PARENTAGE LAW (R)EVOLUTION: THE KEY QUESTIONS

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I. INTRODUCTION

American parentage laws have evolved in the past half-century as a result of major changes in both reproductive technologies and human conduct. Yet the legal evolution, if not revolution, has not kept pace so that today many parentage laws are outdated. With the (r)evolution

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incomplete, state courts may, via common law rulings, update. Yet courts are frequently hesitant because general assembly leadership is preferred.[1]

State legislators are challenged when contemplating new parentage laws, as the goals of protecting constitutional rights; promoting certainty; recognizing the import of blood ties; furthering children's best interests; respecting family members' wishes; preserving healthy parent-child, parental-like, and familial relationships; and enhancing public welfare often cannot be simultaneously pursued.[2] Congress is unlikely to demand national uniformity, if not perfection, as parentage, like many family law matters, is primarily reserved to the states.[3]

This Article will first reflect briefly on recent changes in technology and conduct. Then it will examine the boundaries of American state parentage laws established by the federal and state constitutions. Next, it will explore the diverse array of existing and proposed state parentage

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1. *See, e.g.*, Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 (Cal. Ct. App. 1991) ("By deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition. To the contrary, we intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue."); McAllister v. McAllister, 779 N.W.2d 652, 662 (N.D. 2010) (Crothers, J., concurring) ("I write separately to express concern that our body of law being propagated ad judicum has resulted, and will continue to result, in the judiciary being pulled deep into the legislature's policymaking domain."). When a general assembly has exercised partial leadership (as by explicitly addressing a topic, like surrogacy, in only some settings), some courts will not act without further legislative guidance, as with *In re Marriage of Mancine*, 965 N.E.2d 592, 596 (Ill. App. Ct 2012) (finding that former stepparent visitation outside the express statutory guidelines is not available), while other courts will develop common law "until the legislature instructs otherwise," as with *In re Baby*, No. M2012–01040–COA–R3–JV, 2013 WL 245039, at *3 (Tenn. Ct. App. Jan. 22, 2013), *appeal granted* May 17, 2013 (upholding surrogacy pact between unwed opposite-sex couple who later married even though surrogacy statute covered "biological father and the biological father's wife").

2. As Professor Katherine K. Baker has observed,

> It seems clear that the time has come for the law to choose the relative weight it gives to the qualities of parenthood that accompany a bionormative regime. A premium on biology is not mandated by history, evolutionary theory, or morality, but a premium on biology does bring with it attributes that may have real value, and different attributes have different value for different constituencies. Contemporary living patterns demand some sort of change, but any change will come with costs to some and maybe even costs to all. The policy priorities in this area are not easy or obvious, but they should be defined in recognition of the consequences that are likely to follow.

Katherine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 715 (2008).

3. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 404 (1975) (finding that regulation of domestic relations rests within the "virtually exclusive province of the States.").

laws within these boundaries. Finally, it will highlight key remaining questions for American state legislators and judges seeking to improve parentage guidelines in a changing world.[4]

II. FIFTY YEARS OF CHANGE

A. *Reproductive Technology*

In the past half century, there have been two major technology advances prompting parentage law (r)evolution. One involves the availability of more reliable, less costly, and less intrusive DNA testing to determine male parentage. Soon, private and/or prebirth testing may even be generally available.[5]

The second involves the availability of more reliable, less costly, and generally accessible processes for assisted human reproduction (AHR).[6] Births employing AHR, via the use of surrogates, can now be contemplated even when the intended parents contribute no womb or genetic material.

Other technological advances have also fueled parentage law (r)evolution. For example, new processes now permit a prebirth determination of the sex of any later born child as well as make available safer intended pregnancy terminations.

B. *Human Conduct*

As to changes in human conduct, in the past half century there has been a significant rise in births arising from sex with unwed mothers;[7] in

4. Of course, changes in technologies and human conduct present difficult family law issues extending beyond parentage. *See, e.g.*, Cynthia Grant Bowman, *The New Family: Challenges to American Family Law*, 22 C.F.L.Q. 387 (2010) (exploring, e.g., support, cohabitation, stepparents, divorce).

5. *See, e.g.*, Andrew Pollack, *Before Birth, Dad's ID*, N.Y. TIMES, June 20, 2012, at B1; Xin Guo et al., *A Noninvasive Test to Determine Paternity in Pregnancy*, 366 N. ENG. J. MED 1743, 1743-45 (2012).

6. On the history of AHR (and the recent growth in free private sperm donation), see Lauren Gill, Note, *Who's Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1719-25 (2013). Seemingly, AHR is increasingly available on a "do-it-yourself basis," making governmental regulation ever more difficult. *See, e.g.*, A.A.B. v. B.O.C., 112 So. 3d 761, 764 (Fla. Dist. Ct. App. 2013).

7. *See, e.g.*, Baker, *supra* note 2, at 652 n.9; Elizabeth Wildsmith, Nicole R. Steward-Streng & Jennifer Manlove, *Childbearing Outside of Marriage: Estimates and Trends in the United States*, CHILD TRENDS, Nov. 2011, *available at* http://www.childtrends.org/wp-content/uploads/2013/02/Child_Trends-2011_11_01_RB_NonmaritalCB.pdf ("In 2009, 41 percent of all births (about 1.7 million) occurred outside

the numbers of unwed mothers who raise their children alone;[8] in the numbers of newborns who have no fathers listed on their birth certificates;[9] and in the numbers of stepparents, grandparents, and others who rear, or help to rear, other people's children upon invitation or other conduct by biological (actual or presumed) or adoptive parents.[10] As Justice Stevens observed that there is an "almost infinite variety of family relationships that pervade our ever-changing society."[11]

Seemingly, there have also been increased numbers of children born to married women when sex outside of marriage prompted the births as well as of children born to unmarried women when sex with married men prompted births. There may even be higher levels of secrecy, and deceit, regarding possible and actual male biological ties to children born of sex.

Further, there are ever-increasing numbers of children born of AHR. The women who bear these children need not be intended parents. Intended mothers may seek to raise their children born of AHR alone or with their wed or unwed (and often same sex) partners.

With these changes, there are mounting numbers of nontraditional nuclear families containing children—that is, families where there is no married heterosexual couple. In particular, there has been an upsurge in families, including same sex couples, who plan for, have, and rear children. Additionally, nuclear families, defined herein as including two adults in an intimate, and usually sexual, relationship who are raising

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of marriage, compared with 28 percent of all births in 1990 and just 11 percent of all births in 1970.").

8. Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 55-56 (2010). Outside the United States, the same pattern often emerges. In Great Britain, see, e.g, *One Million Children Grow Up with No Contact with Their Fathers, Reports Centre for Social Justice,* FAM. L. WEEK, www.familylawweek.co.uk/site.aspx?i=ed114337 (last visited Mar. 11, 2014) (reviewing the June 2013 report entitled "Fractured Families," produced by The Centre for Social Justice).

9. *See, e.g.*, Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAMILY L.Q. 1, 2 n.4 (2013) (reporting that in 2012 almost 18 million children were living with mother only, that is, not with the biological father).

10. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 64 (2000) ("[W]hile many children have two married parents and grandparents who visit regularly, many other children are raised in single family households. . . . Understandably in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday task of childrearing."). Thus, in 2012, almost 1.5 million grandchildren were "living with their grandparents without the presence of parents." *Id.* Atkinson, *supra* note 9, at 2.

11. *Troxel*, 530 U.S. at 90 (Stevens, J., dissenting). *See also id.* at 63 (noting that it is "difficult to speak of an average American family") (O'Connor, J., plurality opinion).

children together, more often come and go so that parents frequently move with their minor children from one nuclear family into another.

III. BOUNDARIES OF PARENTAGE LAWS

A. Federal Constitutional Boundaries

American state parentage laws today are significantly guided by federal constitutional boundaries in U.S. Supreme Court decisions. While limiting the (r)evolution of parentage laws, these rulings recognize significant discretion for state lawmakers, resulting in diverse state laws. While Supreme Court decisions have only explicitly addressed parentage for children born of sex, the diversity in state court approaches to parentage extends to children born of AHR (with or without surrogacy).

In *Lehr v. Robertson* in 1983,[12] the Supreme Court ruled that a biological father of a child born of sex acquires, via Due Process, "substantial" federal constitutional childrearing interests only after forming a "significant custodial, personal or financial relationship" with his child.[13] Prior to formation, a biological father only has a less-protected parental opportunity interest, meaning, for example, that he has no right to advance notice of an adoption petition by another person when this opportunity interest had not been timely seized.[14] By contrast, a birth mother necessarily has a significant relationship with any child she bears, so there will always arise substantial childrearing interests[15] at birth in the absence of a prebirth waiver, be it intentional[16] or involuntary.[17]

In *Michael H. v. Gerald D.* in 1989,[18] the U.S. Supreme Court narrowed an unwed biological father's federal constitutional parental opportunity interest when a child is born into a "unitary family"—that is, a "family unit accorded traditional respect in our society," typified "by the marital family" as well as by a "household of unmarried parents and

12. 463 U.S. 248 (1983).

13. *Id.* at 261-62.

14. *Id.* at 250.

15. Nguyen v. INS, 533 U.S. 53, 62-63 (2001).

16. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (holding that a husband and wife whose gametes resulted in an egg carried by a surrogate, per a contract, were the parents of the child born to the surrogate, with the surrogate having no visitation and no recognition as a parent).

17. Drug use during pregnancy at times leads to birth mothers having no parental interests at birth. *See, e.g.*, Jeffrey A. Parness, *Arming the Pregnancy Police: More Outlandish Concoctions?*, 53 LA. L. REV. 427 (1992).

18. Michael H. v. Gerald D., 491 U.S. 110 (1989).

their children."[19] The Court held that there is no requirement for an opportunity interest in an unwed biological father of a child born to a married woman, who raises the child with her husband who is neither impotent nor sterile. In *Michael H.*, state law recognized a marital paternity presumption in such a husband whose wife bore a child.[20] However, had either the mother or her husband in *Michael H.* objected to the husband's presumed legal paternity within two years of the child's birth, as each could do,[21] an opportunity interest to childcare might then have arisen for the unwed biological father. The relevant state law thus explicitly allowed the birth mother or her husband, but not the biological father, to challenge the marital presumption.[22] This approach, however, need not be followed.

In *Troxel v. Granville* in 2000, the U.S. Supreme Court determined that the "substantial" constitutional childrearing interests of established parents could not be easily overcome when third parties, like grandparents, seek court-ordered visitation over parental objections.[23] The broad delegation of child visitation authority within a state statute was stricken,[24] though it remains unclear whether projected harm to a

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19. *Id.* at 123 n.3.

20. *Id.* at 117 (quoting CAL. EVID. CODE § 621(a) (West 1989)).

21. *Id.* at 118. *But see* D.F.H. v. J.D.G., 125 So. 3d 146 (Ala. Civ. App. 2013) (holding that under ALA. CODE § 26-17-607(a) (1975), biological father cannot intervene in a presumed father's divorce in order to challenge husband's paternity, as only the husband can seek to disprove his paternity).

22. Some states do not employ such a scheme because their laws recognize challenge opportunities for certain biological fathers. *Compare* K.S. v. R.S., 669 N.E.2d 399 (Ind. 1996) (paternity act), *and In re* J.W.T., 872 S.W.2d 189 (Tex. 1994) (state constitutional due course of law guarantee), *with* Barnes v. Jeudevine, 718 N.W.2d 311, 314 (Mich. 2006) (holding that biological father, who with mother acknowledged paternity with state register a day after child's birth, cannot challenge paternity of husband whose wife conceived or bore child during marriage unless "a court has determined that the child was not the issue of the marriage"), *and* People v. Zajackowski, 825 N.W.2d 554, 557 (Mich. 2012) (holding that civil presumption of legitimacy favoring blood ties in husband does not extend to criminal context where blood ties are also important).

23. Troxel v. Granville, 530 U.S. 57, 89-91 (2000).

24. In *Troxel*, six Justices found the Washington statute authorizing court orders involving grandparent visitation over parental objection unconstitutional, with four deeming the act unconstitutional as applied and two (in separate concurring opinions) finding facial invalidity. *Id.* at 75 (O'Connor, J., plurality opinion); *id.* at 79 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring).

The *Troxel* opinions left unclear what circumstances can overcome the "substantial" federal interests of established parents in denying visitation opportunities to nonparents. The plurality did recognize that a presumption involving fit parents acting in their children's best interests was embodied in the U.S. Constitution so that "special weight" always must be accorded to parental desires, though it did not opine—as did the Washington state high court—that a showing of serious harm or potential serious harm to

child is needed before third party visitation will be ordered over parental objection. Based on *Troxel*, these childrearing interests have also been found to limit expansive statutory recognitions of parental status for one person when two fit parents already exist.[25] Whether or not there may only be two recognized parents at any one time, after *Troxel* there also remain questions about how parents may cede some or all of their federal parental interests to nonparents, whether the nonparents are then also deemed parents[26] or simply nonparents with childcare interests, and regarding so-called third party visitation opportunities.

Beyond *Lehr*, *Michael H.*, and *Troxel*, there is the 1983 Supreme Court ruling in *Roe v. Wade*.[27] There, and in later cases, both prospective wed and unwed biological fathers were denied any say in certain decisions regarding pregnancy termination by prospective birth mothers who were accorded broad, though fettered,[28] decision-making authority

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children was necessary to sustain nonparent visitation over parental objection. *Id.* at 67-68, 73, 77.

Current grandparent and other third party visitation statutes are reviewed in Atkinson, *supra* note 9, at 18.

25. Bancroft v. Jameson, 19 A.3d 730, 750 (Del. Fam. Ct. 2010) (holding that mother's former boyfriend, who lived with mother and her child for five years, could not employ the recent de facto parent amendment to Delaware's Uniform Parentage Act, as its use would violate the federal and state due process rights of the parents, implicitly suggesting that there can be only two persons at any one time with federal constitutional parental interests in a single child). Given the lack of a majority in *Troxel* and Justice Kennedy's posit that a third party might be deemed a "de facto" parent, this finding is questionable. *Troxel*, 530 U.S. at 100-01 (Kennedy, J. dissenting).

26. *See, e.g.*, S.Y. v. S.B., 134 Cal. Rptr. 3d 1 (Cal. Ct. App. 2011) (holding that former same sex partner of adoptive parent also becomes a parent per statute after receiving the child into one's home and holding out child as one's own, with statute deemed constitutional under *Troxel*—even though each parent acquired parental interests at different times). *See also* David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*, 2001 BYU L. Rev. 1075, 1077 (stating that many read *Troxel* as placing "several of the ALI's directives" on ceding parental interests to be "in doubt"); *id.* at 1084-85. *But see* Robin Fretwell Wilson, *Limiting the Perogatives of Legal Parents: Judicial Skepticism of the American Law Institute's Treatment of De Facto Parents*, 25 J. AM. ACAD. MATRIMONIAL LAW. 477, 482 (2013) (noting concerns about the recognitions of ceded interests when a parent allows a nonparent to do childcare "chores" and to live in the household for a certain time).

27. 410 U.S. 113 (1983).

28. *Id.* at 154 ("[S]ome state regulation in areas protected by [right of privacy] is appropriate."). Seemingly, all "rights of parenthood" are limited. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166-67 (1994) ("Acting to guard the general interest in youth's well-being, the state parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways . . . . [t]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."). Parenthood rights of one parent in a child may also

under federal constitutional privacy interests. Decision-making on future parenthood can, of course, involve pregnancy establishment and pregnancy continuation as well as pregnancy termination. Precedents are scarce. The U.S. Supreme Court has not addressed, for example, to what extent decisions to pursue pregnancy resulting from AHR (with or without a surrogate) are protected from undue governmental interference by federal constitutional privacy interests, and whether any protections extend beyond birth mothers.[29]

AHR statutes now broadly recognize that birth mothers can, in fact, consent in advance of pregnancy establishment to share, or to waive, superior parental rights upon birth. Parental decision-making on future parenthood can also occur postbirth and can involve either sharing, as with adoption by stepparents, or waiving, as with adoption by strangers or utilization of safe haven laws. Some Supreme Court cases, like *Lehr*, have established certain guidelines on sharing and waiving parental rights via formal postbirth adoptions—that is, adoptions involving governmental procedures employed in trial courts. None have addressed the guidelines for safe haven laws. As well, no major U.S. Supreme Court case has addressed shared or waived parental rights in other settings, like informal adoption. There are states, as will be shown, that recognize, for example, "de facto" parents (as well as "equitable" or other classes of parents) that necessarily result in shared or waived superior parental rights.

Whatever the standards on superior parental rights,[30] there are federal constitutional uncertainties regarding how such standards must be demonstrated. In *Santosky v. Kramer*,[31] the Supreme Court ruled that clear and convincing evidence was needed to support the government's pursuit of an involuntary parental rights termination based on a finding that a child is "permanently neglected."[32] It is unclear whether the same evidentiary standard applies when the government pursues parentage establishment over objection by an alleged parent, as when

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be limited by the state not only because of its own interests, but also because of the interests of another parent (or family member) in the child. *Id.*

29. *But see* T.M.H. v. D.M.T., 79 So. 3d 787 (Fla. Dist. Ct. App. 2012) (finding *Lehr* interests can arise in woman whose donated egg led to childbirth for her former lesbian partner).

30. *See, e.g.*, Meyer, *supra* note 26, at 1080 n.28 ("Although in some cases the Court has conceived of family status in categorical terms . . . in which the line of constitutional protection for family kinship was drawn at individuals related by 'blood, adoption, or marriage'—in other cases, the Court has meandered toward a somewhat more functional understanding of family.").

31. 455 U.S. 745, 796 (1982).

32. *Id.* at 747.

reimbursement for child support is sought against a biological father whose child received welfare, or when the government recognizes shared or waived parenthood for one who objects, as with an alleged de facto parent pursued for similar reimbursement. It is also unclear whether similar standards of proof apply in private settings, as when there may be waived or shared parentage via prebirth AHR pacts, or when there may be valid postbirth de facto parent pacts between established parents and their intimate partners or others.

Loss or diminution of the *Troxel* superior parental rights, or of the *Lehr* paternity opportunity interests, need not be comparably guided, whether under federal constitutional principles, or under non-constitutional federal principles, or under constitutional or non-constitutional state principles within federal constitutional boundaries. Fundamental federal Due Process interests are more significantly protected from governmental encroachments than non-fundamental federal due process interests, and certain fundamental interests, as with First Amendment speech, are more protected than others.

Non-constitutional principles illustrate how seemingly comparable federal constitutional rights may be differently lost or diminished, as with the federal court rules on waiving civil and criminal jury trial rights.[33] As well, seemingly comparable rights, like the right to counsel, may be differently waived depending on whether they originate, for example, in constitutional or statutory provisions.[34] Different parental rights, in both constitutional and non-constitutional settings, may also be lost or diminished under different procedural standards.

Beyond federal constitutional Due Process limits on state parentage laws, there may be federal Equal Protection limits. One lower court found to be discriminatory a statute only allowing a husband of an intended AHR mother to consent to parentage; thus, one former same sex female partner's consent to parentage via AHR by the other partner was recognized.[35]

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33. *Compare* FED. R. CIV. P. 38 (stating the time for demanding civil jury trial), *with* FED. R. CRIM. P. 11(b) (stating that a judge must find that a criminal defendant "understands . . . the right to a jury trial" and must determine that a "plea is voluntary").

34. *See, e.g.*, *In re* Welfare of G.L.H., 614 N.W.2d 718, 719 (Minn. 2000) (holding that state statutory right to counsel in parental rights termination proceedings is differently waived than federal constitutional right to counsel in felony cases).

35. Shineovich & Kemp, 214 P.3d 29 (Or. Ct. App. 2009). Other courts have stricken such distinctions on public policy and statutory language grounds. *See, e.g.*, Chatterjee v. King, 280 P.3d 283, 284 (N.M. 2012) (reviewing cases).

B. Other Boundaries

Of course, the lack of federal constitutional interests, as with parentage opportunities for certain unwed biological fathers of children born of sex to married women under *Michael H.*, does not mean there are no other protected interests. Non-constitutional federal laws (like the Indian Child Welfare Act[36]) as well as state constitutional, statutory, and common law dictates can extend greater parentage interests than are constitutionally required under U.S. Supreme Court precedents.

Exemplary of additional state constitutional parentage interests are the Iowa Due Process rights of certain putative fathers to challenge the presumptive paternities of husbands. In *Callender v. Skiles,*[37] a majority of the Iowa Supreme Court looked to the *Michael H.* dissent as well as to its own precedents. Similarly, while the *Troxel* court did not resolve whether projected harm to a child was needed to sustain grandparent visitation orders over parental objections, the Georgia Supreme Court found such a need "implicit in Georgia cases, statutory and constitutional law."[38]

IV. OVERVIEW OF EVOLVING STATE PARENTAGE LAWS

Changes in technology and human conduct have prompted many recent changes in written state parentage laws. In the absence of new written laws, common law rulings have sometimes filled in the gaps. Some state high courts have established broad new guidelines, while others defer to legislators by either abstaining or treading very cautiously. Following are overviews of recent state statutory and common law developments in response to changes in reproductive technologies and human conduct.

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36. 25 U.S.C.A. § 1912 (West 2013), *construed in* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2554 (2013) (discussing import of Indian blood in state adoption proceedings).

37. 591 N.W.2d 182 (Iowa 1999). The putative father in this case later prevailed in disestablishing the husband as father, establishing his own paternity, and securing visitation. Callender v. Skiles, 623 N.W.2d 852 (Iowa 2001).

38. Brooks v. Parkerson, 454 S.E.2d 769, 773 (Ga. 1995) (following the reasoning under Tennessee law in *Hawk v. Hawk*, 855 S.W.2d 573, 581 (Tenn. 1993)).

A. Statutory Developments

1. Children Born of Sex

State legislators have responded with many new laws on children born of sex. While DNA testing is not yet generally required before a man can be deemed a father under law at birth, DNA testing has increasingly been allowed to override the traditional statutory paternity presumptions favoring husbands of women who conceive, carry, and/or bear children during marriage. DNA testing also is increasingly available to unwed fathers who seek to establish their own paternity as well as to unwed mothers, state welfare agencies, and children who seek to establish paternity in order, *inter alia*, to secure child support.

But DNA testing cannot be used in all legal paternity matters involving children born of sex. Recall the *Michael H.* ruling. As well, when men and unwed mothers sign voluntary acknowledgements of paternity (VAPs) for children born of sex, both signers are often foreclosed under law from later rescinding the acknowledgements via DNA tests showing that there are no male biological ties.[39] Per federal statute, after sixty days, fraud, duress, or material mistake of fact must be shown before negative DNA test results can even be presented.[40] Unfortunately, the guidelines for fraud and the like vary significantly between the states,[41] creating uncertainties.

Parentage via birth by sex is now primarily governed in Illinois by the Illinois Parentage Act of 1984.[42] That Act recognizes that a birth mother has a parent and child relationship by "having given birth."[43] Another parent can establish such a relationship "by proof of adoption."[44] A man who does not adopt is presumed under the Act "to be the natural father of a child" if "the child is born or conceived" during his marriage to the natural mother; if he and the child's natural mother married after the child's birth and he is listed as the father on the child's birth

39. Similar foreclosures operate when VAPS are signed by married mothers, their husbands, and other men, wherein the marital paternity presumptions of the husbands are overridden and the legal parenthood of the (most often allegedly adulterous) other men is established. *See generally* 42 U.S.C.A. § 666 (West 2007).

40. *Id.* § 666(a)(5)(D)(iii).

41. Parness & Townsend, *supra* note 8, at 60-62. There is also uncertainty regarding who has standing to challenge acknowledgments based on fraud and the like. *See, e.g., In re* N.C., 993 N.E.2d 134, 136 (Ill. App. Ct. 2013) (resulting in a 2-1 split on whether state can challenge when signors oppose).

42. 750 ILL. COMP. STAT. ANN. 45/1 *et seq.* (West 2013).

43. *Id.* at 45/4(1).

44. *Id.* at 45/4(3).

certificate; or if he and the mother signed an acknowledgement of the man's paternity or parentage.[45] A male acknowledgement of parentage seemingly may be undertaken in Illinois only when the male and female acknowledgers believe the acknowledged man is, or is likely to be, the biological father.[46] Genetic tests to confirm male ties before or after acknowledgments are not required, however.[47] Acknowledgement processes thus appear to be statutorily unavailable to same sex couples and to opposite sex couples when the man is not genetically tied to the child, though these and similar limits are sometimes skirted with success.[48]

The Proposed Illinois Parentage Act of 2013 (PIPA)[49] would alter Illinois law on the presumed paternity of a husband whose past, present, or future wife bears a child. PIPA establishes a man as a presumed parent of a child born to his wife only when the child is "born" during the man's marriage, civil union, or "substantially similar legal relationship" with the mother[50] as well as of a child born to his ex-wife within 300 days after a similar state-recognized relationship has been terminated.[51] Unlike the 1984 Act, PIPA would not establish a man as a presumed parent if a

45. *Id.* at 45/5(a)(1)-(4). The marriage-related presumptions are overcome differently (i.e., rebuttals) than the acknowledgment presumptions (i.e., rescissions). *Id.* at 45/5(b).

46. *See, e.g.*, 410 ILL. COMP. STAT. ANN. 535/12(5). Further, the instruction for completing the Illinois Voluntary Acknowledgment of Paternity form says the "purpose" is to establish legally "the biological father and child relationship (when the biological father is not married to the child's mother)." Department of Public Aid Form 3416BC4 (R-8-2000).

47. On the variations in state processes on affirmations regarding genetic ties between male signers and children, see Parness & Townsend, *supra* note 8, at 72-73.

48. *See, e.g.*, DeBoer v. DeBoer, 822 N.W.2d 730, 735 (S.D. 2012); Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 480-82 (2012) (reviewing cases and urging that acknowledgments should be available to same sex couples when one acknowledger has no genetic ties). On the need for expanding acknowledgment processes, see Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 916-38 (2006) (urging that multiple fathers be allowed); Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families,* 19 HASTINGS WOMEN'S L.J. 171, 201-08 (2008) (urging that Dowd's principles be applied to same sex couples who co-parent).

49. H.B. 1243, 98th Gen. Assemb., Reg. Sess. (Ill. 2013) (PIPA). Both PIPA and the Proposed Illinois Marriage and Dissolution of Marriage Act of 2013 (PIMDMA), H.B. 1452, 98th Gen. Assemb., Reg. Sess. (Ill. 2013), were initially proposed by the Illinois Family Law Study Committee, established by the Illinois General Assembly. For a thorough review of a similar study committee's work in Oregon, see Leslie Joan Harris, *A New Paternity Law for the Twenty-First Century: Of Biology, Social Function, Children's Interests, and Betrayal*, 44 WILLAMETTE L. REV. 297 (2007).

50. H.B. 1234 § 204(a)(1).

51. *Id.* § 204(a)(2).

child is conceived, but not born, during a man's state-recognized relationship with the birth mother, although here a paternity case could establish the former husband's parentage. PIPA also newly extends a comparable parentage presumption to a woman whose partner in a "legal relationship" bears a child.[52]

As well, PIPA newly recognizes presumed parentage of a child for either a man or a woman who "for the first 2 years after the birth of the child . . . resided in a household with the child, openly held out the child" as his or her own "during that time," when the "child had only one parent under law . . . and that parent consented" to the "holding out."[53] PIPA does remove voluntary parentage (or paternity) acknowledgements from presumptive parenthood, declaring they establish parentage, which may be rescinded under certain circumstances.[54]

The Proposed Illinois Marriage and Dissolution of Marriage Act of 2013 (PIMDMA)[55] would also, and more radically, alter Illinois parentage laws on children born of sex. It replaces court-ordered child custody and visitation with judicial allocations of "parental responsibilities," which include "significant decision-making responsibilities with respect to the child" and judicial allocations of "parenting time," which do not envision significant decision-making.[56] Only legal parents, meaning biological or adoptive parents, ordinarily would be eligible for allocations of "parental responsibilities."[57] Allocations of "parenting time" could be made to "equitable parents," defined to include those who provided childcare, like the child's present or former stepparent;[58] a man or woman who "lived with the child for at least two years" while having "a reasonable, good-faith belief" that "he or she was the child's biological parent" based on "marriage to the child's legal parent or on the actions or representations of the legal parent";[59] and, a person who "lived with the child since the child's birth or for at least 2 years, and held himself out as the child's parent . . . under

52. *Id.* § 204(b).

53. *Id.* § 204(a)(5) (man); § 204(b)(5) (woman).

54. *Id.* § 204(a).

55. H.B. 1452 § 47.

56. *Id.* § 600. *See also* COLO. REV. STAT. ANN. § 14-10-124(1.5) (West 2013) (stating that a court determines "the allocation of parental responsibilities, including parenting time and decision-making responsibilities").

57. H.B. 1452 §§ 600; 602.5(b).

58. *Id.* § 600.

59. *Id.*

an agreement with the child's legal parent (or, if there are 2 legal parents, both parents) to rear the child together."[60]

For children born of sex outside of Illinois, there are state laws comparable to both the existing and proposed Illinois provisions.[61] Marital parentage presumptions and establishments often operate today for husbands whose wives give birth to children born of sex (and, at times, one would imagine, to children born of AHR where there is no specific AHR law,[62] or where the use of AHR is known,[63] unknown, or of no concern to the husbands.)[64] As in Illinois, relevant marriages often

60. *Id. Compare* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.09 (2002) [hereinafter ALI Principles], *with id.* § 2.03(1)(b), (c) (employing the phrase "custodial responsibility" in lieu of "custody" and "visitation," distinguishing childcare possibilities for non-biological equitable parents (comparable to PIMDMA "legal" parents) and non-biological de facto parents (comparable to PIMDMA "equitable" parents)).

61. At times, choices between differing state parentage laws must be made to resolve cases involving human reproductive acts in different states, as when sex occurs in one state and birth in another state. Sometimes specific statutes guide, as in AHR cases with CONN. GEN. STAT. ANN. § 45a-776(a) (West 2013) (stating that a child conceived via certain forms of AHR performed in Connecticut and born elsewhere "shall have his status determined by the law of the other jurisdiction unless the mother . . . is domiciled in Connecticut at the time of the birth"); *id.* § 45a-776(b) (stating that a child conceived via certain forms of AHR in another jurisdiction, who is born in Connecticut to a husband and wife who were not Connecticut domiciliaries at the time of conception, but were at the time of birth, has the same status as a child conceived via AHR and born in Connecticut).

Parentage presumptions are reviewed in *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 345 n.1 (Iowa 2013) (noting that characteristics often include "traditional gender terms," like husband and wife, and speak to presumed parents' shared genetic connections, though some "apply or could apply in a gender-neutral manner or to same-sex spouses").

62. Specific AHR laws include FLA. STAT. ANN. § 742.11 (West 2013) (setting forth irrebuttable presumption of parentage in husband and wife when both consent "in writing" to AHR and wife bears child); KAN. STAT. ANN. § 23-2303 (West 2013) (mentioning AHR consents by husband, wife, and "the person who is to perform the technique," which may be filed in the state district court); ALA. CODE § 26-17-704(b) (West 2013) (stating that failure by husband to consent to AHR undertaken by wife does not preclude husband as father "if the wife and husband openly held out the child as their own"); IDAHO CODE ANN. § 39-5405(3) (West 2013) (stating that mother's husband, when child born of AHR, has same relationship, rights, and obligations regarding child as he would have if the child was naturally conceived by mother, but only "if the husband consented to the performance of artificial insemination").

63. *See, e.g.*, Engelking v. Engelking, 982 N.E.2d 326, 328 (Ind. Ct. App. 2013) (holding that husband consented to wife's AHR with another man's semen so husband, per statute, IND. CODE ANN. § 31-9-13(a)(2) (West 2013), is the father of child born during marriage).

64. Less frequently, there are rebuttable presumptions of maternity in women who are not birth mothers. *See, e.g., In re* D.S., 143 Cal. Rptr. 3d 918, 924 (Cal. Ct. App. 2012)

may predate conception, occur during pregnancy, or be celebrated after birth. There are some noteworthy variations. As noted, in Illinois today the presumption arises when a child "is born or conceived" during a valid marriage, while PIPA would prompt a presumption if a child is "born" during a marriage.[65] PIPA would also extend a presumption to women and men in state-recognized relationships "substantially similar" to marriage.[66] Elsewhere some state statutes speak to children "born during the marriage"[67] while others recognize children born or conceived during marriage.[68]

Presumptions of parentage arise in statutes outside of Illinois today without marriage. Some are founded on presumed natural ties and some are founded on parental-like acts of nonparents, with parental consents, including residing with children who are held out as their own. In Nevada, a "man is presumed to be a natural father of a child if [h]e and the child's mother were cohabiting for at least 6 months before the period

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(holding that presumption does not cover stepmother who helped raise children born of sex, as here natural mother had not lost parental rights); *In re* T.J.S., 54 A.3d 263, 264 (N.J. 2012) (equally divided court finding no maternity presumption in AHR with surrogate setting); Della Corte v. Ramirez, 961 N.E.2d 601, 602 (Mass. App. Ct. 2012) (finding former same sex female spouse was presumed second parent to child born of AHR to other female spouse).

65. 750 ILL. COMP. STAT. ANN. § 45/5(a)(1)-(4) (West 2013); H.B. 1243 § 204(a)(1).

66. H.B. 1243 § 204(a)(1).

67. *See, e.g.*, NEV. STAT. ANN. § 126.051(1)(a) (West 2013); MASS. GEN. LAWS ANN. ch. 64 § 6(a)(1) (West 2013); LA. STAT. CIVIL CODE ANN. Art. 185 (2005); KAN. STAT. ANN. § 38-1114(a)(1) (West 2013); IND. CODE ANN. § 31-14-7-1(B); DEL. CODE ANN. tit. 6, § 8-204(a)(1) (West 2013).

68. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-814(A)(1) (West 2013) (recognizing man and mother "married at any time in the ten months immediately preceding the birth); *Engelking*, 982 N.E.2d at 327 (addressing child born to wife via do-it-yourself AHR with sperm from wife's friend's husband and with wife's husband's consent). *Compare* MD. CODE ANN., FAM. LAW § 5-1027(c)(1) (West 2013) ("man to whom" child's "mother was married at the time of conception"), *with* IND. CODE ANN. § 31-9-2-13(a)(2) (West 2013) (child of marriage includes child "born or adopted" during the marriage).

Beside differences in the timing of marriages relevant to parentage, there can be differences in the circumstances constituting marriage. *Compare, e.g.*, FLA. STAT. ANN. § 741.211 (West 2013) (no common law marriage after 1968), GA. STAT. ANN. § 19-3-1.1 (2013) (no common law marriage after 1997), IND. STAT. ANN. § 31-11-8-5 (2013) (no common law marriage after 1958), *and* OHIO REV. CODE ANN. § 3105.12 (West 2013) (new common law marriages prohibited after October 10, 1991), *with* IOWA CODE ANN. § 252A.3(6-9) (West 2013) (common law marriages lead to legitimacy for children born and to spousal status), N.H. STAT. ANN. § 457:39 (West 2013) ("Persons cohabiting and acknowledging each other as husband and wife . . . for the period of 3 years . . . shall thereafter be deemed to have been legally married."), UTAH CODE STAT. ANN. § 30-1-4.5 (West 2013) (elements of common law marriage), *and* COLO. REV. STAT. ANN. § 14-2-109.5 (West 2013) (requisites for common law marriages contracted on or after Sept. 1, 2006).

of conception and continued to cohabit through the period of conception."[69] Neither preconception nor postconception but prebirth acts are needed in Montana where a presumption of natural fatherhood arises for a "person" who, "while the child is under the age of majority . . . receives the child into the person's home and openly represents the child to be the person's natural child."[70] In Alabama, there is a comparable presumption except that the "man" is not presumed to have natural ties and must have established "a significant parental relationship with the child by providing emotional and financial support for the child."[71] In Texas, "[a] man is presumed to be the father" (though not the natural father) of a child "if . . . during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own."[72] By contrast, in Washington "a person is presumed to be the parent of a child if, for the first two years of the child's life, the person resided in the same household with the child and openly held out the child as his or her own."[73] At times, presumptions of natural ties and parentage are prompted by postbirth parent-like acts of a woman who is not the birth mother.[74]

Outside of Illinois there are also (as in Illinois) non-marital parentage presumptions founded on voluntary paternity (or sometimes parentage) acknowledgments.[75] Some states do not employ a presumptive parent approach to acknowledgers, opting instead for parentage establishment upon acknowledgments,[76] though all acknowledgments are always susceptible to at least some avenues of rescission.[77]

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69. NEV. REV. STAT. ANN. § 126.051(1)(b) (West 2013).

70. MONT. CODE ANN. § 40-6-105(d)(1) (West 2013). *See also* COLO. REV. STAT. ANN. § 19-4-105(1)(d) (West 2013); N.J. STAT. ANN. § 9:17-43(a)(4) (West 2013); CAL. FAM. CODE § 7611(d) (West 2013) (making no reference to under majority age, but "child" is received into home).

71. ALA. CODE § 26-17-204(a)(5) (West 2013).

72. TEX. CODE ANN. § 160.204(a)(5) (West 2013). *See also* DEL. CODE ANN. tit. 13, § 204(a)(5) (West 2013) (making a presumption of fatherhood if the man "resided in the same household"); N.M. STAT. ANN. § 40-11A-204(a)(5) (West 2013); N.D. CENT. CODE ANN. §14-20-10(1)(e) (West 2013); OKLA. STAT. ANN. tit. 10, § 7700-204; WYO. STAT. ANN. § 14-2-504(a)(v) (West 2013).

73. WASH. REV. CODE ANN. § 26.26.116(2) (West 2013).

74. *See, e.g.*, *In re* Domestic P'ship of C.P. & D.F., No. E052672, 2013 WL 2099156 (Cal. Ct. App. May 16, 2013) (reviewing California cases).

75. *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-105(e) (West 2013) (stating that a man is presumed to be the natural father if he acknowledges his paternity); D.C. CODE § 16-909(a)(4) (2013) (stating that a presumption exists that a man is a father if he acknowledges paternity in writing).

76. A move from presumption to establishment is proposed in PIPA. H.B. 1243, § 204(a). *See also* ARK. CODE ANN. § 9-10-120(a) (West 2013) (stating that a man is the

2. Children Born of AHR

Technology and human conduct changes have also spurred many new parentage laws on births via AHR. New statutory schemes can recognize the parental desires of both unwed and wed opposite sex couples; of unwed and wed same sex couples; and of individual would-be parents, who can be either female (as when artificial insemination is employed) or male (as when a surrogate is employed). [78]

Parentage in Illinois when birth is by AHR without a surrogate is now significantly governed by the Illinois Parentage Act.[79] That Act, effective in 1984, guides births to wives when there is required both licensed physician supervision and written consents of husbands that are acknowledged by their wives in settings where the husbands are not the semen donors.[80] When the husbands are the semen donors, the husbands are like husbands of women who bear children born of sex as long as the husband consented.[81] When AHR processes are employed solely by wives, with no consents by husbands (as with turkey basters), the marital parentage presumptions seemingly can operate as the presumptions arise for all children, not just for children born of sex.

Parentage via birth by AHR with a surrogate is now governed in Illinois by the Gestational Surrogacy Act, effective in 2005.[82] That Act guides reproductive contracts between a gestational surrogate and an intended parent or two intended parents. Such contracts must involve at least one intended parent who contributes "one of the gametes resulting in a pre-embryo that the gestational surrogate will attempt to carry to

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father "for all intents and purposes if he and the mother execute an acknowledgment of paternity").

77. Under federal statute, states participating in certain federal welfare programs must allow acknowledgers to rescind within sixty days of signing (in part because positive DNA tests are not required for males acknowledging parentage, but also because the sixty day period allows for post-signing testing and perhaps rescission thereafter); after sixty days, states may only allow rescission upon demonstration of fraud, duress, or material mistake of fact. 42 U.S.C.A. § 666(a)(5)(D) (West 2013). *See, e.g.*, *In re* of Oscar X.F., 967 N.Y.S.2d 117 (N.Y. App. 2d 2013) (finding that even with such a demonstration, no rescission (due to estoppel) when challenge to paternity is not in the child's best interest).

78. This paper does not explore emerging AHR techniques involving, e.g., somatic cell nuclear transfer and stem cell technologies. *See, e.g.*, Yehezkel Margalit, Orrie Adam Levy & John D. Loike, *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J. L. & GENDER (forthcoming 2014), *available at* http://papers.SSRN.com/2013/papers.cfm?abstract_id=2290702.

79. 750 ILL. COMP. STAT. ANN. § 40/1 (West 2013).

80. *Id.* § 40/3(a).

81. *Id.* § 40/2.

82. 750 ILL. COMP. STAT. ANN. § 47/1 (West 2013).

term"[83] as well as a "medical need for the gestational surrogacy" by at least one intended parent.[84] There is no statutory recognition in Illinois, as there is not elsewhere, of a presex or postsex surrogacy contract with a woman whose pregnancy resulted from sex.[85]

PIPA would alter the current Illinois Parentage Act but not the current Gestational Surrogacy Act. Under PIPA, opposite sex and same sex couples, wed or unwed, could employ assisted reproduction in order for a nonbirth mother to secure parentage.[86] Under PIPA, licensed physicians need not be employed, and written consents, while required, include postbirth ratifications of earlier oral agreements.[87]

For children born of AHR outside of Illinois, there are state laws[88] comparable to both the existing and proposed Illinois provisions. On births via AHR with a surrogate, not all states recognize the validity of surrogacy contracts. In Michigan, for example, a "surrogate contract is void and unenforceable as contrary to public policy."[89] By contrast, Arkansas statutes, not unlike PIMDMA, declare that surrogate mothers can be used by unwed opposite sex couples, unwed sperm donors, and women who employ "an anonymous donor's sperm."[90] In New Mexico, the enforceability of a "gestational agreement between a woman and the

83. *Id.* § 47/20(b)(1).

84. *Id.* § 47/20(b)(2).

85. *But see In re* S.N.V., 284 P.3d 147, 148 (Colo. App. 2011) (addressing alleged unwritten surrogacy pact between married opposite sex couple and birth mother when child born of sex).

86. H.B. 1243, 98th Gen. Assemb., Reg. Sess. § 703 (Ill. 2013) ("[P]erson who provides gametes for, or consents to, assisted reproduction . . . with the intent to be the parent . . . is a parent.").

87. *Id.* § 704.

88. At times, choices between differing state parentage laws must be made to resolve cases involving conception and birth acts occurring in two or more jurisdictions. Sometimes specific statutes guide on children born of AHR. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-776(a)-(b) (West 2013).

89. MICH. COMP. LAWS ANN. § 722.855 (West 2013). On what prompts such hostility (and its lack of empirical support), see Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 AM. U. J. GENDER SOC. POL'Y & L. 555 (2013). On the benefits of permitting commercial surrogacy (albeit regulated), see Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Surrogacy*, 88 IND. L.J. 1223 (2013) (stating that American states should encourage domestic surrogacy systems).

90. ARK. CODE ANN. § 9-10-201(b)-(c) (West 2013).

intended parents" is left to the courts.[91] And in Utah, statutes guide judicial discretion in validating gestational agreements prebirth.[92]

For births via AHR without a surrogate in Massachusetts, unlike in Illinois today,[93] there is parentage in the husband with no requirement for a licensed physician or for written consent when semen is provided by a third party.[94] In Alaska and Florida, written consent of the husband is needed even when his sperm is employed.[95] In Kansas, there is required consent by the wife, husband, and doctor.[96] In Ohio, there is a separate statutory scheme dealing with "non-spousal artificial insemination for the purpose of impregnating a woman so that she can bear a child she intends to raise as her child" through using "the semen of a man who is not her husband."[97] This scheme includes unwed women.[98] In the District of Columbia, parentage is available for a "person who intends to be a parent of a child born" to a woman by artificial insemination.[99] And in Arkansas, a child born to a married woman via AHR is deemed "the legitimate natural child of . . . the woman's husband if the husband consents in writing," whereas the child born to a married woman via AHR where there is no consent by the husband is still "presumed to be

91. N.M. STAT. ANN. § 40-11A-801 (West 2013) (neither "authoriz[ing] or prohibit[ing]" such an agreement). *But see* N.M. STAT. ANN. § 45-2-121 (West 2013) (addressing parenthood of child born to gestational carrier in absence of a court order).

92. UTAH CODE STAT. ANN. §§ 78B-15-802, 803. State statutes and their policies are well reviewed in Laufer-Ukeles, *supra* note 89 (averring that statutes must balance concerns of intimacy and benefits of commerciality).

93. The Missouri law parallels the Illinois law. MO. ANN. STAT. § 210.824 (West 2013).

94. MASS. GEN. LAWS ANN. ch. 46, § 4B (West 2013).

95. ALASKA STAT. ANN. § 25.20.045 (West 2013); FLA. STAT. ANN. § 742.11(1) (West 2013).

96. KAN. STAT. ANN. §§ 23-2301, -2303 (West 2013).

97. OHIO CODE REV. ANN. § 3111.89 (West 2013) (physician supervision and written consent). An early trial court ruling found that a donor in a non-spousal AHR setting without a surrogate could not always be denied legal parenthood under the "due process safeguards" of *Lehr*. C.O. v. W.S., 639 N.E.2d 523, 525 (C.P. Cuyahoga Cnty., Ohio 1994).

98. OHIO REV. ANN. CODE § 3111.93(A)(1)(d) (West 2013) (requiring that a recipient of artificial insemination must consent, with her husband's consent required if she is married). *See also* TEX. CODE ANN. § 160.7031 (West 2013) (stating that unmarried man and unmarried woman can parent a child conceived via AHR).

99. D.C. CODE § 16-909(e)(1)(A) (West 2013) (stating that consent by birth mother and person must be "in writing"; without a writing, the person intending parentage is a parent when the person and birth mother "resided together in the same household with the child and openly held the child out as their own").

the child of . . . the woman's husband except in the case of a surrogate mother."[100]

For births via AHR without a surrogate that fall outside the explicit statutory parameters, statutory principles may still apply. For example, in a "do-it-yourself" AHR pregnancy involving a lesbian birth mother and her partner, statutes were applied to a semen donor who alleged himself to be the father under law and who was the brother of the partner who separated from the birth mother, who herself desired continuing childcare opportunities.[101]

B. Common Law Developments

In the absence of, or together with, state statutory responses to the new technologies and new forms of human conduct, parentage law reforms can occur via common law precedents. Some courts have responded, utilizing concepts like de facto parentage;[102] parentage by estoppel;[103] and in loco parentis.[104] Other courts significantly defer to legislators, even while recognizing the new technologies and the growing numbers of unconventional families.[105] As one dissent observed, "Only legislation defining parentage in the context of assisted reproduction is likely to restore predictability and prevent further lapses into the disorder of ad hoc adjudication."[106]

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100. ARK. CODE ANN. § 9-10-201(a)-(b) (West 2013). A child born via AHR to an unmarried woman is only "the child of the woman giving birth, except in the case of a surrogate mother." *Id.* § 9-10-201(c)(1).

101. A.A.B. v. B.O.C., 112 So. 3d 761, 763 (Fla. Dist. Ct. App. 2013) (relying, in part, on *In Re* H.C.S., 219 S.W.3d 33 (Tex. 2006), a "factually similar" case, and contrasting other cases in which noncompliance with express statutory terms led to different results).

102. *In re* Parentage of L.B., 89 P.3d 271, 282 (Wash. Ct.. 2004) (holding that former female domestic partner of birth mother has a common law de facto or psychological parent claim; requisite elements often include parental consent to nonparents developing parent-like relationships; same residence; lack of financial consideration by nonparents; and a "bonded, dependent relationship parental in nature").

103. *See, e.g.*, Richard M. v. Alejandra H., 969 N.Y.S.D. 806, 811 (N.Y. Fam. Ct. 2013) (noting three common situations for "equitable estoppel," which can be used affirmatively or defensively).

104. *See, e.g.*, Daniel v. Spivey, 386 S.W.3d 424, 428 (Ark. 2012) (finding that some divorcing stepfathers qualify, but others do not).

105. *See, e.g.*, *In re* T.J.S., 16 A.3d 386, 398 (N.J. Super. Ct. App. Div. 2011) (finding that the legislature, not the court, should decide whether parentage vests at birth in a wife whose husband's sperm led to the birth of another child with a surrogate per AHR); Smith v. Gordon, 968 A.2d 1, 14-15 (Del. 2009) (finding that de facto parentage must be undertaken by General Assembly).

106. K.M. v. E.G., 117 P.3d 673, 690 (Cal. 2005) (Werdegar, J., dissenting) (disagreeing with the majority finding that both lesbian partners were parents of twins born to one partner via AHR with ova of other partner).

Judicial responses within a single state are often not uniform, so there can be common law initiatives in some, but not all, parentage settings. For example, common law contractual parentage has been recognized in Illinois for births arising from assisted reproduction, but not for births arising from sex.[107]

Evolving common law developments can be invited by legislators, as with flexible statutory standards accompanied by (either express or implied) recognitions of broad judicial discretion. Yet legislators can discourage judicial initiatives, as with detailed and determinate standards said to be exclusive.

Common law precedents have determined parentage issues for nonbiological and nonadoptive parents in settings involving both sex[108] and AHR with[109] or without a surrogate.[110] Rulings can supplement or extend, as well as interpret, existing statutes within each context. Rulings sometimes operate where there are no written laws.

V. KEY QUESTIONS FACING AMERICAN STATE LAWMAKERS

With changes in technology and conduct, American state lawmakers must today decide how far, if at all, to extend parentage arising prebirth, at birth, soon after birth, or long after birth to those who are neither (actual or alleged) biological parents nor adoptive parents. Statutes and precedents already recognize some such interests. In considering further extensions, state lawmakers necessarily face several important public policy questions that will often involve state public policy choices, as U.S. Supreme Court precedents are, to date, deferential to state authority.

A. Redefine Biological and Adoptive Ties?

Initially, state lawmakers must decide whether to stray far from recognizing only the traditionally narrow realms of biological and

107. Jeffrey Parness, *Federal Constitutional Childcare Interests and Superior Rights in Illinois*, 33 N. ILL. U. L. REV. 305, 339-41 (2013) (reviewing *In re* T.P.S. 978 N.E.2d 1070 (Ill. App. Ct. 2012)).

108. *See, e.g.*, Randy A.J. v. Norma I.J., 677 N.W.2d 630, 641-42 (Wis. 2004) (finding the equitable parent doctrine not applicable, but determining that the equitable estoppel doctrine operates in childcare disputes when children would be harmed otherwise).

109. *See, e.g.*, *In re* F.T.R., 833 N.W.2d 634, 658 (Wis. 2013) (upholding much of surrogacy contract but invalidating a provision requiring the surrogate mother to terminate her parental rights).

110. *See, e.g.*, Frazier v. Goudschaal, 295 P.3d 542, 544 (Kan. 2013) (upholding co-parenting agreement between lesbian couple); *In re* K.M.H., 169 P.3d 1025, 1051 (Kan. 2007) (reviewing cases outside statute and refusing to extend paternity to sperm donor acting outside statutory guidelines).

adoptive parents. Variances could include altered definitions of biological and adoptive ties leading to expanded parentage opportunities, as with certain presumption laws where there need be no actual biological ties.

Male parentage of and for children born of sex that is founded on presumed sperm ties need not involve actual sex between birth mothers and presumed fathers. A husband is presumed to be the biological father whether or not a sexual encounter with his wife prompted the pregnancy and birth. As well, if the wife/mother in a case like *Michael H.* conceived via AHR without her husband's semen, the same presumption of biological ties, and thus of parentage, would still likely arise for the husband in the absence of a special AHR statute. Thus, as actual biological ties are not always required for opposite sex marital parentage presumptions, biological ties could conceivably be presumed for lesbian partners married to childbearing mothers where donated eggs are always presumed at least initially. With AHR, biological ties both with the birth mother and her female partner are at least possible. Yet, even when biological ties are impossible, as with children born of sex into a lesbian couple, state lawmakers could still employ an approach involving parentage presumptions—as in PIPA, where children born of sex to women in same sex relationships have the birth mothers' partners as presumed parents.[111] Some American states also now presume parentage in those who hold out children as their own even though no "natural" ties are presumed.[112] Yet confusion might arise as presumptive parentage has traditionally embodied presumed parents who possibly, and often probably, are biologically tied to the children. So, this approach should be disfavored. In Illinois, PIPA would remove the presumed "natural" ties of a father and recognize "parentage" for either a man or woman,[113] a preferred approach.

Adoptive ties could also be redefined to accommodate changes in human conduct. Informal or de facto adoptions (i.e., without adoption petitions approved in governmental proceedings) could arise for those in parental-like relationships with certain children for certain periods of time even though there are no presumed natural ties. Such adoptions might be limited to children being reared in nuclear families that include at least one parent with biological or formal adoption ties. New forms of informal adoptions could also be recognized outside nuclear families,

111. H.B. 1243, 98th Gen. Assemb., Reg. Sess. § 204(b) (Ill. 2013).

112. *Compare* MONT. CODE ANN. § 40-6-105(1)(d) (West 2013) (presumed natural ties), *with* TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2013) (no presumed natural ties).

113. *Compare* 750 ILL. COMP. STAT. ANN. § 45/5 (West 2013) (man a presumed "natural father"), *with* H.B. 1243 § 204(a) (man), (b) (woman).

though they might be limited to certain folks, like grandparents or stepparents. Here, confusion could be diminished if differing categories (or tiers or gradations) of adoption were recognized.

There are legitimate concerns with expanding parentage via altered definitions of biological and adoptive ties, however. Most importantly, there would be confusion over terms and concerns about pretext.

B. Three or More Parents?

Assuming parentage law reforms extending beyond biological or adoptive ties, however defined, one key question involves the circumstances under which three or more people might be deemed parents (of some form) imbued with standing to seek at least some form of court-ordered childcare, as with "parenting time." The two pending Illinois proposals, for now, offer conflicting answers. Presumed parentage before PIPA meant a rebuttable presumption about male parentage, wherein only one man seemingly could be a father at any particular time.[114] Thus, a husband's presumed parentage arising from marriage could be rebutted with proof of no genetic ties, with similar proof also available at times to rescind a paternity acknowledgment involving alleged genetic ties prompting a comparable presumed parentage in an unwed father.[115] Few cases in Illinois, and across the United States, have recognized a second father for a child who already has a father and mother.[116] PIPA now calls for a judicial choice of one or another presumed parent who will rear a child born of sex with the birth mother, with the choice guided by logic and public policy, especially the child's best interests.[117] Under PIPA, as in California[118] and elsewhere,[119]

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114. 750 ILL. COMP. STAT. ANN. § 45/5(a)-(b).

115. *Id.* § 45(a)(3)-(4), (b).

116. *But see, e.g.*, Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11 (2008) (reviewing commentaries and cases on "multi-parentage").

117. H.B. 1243 § 204(c). Thus, under PIPA, when there are two competing presumed parents, one can be male and one can be female—as has been recognized elsewhere. *See, e.g.*, *In re* M.C., 123 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011) (typically the male has biological ties—and perhaps a parental-like relationship—and the female has a parental-like relationship).

118. CAL. FAM. CODE § 7612(b) (West 2013) (resolving competing presumptions of natural fatherhood "on the facts . . . founded on the weightier considerations of policy and logic"), *construed in In re* Mia C., No. C069411, 2013 WL 2601865 (Cal. Ct. App. June 12, 2013) (holding that separated husband prevails over mother's live-in girlfriend). There is no choice to be made when one of the presumptions has been recognized in a court judgment. J.B. v. Superior Court, No. C071961, 2013 WL 6092880 (Cal. Ct. App. Nov. 20, 2013).

there can initially be a birth mother and two presumed parents—though only one presumed parent usually can continue.[120]

But PIMDMA allows three or more parents, if perhaps only two legal parents of children born of sex. It has, for example, no provision on a mandated judicial choice between two competing equitable parents.[121] In other states and under PIPA when there is a mother and two presumed fathers, statutes guide courts on choosing which man's presumed status will be ended. In California and under PIPA, choices between two competing parentage presumptions, as between a husband and man who held himself out as a father, are done by assessing "the weightier considerations of policy and logic."[122] By contrast, in Louisiana, the high court[123] has recognized, via its common lawmaking authority, that three different parents of a child born of sex—two men (a husband and the natural father) and a woman (the birth mother)—may child-rear per court order. A Delaware statute on de facto parent status allows this as well.[124]

If at all, under what circumstances should three or more people simultaneously have legally recognized childcare interests as parents? If

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The failed General Assembly attempt in 2012 (due to gubernatorial veto) to recognize the possibility of three parents for one child is reviewed in Elizabeth A. Pfenson, *Too Many Cooks in the Kitchen?: The Potential Concerns of Finding More Parents and Fewer Legal Strangers in California's Recently-Proposed Multiple Parents Bill*, 88 NOTRE DAME L. REV. 2023 (2013) (arguing against more than two parents).

119. *See, e.g.*, People *ex rel.* C.L.S., 313 P.3d 662 (Colo. Ct. App. 2011) (resolving two men's competing parentage presumptions under COLO. REV. STAT. ANN. § 19-4-105(2)(a) (West 2013) according to "weightier considerations of policy and logic").

120. *But see In re* Parentage of J.W., 990 N.E.2d 698 (Ill. 2013) (deciding whether to award biological father visitation under best interests tests when former husband, a presumed father, failed to challenge biological dad's standing to seek a childcare order, even though both mother and former husband also have childcare orders; seemingly, agreement or waiver can lead to three parents).

121. H.B. 1452, 98th Gen. Assemb., Reg. Sess. § 600 (Ill. 2013) (defining equitable parent to include a person who, though not a biological or adoptive parent, is the child's current stepparent or the child's former stepparent).

122. CAL. FAM. CODE § 7612(b); H.B. 1243 § 204(c).

123. *See, e.g.*, Smith v. Cole, 553 So. 2d 847 (La. 1989); T.D. v. M.M.M., 730 So. 2d 873 (La. 1999).

124. DEL. CODE ANN. tit. 13, § 8-201(c)(1) (2013) (holding that de facto parent "has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent"). Similar is D.C. CODE §16-831.01(1) (2013) ("[D]e facto parent [has] held himself or herself out as the child's parent with the agreement of the child's parent, or if there are 2 parents, both parents."). In September 2012, Governor Jerry Brown vetoed a multiple parents measure in California (SB 1476), being sympathetic to the measure but saying more time was needed to study all the implications. Jim Sanders, *Jerry Brown Vetoes Bill Allowing More than Two Parents*, SACRAMENTO BEE (Sept. 30, 2012, 1:22 PM), http://blogs.sacbee.com/capitolalertlatest/2012/09/jerry-brown-vetoes-bill-allowing-more-than-two-parents.html.

only two may have such interests, may three or more persons be parents for child support (or other) purposes? Relatedly, when—if ever—should certain people, like grandparents, former stepparents, or former boyfriends/girlfriends, be accorded standing as nonparents to seek childcare (including custodial) orders even though there are one or two parents who object?[125] Here, the lack of parental status and the existence of even two parents under law might not always foreclose parental-like rights (and responsibilities) for nonparents.

C. Nonparents?

Should certain family members, or others, be accorded special standing allowing them to seek at least "parenting time," if not greater or lesser forms of childcare, though they are not recognized as (legal or equitable) parents and though there is a parental objection? If so, should "parenting time" and the like for nonparents be limited to those in intimate relationships with legal parents? If special childcare standing is accorded to certain nonparent, nonintimate family members over parental objection,[126] how should nonparents be distinguished from other (present or former) family members and others who have also cared for the child?

Consider grandparents who often rear, or help to rear, their grandchildren under agreements with their grandchildren's parents with whom they are not involved in intimate relationships.[127] Should grandparents (not included as parents in the PIMDMA[128]) and stepparents (present and former, both included as parents in the PIMDMA[129]) be distinguished? Should grandparents, still part of a

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125. *See, e.g.*, N.Y. DOM. REL. LAW § 72 (McKinney 2012) (stating that "extraordinary circumstances" are presumed upon two years of "continuous" voluntary relinquishment of child, and child's best interests can prompt grandparent custody over parental objection), *applied in* Laudadio v. Laudadio, 962 N.Y.S.2d 485 (N.Y. App. Div. 2013).

126. *See, e.g.*, E.C. v. J.V., 136 Cal. Rptr. 3d 339 (Cal. Ct. App. 2012) (holding that the lack of a sexual relationship between a mother and her girlfriend at the time a child is born and the lack of involvement in mother's impregnation arising from sex are not relevant to whether the girlfriend held the child out as her own, thereby acquiring presumed parent status).

127. On the increases in grandparents serving as primary caregivers for their grandchildren, see Gretchen Livingston & Kim Parker, *Since the Start of the Great Recession, More Children Raised by Grandparents*, PEW RES. CENTER (Sept. 9, 2010), http://www.pewsocialtrends.org/2010/09/09/since-the-start-of-the-great-recession-more-children-raised-by-grandparents/.

128. H.B. 1452, 98th Gen. Assemb., Reg. Sess. § 600 (Ill. 2013).

129. *Id.* (defining "equitable parent" to include a "child's stepparent," who is "a person, other than a biological or adoptive parent, who is or was married to a legal parent," defined as "a biological or adoptive parent").

family that includes parents and their children, be accorded less standing to seek childcare orders than former stepparents, who are no longer within nuclear families of the parents and their children? Nonparents, but not parents, often must show "extraordinary" reasons to obtain childcare orders.[130] PIMDMA now makes this distinction. Should it? And how about recognizing parent-like statuses for, e.g., the long-term intimate, but not married or unionized, partners of parents who helped child-rear within "unitary" families under *Michael H.*—that is, within "households of unmarried parents and their children"?[131]

As to nonparent childcare standing notwithstanding parental objection, the *Troxel* opinions provide some guidance. The *Troxel* plurality, per Justice O'Connor, suggested nonparent visitation opportunities might be permitted even without a showing of a need to avoid potential harm.[132] Justice Stevens suggested that there could be a nonparent childcare statute with "a plainly legitimate sweep,"[133] while Justice Scalia deemed that elected legislators could craft "gradations" of nonparents "who may have some claim against the wishes of parents,"[134] and Justice Kennedy hinted that nonparent childcare legislation could survive as long as the nonparent acted "in a caregiving role over a significant period of time."[135]

Of course, any parental objection might be unavailable due to earlier parental consent to shared childcare. Such consents will later be reviewed herein. Parents may also lose their right to object, as when parental rights are ended, even though their family members (like grandparents) may continue to have standing to pursue a childcare order.[136]

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130. *See, e.g.*, Brown v. Burch, 519 S.E.2d 403, 410, 412 (Va. Ct. App. 1999) (awarding joint custody to stepfather and father over mother's objection, as stepfather showed "clear and convincing evidence of special and unique circumstances" that justified denying mother custody).

131. Michael H. v. Gerald D., 491 U.S. 110, 123 n.3. (1989).

132. Troxel v. Granville, 530 U.S. 57, 73, 77 (2000).

133. *Id.* at 85.

134. *Id.* at 93.

135. *Id.* at 98 (differentiating strangers from de facto parents).

136. *See, e.g.*, Dotson v. Rowe, 957 S.W.2d 269 (Ky. Ct. App. 1997) (finding grandparent standing though parental rights terminated). *But see* Palmer v. Burnett, 384 S.W.3d 204 (Ky. Ct. App. 2012) (finding no grandparent standing regarding visitation with grandchild when grandparent voluntarily gave up her own child/the mother before birth).

D. Household Residence?

Yet another question involves whether parent (or special nonparent) status should necessitate the same household residence and, if so, for the first two years after birth, as in PIPA. Why should an aspiring parent be denied parentage simply because there were two households, even if only for a little while, as when the aspiring parent was deployed by the military or lived apart for job-related reasons? The Delaware statute[137] on de facto parentage has no two-year residency requirement. Delaware has, in fact, no residency requirement whatsoever, as it demands, *inter alia*, exercise of "parental responsibility" and service in a "parental role" that led to a "bonded and dependent relationship . . . that is parental in nature."[138] In New Jersey, as well, a man is "presumed to be the biological father of a child if" he "openly holds out the child as his natural child" and either "receives the child into his home"[139] or "provides support for the child."[140]

E. Child Support?

A further question is whether the same child support orders should be available against all nonbiological and nonadoptive parents as they are against all biological and adoptive parents. Should support be available from a nonbiological and nonadoptive parent (like a former stepparent) who, though eligible, chooses not to pursue an allocation of child visitation or "parenting time" after an intimate relationship with the child's biological or adoptive parent ends? Recall that a presumed parent under PIPA includes a man or woman who for the first two years after the birth of the child resided in a household with the child and "openly held out the child [as his or her] . . . own during that time," when the "child had only one parent under law at that time, and that parent

137. DEL. CODE ANN. tit. 13, § 8-201(c) (West 2013). *See also* D.C. CODE §16-831.01(1) (2013) (requiring only "same household at the time of the child's birth or adoption," with no time period for holding oneself out as parent; if not starting at birth or adoption, "same household for at least 10 of the 12 months immediately preceding the filing of the complaint or motion for custody").

138. DEL. CODE ANN. tit. § 8-201(c)(2), (3). The statute was prompted by a child custody dispute between a birth mother and her former intimate female partner. *See* Smith v. Guest, 16 A.3d 920 (Del. 2011) (reviewing legislative history and applying the newly-enacted statute to recognize former lesbian partner as de facto parent deserving joint custody with adoptive mother).

139. N.J. STAT. ANN. § 9:17-43(a)(4) (West 2013).

140. *Id.* § 9:17-43(a)(5).

consented to the . . . holding out."[141] Under PIPA, both a temporary and permanent child support order can be entered against any presumed parent, thus including one who moved out of the household and ended an intimate relationship with the biological or adoptive parent twenty-five months after birth.[142] Similar support orders seemingly are available under PIMDMA against an equitable parent, which includes a former stepparent as well as one "who lived with the child since the child's birth or for at least 2 years" and held himself (or herself?) out as a parent under an agreement with one or both of the child's legal parents "to rear the child together."[143] Because under PIMDMA an equitable parent generally can only secure an allocation of parental responsibilities but not an allocation of parenting time,[144] should child support guidelines differ from the guidelines for legal parents who can (or do) secure an allocation of parental responsibilities?[145]

F. AHR with No Surrogate?

Yet another question is whether assisted reproduction leading to a birth without a surrogate—that is, a birth to a woman always intending to parent—should prompt parentage in her significant other (be it a man or woman) who always intended to parent, even if the two intended parents were never in a state-recognized marriage, civil union, or comparable relationship. As noted, the Illinois Parentage Act now covers only married heterosexual couples.[146] PIPA extends similar parentage opportunities to same-sex female couples in a civil union as well as to couples who are not in a state-recognized relationship like a marriage or civil union.[147] Elsewhere, as in Texas, a marriage or the like is not needed, but the statute explicitly contemplates only pacts between an unmarried man and an unmarried woman.[148]

For all current and future couples involved in assisted reproduction with no surrogate, a related issue is whether a written agreement should be required. At least some agreeing heterosexual couples are not expressly covered by the PIPA provisions on assisted reproduction

141. H.B. 1243, 98th Gen. Assemb., Reg. Sess. § 204(a)(5) (Ill. 2013) (man); *id.* § 204(b)(5) (woman).

142. *Id.* § 801.

143. H.B. 1452, 98th Gen. Assemb., Reg. Sess. § 600 (Ill. 2013).

144. *Id.* § 600; *id.* § 602.5.

145. *Id.* § 600; *id.* § 602.5.

146. 750 ILL. COMP. STAT. ANN. 40/3(a) (West 2013).

147. H.B. 1243 § 703 (stating that person who provides gametes or consents to AHR is a parent).

148. TEX. FAM. CODE ANN. § 160.7031(a) (West 2013).

without a surrogate because there is no proper writing.[149] But should a writing always be needed? If so, what writing forms will withstand a federal constitutional challenge involving inappropriate waivers of procreative liberties?[150] A detailed writing requirement that is strictly enforced would protect against undue encroachments upon a birth parent's superior childrearing rights, but it would eliminate some loving relationships between established intended parents and the children they reared.[151]

If unwritten consent to parent with the birth mother can prompt a second parent, there are concerns not only about respecting the birth mother's superior parental rights but also about whether the second parent is unduly saddled with child support duties. In New Mexico, consent by wives and nondonor husbands to parent their wives' children born of AHR arises without a "signed record" as long as the husband "functioned as a parent . . . no later than two years after the child's birth."[152] Can a nonparent function as a parent in an AHR setting without ever contemplating (or desiring) later parenthood under law?

G. AHR with Surrogate?

As to assisted reproduction with a surrogate, if permitted, must the intended parent(s) always show "medical need" or gametes contribution? Both are now required under the Illinois Gestational Surrogacy Act.[153] Parentage intent alone is insufficient. Seemingly excluded from surrogacy pacts in Illinois today are those with nonmedical needs as well as a single sterile man, a single sterile woman, and opposite sex and same sex couples when all partners are sterile. Such restrictions do not operate in other American states.[154]

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149. H.B. 1243 § 704(a) (writing includes written ratification of prior oral agreement).

150. *See, e.g.*, Breit v. Mason, 718 S.E.2d 482 (Va. Ct. App. 2011) (holding that even though statute only recognized parentage in donor husband with gestational wife, it did not bar unwed father of child born via AHR to unwed mother from petitioning for parentage).

151. Other issues can arise. *See, e.g.*, J.D.C. v. Cabinet for Health & Family Servs., 383 S.W.3d 463 (Ky. Ct. App. 2012) (remanding for hearing on whether birth to unwed mother arose from her self-insemination following her theft of a married man's sperm from his used condom that she obtained from a garbage can in his garage).

152. N.M. STAT. ANN. § 45-2-120(F)(2)(a) (West 2013). *See also* TEX. FAM. CODE ANN. § 160.704(b) (West 2013) (stating that husband's failure to sign does not preclude his establishment as father when he and his wife "openly treated the child as their own").

153. 750 ILL. COMP. STAT. ANN. § 47/20(b)(1), (2) (West 2013).

154. *See, e.g.*, COLO. REV. STAT. ANN. § 15-11-121(1)(a), (d) (West 2013) (stating that "intended parent" of a gestational child can be an individual who has no "genetic relationship with the child" and when there need be only one intended parent). *See also*

When permitted, how much leeway for changed minds should surrogacy statutes recognize? In Utah, courts are authorized to issue prebirth orders validating gestational agreements and declaring parenthood in intended parents.[155] In Colorado, court orders on parentage of a "gestational child" are only authorized when the child is born to a gestational carrier.[156] And, when permitted, what additional writing and other requirements (like demands involving doctors) should attach to initial surrogacy pacts?[157]

H. Timing?

As to children born of sex, should intended parentage, in the absence of traditional adoption or marriage or genetic ties, be able to prompt parental status if the relevant intent occurred after birth? As noted, PIPA defines a presumed parent to include a man or woman, with no genetic or marital or adoptive ties, who for "the first two years after the birth of the child" resided with and held out the child as one's own with the other parent's consent.[158] But PIMDMA defines an equitable parent to include one who "lived with the child since the child's birth or for at least two years" while holding oneself out as a parent with the consent of the one or two legal parents.[159] Even if formal adoption is not necessary for a presumed or equitable parent who child-reared since birth, should formal

N.D. CENT. CODE § 30.1-04-20(1) (2013); N.M. STAT. ANN. § 45-2-121(A) (2013). *But see* WASH. REV. CODE § 26.26.735 (2013) (only explicitly speaking to parentage of egg donor via written agreement with gestational carrier). On occasion surrogacy pacts involving sex, not AHR, are alleged. *See, e.g.*, *In re* S.N.V., 284 P.3d 147, 148 (Colo. App. 2011) (addressing competing mother-child relationship claims by both birth mother and wife of man who allegedly prompted pregnancy via sex pursuant to an unwritten surrogacy agreement).

155. UTAH CODE ANN. §§ 78B-15-802, 803 (West 2013) (placing "discretion in tribunal," where considerations must include required counseling for all parties; prohibiting use of gestational mother's eggs; requiring marriage of intended parents; and requiring that at least one intended parent is a donor). *Cf.* COLO. REV. STAT. § 15-11-121(1)-(2) (court order designating "the parent or parents of a gestational child," defined as "a child born to a gestational carrier under a gestational agreement").

156. COLO. REV. STAT. § 15-11-121(1)(c), -121(2). *See also* N.D. CENT. CODE ANN. § 30.1-04-20(1)(c), -20(2) (West 2013); N.M. STAT. ANN. § 45-2-121(A)(3), -121(B) (West 2013).

157. The same questions arise for courts reviewing surrogacy arrangements in the absence of statutes, at least where public policy does not prohibit enforcement of gestational surrogacy agreements. *See, e.g.*, S.N. v. M.B., 935 N.E.2d 463 (Ohio Ct. App. 2010) (finding that prebirth pact between surrogate and intended mother was valid when sperm and egg donors were anonymous).

158. H.B. 1243, 98th Gen. Assemb., Reg. Sess. § 204(a)(5) (Ill. 2013) (man); *id.* § 204(b)(5) (woman).

159. H.B. 1452, 98th Gen. Assemb., Reg. Sess. § 600 (Ill. 2013).

adoption be required of one seeking parental status if his or her childrearing only began (long) after birth? PIMDMA says no,[160] while PIPA says yes.[161]

I. Context?

As questions about parentage law (r)evolution are addressed, lawmakers in a single state must keep in mind that parental (or parent-like or special family) status need not be comparably defined in all contexts. Even today, sometimes parents have no standing to seek childcare orders (e.g., unfitness or failure to seize the *Lehr* paternity opportunity interest), but they continue to have child support responsibilities.[162] And certain children may be deemed blood-related to their mothers' husbands for child support purposes but not for crimes involving "blood" relations between alleged criminals and their victims.[163] As parentage laws evolve, clarity is especially important when parentage definitions vary by context.

J. Names?

As questions about parentage law (r)evolution are addressed, lawmakers must also avoid the confusion surrounding word choice. Often, similar consequences flow in varying American states from naming certain persons as parents differently, as with the terms de facto parents, parents by estoppel, legal parents, and presumed parents. Similar consequences can also flow when custody/visitation is afforded to a nonparent whose designation can include "de facto custodian."[164]

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160. *Id.*

161. H.B. 1243 § 204(a)(5) (man); *id.* § 204(b)(5) (woman).

162. *See, e.g.*, *Ex parte* M.D.C., 39 So. 3d 1117 (Ala. 2009); Porter v. Hill, 835 N.W.2d 247 (Mich. Ct. App. 2013) (finding that though parental rights ended, child support—including Social Security benefits—continued, but grandparent visitation standing ended).

163. *See, e.g.*, People v. Zajaczkowski, 825 N.W.2d 554 (Mich. 2012) (finding, in a criminal case setting, no "blood" relation between brother and sister who had same biological father for child support purposes, as only in latter setting could biological ties be presumed).

164. KY. REV. STAT. ANN. § 403.270 (West 2013) (specifying "primary caregiver for, and financial supporter of, a child"), *applied in* Brumfield v. Stinson, 368 S.W.3d 116 (Ky. Ct. App. 2012) (holding that grandparents cannot be "de facto" custodians, as they co-parented with natural mother who did not abdicate her role of primary caretaker and financial supporter), Hicks v. Halsey, 402 S.W.3d 79 (Ky. Ct. App. 2013) (holding that maternal aunt is de facto custodian when birth mother was "neither involved nor even present"), *and* J.L.A. v. S.C., Nos. 2012-CA-000758-ME, 2012-CA-000937-ME, 2013

Even in a single state, different names might be used to designate very comparable, though not entirely similar, interests. Consider the Illinois Family Law Study Committee's proposals, with PIMDMA's recognition of both legal and equitable parents and PIPA's recognition of biological, adoptive, acknowledged, and presumed parents. Seemingly, if both proposals are adopted as now proposed, PIPA recognitions of parenthood would also prompt legal parenthood, not equitable parenthood, under PIMDMA. And in Delaware, seemingly many stepparents would have standing to seek childcare orders either as stepparents[165] or as de facto parents[166] if they were living with the custodial parents of the children.

Likewise, as to names, traditionally presumed paternity operated to vest parentage in certain husbands, with a general understanding developed over time that such husbands varied in definition from state to state, even though all presumptions were thought to be grounded in probabilities about male biological ties tied to births arising from sex. Today, some statutory paternity presumptions remain traditional while others require neither biological ties nor address only births arising from sex. For example, some courts have read presumed paternity statutes to encompass as parents those who could never have had relevant sex.[167] Here, the term presumed parent can be confusing.

K. Consents to Shared or Waived Parental Rights?

As to parentage for all children regardless of the circumstances of conception, a central question—likely to be first and foremost in many instances—is how a recognized parent might consent to sharing parenthood with another, or how a recognized or potential parent might waive altogether either of the two forms of parental rights described in *Lehr*—the "substantial" federal constitutional childrearing interests and the parental opportunity interests. Shared parentage should be distinguished from waived parentage, as only the latter constitutes a

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WL 843815 (Ky. Ct. App. Mar. 8, 2013) (holding that both grandparents were primary caregivers and financial supporters).

165. DEL. CODE ANN. tit. 13, § 733 (West 2013) (specifying that "upon the death or disability of the custodial or primary placement parent," residential stepparent may seek "permanent custody or primary physical placement" even when "there is a surviving natural parent").

166. DEL. CODE ANN. tit. 13, § 8-201(c) (West 2013) (finding a de facto parent if, with "the support and consent of the child's parent or parents," the person "exercised parental responsibility for the child" and "acted in a parental role" that prompted "a bonded and dependent relationship with the child that is parental in nature").

167. *See, e.g.*, *In re* Domestic P'ship of C.P. & D.F., No. E052672, 2013 WL 2099156, at *3 (Cal. Ct. App. May 16, 2013) (noting statutory presumption of natural ties in a child born of sex in a female partner of the birth mother).

complete loss of parental childcare rights, even if a resurrection of lost rights is possible and even if child support obligations are not ended. Further, the circumstances constituting sharing or waiving parental rights might be varied depending, *inter alia*, on whether a parental right arose for a child born of sex, born of AHR with no surrogate, or born of AHR with a surrogate. Only in the latter two settings are there often contracts guiding any later shared or waived rights.

Of course, parental rights arising from federal constitutional precedents might be defined, shared, or waived differently than additional parental rights arising from, for example, state laws. Thus, even when the federal constitutional interests of children are unavailable or lost, non-constitutional parental interests may still arise.[168]

For a child born of sex, the "substantial" childrearing interests of an unwed birth mother may be deemed shared via, for example, consent within a de facto (or comparable) parenthood law recognizing similar interests in a nonbiological and nonadoptive parent, like the mother's live-in boyfriend or girlfriend. Here, where only two parents may be recognized for a single child, the unwed biological father's parental opportunity interest often is lost with such consent. Such consent may be subject to inference from conduct that does not actually constitute a knowing, voluntary, and informed choice as to sharing legal parenthood, like when a parent does not object to his/her intimate partner helping out with the kids around their house.[169]

Nonparent childcare interests over later parental objections are generally recognized in South Dakota when a "parent's presumptive right to custody" is earlier lost due to forfeiture or surrender of parental rights to a nonparent.[170] A narrower, though still broad, statute in

168. Thus, while there is no presumptive federal constitutional Due Process right to counsel for indigent persons in termination of parental rights proceedings, such a right to counsel sometimes arises under state statute, as in Minnesota. *In re* Welfare of G.L.H., 614 N.W.2d 718, 720 n.2 (Minn. 2000) (comparing Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31-32 (1981), with MINN. STAT. § 260.155 (2) (1998)).

169. Professor Carbone has suggested that both married and unmarried couples intending to parent should, "shortly after the child's birth," make a commitment in "a ceremony modeled on christening." June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1344 (2005). Professor Harris has suggested that the voluntary acknowledgment process be broadened to include intended parents in same sex relationships with no biological or adoptive ties. Harris *supra* note 48, at 487-88. With Zachary Townsend, I have earlier called for such expansion to include prebirth acknowledgments (which could be used to sustain prebirth child support orders). Parness & Townsend, *supra* note 8, at 96-98.

170. S.D. CODIFIED LAWS § 25-5-29(2) (2013). While broadly written, the provision has been narrowly read. *See* Veldheer v. Peterson, 824 N.W.2d 86, 94-96 (S.D. 2012)

Kentucky recognizes similar interests in a "de facto custodian," defined as one who was "the primary caregiver," "financial supporter," and resident in a home with the child for at least six months when the child was under three.[171] In Montana, parental interests can be awarded to a nonparent when "the natural parent has engaged in conduct that is contrary to the child-parent relationship."[172] Elsewhere there are general statutes, as with guardianships,[173] and special statutes, as with laws on former stepparents.[174]

For a child born of AHR with no surrogate, there are often formal consents to waiving any form of parental rights, like those in *Lehr* involving the sperm donor, especially when another, like the birth mother's husband or female spouse or male or female intimate partner, has consented to assume childrearing responsibilities. Likewise, here the birth mother has consented to sharing parenthood, so there is a reduction in her unilateral rights regarding childcare decisions.[175]

For a child born of AHR with a surrogate, the birth mother typically consents preconception to waiving all parental interests, while a gametes donor often consents to shared parenthood with a non-donor[176] when the surrogacy pact anticipates two intended parents.

Consents to sharing or waiving parental rights in AHR settings may need to be in writing, as with surrogacy pacts. Here the implications of signing are usually recognized by the signatories. Yet, consents to shared parental rights in de facto parenthood settings can arise from non-

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(finding no loss of custody even though grandparents served as primary caretakers for approximately two years).

171. KY. REV. STAT. ANN. § 403.270 (West 2013) (requiring residence for at least one year if the child is over three).

172. MONT. CODE ANN. § 40-4-228(2)(a), *construed in* Kulstad v. Maniaci, 220 P.3d 595 (Mont. 2009) (finding requirement met when adoptive mother "ceded her exclusive authority" to her lesbian partner from the time of adoption to the end of their intimate relationship). *See also In re* Parenting of M.M.G., 287 P.3d 952 (Mont. 2012) (finding that birth mother may have "ceded" authority to a couple she met at a gas station when the child was one when the couple primarily cared for the child for about ten years before the mother announced that she was moving out of state).

173. *See, e.g., In re* Guardianship of S.H., 409 S.W.3d 307 (Ark. 2012) (holding that fit mother who consented to paternal grandparent guardianship could move to terminate guardianship without needing to show best interests).

174. *See, e.g.*, OR. REV. STAT. ANN. § 109.119(3) (West 2013); VA. CODE ANN. § 20-124-1 (West 2013).

175. *See, e.g.*, Mason v. Dwinnell, 660 S.E.2d 58 (N.C. Ct. App. 2008) (holding that birth mother acts in a manner inconsistent with her constitutionally protected status when she invites female domestic partner to coparent and partner so acts, as determined when the couple later separated).

176. Of course, there are consent standards for such non-donors, but they do not involve sharing or waiving existing parental rights.

contractual conduct involving, for example, creations of "unitary" families, where the implications regarding parental rights may not always be recognized. There is little case law on such non-contractual consents by conduct in AHR settings, with statutes sometimes providing few guidelines.[177]

L. Parentage Tiers?

Under PIMDMA and some existing American state laws, there can be parentage tiers where one class of parents (like the PIMDMA "legal parent") has more rights (like the PIMDMA distinction between allocations of parenting responsibilities and parenting time) than another class of parents (like the PIMDMA "equitable parent"). Seemingly, different classes of parents also can have different parental responsibilities (as with child support). Are tiers or gradations of legal parentage wise? To date, different sources of parentage—as via biology and adoption—have often been treated comparably, as in childcare settings.[178] But where there are tiers, might even three or more classes be recognized?[179] And should further parentage tiers be primarily established by statutes rather than precedents?[180]

A lower-level parentage tier could include a class of persons whose parentage interests are conditional. For example, the tier could recognize biological fathers of children born to unwed mothers when the men lost their parental opportunity interests under *Lehr* through no conduct exhibiting a significant disinterest in parenthood, as when a man did not consciously fail to file with a putative father registry even though such a

177. Statutes on consents by contract can be vague. *See, e.g.*, GA. CODE ANN. § 19-7-1 (West 2013) (stating that "parental power" involving child "control" can be "lost by . . . voluntary contract releasing the right to a third person"). *See also* S.D. CODIFIED LAWS § 25-5-29 (2013) (setting forth that presumptive control of a child in a parent is "rebutted by proof . . . [t]hat the parent has forfeited or surrendered his or her parental rights . . . to any person other than the parent").

178. *See, e.g.*, Hastings v. Hastings, 732 S.E.2d 272 (Ga. 2012) (finding that adoptive parent is treated like a biological parent when the two dispute childcare when wife had adopted husband's biological son during marriage).

179. ALI Principles § 2.03 recognizes the possibilities of a legal parent, a parent by estoppel, and a de facto parent. These principles have not been generally adopted by American states. Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573 (2008).

180. *See* Troxel v. Granville, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting) (disapproving "judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.)" who have childcare claims against parental wishes).

file failure eliminated his voice in an adoption proceeding[181] or when a man did not provide (sufficient) prebirth support to the prospective mother whose location he did not know.[182] Here, there might be deemed a tier embodying resurrected parental interests.[183]

As well, preferences on future parentage might be afforded to certain persons, perhaps limited to family members, who had earlier developed parental-like relationships with children who lose their parents through death or perhaps otherwise. To some extent, such preferences are already recognized in current adoption laws involving parentless children who are to be placed, if possible, with relatives or with a certain community.[184]

VI. CONCLUSION

American state parentage laws have evolved significantly in the past half-century in response to changes in both reproductive technologies and human conduct. Yet further evolution, if not a revolution, seems inevitable. In particular, American state laws increasingly recognize parenthood by consent for a nonbiological and nonadoptive parent-like figure in an intimate or familial relationship with a child's biological or adoptive parent. Lawmakers, especially state legislators,[185] will need to consider who may be granted standing as parents to seek court-ordered

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181. *See, e.g.*, Heidbreder v. Carton, 645 N.W.2d 355 (Minn. 2002) (sustaining Minnesota adoption over unwed biological father's objection because he did not file with Minnesota parenting registry within thirty days after birth, though he filed in Minnesota thirty-one days after birth on the very day he had learned the mother had moved from Iowa to Minnesota and had given birth in Minnesota and even though the mother had earlier told him she would not offer the child for adoption).

182. *See, e.g.*, *In re* Adoption of Doe, 543 So. 2d 741 (Fla. 1989) (finding insufficient failure to support prebirth by unwed biological father who did not know his pregnant girlfriend's whereabouts for much of her pregnancy), *questioned in* Jeffrey A. Parness, *Prospective Fathers and Their Unborn Children*, 13 U. ARK. LITTLE ROCK L. REV. 165, 166-71 (1991).

183. Consider as well conditional parentage interests in men whose children are later discovered some time after the children were abandoned by birth mothers under a safe haven law. *See, e.g.*, *In re* Commitment of Baby Girl Hope, 932 N.Y.S.2d 832 (N.Y. Fam. Ct. 2011).

184. *See, e.g.*, Indian Child Welfare Act, 25 U.S.C.A. § 1902 (West 2013) (stating that placement of Indian children for adoption should "reflect the unique values of Indian culture").

185. *See, e.g.*, *In re* Adoption of Baby Z., 724 A.2d 1035, 1060 (Conn. 1999) (deferring, on lesbian's attempt to adopt partner's child born of AHR, to the "legislature, as elected representatives of the people" because the legislature "[has] the power and responsibility to establish the requirements for adoption in this state. The courts simply cannot play that role").

childcare, including former stepparents, former boyfriends and girlfriends, and present and former grandparents. As well, whether standing should be granted to three or more possible parents must be pondered, as must issues on how consent to a new parent might be given outside of formal adoption by both a recognized parent and by an intended parent, including whether a formal declaration should be required, as via a voluntary acknowledgment or guardianship, and whether household residence or a particular length of actual childcare should be demanded.

Given the likely continuing changes in human conduct (as with more same sex marriages) and technologies (as with prebirth paternity testing), American parentage laws will undoubtedly continue to be further (r)evolutionized, presenting even more challenges for American state lawmakers.