I. Introduction: Deconstructing Legal Parenthood

The effort to legally redefine marriage to include same-sex couples has engendered a variety of predictions as to its likely effect\(^1\) from ushering in greater tolerance for those who experience same-sex attractions\(^2\) to creating greater opportunities for conflicts between the work of religious organizations and persons of faith and discrimination laws.\(^3\) While there is merit to these predictions, the most predictable consequence of redefining marriage to include same-sex couples will be to alter, perhaps permanently, the default rules for determining the legal status of parenthood, untethering them from the principles and interests with which they have long been entwined. This, in turn, will have significant implications for our social understanding of what children are entitled to and what institutions can and should do to promote these.

Past decades have witnessed a revolutionary shift in the understanding of parenting away from settled norms serving specific interests focused on child well-being. Legal, cultural and technological changes have unsettled these norms but when marriage is redefined to entirely sever the link between the marriage institution and male-female complementarity, the deconstruction process is accelerated and codified in the law. This, in

\(^1\) Ironically, those who claim that redefining marriage will not harm marriage admit that it will have all kinds of effects, they just deny that these effects will be harmful. See Brief of Amici Curiae Utah Pride Center, et al., Hollingsworth v. Perry & Windsor v. United States, Nos. 12-144 & 12-307 (2013) at http://www.rqn.com/sites/default/files/publications-articles/Amici%20Curiae%20Brief%20of%20Utah%20Pride%20Center%20et%20al_0.pdf.


\(^3\) See Same-Sex Marriage & Religious Liberty: Emerging Conflicts (Robin Fretwell Wilson, et al., editors 2008).
turn, invites even more radical changes, most importantly in the goals served by legal recognition of parenthood.

II. “Classical Unities” of Parenthood Law

The significance of the changes in the legal understanding of parenthood enabling and accelerated by marriage redefinition is underscored by a comparison to a past baseline measure. Roughly, the law of parenthood was once characterized by a cluster of unities. A parent was part of a unit, joined by marriage, of two people—a mother and father—whose union had created the child. Laws related to legitimacy, presumption of paternity, and divorce all contributed to protecting these norms which were bolstered by cultural commitments.

Adoption was added to the mix in order to provide parents for children who would otherwise not have that opportunity because of death, abandonment or abuse. In many ways, the law of adoption reinforced the norms of parenthood, albeit of necessity the biological relationship could not be preserved. Thus, for instance, the law has required the termination of the biological parents’ rights before an adoption could take place, preserving the standard of two parents per child. Until very recently (and still in some states) unmarried couples and couples of the same-sex could not adopt jointly. Even now, it is

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4 See Carl E. Schneider, The Channelling Function in Family Law, 20 Hofstra L. Rev. 495, 501 (1992) (“In the same way, our legislator might posit an institution of "parenthood" with several key normative characteristics. Parents should be married to each other. They are preferably the biological father and mother of their child. They have authority over their children and can make decisions for them. However, like spouses, parents are expected to love their children and to be affectionate, considerate, and fair. They should support and nurture their children during their minority. They should assure them a stable home, particularly by staying married to each other, so that the child lives with both parents and knows the comforts of security.”); Hutchison v. Hutchison, 649 P.2d 38, 40 (1982) (“It is rooted in the common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child’s benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of the child than anyone else.”).
common for adoption statutes to require that a married individual must adopt jointly with their spouse.\(^5\)

Of course, given the nature of adoption proceedings as a way to provide for a child whose situation already differed from the ideals meant to be reflected in the law of parenthood, all aspects of the law did not track precisely with the default rules. It is common, for instance, for the states to allow adoption by single persons as a way to ensure that children will not be unnecessarily kept in less permanent foster care arrangements. This, however, reflected the different circumstances and goals of the adoption statutes.

III.  Deconstructing Parenthood

Cultural and legal changes have led to significant abandonment of many of the baseline norms of parenthood. The law of divorce, for instance, has been revolutionized to make divorces much easier to obtain and divorce is now common leading to far fewer parents acting as a unit in their interactions with children. In an attempt to ameliorate the harsh consequences to children of the law of illegitimacy, the formal link of parental status (in the sense that an unmarried father was considered to be something less than a legal parent in many cases) with marriage has been cut with the abandonment of that concept.\(^6\) Even the norm of two parents has been broached with cases arising out of disputes between same-sex couples, one of whom conceived through assisted reproduction, and the other biological parent of child.\(^7\) Delaware and the District of Columbia have even created in statute a legal status of *de facto* parent by which any number of adults can be designated


\(^7\) See LaChapelle v. Mitten, 607 N.W.2d 151, 157 (Minn. App. 2000) (involving a case where a lesbian couple conceived with the help of a donor, and the parties agreed in writing that donor would have a right to a—significant relationship] with the child); A.A. v. B.B., 28 D.L.R. (4th) 519, 522 (2007) (concerning same-sex partners recognizing a biological father’s equal parenting status).
as legal parents. Some states have allowed for joint adoptions by two adults of the same-sex, weakening the ideals that a parent will be either a mother or a father and that biological ties, even by analogy, are relevant to parenthood.

IV. A Presumption of “Parentage”

One could understand all of these changes as somewhat exceptional because they do not necessarily displace the default legal rules of parenthood, they just stretch them (though sometimes beyond recognition). More recent changes are more significant—such as the transformation of the presumption of paternity into a presumption of parentage. The presumption of paternity was consistent with reality and with compelling social objectives. In the vast majority of cases, the presumption accorded with biological realities because, of course, the husband of the mother was the biological father of her child. The presumption protected the boundaries of an intact marriage and ensured that a child would have legal ties to both a mother and father; importantly, they would be married to one another, ensuring additional stability and clarity for the child.

In a handful of jurisdictions, however, the presumption has begun to be “read” by courts as gender neutral in order to facilitate adult arrangements for alternative family forms.

An “early” (2005) California case involved a dispute over child support between a mother who had conceived through artificial insemination and her former same-sex partner. The trial court had ordered support after finding the partner was a de facto parent. The court of appeals reversed but the California Supreme Court assigned parental status to the partner. The court took as its starting point, the erasure of the distinction of legitimacy

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which meant "the parentage of a child does not depend upon “the marital status of the parents."” Although the court recognized that the Uniform Parentage Act, adopted in California, contained separate provisions defining “mother” and “father,” it invoked another section of the UPA that said: “[i]nsofar as practicable, the provisions of this part applicable to the father and child relationship apply” to determining who is a legal mother. Perhaps reflecting the state of health education in the state, the court declared: “We perceive no reason why both parents of a child cannot be women.” The specific statutory presumption on which the court relied provided: “a man is presumed to be the natural father of a child if ‘[h]e receives the child into his home and openly holds out the child as his natural child.’” Stretching practicability beyond the breaking point, the court said that even though the partner “has no genetic connection to the twins does not necessarily mean that she did not hold out the twins as her ‘natural’ children.” It is entirely unclear how this gender-neutral reading of the statute could be “practicable” since while there is a chance a man might be a child's biological father and that others could be convinced of this based on his representation, it will in no case be possible that a woman will be a biological father. The court boldly insisted the opposite, however, untethering paternity to biology and going so far as to assert that it would be “an abuse of discretion to conclude that the presumption may be rebutted in the present case” since the partner, among other things “received the twins into her home and held them out to the world as her natural children.”

The court did not spend much time dealing with the inconvenient question of a father, deeming it sufficient to make the false statement that the children “have no father

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10 Id. at 667 (quoting Cal. Fam. Code 7611).
11 Id. at 667.
12 Id. at 669.
because they were conceived by means of artificial insemination using an anonymous semen donor”\textsuperscript{13} as if assisted reproductive technology were more than a matter of the “time, place and manner” of conception but rather magically transformed the biological realities of childbirth. The twins at issue in this case have a father, as all children do, but California law had chosen to relieve him of responsibility for his children. The court’s sleight of hand continues when it quotes the purpose statement in the paternity establishment statute:

‘There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors’ benefits, military benefits, and inheritance rights. ...’\textsuperscript{14}

Then, it says: “By recognizing the value of determining paternity, the Legislature implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public.”\textsuperscript{15} On reading this passage, one is struck by the assertion that the legislature viewed paternity as nothing more than a way of ensuring two parents and avoiding charges on the public fisc. It turns out, however, that this is not all that the legislature had in mind. The portion of the statute omitted by the court actually goes on to say: “Knowledge of family medical history is often necessary for correct medical diagnosis and treatment. Additionally, knowing one’s father is important to a child’s development.”\textsuperscript{16} Not surprising that the court would omit these findings.

\textsuperscript{13} Id.
\textsuperscript{14} Id. at 669 (ellipses in original).
\textsuperscript{15} Id.
\textsuperscript{16} Cal. Fam. Code 7570.
This is not an idiosyncratic ruling, either. A later case involved an adoptive mother whose partner, an appeals court concluded had “openly held the children out as her natural children.”\textsuperscript{17} The next year, another appeals panel concluded “the adoption decree establishes that M.G. is the Child’s mother, but it does not preclude a determination under the UPA that L.M. is the Child’s second mother.”\textsuperscript{18} In California, not only can the partner of a biological parent be a “natural” parent but so can the partner of an adoptive parent.

Nor is California alone. A recent New Mexico case involved a petition from the former partner of a child’s adoptive mother to establish parentage. The supreme court concluded the partner had standing “as a natural mother” pointing to the state’s codification of the UPA which, the court said, requires that “criteria for establishing a presumption that a man is a natural parent” be applied to women “because it is practicable for a woman to hold a child out as her own by, among other things, providing full-time emotional and financial support for the child.”\textsuperscript{19} The court pointed to the UPA provision that called for paternity and maternity provisions to be applied in a gender neutral way “insofar as practicable.”\textsuperscript{20} The court reinterpreted the presumption so that it was “based on a person’s conduct, not a biological connection” though, of course, the language of “natural” parent as opposed to \textit{de facto} parent which is the legal construct created to designate parental status on non-parents because of the actions of that person. The court concluded that “a woman is capable of holding out a child as her natural child” despite the fact that the child already has a mother.\textsuperscript{21} The court argued that doing so was necessary

\textsuperscript{17} S.Y. v. S.B., 201 Cal. App. 4th 1023, 1026 (2011).
\textsuperscript{19} Chatterjee v. King, 280 P.3d 283, 285 (N.M. 2012).
\textsuperscript{20} \textit{Id} at 287.
\textsuperscript{21} \textit{Id} at 288.
because the “law needs to address traditional expectations in light of current realities to
keep up with the changing demographic of American families and to protect the children
born into them.”22 This appears to be another way of saying the law needs to facilitate adult
ordering of their lives as regards children they desire to have a relationship with. The
court’s policy rationale was that it was “against public policy to deny parental rights and
responsibilities based solely on the sex of either or both of the parents.”23

In a very recent Kansas decision, a mother who had conceived through artificial
insemination signed a “coparenting agreement” with her female partner. After the couple
separated, the biological mother sought to curtail the former partner’s relationship with
the children so the partner sued to enforce the agreement. The court there also invoked the
Kansas Parentage Act and argued it could be interpreted so that “a female can make a
colorable claim to being a presumptive mother of a child without claiming to be the
biological or adoptive mother.”24 The court went so far as to say an earlier Kansas decision
deferring to the legislature’s determinations about parenting by third parties was “an
abdication of the legislature of the court’s responsibility for the well-being of this state’s
children.”25 The court concluded Kansas law “permits the creation of presumptive
motherhood through written acknowledgment.”26 In a very nimble move, the court said:
“Denying the children an opportunity to have two parents, the same as children of a
traditional marriage, impinges upon the children’s constitutional rights.”27

V. Codifying the Presumption

22 Id. at 292.
23 Id. at 293.
25 Id. at *42.
26 Id. at *44.
27 Id. at *48.
As radical as the shift to a gender-neutral presumption of parenthood is, it would still largely be applied on a case-by-case basis as judges designate specific unrelated adults as “parents” by presumption. This approach, however, provides the mechanism for a more sweeping abandonment of the traditional ordering of legal parenthood which occurs when marriage is redefined to become a gender-neutral arrangement oriented towards adult desire. In that case, the presumption is codified and is applied by operation of law.

Redefining marriage to include same-sex couples means abandoning the idea that there is something unique in the relationship of a husband and wife, father and mother. The experience of other nations has made clear that changes to marriage are intertwined or lead to changes in the law of parenthood. Thus, after redefining marriage in the Netherlands, the legislature enacted a law to “make joint parental authority automatic on the birth of a child to a female same-sex married couple.” Belgium redefined marriage in 2003 and then allowed joint adoption by same-sex couples two years later. The redefinition bill in Canada included “consequential amendments” to other statutes including the replacement in various provisions of the “requirement for connection by blood relationship or adoption” with “legal parent-child relationship.” In the tax code “natural parent” was replaced by “legal parent.” Two years after marriage redefinition in Spain, the law regarding assisted reproduction was amended so that “two women partners could be mothers of the child born as a consequence of these techniques.” Although the “presumption of paternity is not applicable to same-sex unions” there, a recent

administrative action involving two men who had married in Spain and contracted with a surrogate in California resulted in “the registration of the two children as the children of the requesting parties.”  

The courts that have mandated redefinition have also linked marriage and parenthood. One reason for redefining marriage given by the Massachusetts Supreme Judicial Court was that “the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws.”  

The court complained that “same-sex couples must undergo the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage.”  

The court specifically charged: “The absolute foreclosure of the marriage option for the class of parents and would-be parents at issue here imposes a heavy burden on their decision to have and raise children that is not suffered by any other class of parent.”  

Similarly, the Iowa Supreme Court said society had an interest in “providing same-sex couples a stable framework within which to raise their children” which could be advanced by “official recognition of their status.”  

The court later pointed to the presumption of paternity as a statute “affected by civil-marriage status.”  

Interestingly, when New Jersey’s high court ruled that the benefits but not the status of marriage must be extended to same-sex couples, it specifically noted:

Every statutory provision applicable to opposite-sex couples might not be symmetrically applicable to same-sex couples. The presumption of parentage would apply differently for same-sex partners inasmuch as both partners could not be the biological parents of the child. It appears that the presumption in such circumstances would be that the non-biological partner consented to the other partner either conceiving or giving birth to a child.

32 Id. at 305, 307 note 27.  
34 Id.  
35 Id. at 964 note 26.  
37 Id. at 903 note 28.
In “response to [Maryland] Attorney General Doug Gansler’s opinion . . . that state agencies should recognize out-of-state gay marriages” the state Department of Health and Mental Hygiene sent a letter to birth registrars saying “a woman can be named as a parent of a child born to her same-sex spouse.”38 A bill to redefine marriage in Minnesota, just approved by two legislative committees includes “rules of construction” providing: “When necessary to implement the rights and responsibilities of spouses or parents under the laws of this state, including those that establish parentage presumptions based on marriage, gender-specific terminology, such as ‘husband,’ ‘wife,’ ‘mother,’ ‘father,’ ‘widow,’ ‘widower,’ or similar terms, must be construed in a neutral manner to refer to a person of either gender.”39

Legal statuses short of marriage have been used to invoke the presumption of parentage by operation of law. A New Jersey trial court decision in 2005 concluded that “a child born within the context of a marriage with two spouses” after a Canadian same-sex marriage was the child of the mother and the mother’s female partner.40 In a dispute between two partners in a civil union, one of whom was the mother of a child, the Vermont Supreme Court held the state’s presumption of paternity applied to a partner in a civil union because the civil union statute provided that “rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple with respect to a child of whom either

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39 Minnesota Senate File 925 (88th Legis. 2013).
spouse becomes the natural parent during the marriage.”41 The court said the
“Legislature’s intent in enacting the civil union laws was to create legal equality between
relationships based on civil unions and those based on marriages.”42 It said the idea that a
“natural” parent meant a biological parent was “an overly broad[!] reading of the language”
of the paternity statute.43 For the court the “first and foremost” reason that the partner was
a presumed parent was the fact that she and the mother “were in a valid legal union at the
time of the child’s birth.” It explained that if the partner had been the mother’s “husband,
these factors would make [the partner] the parent of the child born from the artificial
insemination.” So, because “of the equality of treatment of partners in civil unions, the same
result applies” here.44 The court added that “in accordance with common law, the couple’s
legal union at the time of the child’s birth is extremely persuasive evidence of joint
parentage.”45 A subsequent New York case recognized this effect of Vermont civil unions on
parentage and granted parent status to the partner of a child’s mother.46

Ironically, when marriage has been redefined to remove the element of sexual
complementarity it still plays a role in determining parenthood, though to very different
effect. It is as if, deprived of any real meaning, marriage can now be brought back into the
parenthood equation, albeit now in order to formalize its deconstruction; no longer a
principle of organization but of disorganization. Redefined, marriage and parenting no
longer serve to advance earlier goals of clarity, stability and complementarity. The new

42 Id. at 462.
43 Id. at 464.
44 Id. at 465.
45 Id. at 466.
goal is equal satisfaction of adult desires and redefined marriage effectively advances this goal.

Thus, a recent Massachusetts case granted joint legal custody to a child’s mother and the mother’s former same-sex spouse. Even though the state’s paternity presumption for artificial insemination referred to “husbands” the court of appeals said it would “not read ’husband’ to exclude same-sex married couples, but determine that same-sex married partners are similarly situated to heterosexual couples in these circumstances.”47 Following the Goodridge decision, the court concluded that “when there is a marriage between same-sex couples, the need for that second-parent adoption to, at the very least, confer legal parentage on the nonbiological parent is eliminated when the child is born of the marriage.”48

A pending Iowa case involves a dispute over whether the birth certificate of a child both to a married same-sex couple could list both spouses as parents. The mother had conceived through artificial insemination. Again, the relevant statute refers to “husband” and “father” but the court referenced a passage in the Iowa Supreme Court’s marriage decision that “the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage.”49 Here, the court said the Department of Public Health decision not to list a “second mother” on the birth certificate “frustrates the purpose of the law to recognize the legitimacy of a child born to a marriage, and to establish the parents’ obligation to support the child as

48 Id. at 603.
recognized in the \textit{Varnum} decision."\textsuperscript{50} That decision, the court believes "recognizes that some statutory language will have to be interpreted and applied in a manner allowing gay and lesbian people ‘full access to the institution of civil marriage’" and “[o]ne important incident of the institution of civil marriage is a presumption that a child born during the marriage is the legal child of both parties to the marriage – regardless whether there is a biological connection to the other parent.”\textsuperscript{51} Thus, the same-sex marriage mandate “dictates that” the paternity presumption “be interpreted and applied to give ‘full access to the institution of marriage’ by placing her spouse’s name on the birth certificate.”\textsuperscript{52} Thus, the legal preference for two legal parents for a child, which made sense as a reflection of biological realities, remains but now untethered to natural parenthood.

Another recent Iowa case involved a dispute over a fetal death certificate of a stillborn child on which the same-sex spouse who had donated the egg that was fertilized and implanted in the other spouse was listed in the space for the father.\textsuperscript{53} The Department of Public Health “interprets the term ‘father’ on a Certificate as the male parent of the child.”\textsuperscript{54} The court noted that for “purposes of marriage in general, same-sex couples are similarly situated to opposite-sex couples” and concluded: “As parents, a mother’s wife is identical to a mother’s husband in every common and ordinary sense except for biology.”\textsuperscript{55} For the court, it was critical that the Department usually just accepts the name the mother provides (though, would it if the mother listed the father as Zeus or Mickey Mouse?) and added that "biology alone is an insufficient justification to disparate treatment of a

\textsuperscript{50} Id. at 8.
\textsuperscript{51} Id. at 9.
\textsuperscript{52} Id. at 9-10.
\textsuperscript{53} Buntemeyer v. Iowa Department of Public Health, Case No. CV 9041 (2012), slip op. at 2.
\textsuperscript{54} Id. at 3.
\textsuperscript{55} Id. at 14-15.
mother’s husband and a mother’s wife on a Certificate. Since biology is the only relevant
difference between a mother’s husband and a mother’s wife for purposes of a Certificate, a
mother’s husband and a mother’s wife are similarly-situated as non-gestational parents.”56
For this proposition, the court cited the same-sex marriage case. Note the scrupulous care
to avoid the term “father” in this passage instead of the “mother’s husband” which
demonstrates how the adult relationship trumps other considerations in the case. The
court even held that the Department policy of listing an actual father on the certificate
violated equal protection because under intermediate scrutiny, the policy or ensuring
“accuracy on a Certificate” is not served because, to the court, the Department “does not
and cannot explain how omitting one parent on a Certificate improves accuracy.”57

VI. “A Cloud No Bigger Than an Hand”

What do these changes portend?

A recent Washington Post style article reporting on the quest of a married male
couple to acquire a child begins with a variation of the schoolyard chant: “First comes love.
Then comes marriage. Then comes an online bake sale to pay for an egg donor, a surrogate
and in vitro fertilization.”58 If the law is to insist on quality in parenthood between same
and opposite-sex couples, it must endorse and facilitate the acceptance of assisted
reproductive technology. Other than adoption (and in the reported cases so far, adoption is
the minority option), some form of ART is required to allow same-sex couples to raise
children jointly. The presumption of parentage cases have largely illustrated this in regards
to the practice of artificial insemination but the Spanish situation noted above makes clear

56 Id. at 17.
57 Id.
58 Emily Wax, Will and Dan Neville-Rehbehn are Baking Up a Storm to Pay for Surrogacy, WASHINGTON POST
   (Feb. 8, 2012.)
that surrogacy too must be accepted in order to allow for equality in opportunities for parenthood by male couples. A recent Connecticut case upheld a surrogacy contract for purposes of amending a birth certificate to list two men as parents. The men in the case were married in Massachusetts but after the certificate so the court noted the fact had “no bearing on the outcome”\(^59\) but it is easy to imagine that it would be very relevant in a case where the contracting couple were married before the surrogacy contract was carried out. It has been reported that with the move in France to redefine marriage, the attorney general has issued a memorandum “to facilitate the conferral of French citizenship upon children born by a foreign surrogate mother.”\(^60\)

The increasing acceptance of ART, in turn, objectifies all participants. It requires a class of parents whose only role in procreation is to provide children for others to use in forming their preferred family arrangements. In stark contrast to settled norms of parenthood such as the duty to support, this class is relieved of the responsibility to care for the children they create. Indeed, they are encouraged not to be too close to children unless their doing so comports with the intentions of the intended “parents.” Surrogates, in particular, are put at great risk of exploitation by these arrangements.\(^61\) Others may be imposed upon as well. In California, a doctor was sued for declining to provide artificial insemination to an individual in a same-sex couple and denied the defense that he was

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\(^{59}\) Raftopol v. Ramey, 12 A.3d 783, 787 note 9 (Ct. 2010).


acting in accordance with his religiously-motivated concerns about facilitating childbirth by unmarried couples.

Most importantly, children become a commodity to be purchased to satisfy adult desires, as acquisition displaces procreation. Thus, in the Kansas case, the court highlighted an “irony” that state courts might “have jurisdiction over the jointly acquired property of cohabiting adults, while . . . those same courts cannot acquire jurisdiction over the children brought into existence by the same cohabiting adults.”62 What a telling passage! Here, “brought into existence” does not refer to the creation of the child by the union of his or her parents but to the contractual arrangement by which the couple acquired the child, likely of an economic nature.

These kinds of marketplace transactions involving children can also be messy. A recent Florida trial court decision ordered the names of three people, a mother and her same-sex spouse and the sperm donor father, to be listed on a child's birth certificate (dad is, per agreement, relieved of his duty to support). As noted above, the norm of two parents per child has already been breached. With the number of adults typically involved in these arrangements (mother, father, partners, surrogates, donors), the likelihood of many future three-plus parentage settlements is high.

Related to this is the fundamental shift in the orientation of parents. When children become the “object of rights” rather than “a subject of rights”63 parenting becomes just another manifestation of choice; children become not a gift but an intention. In the Florida three-parent case, one of the attorneys reportedly admonished the parties: “Next time, [the

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62 Frazier v. Goudschaal, No. 103,487 (Kansas 2013), slip op. at 12.
attorney] warned the three, work out the details before anyone gets pregnant. 'God forbid you don’t put together a written agreement,’ she told them, ‘I’ll knock on your door and slap you all.'” Of course, this is precisely the problem—the treatment of children as the objects of adult arrangements and the existence of parenthood as dependent on adult desires to be parents. What was wrong in this case was not that the parties did not properly reduce their intentions to writing but that they believed children and our duties to them could be properly contracted for or contracted away.

Consider a phrase from the New Jersey decision noted above where the court cavalierly dismisses the father, a sperm donor, of the child who was the subject of the case: “No agreement exists with the donor giving him any birthrights to the child.” Notice the inversion of the term “birthright.” It properly means a child’s inheritance by virtue of being born but the court uses it to mean an adult’s ownership interest in a child that can be bargained away. This is why another recent Connecticut case regarding surrogacy can speak of an era of “intent based parenthood.” As Anthony Esolen explains: “There are many things, among them the most beloved and noble in life, that are compromised or vitiated or changed in nature just insofar as they are chosen or planned.” The deconstruction of parenthood, with other legal and cultural trends, threatens a repudiation

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of “moral excellence, the quality of fulfilling obligations one has not precisely chosen, in the sense of 'bargained for.'”  

And what of children's needs and desires? What is their place? We have plenty of empirical evidence that the failure of parents to unitedly care for their children creates significant and lasting deficits for those children and no credible evidence that “parental” intentions can overcome this. As Rabbi Gilles Bernheim explains, “no person has the right to be relieved or suffering at another’s expense, particularly when this is to the disadvantage of the weak and innocent.”

When fifteen million children in the United States, one in three, lives in a household “without a father and nearly five million live without a mother” is our greatest need really the satisfaction of adult desires to fulfill their vision of the family? As we read about a British survey reporting that “the tenth most popular Christmas wish on the list was a ‘Dad’” and that “[a] request for a ‘mum’ reached number 23 on the list,” do we really need our law to endorse the proposition that mothers and fathers are interchangeable and that neither is essential?

VII. Conclusion: Entropic Parenthood

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What does parenthood look like after the full transformation effected by its deconstruction and the acceleration and codification of its deconstruction through a redefinition of marriage?

The baseline “classical unities” of parenthood were: A parent was part of a unit, joined by marriage, of two people—a mother and father—whose union had created the child.

Now, legal parenthood is: Any adult, singly or in tandem with one or more others, whether married or unmarried, cohabiting or living alone, in a relationship with one or more persons of the same or opposite sex who has created or intentionally caused (in proximity with another human being or not), biologically or by contract, a child to exist and has acquired through those means or through other actions access to and/or control over the child.

It has been heartening to follow the French debates over marriage redefinition in which opponents have focused so intently on children’s entitlement to be reared, wherever possible, by a mother and father. Before it is too late, this consideration must become paramount in all discussions of the meaning and legal definition of marriage. As a brave man admonished during the briefing process related to Proposition 8: “Win this for children everywhere.”