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A Feminist Interpretation of the Law of Legitimacy

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I am actually going to continue Professor Ead's discussion on procreation and think about it in a slightly different way. As an inheritance law scholar, the definition of the parent-child relationship has obvious importance to me because it determines who is an heir. As a feminist scholar, the definition is also significant to me because the legal rules regarding the parent-child relationship provide a unique perspective on the dialectical link between property and family.

What I want to do today is to provide for you one possible feminist interpretation of the law regarding legitimacy.[1] With that feminist interpretation, I want to look at how the law of legitimacy has affected American society at different times in our history and how it has changed over time. I also want to look specifically at the Uniform Parentage Act. Finally, I want to address what changes in the laws of legitimacy might we expect in the future. As I do this feminist interpretation, I am not arguing that it is either the truth or the only feminist interpretation. Rather, what I am going to argue is that this interpretation may provide us with another perspective so that we might look at some things in a different way after we do this analysis. I also have to ask you, before we start, to bear with me because I am going to go through some legal history. I am going to link it up to current law and to future reform, which may not seem so obvious as I am going through it.

First, the history. A finding that a child is a legal heir of a married man means that the man is going to be legally responsible for the child's support during the child's minority and that the child will be the man's legal heir. We have talked a lot about child support and other things. I am going to go a step back and look at the question: How do we know this is that man's child? Very early on, the common law established the presumption that a child born to the wife of a married man was his child

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1. For a more detailed discussion of this topic, see Mary Louise Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 COLUM. J. GENDER & L. 495 (1993).

unless evidence could be shown that he had no access to his wife. In conjunction with that rule of marital presumption was Lord Mansfield's rule of evidence, which was stated in dicta, in 1777, in the case of *Goodwright v. Moss*.[2] In that case, Lord Mansfield stated that although others could testify, the declarations by the husband or wife regarding lack of access should not be admitted. This evidentiary rule stated by Lord Mansfield was widely adopted in the United States in the eighteenth and nineteenth centuries. The marital presumption and the evidentiary rule have been understood as serving the welfare of the child at the expense of a husband who was married to an adulteress. As Lord Mansfield wrote in *Goodwright*, "It is a' rule, founded in decency, morality, and policy, that they shall not be permitted to say after marriage, that they have had no connection and therefore that the offspring is spurious; more especially the mother, who is the offending party."

The question I think worth investigating is whether the marital presumption and the evidentiary rule have served the welfare of the child. If preventing a child from becoming illegitimate was the court's central concern, then why would the court have allowed anyone to testify that the husband had not had access to the wife? Admission of any testimony of nonaccess suggests that "welfare of the child" was subordinate to the law's interest in protecting the husband from obligations to support a child, and in protecting the husband and the husband's family from having any of their property passed by succession to a child who is not genetically related to them. What, then, can explain the common law's sometime concern for the child's welfare, sometime preference for a child created by blood, and sometime preference for a child created by marriage, and the common law's abhorrence to the couple's testimony, especially the wife's, regarding the nonaccess of the husband?

Some feminists would suggest that the answer may be found by focusing on the relationship of property, gender, and procreative power. I am going to look to the feminist literature, to someone many of us hold very dear, Adrienne Rich, a feminist poet, and, most especially, to her book, *Of Woman Born*.[3] In that book, she writes, "At the core of patriarchy is the individual family unit which originated with the idea of property and the desire to see one's property transmitted to one's biological descendants. . . . A crucial moment in human consciousness . . . arrives," she says, "when man discovers that it is he himself who impregnates the woman; that the child she carries and gives birth to is his child, who can make him immortal . . . ." The problem for this man,

2. 98 Eng. Rep. 1257 (K.B. 1777).

3. ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (10th anniv. ed. 1986).

however, is how to know with certainty that his wife's child is his child. Adrienne Rich writes further about that: "If he is to know 'his' children, he must have control over their reproduction, which means he must possess their mother exclusively. The question of 'legitimacy' probably goes deeper than even the desire to hand down one's possessions to one's own blood-line; it cuts back to the male need to say: 'I, too, have the power of procreation—these are *my* seeds, *my* own begotten children, *my* proof of elemental power.'" In the instances where the presumption makes a difference, something critically wrong has occurred. A husband has lost exclusive sexual possession of his wife, and thereby has lost procreative power, according to Rich.

Seeing the problem in this way allows us to recognize the possibility that the common law, as developed in the eighteenth, nineteenth, and twentieth centuries, might have been used to ameliorate this painful fact. Wrapped in the rhetoric of the "welfare of the child," the common law could be understood to have moved to preserve the remnants of the husband's procreative power by presuming he had sexual intercourse with his wife and that it was his seed that begot the child. This perspective also provides some insight into how the marital presumption and the Lord Mansfield evidentiary rule might have operated in practice.

Within the context of the Anglo-American culture that gave men nearly exclusive control over their household, the presumption left the husband with the power to decide how to constitute his family. If he personally believed the child was his, or if he decided that he wanted that child to be his, he was free to play the role of the father. If he believed the child was another man's, he could meet his support obligations at minimal financial costs and disinherit the child by writing a will. Consider, for example, the acts of the husband in the 1857 Pennsylvania case of *Dennison v. Page*,[4] which was a case contesting the legitimacy of an heir to the husband's estate. The husband married and three or four months afterward, his wife gave birth to a daughter. The facts recited in the case indicate that the husband instantly disclaimed being the father of the child, and she was almost immediately removed to her grandfather's, by whom she was raised. The husband, apparently, had failed to write a will to ensure that his legal daughter did not inherit his property, but he certainly had had the power to do so.

The evidentiary rule that allows the marital presumption to be rebutted by testimony, regarding nonaccess, of persons other than the husband and the wife can also be understood as serving the harmed husband. If he decided to pursue a public remedy, the husband had the right to present, by others, evidence regarding nonaccess for the purpose

4. 29 Pa. 420 (1857).

of rebutting the presumption and avoiding fatherhood. For example, in the 1832 New York case of *Cross v. Cross*,[5] the husband sued his wife for a divorce on the grounds of adultery. The court held that adultery had been proved sufficiently, and it focused only on the question of the legitimacy of the child born to the wife. It held that the testimony of the husband's mother, who lived with her son during the relevant time, was sufficient to prove nonaccess. The evidentiary rule serves the harmed husband. Giving the wife the right to speak about her husband's nonaccess would have required the common law to acknowledge her power to know her child with certainty and to know who could or could not be the child's father. It would lay bare the truth that could otherwise remain obscure. Women have a unique and elemental power to procreate. To give her the power to testify to nonaccess would mean that her husband would lose his power, provided to him by the marital presumption, to choose fatherhood and to control the harm caused by having lost exclusive possession of his wife.

If we accept that the silencing of the eighteenth, nineteenth, and early twentieth century wife regarding her sexual relations with her husband served her husband, how might some feminists explain the concomitant silencing of the husband regarding his sexual relations with his wife? Why is he not given the power to say he did not have sexual intercourse with his wife during the period of conception? Perhaps one reason the common law denied the husband the power to speak was for the purpose of convincing wives that the law affords them the same treatment it affords their husbands. It would have been difficult for Lord Mansfield to justify the rule in terms of the child's welfare unless the husband's freedom to speak was limited along with the wife's. If the rule is to be based on a concern for the illegitimacy of a child, the testimony of a husband to prove nonaccess would be as offensive as the testimony of a wife. It is well to know, however, that Lord Mansfield suggested that the testimony of the wife was more offensive, especially when he singled her out as the offending party. Surely Lord Mansfield could have convinced himself, and other judges applying his dicta, that children would have been sufficiently protected by refusing to admit the testimony of the wife, the offending party, and that there was no need to refuse to admit the husband's testimony. One feminist argument, however, might be that by extending the evidentiary rule to husbands, Lord Mansfield allowed for the appearance of equal treatment of mothers and fathers under the law. Moreover, to provide for equal treatment in this particular instance was relatively costless because the husband, as family head, had a range of legal and extra-legal remedies to deal with the

5. 3 Paige Ch. 139 (N.Y. Ch. 1832).

possibility that another man's child was in his household.

A further benefit of silencing husbands along with their wives, according to one feminist perspective, was that husbands were able to avoid admitting that they did not have equal access to procreation. Faced with the conundrum that to admit the wife's testimony would be an admission of her procreative power, and that to single her out as the only one not able to testify would also be an admission of her greater uncorroborated knowledge, the rule silencing both wife and husband permitted the greatest possibility of maintaining the male claim to equal or greater contribution to the procreative process. The judicial opinions themselves, and in my view, surprisingly, provide support for the proposition that the marital presumption and the related evidentiary rules represent the law's struggle to wrest procreative power from a woman. Consider the court's language in a 1919 California case, *In re McNamara's Estate*,[6] regarding the presumption. The court writes,

> [T]he process of conception is a hidden one, and the organs perform their appropriate functions without the volition of the female and without her being conscience that the process is going on. Where she has had intercourse with more than one man at about the same time, and a child has resulted, neither she nor anyone else can say with reasonable certainty which is the father.[7]

By minimizing her role in reproduction, by denying any possibility that she could say with any certainty who is the father of her child, the courts denigrated the woman's procreative power, and thereby created the possibility for men to control fatherhood. The silencing, along with the marital presumption itself, in effect, accomplished for husbands what science was denying them.

Of course, a feminist theory of legitimacy law must ask whether the marital presumption and the accompanying evidentiary rules served some women's interest during the eighteenth, nineteenth, and early twentieth centuries. For working class women who were separated but not divorced from their husbands, and for whom the modern day equivalent of a paternity suit against the child's putative father was necessary, the evidentiary rules might prove particularly troubling. Unless others could testify to the husband's nonaccess, the putative father could use the marital presumption to fend off the charge of paternity.

Although she was thus constrained from establishing someone other than her husband as the father, the presumption and the limitation on proof certainly did not assure a woman, regardless of her class, that her

6. 183 P. 552 (Cal. 1919).
7. *Id.* at 557.

child would be treated, in fact, as the legal child of her husband. Within the family unit, her economic and social dependence on her husband might have made it difficult for her to force him to treat her child as his. Consider again the Pennsylvania case of *Dennison v. Page*,[8] in which the husband apparently forced the wife to give up her child. This case illustrates that the presumption provided neither mothers nor their children with economic or physical security. Thus, it is difficult to see how any woman within the patriarchal family system, whether from a wealthy or working class family, was advantaged by the rule. The martial presumption appears to provide her and her children economic protections, but, in operation, those protections are illusory. The husband could either bring in others to testify as to his nonaccess or demand the child be removed from the household. On the one hand, the law assisted him in avoiding paternity, and, on the other, social and economic power assisted him. Regardless of the means, the wife and child had little economic and physical security, notwithstanding the presumption. In the end, the rule served only to reinforce the social norm that she should remain silent. At the same time, the evidentiary rule allowed others to portray her as an adulteress. Thus, while simultaneously being denied her procreative power, the claim of her sexual promiscuity was highlighted.

The rules not only had gender implications; they also had racial implications. Whatever validity that there might be to the claim that the marital presumption and the evidentiary rule reflected concern for the welfare of the child, this claim was never intended to have included children of color. If a child who had African-American features was born to a woman who was believed to be of the white race, and whose husband was also believed to be of the white race, the nineteenth century courts refused to apply the marital presumption. The courts held that the presumption could be rebutted by "evidence which clearly and conclusively shows that the procreation by the husband was impossible, and that, . . . according to the course of nature, the husband could not be the father of the child . . . ."[9] They found repugnant the notion that the presumption inherited from the common law could be used to legitimate an African-American child and make her or him the child of a father believed to be white. As the court in *Watkins v. Carlton*,[10] an 1840 Virginia case, reasoned,

> The essence of the rule is, that if it be impossible that the husband can be the father, the child is a bastard. The cases of the husband being beyond sea, imprisoned, impotent and the

8. 29 Pa. 420 (1857); *see also supra* text accompanying note 4.
9. Bullock v. Knox, 11 So. 339, 340 (Ala. 1891).
10. 37 Va. (10 Leigh) 560 (1840).

> like, are but instances of the application of the rule. . . . How, then, if the impossibility rests upon the laws of nature itself? Shall it be less regarded? Shall the white child of a white couple be bastardized, upon questionable proof that the husband was rendered impotent by disease; and shall we legitimate a negro because he was born in wedlock?[11]

An analysis that shows how the operation of the common law marital presumption and the Lord Mansfield evidentiary rule reinforced race boundaries in the nineteenth century may seem to have little relevance to the current law of legitimacy. Likewise, an analysis of eighteenth, nineteenth, and early twentieth century cases that shows how the operation of the common law marital presumption and the Lord Mansfield rule reinforced white men's control over their wives and contributed to the construction of women as untrustworthy, with minimal procreative power, may also seem to have little relevance to the current law of legitimacy. However, not surprisingly, some feminists would argue such is not the case.

The Uniform Parentage Act (UPA), which has been a model for many state laws, presumes a husband is the father of his wife's child. By privileging the marital relationship, the UPA would seem to continue the common law tradition of leaving the legal husband with the right to decide to make the child his own. Arguably, the growing efforts of enforcement of child support orders against fathers would seem to limit severely the choice that men have historically enjoyed regarding fatherhood. The explanation for the widespread acceptance of the presumption within this new legal environment may be attributable to technological advances and the reliability of bloodtyping tests to determine paternity. The husband now has the ability to determine, with certainty, whether a child born to his wife is his. If the bloodtyping tests show that the child is not his, under the statute, he can avoid fatherhood so long as he disputes paternity within five years of the child's birth. Thus, the availability of bloodtyping tests makes the burden of child support of little consequence to a husband who decides he does not want to be the child's father, and who knows the child is not his. The fact that a wife can contest her husband's paternity under the UPA and testify to his nonaccess could be viewed as an improvement over the common law. By not silencing the wife, the UPA, contrary to the common law, acknowledges her power to know her child with certainty and also know who the child's father is and who he is not. On the other hand, the reliability of blood tests would seem to undermine the importance of allowing the wife to testify regarding her sexuality and her reproductivity.

Perhaps the UPA should not be understood to support the

11. *Id.* at 575.

proposition that a wife's word is believed more today than it was in the past, or to recognize the wife's unique knowledge. The UPA's willingness to allow the wife to testify is just as easily explained as a harmless concession within the new technological climate. There is no risk in letting a wife speak, now that scientific evidence is available to corroborate or impeach her testimony. The importance of allowing the wife to testify is further undermined by the heightened burden of proof of clear and convincing evidence. If, at the time of the paternity proceeding, neither the husband nor the putative father are available for bloodtyping tests, it is not at all clear under the statute whether the wife's testimony alone could be sufficient to meet the clear and convincing evidence standard. In that respect, the UPA is not so different from the common law—better to attribute fatherhood erroneously to the husband than to have to rely on the wife's word.

One further aspect of the UPA undermines the importance of allowing the wife to testify. The wife, as well as the husband and the child, can only bring a suit to declare the nonexistence of paternity within five years of the child's birth. The time limitation has not been the subject of very much discussion. Presumably, one of its purposes is to assure prompt determinations of paternity. The benefit of this is that it avoids problems of proof created by the passing of time. However, with paternity based, for the most part, on blood tests, potential problems of proof do not seem sufficiently significant. In any case, the higher burden of proof to rebut the presumption would seem to provide sufficient protection to the state and the interested parties. A second purpose might be that the time limit provides certainty and finality to the issue of paternity. In this context, certainty and finality presumably means that the legal family is given protection against interference. If the focus of the legal family is the marital unit, however, this rationale fails because it is based on the insupportable assumption that just because the marriage is intact at the time of conception and birth of the child, it will remain intact. Moreover, the time limit fails to take into account the circumstances in which the wife is likely to find herself if she remains married to her husband. It is unlikely to be in the wife's interest, or her child's interest, to contest her husband's paternity. Circumstances change, however, and she may find herself silenced by the statute of limitations, against her or her child's interests, in much the same way she was silenced by Lord Mansfield's evidentiary rule. The finality rationale does have force, however, if we understand that the primary concern of the UPA is the relationship between the husband and the child. The five-year rule provides the husband with considerable security regarding his fatherhood. To be sure, that security comes with a concomitant cost of not being able to avoid fatherhood responsibilities in the future, even

though the husband's circumstances change and fatherhood proves inconvenient.

The statute of limitations pertaining to the marital presumption carries with it vestiges of the common law's presumption and the Lord Mansfield evidentiary rule. If the husband chooses fatherhood, the law will use its power to enforce his choice against his wife, his child, and the biological father. Legal marriage, legal presumptions, and legal procedures work with the husband to produce a child for him. In other words, according to one feminist perspective, the power of the law becomes the equivalent of male procreative power.

The UPA's marital presumption and the related procedural rules also are not racially neutral. For example, they might have been configured quite differently had the legitimacy issues regarding African-American children been considered. The appropriateness of the broad marital presumption rule found in the UPA might be questioned, in light of one study that shows that African-American women spend an average of eleven years separated between their first marriage and divorce. During this lengthy time of separation, any child born to the wife will be treated as a child of her husband. Situations may develop where the presumption of paternity of the absent husband becomes problematic.

In those situations, the statute of limitations, which precludes the wife, husband, and child from declaring the nonexistence of paternity more than five years after the child's birth, may prove particularly troublesome. It does not seem a sufficient response to say that the UPA is furthering the welfare of the child by presuming the wife's husband to be the father. At stake is not only whether the child's biological father will be held financially responsible, but also whether a man who has neither social or biological connection will be deemed by law to be the father. A legal presumption that has no basis in reality is seldom going to be helpful. A mother is unlikely to want any connection with a man who is no longer playing a role in her life and has no social or biological connection with her child. Yet the law deems that man the father of her child and imposes parental obligations on him, giving him a legal basis for intruding himself into the lives of the mother and the child in a potentially disruptive and problematic manner. In this situation, the legal rule is not furthering domestic tranquillity, but contributing to family strife. Moreover, it is not enough to say that the child is benefited by the ability to charge some man with support obligations and the right to claim a share of his estate at death. By having someone else presumed to be the father, the biological father may feel less obligation to participate in the rearing and financial support of his child. The legal rule may have the effect of encouraging the biological father to abandon his child and ignore his childrearing obligations.

When considering the issues of illegitimacy regarding African-American children, Professor Harry Krause, a drafter of the UPA, strongly argued against relying exclusively on the formality of marriage for creating a legal relationship between father and child. He wrote tellingly,

> If the law denies one in four black children a legal relationship with his father, the law must be adapted to the social circumstances that the parents of one in four black children have neglected to comply with a formality. There are some methods other than marriage certificates to determine descent—which is a question of fact, not morality. And one long step toward encouraging private responsibility is to impose it.[12]

Professor Krause understood that the absence of a marriage certificate should not deny an African-American child the benefit of a father. Had he been aware of the data regarding marriage and divorce for African-American women, Professor Krause might have more clearly understood that the existence of a marriage certificate and the absence of a divorce decree should not, without more, be sufficient to determine fatherhood.

Well, what does this feminist and race analysis bring to a consideration of law reform? A basic assumption found in the common law operation of the marital presumption and evidentiary rule and in the current UPA is that each child should have only one father and one mother. This basic assumption is demonstrated recently and clearly in the U.S. Supreme Court case of *Michael H. v. Gerald D.*[13] The case involved a California statute treating any child born to a married woman as the child of her husband. A majority of the Court upheld the constitutionality of the statute, which denied the biological father the right to establish paternity over a child born into the intact marriage of the child's mother and her husband. In reaching its decision, the plurality opinion, written by Justice Scalia, rejected the possibility of dual fatherhood and went on to say, "If there were no social tradition either way regarding the rights of the natural father of a child, adulterously conceived, we would have to consult, and if possible reason from, the traditions regarding natural fathers in general."

Should we reject the idea of dual paternity out of hand? At least two states have embraced that idea. Louisiana did so in 1989, in *Smith v. Cole*,[14] and Nebraska did so in 1992, in *State v. Mendoza*,[15] which has

12. HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 265 (1971).
13. 491 U.S. 110 (1989).
14. 553 So. 2d 847 (La. 1989).
15. 481 N.W.2d 165 (Neb. 1992).

most recently been approvingly cited in *State v. Batt*,[16] a 1998 case. Arguably, the best interests of a child are served when only one man answers to the name Father, and that should justify placing limitations on a putative father or other third party, like the state, coming in for the purpose of proving another man is the biological father. The *Mendoza* court, however, rejected that reasoning when it stated that

> the legal status of children born out of wedlock is much more favorable today than in the past. Thus, the necessity of indulging in legal fictions in order to steadfastly protect their legal status is somewhat lessened. . . . This trend in the law, combined with the inequity of granting biological fathers of children born out of wedlock extensive rights without imposing on them the corresponding responsibilities, indicates that concerns regarding the stigma of illegitimacy should not outweigh the primary purposes of the filiation statutes: identifying the biological fathers of children born out of wedlock and imposing on them an obligation of support.[17]

Whatever the justification for the rejection of dual paternity in the past, the *Mendoza* court argues, "We are in a new era." Why does there remain a general reluctance to embrace dual paternity? Is it because it would destroy the husband's power to prevent the biological father from interfering in the husband's relationship with his wife's child and would lead to public and legal acknowledgment that the husband had "lost control of his wife to another man?" Is it also because dual paternity would thwart a biological father who now can use the marital presumption as a shield to avoid paternal responsibilities? Dual paternity would increase the risk of forced fatherhood outside of marriage and decrease the control of fatherhood inside of marriage. Both of these consequences have little to do with children's welfare.

With the increasing prevalence of families created through reproductive technology, families headed by same-sex couples, non-secret adoptions, and blended families, it becomes easier for the law to imagine and work out the details of dual paternity. Dual paternity is not necessarily a solution to the gender and racial implications as reflected in the law of legitimacy. For that to happen, courts and legislatures must be cognizant of how the law historically perpetuated gender and racial prejudices and remain vigilant in preventing that from happening in the development of dual paternity. What can be said in favor of dual paternity is that it may be the right solution in some family circumstances.

16. 573 N.W.2d 425 (Neb. 1998).

17. *Mendoza*, 481 N.W.2d at 172 (citation omitted).

Once the law expanded the rights of nonmarital children and drew the distinction between moral beliefs and fairness, it set the stage for us to imagine an array of family configurations that reflects the complexity of children's lives as well as the lives of their parents. Dual paternity should not be dismissed merely on the basis of tradition because, as I have tried to show, tradition frequently overlooked concerns for equality and fairness.