’s legal autonomy. Upper-class women were the exception to the traditional, legally authoritative rule. For further reading on the history of married women and separate property, see e.g., STAVES, *supra* note 97.

¹¹⁵ *Id.* at 441.

¹¹⁶ Robert Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L. J. 226, 316 (2006)

2. Property in Family

Paternity is a labor of defining parental roles, and while it determines who may have access to the child, it also dictates who may set those parameters.¹¹⁷ The Supreme Court has deferred to parental autonomy as an inviolable prerogative of due process. Decision-making capacity, for the parent of the child, includes the liberty interest to “make decisions concerning the care, custody, and control of their children.”¹¹⁸ This includes the power of exclusion, which when established, empowers the parent to forbid other relatives, including grandparents, from asserting visitation rights.¹¹⁹ If the family—in the simplified legal sense of it—decides to exclude access to the child, it stimulates one of the “oldest of the fundamental liberty interests.”¹²⁰

Troxel v. Granville declared unconstitutional a Washington State statute that allowed third party nonparents to petition for visitation rights if it served the best interest of the child.¹²¹ This would have allowed any person, such as a caregiver, friend, or relative to petition the court for visitation. The Troxels, paternal grandparents of Granville’s daughter, moved to uphold the statute. The Supreme Court rejected this as a violence of due process because it supplanted the parents’ wishes with a judge’s ruling of the child’s best interests.¹²² Although the lower court declared that no adverse affects would stem from grandparent visitation, the High Court ruled that Granville’s decision to limit visitation deserved material weight.

Depending on one’s standpoint, the best interests standard takes on different meanings. For Granville, the state’s support of third-party visitation replaced her parenting preferences with the courts’.¹²³ As a fit parent of the child, the mother wanted the state to withdraw from her private realm of paternal decisionmaking, which would allow her to act autonomously in regards to child deployment. The state and the grandparents, in opposition, viewed the sole reliance on the mother’s wishes as flawed and parent-centered. This argument maintains that best interests

¹¹⁷ Biological mothers are categorically declared as mothers of their children, regardless of their marital status.

¹¹⁸ *Troxel v. Granville*, 530 U.S. 57, 65, 67 (2000). [hereinafter ‘TROXEL’]

¹¹⁹ *Id.* at 67.

¹²⁰ *Id.* at 65.

¹²¹ *Id.* at 67.

¹²² *Id.*

¹²³ *Id.*

should include extended family members, who also impact the life of the child. Leaving this decision solely to the parent runs the risk of unfounded exclusions and boundless denials that universally jeopardize the visitation interests of all nonparents and of the child.¹²⁴ From this angle, severing ties between grandparent and grandchild distorts fundamental liberty as the mother's ability to determine the best interest *of the parent*.

But strict deference to the legitimate authority of the parental veto mistakenly conflates liberty and children's interests.¹²⁵ It fails to acknowledge that the child's best interest may exist separately of the desires of the parent. This difficult conflict between parents, both legal and biological, forestalls the preservation of relationships that may benefit the child. This is particularly pertinent in the context of extramarital paternity. Despite a status as a biological parent, the marital presumption classifies the unwed father as a legal stranger.¹²⁶ Even though third parties may have strong attachments to a child, the legal parent may restrict access: without reasons, without accountability.¹²⁷ The ability to exclude all others—grandparents, and caregivers, in addition to biological parents—allows the marital parent alone to determine the best interests of the child to the exclusion of others with pertinent interests. Courts restrain from questioning the instability of objective decision making: bad or good, parental judgment wins.

3. Property in the Complex Family

Legitimacy not only describes the status of the child, it also characterizes marriage as the sanctioned channel for men establishing rights in children. Legitimacy provides access to the child, just as the husband is presumed to have access to the wife at her moment of conception.¹²⁸ For the great majority of families,

¹²⁴ Disallowing this type of established relationship favors married parents—under the cover of legitimacy—but the majority, Justice Kennedy argues, overlooks the potential harm inflicted upon the child. *TROXEL* at 94 (Kennedy, diss.).

¹²⁵ *Id.* at 96.

¹²⁶ "The law effectively has constructed a parent/stranger dichotomy in which one is either a parent, vested with the rights and responsibilities of caregiving, or one is a legal stranger without legal entitlements or obligations." Murray, *supra* note 8 at 399.

¹²⁷ *TROXEL* at 72.

¹²⁸ "Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had had no access to his wife during

paternity is less scrutinized and contested. But for multiparent kinship structures¹²⁹ that simultaneously produce children¹³⁰ inside and outside of marriage, the Manichean, property-based discourse of parent and child fails to acknowledge difference. By restricting the term "family" to the spousal unit without including the third party furthers a collective rejection of families that deviate from a marital norm. Perhaps these families do not wish to self-label as nontraditional or complex, but calling these tangled webs of relationship something other than a family undergirds the legal fiction of the genetically pure marital unit. Ignoring the extramarital relationship and its human output only feeds a dishonesty of paternity that allows the societally and legally condoned family to cocoon itself from germane confrontation. Not only are children declared illegitimate, but also the multi-layered family structure that produced them.

Objectively speaking, terming this web of related people a complex family admittedly reprograms an understanding of caregiving and relating by eroding the familial normativity of a two-parent binary.¹³¹ To call an interrelationship of one woman, two men, and the children between them a family recognizes the

the relevant period." MICHAEL H. at 124.

¹²⁹ A number of scholars have addressed the legal status of nontraditional, nonnuclear families. See, John DeWitt Gregory, *Family Privacy and the Custody and Visitation Rights of Adult Outsiders*, 36 FAM. L.Q. 163 (2002); Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. UNIV. L. REV. 439 (2003); Elizabeth Emens, *Monogamy's Law: Compulsory Monogamy And Polyamorous Existence* 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004); Laura Rosenbury, *Friends With Benefits?* 106 MICH. L. REV. 189 (2007); Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. 275 (1999); and Melissa Murray, *supra* note 8. "This limitation excludes a variety of potential multiparent or blended familial structures made possible through use of assisted reproduction, especially among gays and lesbians." Lee-Ford Tritt, *Technical Correction Or Tectonic Shift: Competing Default Rule Theories Under The New Uniform Probate Code*, 61 ALLR 273, 315 (2010).

¹³⁰ Scholars have also investigated the impact of reproductive techniques, such as artificial insemination and surrogacy on claims to parenthood. While these studies address important issues that illuminate a discussion on children as property, I limit my article to sexually intimate reproduction to focus on the interrelationships between married and unmarried adults. See Janet Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347 (2008).

¹³¹ See Murray, *supra* note 8 at 207. ("most courts have remained fixed on the concept that parenthood is exclusive and may only be shared by two people").

difficult complexity of relations while acknowledging an unnamed reality of domestic life. Certainly this does not advocate or promote a polyandrous vision of parenthood.¹³² It does not decry marriage as inherently exclusive or injurious to modernity. Instead, it grounds the discussion within an epistemic possibility of who can be related to the child, and how this acknowledgment can promote the interests of that child. Rather than allowing conflicts of paternity to persist as disputes over property, this turns attention to the utility of paternity to the child.

Critics of this conceptualization of the complex family may argue that it erodes parental authority by inviting the interests of third parties. States limit the number of parents for each child to two, and generally do not provide legal recognition of additional persons. Even if the two parent family consented to additional parents, the mutual agreement remains legally invalid. In oral argument for *Michael H.*, the Court questioned the possibility of a “*menage a trois*” family structure that would “introduce[s] [the lover] into the structural relationship of the marriage.”¹³³ This act of including the biological father would “create a liberty interest that he doesn’t now have.”¹³⁴

Case law generally refrains from granting recognition of unrelated persons as family. In *Village of Belle Terre v. Boraas*, the Supreme Court held that a group of college students living together in a house failed to meet the Village’s definition of “family.” Although the students argued that they operated together as a family unit, they were still unrelated individuals sharing living space rather than a family deserving recognition of their fundamental rights. The Court held that the Village had a rational reason for restricting occupancy to families, a limitation which promotes communities where “family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”¹³⁵ Because the group did not constitute a family, the ordinance did not affect a fundamental right.

Housing ordinances generate different constitutional effects when blood relations link the residents together. Although

¹³² Id. at note 211. (“the limited expansion of marriage to include same-sex couples has not led to including other historically excluded groups like consanguineous relatives and those in polyamorous relationships”).

¹³³ Michael H. V. Gerald D Oral Argument transcript, 1988 U.S. Trans. LEXIS 13, 10.

¹³⁴ Michael H. Oral Argument at 16.

¹³⁵ *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

extended families do not comprise a traditional nuclear family, the Court recognizes a fundamental right of blood relatives to live under the same roof. In *Moore v. City of East Cleveland*¹³⁶, the Court ruled unconstitutional a housing ordinance that limited occupancy of a dwelling unit to a single family, which would have disqualified a woman living with her son and grandsons.¹³⁷ The State's narrow definition of family deprived the plaintiff of a fundamental right. This violation of substantive Due Process—the “intrusive regulation of the family”¹³⁸-- permits some combinations of relatives to live together while denying the same protections to others. In placing value judgments on acceptable family arrangements, the ordinance under-cludes blood relatives.¹³⁹

These two housing cases, *Belle Terre* and *Moore*, complicate traditional definitions of family. Even though neither case presents a nontraditional family in the strict sense, both offer examples of legal accommodation (or rejection) of nonnuclear families. Occupancy laws articulate conceptions of the family that challenge subjective beliefs in domestic life. These cases force an examination of the core principles that legitimate the existence of family.

But complex families generate a problem with recognition because law fails to recognize multiple paternity. Marital presumptions of paternity block the unmarried father from asserting rights in the child, leaving him as the sole party asserting the possibility of complexity. If law traditionally sees only one father, he becomes a legal stranger to the child, and he cannot impose upon the marital unit any rights to membership. Only with the consent of the married couple¹⁴⁰ does the complex

¹³⁶ 431 U.S. 494 (1977).

¹³⁷ *Id.* (“The ordinance here expressly selects certain categories of relatives who may live together and declares that others may not, in this instance making it a crime for a grandmother to live with her grandson.”)

¹³⁸ *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977).

¹³⁹ Justice Brennan’s dissent emphasizes the ordinance’s restrictive view on family: “zoning power is not a license for local communities to enact senseless and arbitrary restrictions which cut deeply into private areas of protected family life. East Cleveland may not constitutionally define ‘family’ as essentially confined to parents and the parents’ own children.” *Moore v. E. Cleveland* at 507.

¹⁴⁰ The marital presumption can be rebutted by the husband, or by the wife—in tandem with the acknowledgement of paternity by the biological father. “The presumption may be rebutted by blood tests, but only if a motion

family become legally visible, because they admit and recognize the unmarried father's paternity. Such support of family privacy ensures the liberty interests of married couples while fulfilling the protective promises of marriage.¹⁴¹ However, this protection directly serves the property interests of adults while indirectly serving the interests of the child. The absence of a macroanalysis of the complex family undergirds the legal fiction of the simplified, nuclear family within a context that clearly disproves it.

II. MARITAL PRESUMPTIONS OF PATERNITY: MICHAEL H. VS. GERALD D.

In 1981, a former model named Carole gave birth to a baby girl, Victoria, in Los Angeles.¹⁴² Carole had married Gerald five years earlier and they lived together in an apartment on the beach. At Victoria's premature, c-section birth, Gerald joined Carole in the delivery room and remained with her and Victoria as the newborn was admitted to critical care.¹⁴³ Upon Victoria's healthy recovery, she came home to the beach apartment and lived with Gerald, who assumed many primary caretaker responsibilities.¹⁴⁴

Beginning in October 1981, Carole moved with Victoria to a number of cities on an average of every three months. She separated from Gerald in October 1981, moved to the Virgin Islands to live with Michael from January 1982 to March 1982, and then reuniting with Gerald in New York in the spring of 1982. In May 1982, Gerald learned that he was not Victoria's biological father. Michael, who lived near the couple in Los Angeles, had been Carole's extramarital lover in Los Angeles. Blood tests¹⁴⁵ revealed a 98.07% probability that Michael D was the father. Nevertheless, Gerald continued to live with Carole in New York and also in Europe, through the fall of 1982. At the same time,

for such tests is made, within two years from the date of the child's birth, either by the husband or, if the natural father has filed an affidavit acknowledging paternity, by the wife." MICHAEL H. at 115.

¹⁴² MICHAEL H. at 113.

¹⁴³ Declaration of Gerald Dearing, 1987 U.S. Briefs 746, *2 (1987).

¹⁴⁴ *Id.*

¹⁴⁵ MICHAEL H., at 114.

Carole continued a relationship in Los Angeles with Scott, who demands no rights to Victoria, until March 1983.

Carole and Gerald, as a married couple, did not live together permanently, and she lived independently of Gerald during the times when they were apart. In the periods that Carole lived with Michael in St. Thomas, VI, she held herself out as his wife and the mother of his child, even through her legal ties stayed open with Gerald.¹⁴⁶ During this period in the Caribbean, Victoria called Michael "Daddy."¹⁴⁷ She then returned to New York in the summer and fall of 1982 to reconcile with Gerald.

That fall, in November of 1982, Carole forbade Michael from seeing Victoria, and he responded by filing a filiation action to establish paternity and secure visitation rights.¹⁴⁸ The California court appointed a guardian ad litem in March 1983 to represent Victoria's interests, who filed a cross-complaint to maintain filial relationships with both Michael and Gerald.¹⁴⁹ Carole filed for summary judgment in May 1983, returning to Gerald in New York.

In the following years prior to litigation, Carole vacillated between stipulating Michael's paternity and reconciling with Gerald.¹⁵⁰ Carole traveled to Los Angeles, independently of Gerald, in the summer of 1983, and withdrew her summary judgment motion. She and Victoria lived intermittently with Michael, and they considered themselves a family, even signing a stipulation of his paternity in April 1984.¹⁵¹ However, Carole recanted this stipulation and returned to Gerald in New York in June.

This final move prompted Michael and Victoria (through her guardian ad litem) to seek visitation rights *pendente lite*. Gerald moved for summary judgment in October 1984, citing section 621 of the California Evidence Code that no triable issue of fact existed regarding Victoria's paternity.¹⁵² The law relied on marital status as a definitive proxy for paternity by presuming that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the

¹⁴⁶ *Id.* at 114-15.

¹⁴⁷ *Id.* at 119.

¹⁴⁸ *Id.* at 114.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 115.

¹⁵² *Id.* at 101.

marriage."¹⁵³ Only two people could rebut the marital presumption: the husband or the wife, following an acknowledgement by the biological father.¹⁵⁴ This action must be taken within two years after the child's birth.

Michael holds that the presumption violates procedural due process because it denies him a hearing on the issue of his paternity. It terminates any legal relationship between Michael and Victoria by tautologically rejecting the legal interests of an unmarried party. Moreover, Michael can claim no standing to object to Gerald's paternity, which renders him legally unable to proceed. The Supreme Court held that Michael had no constitutionally protected liberty interest to maintain his father-daughter relationship with Victoria.¹⁵⁵ Under California law, biological paternity is irrelevant within the context of marriage. For children born into wedlock, the husband assumes, to the exclusion of all others, legal responsibility for any children.¹⁵⁶

California articulates three state interests for maintaining the marital presumption.¹⁵⁷ First, presuming marital children as fathered by the husband promotes family privacy. The state defers to the marital status of the couple as a determinant of intention to bear children and assume responsibility for their well-being. At the same time, it protects and discourages interrogation into the intimate sexual life of the couple. The presumption grafts a legal potency on the husband, which dispenses with an intrusive examination of his sterility, sexual frequency, and whereabouts.¹⁵⁸ Secondly, it assures that the child will have a legal father, regardless of the biological parentage. It erases the ambiguity and anticipation of the nonmarital father's accession to paternity. In this way, the assurance of paternity

¹⁵³ *Id.* (citing CAL. EVID. CODE ANN. § 621(a) (West Supp. 1989)).

¹⁵⁴ *Id.* at 115.

¹⁵⁵ Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 666 (1993).

¹⁵⁶ MICHAEL H., at 103.

¹⁵⁷ Appellee identifies the state interests pertinent to this case as follows:

1. Promoting marriage;
2. Maintaining a relationship between the child and the mother's husband;
3. Protecting the privacy and integrity of the family relationship.

Reply Brief of Appellant Michael H, 1987 U.S. Briefs 746.

¹⁵⁸ "As explained by Blackstone, nonaccess could only be proved "if the husband be out of the kingdom of England (or, as the law somewhat loosely phrases it, *extra quatuor maria* [beyond the four seas]) for above nine months . . ." *Id.* at 125.

ensures that the child will have financial support and rights to inheritance and succession.¹⁵⁹ Thirdly, this promotes “peace and tranquility of States and families” by preventing third parties from challenging the paternity of the legally recognized family.¹⁶⁰ Even if the claim were biologically valid, it removes the marital family unit from the threat of challenges to its composition.

This Section examines the Supreme Court’s treatment of unmarried fathers rights in their biological children. This analysis reveals a disjuncture between biology and fatherhood, with the court affording rights for unwed, active fathers in a noncompetitive context. That is, when rights to children do not pose a threat to marriage, courts uphold fathers’ interests as long as they have demonstrated a commitment to fatherhood beyond a genetic link. This may be viewed as an embrace of nonmarital fathers’ rights by favoring action over status, but as my research shows, it sustains a notion of status as instrumental in the determination of paternity.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

Developments in the legal history of the family perennially demonstrate the changing idea of the American family. Certainly, a substantial number of scholars advocate a matching of law and social practice, which would eliminate the ideological cleavage between what law allows families to be and what they really are.¹⁶¹ Such a closing of the legal gap dispenses with upholding an ideal of the family that, in most cases, is no longer a majority of domestic arrangements.¹⁶² However, critics of this shift in cultural values denounce a possibility of law parroting social developments.¹⁶³ From this angle, law, not persons, should set the standard for regulating and defining the family.

This latter view is highly problematic because it encourages and maintains a static view of the private sphere. Rights are premised upon initial eligibility as one whose interests deserve protection. Inherently, this protective model of the family operates under an ideology of resistance, concomitant with a political objective of conservation. The thing trying to be saved is the past, or at least a perception of it.¹⁶⁴ What has already occurred, in regards to the family, influences what will occur in the future.

¹⁶¹ See, e.g., Kevin Noble Maillard, *The Color of Testamentary Freedom*, 62 SMU L. REV. 101, 114 (2009); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 390-394 (2008); Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Inequality Remedies*, 76 FORDHAM L. REV. 2873 (2008); Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189, 201 (2007); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004).

¹⁶² A slim majority of American households are maintained by married, different-sex couples: 52%. The other 48% consists of single households, unmarried partners of same and different sex. <http://www.google.com/url?sa=t&source=web&ct=res&cd=1&ved=0CAoQFjAA&url=http%3A%2F%2Fwww.census.gov%2Fprod%2F2003pubs%2Fcensr-5.pdf&rct=j&q=census+of+households+married&ei=RSGnS7eIIsX6lwfQ0pWKCO&usg=AFQjCNEcKTCc3bjNMFxWyNq2rraLpvRaEA>

¹⁶³ See Lynn D. Wardle, *The Attack on Marriage As the Union of a Man and a Woman*, 83 N. Dak. L. Rev. 1365 (2007). See, generally, JAMES Q WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* (2002); See also, The Institute for American Values, <http://www.americanvalues.org/index.html>; The National Institute for Marriage, <http://www.nationalmarriage.com/ourpurpose.asp>; The National Marriage Institute, <http://www.virginia.edu/marriageproject/mission.html>.

¹⁶⁴ See, generally, STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (2000).

Conceptualizing unmarried fathers' rights forces a reexamination of the past in paternity decisions. Holding true to the majority may uncover traditions and conditions of the past that sharply conflict with contemporary life. It is unclear what kind of a past was meant by the Court, and which one of these legal customs are rendered invalid. Seriously engaging the past would justify slavery¹⁶⁵, restrict women,¹⁶⁶ and criminalize sodomy.¹⁶⁷ It would also bridge past and present by regenerating the concept of children as property and also of nonrecognition of unmarried fathers.

Although the marital presumption of the husband's paternity may be rebutted by the wife, she must do this in concert with the formal acknowledgment of the biological father. Carole's role as wife, however wandering, is highly dependent on the three men in her life.¹⁶⁸ But Carole's role in this case is minimal in comparison with the paternity interests of the two men. Michael H's interest in Victoria is blocked by Gerald's marital status. Despite the blood test and close proximity of their homes¹⁶⁹ Gerald can still displace Michael H as the only willing and legally able parent to care for the child. Actual knowledge is legally revised to reflect a fictional knowledge—law renders biological

¹⁶⁵ *Dred Scott v. Sandford*, 60 U.S. 393 (1856). ("The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.")

¹⁶⁶ *Minor v. Happersett*, 88 U.S. 162 (1874) (excluding women from suffrage).

¹⁶⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Denying the extension of fundamental rights to homosexuals to engage in acts of sodomy: "to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious").

¹⁶⁸ The psychologist in the case found that Carole sought validation and adventure in her relationships with men. Evaluation by Norman and Susan Stone (Sept. 24, 1984).

¹⁶⁹ Carole's address was 6401 Ocean Walk; Michael's was 6407. During the time that Gerald lived in Los Angeles, Michael lived next door. Michael attests: "Carole told me that she and Gerald were using separate bedrooms with her bedroom being the one in the back of the apartment, the one I could see from my nearby apartment. Carole would wave to me each night we were not together from her bedroom and allowed me to watch while she readied herself for, and got into, her bed." Declaration of Michael Hirschensohn, December 27.

fact impossible. Legitimacy, fortified by legal presumptions and prohibitions, allows judges to make legal conclusions about the contours of the family that are simply untrue. Yet, tradition, as an accumulation of cultural values revered by society, dictates a path of resistance for stray branches of the family tree. Without a history of recognizing the seemingly unusual family branches, law redraws the past to conform with the mandates of tradition.

In *Michael H.*, the Court resisted the biological father's due process claim by calling on tradition as a basis for upholding laws favoring the marital family. Legitimacy, as a "fundamental principle of the common law,"¹⁷⁰ uniformly favored the husband for paternity, save times of physical incapacity. The plurality explains nonaccess by citing Blackstone: "if the husband be out of the kingdom of England [beyond the four seas] for above nine months."¹⁷¹ Thus, if the husband is within physical proximity of the wife at the time of conception, his legal status qualifies him as father. At common law, the pro-husband approach to wifely access ensured double sexual dominion over the spouse: the husband, in some states, could kill his wife's adulterous partners¹⁷² and claim any children that she bore as his.

Pitting the rights of unmarried, biological fathers against married, nonbiological fathers represents no tradition that favors what the court calls "adulterous natural fathers."¹⁷³ Implicit in the majority opinion lies a judicial denouncement of cuckoldry.¹⁷⁴ Courts often empathize with men whose marital rights are compromised by infidelity. Prioritizing nonmarital assertions over marital expectations, according to the majority opinion, undermines judicial continuity by departing from the rule of law.¹⁷⁵ Because no previous court had favored adultery over marriage, the Court concluded that such a departure would impose arbitrary decision-making that would "permit judges to dictate rather than discern the society's views."¹⁷⁶

In order for the biological father to gain substantive parental rights to baby Victoria, he must prove that the state has,

¹⁷⁰ *Id.* at 124.

¹⁷¹ *Id.*

¹⁷² Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 235 (1986).

¹⁷³ *Id.* at 120.

¹⁷⁴ *Id.* at 124.

¹⁷⁵ *Michael H.*, 491 U.S. at fn127 n. 6.

¹⁷⁶ *Id.*

in the past, trumped biology over law. To succeed in his claim, Michael must demonstrate that courts protect the interests of unmarried fathers. The Supreme Court relays that no other cases (“We are not aware of a single case[s],”)¹⁷⁷ address this issue, which justifies a denial of due process to such parties. By this premise, access to due process rests upon its preexistence. The Court does not enforce a perfect factual fit to recognize the tradition, yet it would consult more general treatments to illuminate the presence of judicial inquiry.

The Court insists that no historical and legal rationalization exists that gave rights to unmarried fathers. Without such a precedent, the court ruled that factual scenarios like Michael H’s failed to resemble family relationships “so deeply imbedded within our traditions as to be a fundamental right.”¹⁷⁸ Without a tradition of *adulterous fathers* (as the court characterizes and emphasizes) having a protected interest in biological children, there is no fundamental right for the Court to preserve.¹⁷⁹

If substantive due process materializes from “conduct ‘deeply rooted in this Nation’s history and tradition’”¹⁸⁰, it mummifies a conception of rights previously treaded by successful litigants. In foreclosing constitutional development, the majority imposes a static concept of rights by recycling dicta to the detriment of new facts, circumstances, and conflicts. In *Michael H’s* dissent, Justice Brennan criticizes the majority’s articulation of tradition as “nothing more idiosyncratic or complicated than pouring through dusty volumes on American history.”¹⁸¹ For a textured and complex web of relationships in Michael H, the specific reliance on tradition would find no possibility of recognizing and entertaining the interests of the unmarried father. As the dissent argues, previous cases would have different outcomes, limiting due process to the confirmation of “interests already protected by a majority of the States.”¹⁸²

B. The Unstable Rights of Man

Traditionally, family law does not flatter men as fit for

¹⁷⁷ *Id.* at 127.

¹⁷⁸ *Id.* at 125.

¹⁷⁹ *Id.* at 128.

¹⁸⁰ *Id.* citing *Bowers v. Hardwick*.

¹⁸¹ *Id.* at 137 (Brennan, J., dissenting).

¹⁸² *Id.* at 141 (Brennan, J., dissenting).

raising children alone.¹⁸³ In *Stanley v. Illinois*, a state statute presumed unfitness for unmarried fathers upon the death of the children's mother. Upon the death of his nonmarital partner, Peter Stanley lost custody of his three children.¹⁸⁴ With the absence of marriage between the mother and father, Illinois declared that the children became wards of the state. No hearing was scheduled, and he had not abused or neglected the children in his 18 years as an unmarried father. Yet, his marital status proved neglect, as the state argues, because he had not formalized his relationship with his partner or his children.¹⁸⁵ Illinois' termination scheme depicts unmarried as unsuitable, and it also presumes that surviving fathers have an insubstantial interest in raising children.

Termination of parental rights would not occur for surviving mothers of deceased fathers, however, because the state assumes both her maternity and fitness. The unfitness presumption, by automatically severing the father-child relationship, places a higher burden of proof on unmarried men to assert a right to parenthood. Father's rights persist as long as the mother remains alive; she is the life in being by which his parental tenancy is measured.¹⁸⁶ Upon her death, the unmarried father's rights terminate because statutory construction fails to include him as "parent."¹⁸⁷

The Court declined to assess the state's interest in the "protection" of children from unmarried fathers in favor of a procedural due process analysis. Regardless of Illinois'

¹⁸³ At common law, the tender years presumption favored mothers in custody placements. Amjur. Evid. Section 248 ("A "tender years" presumption favoring a mother over a father has been held to represent an unconstitutional gender-based classification that discriminates between fathers and mothers solely on the basis of sex. However, some courts still recognize a presumption in custody cases that a mother is generally better suited to raise a young child, although the "presumption" is treated more like a factor, among many factors, in determining custody issues."). Currently, the majority of states do not base custody determinations on gender, but on a nexus of factors including, but not limited to, the best interest of the child, the primary caregiver, the stability of the home environment, and the parental abilities of the custodian.

¹⁸⁴ *Stanley v. Illinois*, 405 U.S. 645, 646 (1972)

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 645. (dictating Illinois statute that upon the death of the mother in an unmarried household, the children become wards of the state).

¹⁸⁷ *Id.* at 650. ("Parents...means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent[.]")

substantive motivations, regulations that denied all unmarried fathers rights to their children violated a right to be heard.¹⁸⁸ The court noted that the state subjected unmarried men to a unique dependency proceeding, denying them of “notice, hearing, and proof of...unfitness.”¹⁸⁹ The state claimed that his claim of fitness was “irrelevant.”¹⁹⁰ This effort at efficiency and expedience, articulated as the best interest of children, oversimplifies a presumption of unfitness for unmarried fathers. Because it categorically denies due process to this class of fathers, the Court ruled the statute unconstitutional.¹⁹¹

States refrain from automatic interpretations of biology as definitive of legal parenthood. Justice Burger’s dissent in *Stanley* viewed marriage or adoption as Peter’s sole legal path to his children.¹⁹² His status as an unmarried father demonstrates the lack of commitment to his deceased partner and his children.¹⁹³ Fathers, according to this understanding, do not have a connection to children based in nature, but only through law. They must avail themselves of the contractual relationship within marriage that legally binds men, women, and children.¹⁹⁴ Justice Burger, like the State of Illinois, justified the restrictions through an observation that unwed men, as proved by “centuries of human experience,” generally exhibit less responsibility towards children.¹⁹⁵

C. *Becoming Fathers*

Relationships between children and fathers find security not in nature but in art. Deliberate actions of legal declarations or parental exercises must be present. This may be examined in two ways. First, marriage dispenses with the biological requirement, trumping other sources of paternity.¹⁹⁶ Once the state ascertains the man’s marriage to the mother, his rights to the child remain, absent a termination hearing. No requirement for genetic ties or

¹⁸⁸ *Id.* At 649.

¹⁸⁹ *Id.* at 650.

¹⁹⁰ *Id.* at 650.

¹⁹¹ *Id.* at 657.

¹⁹² *Id.* at 667 (Burger, J., dissenting).

¹⁹³ *Id.* at 664 (Burger, J., dissenting) (“Stanley did not seek the burdens when he could have freely assumed them.”)

¹⁹⁴ *Id.* at 663.

¹⁹⁵ *Id.* at 666.

¹⁹⁶ Dolgin, *supra* note 116 at 382.

parental activity exists for married men.¹⁹⁷ Second, nonmarital fathers must demonstrate a higher burden of proof to exercise parental prerogatives that states quickly attribute to married fathers. Unmarried fathers must declare legal paternity and beyond that, exercise responsibility for the child.¹⁹⁸ Substantive requirements tests do not exist for married men, because the state presumes their commitment. Biology alone, without demonstrating a commitment to parenting the child, fails to trigger constitutional protection.¹⁹⁹ And marriage alone, minus genetics, minus parental support, minus physical presence, precludes courts from assessing the biological father's claim.

Such asymmetries of parental involvement is over-inclusive for both married and unmarried men. Allowing all married men to declare paternity based on status alone belies a fiction that conflates genealogy and law. Presuming husbands to father all children born to their wives blindly over-includes children not biologically theirs. At the same time, marital presumptions under-include because biological fathers, like Peter Stanley,²⁰⁰ do not have the security of protection. While the state has the interest of curtailing the objections of nonpresent, noninvolved biological fathers, it overshoots and includes active parents whose domestic lives do not mirror the marital norm.

Preemptive dismissals engendered by rules of standing and presumption definitively assign property rights to children within the marital family.²⁰¹ This procedural snafu achieves two objectives. First, it precludes the assertion of parental rights for the marginalized party—the unmarried father. Prevented from establishing paternity, he has no opportunity to develop a parental relationship with the child. Third party fathers who have already contributed to the family unit have no recourse to assert rights within the domestic estate. Likewise, it protects the marital family unit by warding off legal challenges to paternity,

¹⁹⁷ *Id.* At 381.

¹⁹⁸ See, Lehr, *supra* note 3 6.

¹⁹⁹ Caban v. Mohammad at 397. (“Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.”)

²⁰⁰ Peter had an 18-year long relationship with his deceased partner, and their children together were part of their household. See Stanley, *supra* note 5 at 646.

²⁰¹ See Michael H. v. Gerald D., 491 U.S. 110, 118-19 (1989); see also Melissa Murray, *The Networked Family*, 94 VA. L. REV. 385, 395-96, 444-45 (2008).

making it immune to challenges regarding its composition. In preventing outsiders from disrupting the legal relationship between the married husband and the extramarital child, it furthers the state's interest of supporting stability within the family unit.²⁰² Standing rules ensure that familial inclusion is not extended from without but regulated from within. Disallowing the paternal supplantation by the third party sustains the presumption that children born within a marriage "belong" to the husband.

States attest that legitimacy statutes promote the best interests of children.²⁰³ This standard for adjudicating child custody permits flexibility rather than unquestioned rigidity, and it recognizes family diversity.²⁰⁴ By taking multiple factors into account, parental custody shifts from a binary equation to a more nuanced inquiry into the needs of the child.²⁰⁵ This great utility of best interests allows for a fluid estimation of the child's life, rather than restricting the evaluation to the qualifications of the parent.

In many ways, *Lehr v. Robinson* observes a fluidity of paternity by basing access to rights on the development of an enduring relationship between father and child.²⁰⁶ *Lehr* shifts from biology to affinity to dismiss the interests of the birth father, whose decision not to marry opens criticism of his substantive relationship with the child. Instinctually, liberality in family construction grants rights to the changing American family, and such expansions challenge the notion of "traditional." But

²⁰² *Orange v. Leslie B.*, 17 Cal. Rptr.2d 797, 799 (Cal. Ct. App. 1993).

²⁰³ *Pritchett v. Merritt*, 587 S.E.2d 324, 326 (Ga. Ct. App. 2003) ("it is implicit that the trial court found that legitimation was in the children's best interests"); *Roe v. Conn*, 417 F. Supp. 769, 781 (M.D. Ala. 1976). ("Legitimation confers benefits on the child and mother by obligating the father to support the child and allowing the child to inherit from the father's estate.")

²⁰⁴ See, Janet Dolgin, *Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies*, 28 ARIZ. ST. L.J. 473, 498 (1996); John Dewitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 5 WASH & LEE L. REV. 351, 386 (1998).

²⁰⁵ The number of factors to assess best interests varies from state to state, as do the standards that govern this determination. Some states, such as New York, have very specific characteristics, such as mental health of the parent, quality of home environment, needs of the child, and financial status of the parents. NY Dom. Rel. Law § 240. But the UMDA standards offers a different approach to best interest by setting large, amorphous standards for best interest.

²⁰⁶ *Lehr* at 261-262.

liberality in *Lehr* further entrenches the “traditional” into the concept of family. Instead of embracing a larger group, it shrinks its existing parental constituency.

Lehr restricted a biological father from blocking the adoption of his daughter by her stepfather. He had not registered with the New York “putative father registry,” which would notify a class of potential fathers of the nonmarital child. The child’s mother petitioned for adoption in Dec 1978. Four months later, the court entered an adoption order, and Lehr, the biological father, objected because he was not given proper notice.²⁰⁷ The court held that his biological connection to the child was tenuous and stretched. He could have an opportunity to receive notice if he had assumed a more active role in the child’s life, or he had registered himself as a putative father of the child.²⁰⁸ In what the court saw as an eleventh-hour attempt to disrupt the placement process, the absent Lehr had no due process to protect, and the state had a reason to treat him differently.²⁰⁹

The Court’s rejection of *Lehr*’s due process challenge chides him for not asserting his right to be notified about a child. Because he failed to complete the simple task of mailing a postcard,²¹⁰ he is now a legal stranger to his child. Biology aside, he has no cognizable leg upon which to stand his paternity. Other men may register as putative fathers and their interests could complete with Lehr’s. These nonbiological figures can hold themselves out as fathers to the child, or register their name with the state. By the majority, these actions, notwithstanding the insignificance of putative father registry, comprise a diligent efforts to maintain ties between putative father and child. Even if the child is not biologically theirs, they add labor to the property to make it their own.

Under *Lehr*, father’s rights to children as property hinges on personal investment. The Lockean theory of appropriation –of mixing one’s labor with property—demands time and resources in order to declare oneself as owner. The candidate who fails to appropriate the property for themselves is denied possession by

²⁰⁷ *Lehr* at 250.

²⁰⁸ *Lehr* at 644, n. 18. The dissent notes that the circumstances of either occurring were low, as 1) continued contact was made difficult by the mother’s refusal to share their location and 2) Lehr had filed for paternity at the time of the adoption.

²⁰⁹ *Lehr* at 262.

²¹⁰ *Lehr* at 264.

competing others. As in the ownership of real property, if the disseisor claims the property for the duration of the statutory period without being ousted, the property becomes hers. Traditional treatise definitions of adverse possession assert that possession must be exclusive and not shared in order for the disseisor to assume ownership. But clear and simple delineations of dominion usually do not exist for settling parental disputes. I reiterate that I do not intend to commodify children or suggest that they have numerical value. Rather, this analysis helps to conceptualize judicial approaches to paternity that rest upon parental labor.

If we engage the doctrine of *Lehr*—that “relationships more enduring”²¹¹ qualify fathers as parents, we find a hybrid of status and effort that distinguishes the unmarried from the married. For married men, paternal labor occurs at the moment of marriage to the mother. Men, like women, can be natural fathers—to any child—when they marry, which legitimates birth as naturally legal. This preordained status is not available for unmarried men, who must separately and newly affirm relationships with each child through a declaration of paternity and also an active relationship. Natural links to the child, as states automatically grant to the mother, are not attributed to the father when the birth occurs outside of marriage.

Legally, the marital father has a superior claim to fatherhood over the nonmarital father. With a clear legal relationship established between husband and wife, the marital husband is legally potent, that is, unassailable in regards to third-party interlopers. Courts view the initial acceptance of marriage, its obligations and responsibilities, as signifying a familial and reproductive undertaking that prospectively accepts any children born to the spouse. If the unmarried but clearly biological father wishes to assert paternity in conflict with a married man, actual parentage fails. As a paternal labor, marriage trumps biology, and only one father prevails. Paternity based on status, whether marital or biological, attempts to dispense with parental ambiguity with an efficient solution that instills stability and finality, thus streamlining the complex family into a simpler structure. This formula of binary consequences underscores a traffic in children that reifies property concepts of exclusive ownership and legitimate entitlement. In the next section, offer

²¹¹ *Lehr* at 260, quoting *Caban* 441 U.S. at 397.

an alternative way of thinking about children as property that moves away from rigid characteristics of consent and ownership that purport to serve the best interests of children.

III. THE FIDUCIARY ETHIC OF STEWARDSHIP

Equating children with rights of property runs the negative risk of commodifying child custody as something to exchange, purchase, or flip. Parents “claim” children²¹²; couples “exclude” biological fathers²¹³; families assert “interests” in visitation.²¹⁴ These terms of use and possession suggest that children are chattels²¹⁵ in a competition of rights and liberties between adults. Understanding this discourse on property facilitates a best interests analysis that actually attends to the needs of children in addition to the interests of adults. This does not dispose married parents of their liberty interests—it forces a practical analysis of the effect of paternity law on children’s lives. From this vantage point we realize the important need for a nuanced and layered examination of the complex family that substantively and practicably engages the potential role of the unwed father. This analysis requires active reworkings of the property foundations of paternity.

Traditional theories of property emphasize delineation of ownership: who owns and who does not. At the moment that an individual obtains an object or thing, they effectively publicize its unavailability to the rest of the world. Labor combined with an object allows the person to appropriate the property as their own, according to Locke.²¹⁶ During the tenure of ownership, they have use and enjoyment of the property. Others cannot access the property without the consent of the owner. For Bentham, owning property meant “being able to draw such and such advantage from the thing possessed,” which describes an unadulterated enjoyment that remains untouched by challenges to ownership.²¹⁷ This expectancy of not being disturbed provides security, and looking ahead to a future adds a temporal longevity to property.

But property itself belies a complexity and texture that reveals a multiplicity of ownership structures. The traditional

²¹² See, Stanley.

²¹³ See, MICHAEL H.

²¹⁴ See, Troxel.

²¹⁵ See, WOODHOUSE.

²¹⁶ See, Locke, *supra* note 53.

²¹⁷ See HARRIS at 1729.

concept of property holds unchallenged, single possession as normative, simple, and flat.²¹⁸ This simplification under-includes schemes of borrowing, exchange, and hybridization that destabilize the notion of a unified actor with sole authority of development and alienation.²¹⁹ Such a view champions the rights of property owners as motivated by wealth-maximization, which accedes to a Lockean interest in improvement.²²⁰ Distribution of benefits from the development of property rests upon an expectation of entitlement, which necessitates a clear identification of who has access and who may exercise dominion over property. This classic view of property exists in opposition to a relational scheme of property that accounts for the contributed labor of nonowners as well as their nonmarket interests.²²¹ In moving away from an appeal to stability that property supposedly engenders, this relational model encompasses a sphere of involvement traditionally excluded and marginalized. To travel beyond the traditional model of individual ownership invites the interests of untitled parties as legitimate and valid considerations that cannot be ignored.²²²

²¹⁸ See CARPENTER AT 1083.

²¹⁹ See CARPENTER .

²²⁰ See *Locke*, supra note 53..

²²¹ Id. at 1028.

²²² Id. at 1110.

not benefit the child if it forces termination of one relationship for maintenance of another. What is needed here is a diversified conception of parental property that simultaneously embraces legal and biological characteristics of paternity. Carpenter et al have theorized a model for shared ownership that transforms the classic view of property as singularly owned. Rather, they offer a stewardship vision that acknowledges borrowing and possession, which gives language to the fiduciary duty between property owner and property steward that both have pertinent interests.²²⁵ Working from the context of cultural property of indigenous nations, Carpenter calls for a more inclusive approach to indigenous cultural property that animates untitled interests and “challenges ownership as the fundamental nexus of property interests.”²²⁶

These lessons of indigenous stewardship critique a model of ownership that adheres to stability and simplicity. Such an interpretation of stewardship seeks to share in a claim to property that engages the opinions and knowledge of indigenous groups while simultaneously recognizing the use and appropriation of that property by outside groups. For both tangible property (e.g. Indian artifacts and remains), intangible property (e.g. Indian mascots), and real property (e.g. sacred sites), the strict ownership model dispossesses indigenous groups of objects, ideas, and land that originated within Indian communities.²²⁷ In response to this appropriation, stewardship replaces the classic bundle of rights: “use, representation, access, and production,”²²⁸ with a “web of

interests"²²⁹ that displaces discrete ownership with shared considerations. This vision of cooperation within a context of property reveals a commonality of interests that joins nonowners and owners to articulate a merged vision of authority.²³⁰

Thinking of a shared model of property can facilitate the best interests of children born into complex families. Children with two fathers, one legal and the other biological, are predetermined as better off in the hands of the marital unit. This professed appeal to stability wards off the potential development of a nurturing relationship between biological father and child, without a dynamic investigation into the child's needs. By considering that active fathers, albeit extramarital, may contribute to the wellbeing of the child, this observes an initial interest in the biological connection that does not automatically categorize him as a legal stranger. This transforms paternity from an adversarial battle between adults seeking exclusion into a vigorous exposition of children's needs. Additionally, it turns away from a tacit discourse on children as chattels to be owned and exchanged between adults.

D. A Plea for Stewardship

A model of stewardship in the family context recognizes a triangulation of interests: the married couple, the biological father, and the child. The ownership model engages two of these prongs to the exclusion of the third. From this perspective, a binary discourse between married parents and child or married parents and the biological father, a third party is excluded to the detriment of the child. To borrow from Professors Carpenter, Riley, and Katyal, the stewardship model transforms this discussion by negotiating a fiduciary ethic into conflicts over paternity. Instead of issuing a blanket ruling that the child definitively belongs to one parent or the other, stewardship allows for a multiplicity of interests that opens the possibility of involvement by the biological father. In keeping with *Lehr*, stewardship examines the development of a relationship as a claim to fatherhood rather than the circumstance of status.²³¹ In the same way that biology fails as an automatic qualification to paternity, marital status would not elevate the spouse to qualified fatherhood. Status, then, fails as a proxy of paternity, which forces an examination of the actual needs of the child.

Critics of this approach will argue that it requires a marshalling of unnecessary resources to initiate individual

adjudications of paternity. Marriage exists as a shorthand for stability, responsibility, and support, and second guessing this central institution enervates the foundational protections of matrimony.²³² The critical view asserts that marriage provides an optimal environment for rearing children, and it serves their best interests to live within a structure rooted in the propagation of families. To place marriage on the same evidentiary scale as nonmarriage threatens its authority and invades the privacy interests of spouses.²³³ Maintaining the marital presumption facilitates the efficient determination of paternity and forestalls misguided obstructions of filiation.

But stewardship does not force pluralistic paternity. It does not seek to undermine or invade marital relationships, or to divest married couples of their children. It also does not demand child-sharing in complex families. Instead, stewardship visualizes paternity as dually possible between biological and legal father, as a fiduciary relationship between married and unmarried.²³⁴ In this way, we may view the custodial parent of the child as the fiduciary that owes duties to the biological father.²³⁵ This relationship is based on a wellspring of trust and a host of expectations, which surface as fiduciary duties: loyalty, care, and good faith.²³⁶ In the majority of cases, the fiduciary is the married father who wishes to hold biological father's child out as their own.²³⁷ As in any relationship of trust, the fiduciary holds legal title to the property, which explains the relationship between the marital father and the child.²³⁸ This makes the married father the common law owner of the property, but this ownership is contingent on upholding fiduciary duties. This model of paternity turns attention away from who *can* be the parent to a more productive distribution of rights and responsibilities.

Guided by a stewardship model, paternity for complex families may better satisfy a best interests standard because it turns attention away from the legal rights of parents to the actual obligations of parenting itself. Adopting such a model turns away from constitutional struggles of marital v. parental interest and a tradition of liberties to a reconceptualization of the theoretical underpinnings of paternity. This maintains a property-based approach, but it steers away from the chattel understanding to a fiduciary vision. Such duties of loyalty and care require that the legal parents act in the interests of others, which creates a lateral relationship between the legal parents and biological father. Establishing this connection does not give the biological father

rights, but it forwards a dynamic of responsibility between father and father, or married and unmarried, for the task of raising someone else's child. This model of fiduciary duties and obligations invites complexity by embracing the potential duality of fatherhood. In its support of transparency, stewardship finds no shame or imposes no amnesia on the origins of the child. It refuses to embrace legal simplicity and statutory falsehoods as the traditional method of determining a family. Uniquely, stewardship envisions an equitable and legal accommodation for both fathers. It also offers a more ethically sound interpretation of property theory in children that champions parental duties over property claims.

CONCLUSION

As law sees it, children are either legitimate or illegitimate, with no mitigating factors that reflect births occurring outside—but inside—of marriage. Law attempts to make sense of childbirth through marital shorthand that describes their parentage. The traditional marital presumption imposes organization in the midst of complication, even if that representation is erroneous. Studies estimate that a substantial percentage of children born into marital homes have fathers who are not married to the mother.²³⁹ Yet marital presumptions classify these children as “legitimate” because they were born within marriage, even to a biological father outside the marital dyad. States claim the presumption protects children by ensuring their legitimacy within the legal family, and this protection substantiates parental dominion over marital children.

But this fails to deliver the full story of complex and other nontraditional families.²⁴⁰ The rhetoric of paternity cases

²⁴⁰ John G. New, *“Aren't You Lucky You Have Two Mamas?”: Redefining Parenthood in Light of Evolving Reproductive Technologies and Social Change*, 81 CHI-KENT L. REV. 773, 777 (2006); Steven N. Peskin, *Who's Your Daddy?: An Analysis of Illinois' Law of Parentage and the Meaning of Parenthood*, 35 LOY. U. CHI. L. J. 811, 836 (2004); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2405 (1995); Gregory A. Kelson, *In the Best Interest of the Child: What Have We Learned From Baby Jessica and Baby Richard?*, 33 J. MARSHALL L. REV. 353 (2000); John Lawrence Hill, *What Does it Mean to be a “Parent”?* *The Claims of Biology as the Basis of Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97 (2006).

demonstrates a professed interest in maintaining family stability, but this only serves to whitewash nonmarital reproduction for purposes of preserving marital reproduction. Actual knowledge is legally revised to reflect a fictional knowledge—law renders biological fact impossible. Paternity, fortified by legal presumptions and prohibitions allows judges to make legal conclusions about the contours of the family that are simply untrue. Yet, tradition, as an accumulation of cultural values revered by society,²⁴¹ dictates a path of resistance for stray branches of the family tree. Without a history of recognizing the seemingly unusual family branches, law redraws the past to conform with the mandates of tradition.

As reflected in much of legal scholarship on the family, law lags behind the changing composition of the “traditional” family.²⁴² Although many scholars disagree on what comprises “traditional,” courts adhere to conventional notions regarding marriage and the presumptions it creates for paternity of children. Law imposes a rigid structure of property-based exclusions and possessions in children that disgorges unmarried men of an opportunity to develop a constitutionally preferred relationship with their offspring. This stance of the statutory ingénue mistakenly presupposes the best interests of marriage—in a family that deliberately complicates the supposedly monofidelitous institution—without a substantive inquiry of the merits of sustaining an established relationship between parent and child. Even if “traditional” is a hopeful manifestation of reproduction occurring within wedlock, it persists in oversimplifying complex family forms by categorically foreclosing the “legitimate” interests of children and their biological fathers.

²⁴¹ See Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457 (1897) (“The law is the witness and external deposit of our moral life.”)

²⁴² See Press Release, U.S. Census Bureau News, Census Bureau Reports Families with Children Increasingly Face Unemployment (Jan. 15, 2010), http://www.census.gov/Press-Release/www/releases/archives/families_households/014540.html (last visited Mar. 13, 2010); U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2009 (2010), <http://www.census.gov/population/www/socdemo/hh-fam/cps2009.html> (last visited Mar. 13, 2010); CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT : 2007, *available at* <http://www.census.gov/prod/2009pubs/p60-237.pdf>; NATIONAL STEPFAMILY RESOURCE, STEP FAMILY FACT SHEET (2010), <http://www.stepfamilies.info/stepfamily-fact-sheet.php> (last visited Mar. 14, 2010).

