ARTICLES

THIS CHILD DOES HAVE TWO MOTHERS . . . AND A SPERM DONOR WITH VISITATION†

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† *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L. J. 459 (1990) (arguing that parenthood should be an exclusive status reserved for custodial parents and their partners).

This Article represents tentative thoughts on the role, and rights if any, of the "involved sperm donor." It is not a direct response to the Brief *Amicus Curiae* in Support of the Respondent-Appellee, Thomas S. v. Robin Y., 599 N.Y.S.2d 377 (Fam. Ct. 1993), *rev'd*, 618 N.Y.S.2d 356 (App. Div. 1994), *reprinted in* 22 N.Y.U. REV. L. & SOC. CHANGE 213 (1996) (authored by Nancy D. Polikoff).

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While researching this Article, the author made several suggestions, consistent with the views expressed within, to Thomas Steel and his attorney.

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INTRODUCTION

Gay men and lesbians are creating new family forms that include biological children. They are doing so in a variety of ways, including surrogacy and the use of known or anonymous sperm donors. The arrangements are as varied as the personalities of the individuals involved. Yet each of these families has a common element: the existence of one biological parent who is not the affectional partner of the other.

In some such cases, the noncustodial biological parent (a sperm donor or surrogate mother) is either not known to the custodial parent or is known but has no involvement in the child's life. In other cases, the noncustodial biological parent is known and involved. In one highly publicized case,[1] the noncustodial parent, Thomas Steel, was a sperm donor who maintained a relationship with his daughter for six years. The child knew Steel as her father. When relations between Steel and the girl's mothers (her biological mother and the mother's partner) soured, Steel sued for visitation,[2] and the courts were called on to determine what rights, if any, should accrue to Steel as a known donor.

In our society, fatherhood is defined by a "man's biological relationship with the child, his legal or social relationship with the child's mother, and . . . his social and psychological commitment to the child."[3] The second of these three factors is generally given the most weight by the courts.[4]

1. Thomas S. v. Robin Y., 599 N.Y.S.2d 377 (Fam. Ct. 1993), *rev'd*, 618 N.Y.S.2d 356 (App. Div. 1994) [also referred to herein as the *Steel* case]. The case has received media attention. *See, e.g.*, Dennis Hevesi, *Judge Rejects Sperm Donor's Claim for Custody*, N.Y. TIMES, April 16, 1993, at B2; Edward Adams, *Gay Man Wins Rights as Father*, N.Y. L.J., Nov. 18, 1994, at 1. *See also infra* part II.

2. "Steel filed a paternity action in New York Family Court in August, 1991, seeking immediate visitation with [his daughter] Ry." Nancy D. Polikoff, *What's Biology Got To Do With It?: The Specter of Norms in Gay/Lesbian Parenting Disputes*, GAY COMMUNITY NEWS (Boston), Spring 1995, at 5 [hereinafter Polikoff, *What's Biology Got To Do With It?*]. For a discussion of the relationship between biology and visitation under New York law, see *infra* notes 293-94 and accompanying text.

3. John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 381 (1991).

4. *See generally* Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 253 (1995) ("At common law, . . . [a] man obtained parental rights only through marriage. . . . Recent Supreme Court cases involving parental rights of unwed fathers suggest that legal

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Consequently, a sperm donor who has a part-time or sporadic involvement in his child's life is an anomaly. To concede that such a person, a biological progenitor who was invited to have a relationship with his child but who is not the mother's partner, should be granted parental rights requires (1) that some weight be given to the biological filial connection; and (2) that the donor-child relationship, limited as it may be, be recognized as sufficiently valuable to the child to warrant legal protection.

The first proposition—that biology distinguishes the involved donor from other adults who may be involved in the child's life—is controversial.[5] Courts seem to be placing greater emphasis than ever on biological connections,[6] most notably in a series of highly publicized cases involving failed adoptions.[7] However, the view that parental relationships are created solely by behavior (that is, by functional parenting[8]), and that biology should be given no weight in the allocation of parental rights, is an increasingly popular response to the complex realities of modern family forms.[9]

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paternity continues to depend more on the father's relationship with his children's mother than on a genetic tie with the children."); *see also* Michael H. v. Gerald D., 491 U.S. 110 (1989) (upholding presumption that the man married to a child's mother is the child's father); Hill, *supra* note 3, at 373 (describing history and durability of common law presumption).

5. *Cf.* Polikoff, *What's Biology Got To Do With It?*, *supra* note 2, at 15, analogizing between a donor/child relationship and the relationship between Polikoff's daughter and a close family friend:

> If I decided not to send my daughter to Joanne this year for her summer visit, [our friends] might think I was making the wrong decision; they might think I was undervaluing the importance of my daughter's relationship with Joanne; they might try to get me to change my mind. But the notion that Joanne would have a legally enforceable right [to visitation] is absurd.

6. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 206 (1995) ("[N]otions of fathers' rights based only on biological connection are beginning to dominate discussions of access and claims to children.").

7. *See, e.g.*, In re Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993) (allowing mother's misrepresentations to invalidate adoption and returning "Baby Jessica" to her biological parents after years of litigation), *described in* Lucinda Franks, *The War for Baby Clausen*, THE NEW YORKER, Mar. 22, 1993, at 56; In re Otakar Kirchner, 649 N.E.2d 324 (Ill. 1995) (voiding adoption of "Baby Richard" by couple who had cared for child since infancy and "returning" child to biological father who had been told by mother that child died at birth and who did not raise claim of parental rights until years later), *described in Adoptive Parents Hand Over Boy in 4-Year Custody Fight*, N.Y. TIMES, May 1, 1995, at A13 ("A boy at the center of a four-year custody battle was taken sobbing and whimpering from his adoptive parents today by the mother who had given him up and the father he had never met."). *See also* FINEMAN, *supra* note 6, at 87 ("[The 'Baby Jessica' and 'Baby Richard'] cases . . . raise paternal biological connection to the same level as that associated with motherhood."); *Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1527 (1990) (commenting that "judges have repeatedly responded to parental disputes by choosing solutions that implicitly favor biological over social relationships, ruling for biological parenthood and against adoption").

8. *See infra* notes 243-52 and accompanying text.

9. This is the view taken in Polikoff, *What's Biology Got To Do With It?*, *supra* note 2, at 4, 14 ("In alternative family structures, biology is not determinative . . . . [By contrast, i]n

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The mothers in the *Steel* litigation and their supporters advanced a position based on functional parenting theory.[10]

The second proposition—that a possibly sporadic, possibly unplanned relationship between a donor and his child is sufficiently important to merit legal protection[11]—is also controversial. It is inextricably linked to feelings in society about the role of fathers generally: how they behave, how they could behave, and whether society should reward or discourage paternal, as opposed to stereotypically maternal, behavior.[12]

This Article explores the legal status, both as it exists and as it could exist, of a biological progenitor who has a limited involvement in his child's life. It does so in the context of gay and lesbian parenting,[13] paying particular attention to the previously underemphasized history[14] of the "involved sperm donor"[15]—a donor who, like Thomas Steel, establishes a relationship with his biological child. It argues that recounting the history of the involved donor is the type of outsider storytelling that can and should be used to influence the development of statutory and common law.[16] It further suggests that the story of the involved donor provides a context in which donors can state claims for limited parental rights without attacking

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a rigidly defined patriarchal family, a man's biological connection confers rights."). *See also infra* notes 181-88 and accompanying text.

10. *See, e.g.* Brief *Amicus Curiae* of the National Center for Lesbian Rights; Lambda Legal Defense and Education Fund; Gay and Lesbian Advocates and Defenders; Center Kids; and Gay and Lesbian Parents Coalition Int'l in Support of Respondent-Appellee, Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994), at 42, *reprinted in* 22 N.Y.U. REV. L. & SOC. CHANGE 213, 237 (1996) [hereinafter *Amicus* Brief as reprinted in 22 N.Y.U. REV. L. & SOC. CHANGE 213 (1996)].

11. That is, for courts to grant the donor rights against the wishes of the custodial parent or parents.

12. For further discussion of how our society defines paternal and maternal roles, see *infra* part IV.A.

13. *See infra* parts I.A-B.

14. Articles on involved sperm donors are rare. *Cf.* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO L. J. 459 (1990) [hereinafter Polikoff, *This Child Does Have Two Mothers*]; Paula Ettelbrick, *Who Is a Parent? The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y. L. SCH. J. HUM. RIGHTS 513 (1993); Elizabeth A. Delaney, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177 (1991); Carmel B. Sella, *When a Mother Is a Legal Stranger to Her Child: The Law's Challenge to the Lesbian Nonbiological Mother*, 1 UCLA WOMEN'S L.J. 135 (1991).

15. To the best of my knowledge, the phrases "involved donor" and "involved sperm donor" are original to this Article. *Cf.* Marc E. Elovitz, *Reforming the Law to Respect Families Created by Lesbian and Gay People*, 3 J.L. & POL'Y 431, 436 n.21 (1995):

> Thomas S. is given a wide range of names by the parties, the amici, and the parents[,] including: "sperm donor"; "semen donor"; "paternal biological progenitor"; "natural parent"; "biological father"; "purported father"; "close family friend"; "surrogate uncle"; "known father"; "gay father"; "father"; "Petitioner"; and the "man whom [Ry] called 'Dad.'"

16. *See infra* notes 35-42 and accompanying text.

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the legitimacy of planned lesbian families[17]—the very families they helped create.

This Article is not a direct response to the Brief *Amicus Curiae* in Support of the Respondent-Appellee in the *Steel* case.[18] In fact, the Article critiques both parties' litigation strategies: the mothers' insistence that their child has only two parents (her two functional parents) and the father's corresponding argument that his child has only two parents (her two biological parents). It argues that the law does not require such reductionist, binary thinking.[19] Nonetheless, both the trial court decision (denying Steel an order of filiation) and the Appellate Division decision (ordering filiation and remanding to the family court for a hearing on visitation) suggest that Steel is either a father or he is nothing.[20]

This Article proposes a solution in which Steel is treated neither as legal father nor legal stranger, but as an involved sperm donor. An involved donor, under the Model Presumption proposed in this Article,[21] would be permitted to maintain the donor-child relationship at the approximate level permitted by the mothers prior to litigation. The legitimate fear of custodial mothers vis-a-vis donors is, "If you give him an inch, he'll take a mile." The solution proposed in this Article is, "If you give him an inch, he should be allowed to keep the inch." In effect, the custodial parent is estopped from ending the relationship while the noncustodial parent is estopped from escalating it. Such a framework of mutual estoppel should facilitate cooperation between lesbian mothers and known donors.[22]

By protecting the parent-child relationship at the level previously permitted by the custodial parent, the Model Presumption will enable dispute resolution without requiring that every relationship be classified as parental or nonparental.[23] Instead, the presumption stresses the child's interests in maintaining relationships with those adults who have, in the child's view,

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17. The phrase "planned lesbian family" has been attributed to April Martin. *See* Polikoff, *This Child Does Have Two Mothers*, *supra* note 14, at 465 (citing April Martin, *Lesbian Parenting: A Personal Odyssey*, *in* GENDER IN TRANSITION 249 (Joan Offerman-Zuckerberg ed., 1989)).

18. *See supra* note 10.

19. This may be even more true in the wake of In re Jacob, Nos. 195, 196, 1995 WL 643833 (N.Y. Nov. 2, 1995), in which the New York Court of Appeals permitted a "best interests" standard to trump the ostensible meaning of a state adoption statute.

20. *Cf.* Elovitz, *supra* note 15, at 436 (discussing the role of language in reinforcing binary choices).

21. *See infra* part IV.B.

22. This model could also prove useful for resolving disputes in other contexts, such as surrogacy and open adoption, in which a noncustodial biological parent may develop a relationship with his or her child. For a thoughtful discussion of related issues in the context of open adoption, see Nancy E. Dowd, *A Feminist Analysis of Adoption*, 107 HARV. L. REV. 913 (1994) (reviewing ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993)). Dowd "argue[s] . . . that the definition or concept of the adoptive family should include the birthparents." *Id.* at 930.

23. *See generally* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637 (1993) (exploring difficulties of defining "parent").

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filled the role of mother or father. By increasing the chances that such relationships, once created, will continue, this solution will advance the best interests of children in nontraditional families. It reconciles the involved sperm donors' need to know that their relationships with their children will be preserved, lesbian mothers' need to know that the law will protect the families they create, and children's need to know that relationships with adults they have come to view as important—including relationships with involved biological progenitors—will be protected.

In attempting to graft this presumption onto a dynamic legal system, it is necessary to examine the process by which the notion of the planned lesbian family has influenced, and is continuing to influence, academic thought and judicial decision making. To that end, this Article examines Nancy Polikoff's highly influential article, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*.[24] Polikoff's work, by advancing the argument that parenthood should be defined by functional criteria alone, has been instrumental in shaping legal discourse on the rights of parents in nontraditional families.[25] However, its implications for the legal claims of donors, including donors who, like Thomas Steel, were invited to form relationships with their children, have generally been overlooked.

24. *See* Polikoff, *This Child Does Have Two Mothers*, *supra* note 14, at 459 (arguing that parenthood should be an exclusive status reserved for custodial parents and their partners).

25. That numerous states, as of this writing, allow second-parent adoptions is a development for which Polikoff deserves a good deal of the credit. Second-parent adoption is the adoption of a child by the biological parent's gay or lesbian partner. Decisions granting second-parent adoptions to lesbian co-mothers have been officially reported in several states. *See, e.g.*, In re M.M.D. & B.H.M., 662 A.2d 837 (D.C. App. Ct. 1995); In re K.M. and D.M., 652 N.E.2d 888 (Ill. App. Ct. 1993); In re Tammy, 619 N.E.2d 315 (Mass. 1993); In re H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); In re J.M.G., 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993); In re B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993). Most recently, in In re Jacob, Nos. 195, 196, 1995 WL 643833 (N.Y. Nov. 2, 1995), the New York Court of Appeals permitted a second-parent adoption as consistent with the best interests of the child. The only state in which the highest state court has denied a second-parent adoption is Wisconsin. *See* In re Angel Lace M., 516 N.W.2d 678 (Wis. 1994). More recently, however, the Wisconsin Supreme Court has held that judges have equitable power to act in a child's best interests and grant visitation if the petitioner proves a parent-like relationship and the parent had consented to the relationship and then substantially interfered. *See* Holtzman v. Knott, 533 N.W.2d 419 (Wis. 1995) (awarding visitation to the nonbiological co-mother of a young boy after her ten-year relationship with the child's biological mother ended).

In addition, the Gay and Lesbian Parents Coalition International and the Lambda Legal Defense & Education Fund have identified numerous unreported trial court decisions granting second-parent adoptions. *See Second-Parent Adoption Update*, GAY AND LESBIAN PARENTS COALITION INT'L NEWSLETTER (Gay and Lesbian Parents Coalition Int'l, Washington, D.C.), Winter 1993-94, at 2 (listing Alaska, California, District of Columbia, Massachusetts, Minnesota, New Jersey, New York, Ohio, Oregon, Rhode Island, Texas, Vermont, and Washington); Second-Parent Adoption Files (internal memoranda), Lambda Legal Defense & Education Fund (New York, N.Y.) (December 1995) (listing Alabama, Colorado, District of Columbia, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, and Vermont).

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Polikoff's rule would reserve all parental rights for custodial parents and their partners. In a world in which "[g]ay men are often in the position of parenting children who are primarily raised by lesbians,"[26] this rule would generally prevent gay men from securing any parental rights.

Although the *Steel* litigation has spawned considerable scholarly debate, the question of sperm donors' rights is more than academic:[27] the *Steel* case has had a profound effect on gay men and lesbians who have had, or are planning to have, children. This population, creating families outside the protection of legal institutions such as marriage, is unusually sensitive to developments in the law.[28] The Appellate Division decision granting Steel paternity has confirmed fears that the planned lesbian family remains vulnerable to attack. Thus, it has created a powerful incentive for lesbian mothers to rely on anonymous donors. Gay rights organizations

26. LAURA BENKOV, REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS 248 (1994).

27. *See, e.g.*, Elovitz, *supra* note 15, at 431 ("The case of *Thomas S. v. Robin Y.* has engendered . . . rich dialogues [among the] parties, amici, trial and appellate courts and members of the lesbian and gay community.") (citation omitted); Brad Sears, *Winning Arguments/Losing Themselves: The (Dys)Functional Approach in Thomas S. v. Robin Y.*, 29 HARV. C.R.-C.L. L. REV. 559 (1993) ("The *Thomas S. v. Robin Y.* decision precipitated a heated debate in the lesbian and gay community."). *See also* BENKOV, *supra* note 26, at 248 ("The [*Steel*] case taps into profound feelings about the significance of biology [and the] different ways men and women construe parenting."); Susie Day, *Tug of War*, LGNY (Lesbian & Gay New York), Apr. 24, 1995, at 15 ("The enormous volatility of this [case] has been mirrored in [the] lesbian and gay community, which [has] been quick to fragment into (a) the [mothers'] defenders, who see the opposing side as predatory and offensively patriarchal, and (b) the Steel defenders, who see the opposing side as self-righteous and politically manipulative.").

28. Effects of the *Steel* case are not yet reflected in social science data (which can take years from conception to publication). Thus, it is not always possible to cite academic literature to support the proposition that the case has affected attitudes within the gay and lesbian community. The author relies, where necessary, on newspapers, magazines, newsletters, and interviews. Such sources are plentiful. For example, when Professor Arthur Leonard published a brief item on the trial court's decision in the *Steel* case, *see Judge Denies Parental Standing to Gay Sperm Donor*, LESBIAN/GAY LAW NOTES, May 1993, at 33, he was deluged with responses. Among them was a letter from Paula Ettelbrick, which described Steel's litigation strategy as "heterosexist and misogynist," and complained that the trial court decision, "this most affirming victory of lesbian and gay families[, was] reported by the *Law Notes*, a lesbian and gay publication, as a defeat." Letters to LESBIAN/GAY LAW NOTES, June 1993, at 1. However, not all of the men who wrote to the *Law Notes* supported Steel, and not all of the women supported the mothers. For example, Jim Levin of New York City wrote, "Almost everyone I know regards this as an important victory for the rights of lesbian mothers." *Id.* By contrast, Nanci Clarence of San Francisco wrote that the decision "strikes a blow against alternative family structures. Some lesbians, starved for affirmation from a legal system that has alternately discriminated against them and ignored them, have understandably embraced this [decision]. . . . [But the] decision . . . merely excludes the father. . . . To deny visitation is not only adverse to the father's moral and human rights, but [also] clearly adverse to the child's right to continue to enjoy [the] love [and] attention [of the father]." *Id.* at 3-4. A month later, Laurel Gonsalves of New York City wrote that the decision "exclude[s] a father after years of inclusion" and that letters hailing the ruling "[make] me worry about intolerance in a community that is petitioning society at large for tolerance." Letters to LESBIAN/GAY LAW NOTES, July 1993, at 1.

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that supported the mothers in the litigation predicted as much: "[I]f [the] court awards parental rights to Thomas S. it will effectively eliminate the option of lesbians choosing known donors unless the lesbian mother is willing to fully share parental rights."[29] It is, consequently, a setback for lesbians who would like to parent with known donors;[30] for gay men who would like to parent with lesbian mothers;[31] and, more generally, for the future of gay/lesbian cooperation.[32]

This Article suggests that Polikoff's arguments for broadening the definition of family need not stop short of including the involved sperm donor.[33] It does not argue, however, that involved donors are entitled to full parental rights, or that uninvolved donors are entitled to any rights at all. Also, it does not presume that every child needs a mother and a father.[34] It will suggest, instead, that relationships with parental figures of one sex or the other can be deeply valuable for children once they are permitted to exist. The ideas expressed in this Article—imperfect as they may be—are intended to facilitate future cooperation between mothers and donors.

To that end, part I recounts the history of gay and lesbian parenting, the context from which such cooperation must emerge.

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29. *Amicus* Brief at 228 n.70. In the wake of the Appellate Division decision, Nancy Polikoff warned that "selecting a known donor is a high-risk proposition." Polikoff, *What's Biology Got To Do With It?*, *supra* note 2, at 16.

30. *See infra* part I.B.

31. *See infra* part I.A.

32. *See supra* note 28. *See also infra* part V.B.

33. In this pursuit, the author is indebted to Katharine Bartlett, who, in a world of rights and ultimatums, urges

> parents to state their claims, and courts to evaluate such claims, not from the competing, individuated perspectives of either parent or even of the child, but from the perspective of each parent-child relationship. And in evaluating (and thereby giving meaning to) that relationship, the law should focus on parental responsibility rather than reciprocal "rights," and express a view of parenthood based upon the cycle of gift rather than the cycle of exchange.

Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 295 (1988).

34. This author agrees with Elovitz, *supra* note 15, at 443, that "[l]esbians should not be forced to confront the myriad of issues raised by using a known sperm donor unless they so desire." The right of mothers to use anonymous donors must remain absolute. The author is, however, concerned with the lack of parenting opportunities for gay men, and the potential for frustration associated with those opportunities that do exist. *See* Sylvia A. Law, *Rethinking Sex and the Constitution,* 132 U. PA. L. REV. 955, 955-56 (1984) ("Men are profoundly disadvantaged by the reality that only women can produce a human being . . . ."). As one commentator has noted, "[a]lthough recently the law has acknowledged and dealt with lesbian-created families, it has failed to address the desires of gay men to form their own families." Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & LAW 183, 196 (1995). *But see id.* at 196 n.49 (admitting "ambivalence about arguing that gay men are being denied equal rights, being treated unfairly, and having their needs ignored by the legal system, [because g]ay men are part of the patriarchy that has historically dominated the legal, social, political, and economic agenda of this country and gay men continue to dominate the endeavor to achieve homosexual rights . . .").

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I.
TELLING STORIES

> [S]ome scholars have focused on the use of stories to create empathy as an effective tool of persuasion. Stories are particularly powerful when . . . [they] demonstrate common emotive ground with those who are not part of the storyteller's group. This creation of empathy . . . may strongly influence decisionmaking . . . .[35]

As Daniel Farber and Suzanna Sherry have argued in their work on storytelling, "[m]uch of legal analysis involves balancing trade-offs of various kinds. Our ability to engage in such balancing is heavily dependent on our ability to assimilate the emotional experience of those affected by a legal rule."[36]

William Eskridge has criticized Farber and Sherry for overlooking the substantial body of "gaylegal narratives,"[37] a type of outsider scholarship that has had a significant impact on academic thought and judicial decision making. Eskridge makes a powerful case for the utility of storytelling by outsider scholars: authors who are female, nonwhite, and/or gay. Such "personal narratives . . . [are] useful [to lawyers] for the insight they provide into the law's operation on people in the world and into the subterranean social shifts that have tremendous ramifications for the law's evolution."[38] Outsider scholars usually have a different view of the law than do their traditionalist colleagues. As Eskridge explains:

> From the outsider's perspective, the law not only makes errors of deduction or fact (in that it operates from factually erroneous premises or draws erroneous conclusions from uncontested premises), as traditional scholars often argue, but also makes errors arising out of bias and global ignorance. Outsider scholarship seeks to challenge the law's agenda, its assumptions, and its biases.[39]

Eskridge argues that it is possible for one person to be an outsider in some scholarly pursuits, and an insider in others.[40] A gay man writing on

35. Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 521 (1992) (internal citations omitted); *see also* Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845 (1994).

36. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 830 (1993).

37. William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994).

38. *Id.* at 623.

39. *Id.* at 608 n.2. *But see* Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2475 (1993) ("In our celebration of stories and our encouragement of more narratives, we cannot overlook the possibility that outsiders' stories may conflict, and that the narratives of excluded groups may be inconsistent.").

40. Eskridge, *supra* note 37, at 608.

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criminal procedure may be an insider, but the same gay man telling the story of a mode of parenting that lacks the indicia of traditional parenting is an outsider.[41] Yet, significantly, the list of gay/lesbian literature compiled by Eskridge includes nothing on the involved, or even the uninvolved, sperm donor.[42]

A. Gay Fathers

Before the 1980s, most gay men who fathered children did so in the context of heterosexual marriage.[43] So common was this phenomenon that

41. *Cf.* Julie Novkov, *A Deconstruction of (M)otherhood and a Reconstruction of Parenthood*, 19 N.Y.U. REV. L. & SOC. CHANGE 155, 171 (1991-92) (noting "the continuing bifurcation of family and civil society, along with the definitional placement of women in the former sphere and men in the latter . . .").

42. Eskridge, *supra* note 37, at 610 (listing significant gay/lesbian storytelling works, including Polikoff, *This Child Does Have Two Mothers*, *supra* note 14, and Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 (1976)).

43. It is difficult to generalize about the relationships between gay men and their wives, which can take a variety of forms. *See, e.g.*, CATHERINE WHITNEY, UNCOMMON LIVES: GAY MEN AND STRAIGHT WOMEN 188-92 (1990) (describing husbands' difficulty in disclosing homosexuality to family members). In some cases, wives are unaware of their husband's sexual orientation. Others know or suspect the truth but remain married. *See* ROBERT L. BARRET & BRYAN E. ROBINSON, GAY FATHERS 111 (1990) ("Many of the wives . . . are in highly dependent marital relationships that endure in spite of the obvious [problems]. These women are afraid they would not be able to make it on their own."); *see also* Trip Gabriel, *When One Spouse is Gay and a Marriage Unravels*, N.Y. TIMES, Apr. 23, 1995, at 22 ("[M]any [wives of gay men] find staying put a financial necessity."). Women's liberation was not always enough to win women their freedom where its ideals were unaccompanied by economic clout. Thus, as if confirming feminists' beliefs that it is men's desires that matter, *see generally* Catharine A. MacKinnon, *Reflections of Sex Equality Under Law*, 100 YALE L.J. 1281 (1991) (discussing women's lack of representation in the design of legal institutions), it was the gay liberation movement, which encouraged husbands to assert *their* rights, that in many cases released wives from marriages of "convenience."

It is equally impossible to generalize about the break-ups of marriages in which gay men fathered children. Some such break-ups are amicable, permitting continued father-child contact; others lead to bitter disputes over custody or visitation. In many cases, the legal system extracts a high price from gay fathers who chose to leave their wives but hoped to maintain relationships with their children.

Before 1980, many men were reluctant to fight for custody or even visitation, in the face of almost certain defeat. *See* WHITNEY, *supra* this note, at 199-200 (quoting a divorced gay father: "[My lawyer] said I stood no chance of fighting [for custody of my children] because if the issue of my sexuality were brought up, I would surely lose."). Gay fathers who "chose" to come out were viewed as immature and selfish. *See* Gabriel, *supra* this note, at 22 ("Custody of children can become a battleground, with the abandoned spouse contending that the gay spouse is an unfit parent. Almost no states offer statutory protection of the custody rights of homosexual parents, and some judges have ruled against them because of their sexual orientation.").

However, greater tolerance for homosexuality in society at large has led, in many jurisdictions, to more humane treatment of gay fathers. By the 1970s, in some cases, bans on custody or visitation—for those gay men intent on leaving their marriages, but not their children—had given way to "mere" restrictions on behavior. *See, e.g.*, In re J., S., and C., 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974) (restricting gay father's right to attend gay political events while his children were visiting). By the 1980s, in some courts, the sexual orientation of a parent-litigant was no longer a significant factor. *See, e.g.*, M.A.B. v. R.B.,

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even in 1995, observers believed that the "vast majority" of openly gay fathers became fathers during marriage.[44] The fathers in gay and lesbian parenting groups are, overwhelmingly, men who had children while married.[45] That some of their children are quite young indicates that this mode of parenting—based, often, on deception of self or others—is thriving.[46]

Compared to parenting by married, generally closeted, gay men, parenting by openly gay men is a phenomenon with a brief past and an uncertain future. It is a particularly fragile offshoot of a young and vulnerable liberation movement.[47]

To heterosexuals, gay liberation may appear to be a move toward self-indulgence. As activist Larry Kramer has noted, "[c]ompared to most people, [gay men] appear to have large disposable incomes, . . . to exercise few family or community responsibilities, . . . to be entirely frivolous and, until

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510 N.Y.S.2d 960, 969 (1986) (stating that father's "homosexuality . . . has no adverse . . . effect" on his twelve-year-old son) and cases cited therein. Yet, in this move toward recognition of the parenting rights of gay men, there have been many setbacks. For example, a number of courts have attempted to protect children from the perceived dangers of exposure to HIV-positive fathers. In 1986, a judge in Puerto Rico ordered an HIV-positive man to stop kissing his children. *See* MICHAEL T. ISBELL, HIV & FAMILY LAW: A SURVEY, (Lambda Legal Defense & Education Fund ed., 1992). A New Jersey court approved visitation with an HIV-positive father only with supervision. *See id.;* Aline Cole Barrett & Michelle A. Flint, *The Effect of AIDS on Child Custody Determinations*, 23 GONZ. L. REV. 167, 183 (1987/88); *AIDS Looms as an Issue in Visits by Fathers*, N.Y. TIMES, Oct. 5, 1986, at A33. A court ordered a gay man living in San Francisco to be tested for HIV before it would grant visitation. *See* ISBELL, *supra* this note; Barrett & Flint, *supra* this note; E.R. Shipp, *AIDS Test at Issue in Homosexual's Bid to Have Children Visit*, N.Y. TIMES, Apr. 28, 1986, at A18.

44. *See* GLPCI NETWORK (newsletter of the Gay and Lesbian Parents Coalition Int'l, Washington, D.C.), Winter 1994-1995, at 1 ("Of the four million (plus) gay and lesbian parents in the U.S., the 'vast majority' come from heterosexual marriages.").

45. Author's observations during meetings and internet forums.

46. Whatever legal progress has been made, the psychological effects of such marriages and their break-ups remain great. The dissolution of marriages involving gay fathers—like all divorces—takes a heavy toll on husbands, wives, and children. Both individuals and society suffer when marriage based on deceit is, for some men, a viable—perhaps even the *most* viable—option for having children. *See, e.g.*, WHITNEY, *supra* note 43, at 189 (quoting a gay father: "I . . . knew men who went ahead and got married without telling their wives they were gay, because they wanted children."); *see also* BARRET & ROBINSON, *supra* note 43, at 110-19 (1990) (describing "grief" and "feelings of . . . betrayal" among wives who discover that their husbands are gay); George Dullea, *Wives Confront Spouses' Homosexuality*, N.Y. TIMES, April 27, 1987, at B11 (reporting that disclosure of husbands' homosexuality left wives "feeling bewildered, jealous, betrayed, angry, guilty, disgusted and repulsed"); Gabriel, *supra* note 43, at 1 ("Experts say abandoned partners typically undergo their own sexual crisis, collapse of faith in their judgment and sense of embarrassed isolation.").

47. Gay liberation consists of two very different processes: older men deciding to "come out," and younger men not being secretive in the first place.

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recently, utterly hedonistic."[48] In fact, given the costs to society of relationships based on deceit,[49] gay liberation benefits heterosexuals as well as homosexuals. Moreover, for gay men, the decision to "come out" is best understood as a moral choice[50] that carries benefits and burdens.[51] Among those burdens are the obstacles to having children.[52]

That gay men want to have children has not always been understood. Gay liberation in the post-Stonewall era[53] was largely a rejection of heterosexual values. Throwing out the babies with the bathwater, many gay men disparaged straight couples as "breeders" and created alternative lifestyles that excluded children.[54] Yet by the 1980s, gay liberation had retreated from its initial extremes. A small but growing number of "out" gay men began expressing the desire to have children.[55] As one gay man told the *Los Angeles Times* in 1991, "Being gay has nothing to do with your desire or need to raise children.... Heterosexuals have such an easy time having children they sometimes don't appreciate what a gift it is."[56]

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48. LARRY KRAMER, REPORTS FROM THE HOLOCAUST: THE MAKING OF AN AIDS ACTIVIST 245 (1989).

49. *Cf.* Able v. United States, 880 F. Supp. 968, 979 (E.D.N.Y. 1995) (describing military policy that forces gay and lesbian personnel to lie as "demeaning and unworthy of [this] nation.").

50. *See, e.g.*, Barrett Brick, *Love Mandated in Marriage*, WASHINGTON JEWISH WEEK, Nov. 4, 1993, at 48 (suggesting that religions that purport to value love in marriage "ought not to pressure [gay men and lesbians] into heterosexual marriage" but should encourage same-sex unions).

51. *See Able*, 880 F. Supp. 968 (describing burdens of remaining in closet).

52. *Cf.* ANDREW SULLIVAN, VIRTUALLY NORMAL 196 (1995) ("The timeless, necessary, procreative unity of a man and a woman is inherently denied homosexuals; and the way in which fatherhood transforms heterosexual men, and motherhood transforms heterosexual women, and parenthood transforms their relationship, is far less common among homosexuals than among heterosexuals.").

53. The Stonewall uprising, which occurred on June 26, 1969, is generally viewed as the start of the modern gay and lesbian liberation movement. *See generally* MARTIN DUBERMAN, STONEWALL (1993) (describing uprising and its aftermath); NEIL MILLER, OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT 365-68 (1995) (describing Stonewall as "the Boston Tea Party of the gay movement").

54. *See generally* FRIENDS AND LOVERS: GAY MEN WRITE ABOUT THE FAMILIES THEY CREATE (John Preston & Michael Lowenthal eds., 1995) (describing a variety of nurturing family forms, sans children).

55. *See Introduction* to ALL THE WAYS HOME: PARENTING AND CHILDREN IN THE LESBIAN AND GAY COMMUNITIES 1 (Cindy Rizzo, Jo Schneiderman, Lisa Schweig, Jan Shafer, and Judith Stein eds., 1995) ("In the 1960s and 1970s, children were usually in our communities by default, legacies of earlier heterosexual relationships. Over the past fifteen years, out lesbians and gay men have been *choosing* to create families with children.") (emphasis in original).

In 1987, *The Advocate*, a national newsmagazine devoted to issues of gay and lesbian concern, reported that "[i]n the past, a lot of gay men thought having children was an impossible dream. Now many are finding alternative ways to become proud gay dads." Kevin McKinney, *How to Become a Gay Father*, THE ADVOCATE, Dec. 8, 1987, at 43.

56. Scott Harris, *2 Mothers or 2 Fathers—and a Baby*, L.A. TIMES, Oct. 20, 1991, at A1, A26 (quoting a prospective gay father).

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Indeed, the obstacles to gay male parenting were and are great. Beginning in 1981,[57] HIV-related illness divided gay communities into the dead, the dying, and the mourning. By 1986, nearly half the gay men in some large cities were HIV-positive,[58] a status that generally precluded reproduction.[59] Of the gay men who were *not* infected, many were caring for friends or lovers who were sick, had lost the partners with whom they might have chosen to have children, or were emotionally exhausted. More than a decade into the epidemic, news accounts described widespread feelings of hopelessness among gay men,[60] and there was no relief in sight.[61]

AIDS, however, is not the only obstacle to parenting by openly gay men. Many men feel that raising a child who is almost certain to be ostracized is unfair to the child,[62] and that widespread prejudice will diminish their effectiveness as parents.[63] Others, having internalized society's proscriptions, believe that to raise a child without a mother, to raise a child in a world of death and disease, or to raise a child who might be shunned by

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57. *See, e.g.*, Leslie Berkman, *AIDS Meeting Will Examine Epidemic*, L.A. TIMES, Mar. 14, 1994, at B1 (noting that the first case of HIV-related illness was reported in 1981).

58. David Perlman, *Mixed Findings on SF Rate of AIDS Infection*, S.F. CHRONICLE, Jan. 4, 1990, at A5.

59. For a moving account of a gay man's decision not to become a father after testing positive for HIV, *see* Gerry Gomez Pearlberg & Stephen Wilder, *The Cultural Exchange, in* SISTER & BROTHER: LESBIANS AND GAY MEN WRITE ABOUT THEIR LIVES TOGETHER 323 (Joan Nestle & John Preston eds., 1994). Not all commentators concede that HIV is a bar to reproduction. *See* ISBELL, *supra* note 43, at 35-36 (experts state that an HIV-positive woman "has the ultimate right to decide whether to continue her pregnancy"); *see also* Sue Rochman, *Women with HIV Struggle to Hold on to Their Reproductive Rights*, THE ADVOCATE, Feb. 12, 1991, at 52. Nonetheless, it is possible to concede the right of HIV-positive men or women to reproduce and still view the decision to do so as unwise. While high doses of AZT may reduce the chances that a mother will pass the virus on to her offspring, *see, e.g.*, Lawrence K. Altman, *In Major Finding, Drug Curbs HIV Infection in Newborns*, N.Y. TIMES, Feb. 21, 1994, at A1, currently no technique exists for making the semen of an HIV-positive donor "safe." Telephone interview with Barbara Raboy, Executive Director, The Sperm Bank of California (Berkeley, CA) (Jan. 6, 1994).

60. *See* Jane Gross, *Second Wave of AIDS Feared by Officials in San Francisco*, N.Y. TIMES, Dec. 11, 1993, at A1, A10 (describing high rate of seroconversion among younger gay men and hopelessness and depression in the gay community).

61. *See* Natalie Angier, *Consummate Politician on the AIDS Front*, N.Y. TIMES, Feb. 15, 1994, at C1 ("There is no vaccine in sight. There are no new drugs in the pipeline, and the . . . drugs that do exist . . . have been shown to be of questionable benefit."); Jesse Green, *Who Put the Lid on gp120?*, N.Y. TIMES, Mar. 26, 1995, §6 (Magazine), at 50 (describing failure of efforts to develop a vaccine).

62. *See* Sally Jacobs, *More Gay Men Hearing the Call of Fatherhood*, BOSTON GLOBE, Sept. 28, 1992, at 1 ("For many gay men, however, longstanding cultural stereotypes of homosexual[s] . . . remain formidable."). *See also* BENKOV, *supra* note 26, at 188 (describing meeting in 1980 at which a number of women "stood up and asked if they had a right as lesbians to bring children into their families.").

63. Public opinion polls, in which even supporters of gay rights in housing and employment balk at gay parenting, lend support to this view. *See, e.g.*, Frank Bruni, *Gay Couples Plant Family Trees*, ARIZONA REPUBLIC, May 9, 1993, at H3 (citing a poll which found that 78% of respondents think gays and lesbians should have equal job opportunities but only 32% believe gays and lesbians should have adoption rights).

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aunts, uncles, and grandparents, is ill-advised.[64] Whatever the validity of these views, many gay men who abandon the idea of having children do so not out of selfishness, but selflessness.

Even a gay man who has avoided contracting HIV, buried and mourned loved ones yet emerged with enough *joie de vivre* to consider becoming a father, created a network of friends and relatives to turn to for support, forged a self-image strong enough to protect himself and his children from society's abuses, and found financial and career stability and a spare bedroom, has limited parenting options.[65]

One route to parenthood is adoption, which can take a variety of forms.[66] Yet, as Deborah Rhode has stated, "[t]o suppose that adoption is an adequate alternative [to biological reproduction] ignores its practical difficulties."[67] Those difficulties, present for all prospective parents, are especially acute when the prospective adoptive parents are lesbians or gay men.[68] In addition, adoption is not the first choice of every prospective parent. Believing adoption to be the appropriate route for every gay father "undervalues desires for a biological legacy—desires that have persisted across time, culture, race, and class."[69]

Another option, surrogacy, has been described as the male equivalent of donor insemination.[70] Yet such descriptions, possibly intended to create

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64. *See id.* Conceivably, younger gay men are freer from such internalized self-doubts.

65. *See* BENKOV, *supra* note 26, at 128-43 (describing parenting options for gay men).

66. For a thorough account of adoption and foster care by lesbians and gay men, including case studies and an extensive bibliography, see Wendell Ricketts & Roberta Achtenberg, *Adoption and Foster Parenting for Lesbians and Gay Men: Creating New Traditions in Family, in* HOMOSEXUALITY AND FAMILY RELATIONS 83 (Frederick W. Bozett & Marvin B. Sussman eds., 1995).

67. DEBORAH L. RHODE, JUSTICE AND GENDER 221 (1989).

68. *See* David W. Dunlap, *Support for Gay Adoptions Seems to Wane*, N.Y. TIMES, May 1, 1995, at A13 ("Courts in New York and Virginia have dealt serious blows to adoption by lesbian and gay parents in recent weeks, leading both advocates and opponents to say that the legal climate seems to be growing inhospitable to such adoptions.").

In Florida and New Hampshire, adoption by gay men is prohibited by statute. FLA. STAT. ch. 63.042 (1995) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."); N.H. REV. STAT. ANN. § 170-B.4 (1994) (stating in introductory clause that "any individual not a minor and not a homosexual may adopt . . ."). For a thorough state-by-state discussion of adoption laws regarding gays and lesbians, see David P. Russman, *Alternative Families: In Whose Best Interests?*, 27 SUFFOLK U. L. REV. 31 (1993). *See also* Maria Gil de Lamadrid, *Expanding the Definition of Family*, 8 BERKELEY WOMEN'S L.J. 170, 174 (1993) ("[A]doption, in a good many states, . . . has not been available to lesbians and gay men.").

For evidence of the difficulty of adoption by gay men and lesbians, see, e.g., *Mother Fights Son's Adoption by Homosexuals*, N.Y. TIMES, Jan. 1, 1994, at A8 (describing Washington mother's attempt to revoke adoption of her biological son after learning that the adoptive parents were gay). *But see Lengthy Adoption Battle Ends in Gay Couple's Favor*, N.Y. TIMES, Dec. 27, 1994, at A10 (describing resolution in fathers' favor).

69. RHODE, *supra* note 67, at 226. Adoption, a viable approach for many, is beyond the scope of this Article.

70. The most popular handbook for prospective gay and lesbian parents, in an attempt to make surrogacy sound like a viable option, offers this unsettling assurance:

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the appearance of equal parenting opportunity for lesbians and gay men, avoid the reality that, unlike obtaining semen,[71] hiring a surrogate is complex,[72] expensive,[73] and, in many states, illegal.[74]

In fact, surrogacy includes a range of options, from the purely commercial to the purely altruistic,[75] and from cases in which mothers have no contact with their "surrogate children" to those in which they are known and involved. At least in theory, the range of options available to prospective employers of surrogate mothers mirrors the range of options available

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> There are currently eleven states in which surrogacy is not a crime . . . . [In those states], you are not breaking any law by contracting with a surrogate, and you do not risk going to jail. The statute simply means that if the surrogate changes her mind, the courts will not throw her claim out without considering it.

APRIL MARTIN, THE LESBIAN AND GAY PARENTING HANDBOOK: CREATING AND RAISING OUR FAMILIES 166-67 (1993). *See also* Hollandsworth, *supra* note 34, at 244. Hollandsworth argues that,

> [f]or many gay men, the only avenue to parenthood is through a surro-gay arrangement: utilizing artificial insemination to conceive a child and then placing the child with the intended father and his partner. *The only distinctions between lesbians' parenting through donor insemination and gay men's parenting through surro-gay arrangements are the intent of the parties to the agreement and the gender of the intended parent or parents.*

Id. (emphasis added).

71. *See* Joan H. Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REF. 865, 922 (1985) ("The donor's contribution is impersonal, indeed mechanical.").

72. *See* BENKOV, *supra* note 26, at 133 ("There is no equivalent [for men] of donor insemination. Surrogacy comes the closest, but it is a much more biologically, ethically, legally, financially, and psychologically complex process.").

73. *See id.* at 872 (estimating cost of obtaining "healthy baby" through surrogacy at $40,000-50,000); *see also* Center for Surrogate Parenting Inc., Information Sheet 3-4 (1986) (on file with *New York University Review of Law & Social Change*) ("In general, the prospective parents can expect to pay $36,000 to $42,000 in total."); CENTER KIDS, THE FAMILY PROJECT OF THE LESBIAN AND GAY COMMUNITY SERVICES CENTER OF NEW YORK, Surrogacy Information Packet (on file with *New York University Review of Law & Social Change*) (describing costs).

74. *See supra* note 70. Surrogacy and insemination also differ in their potential for abuse of basic human rights. Two of the most obvious differences are that the surrogate is being asked to end a nine-month-long relationship with an offspring, while a semen donor's contribution takes minutes; and that a surrogate is being asked to follow a once-, twice-, or thrice-in-a-lifetime event to a conclusion that she may find disturbing, while a sperm donor can repeat his contribution several times a day. For acknowledgment of the bond formed during pregnancy, see, e.g., Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 65 (1995) (defining parenthood as "a mixture of genetic relationship, assumption of responsibility, and provision of care to the child (*including gestation*)") (emphasis added); Bartlett, *supra* note 33, at 315 (urging courts determining which parental relationships to protect "to take account of the [mother-child] relationship . . . developed through pregnancy and childbirth."). Although this author would be the last to concede that the father forms no emotional ties to his biological children, those ties are not to the contents of the specimen bottle.

75. *See* BENKOV, *supra* note 26, at 133-34 (describing noncommercial surrogacy arrangements).

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to prospective employers of sperm donors. In reality, prospective employers of surrogates, particularly if they are gay, must be willing to take great emotional and financial risks.[76]

No gay man who employs a surrogate can be assured of success. Commentators have correctly observed that, had the father of "Baby M."—a man whose effort to enforce a surrogacy contract against Mary Beth Whitehead became a cause celebre in the 1980s[77]—been gay, he would not have stood a chance of obtaining custody from Whitehead. As Polikoff has written, without "another woman [the father's wife] ready to be the child's mother, . . . Whitehead would not have been referred to as a 'surrogate uterus'; she would have been the mother."[78]

Moreover, to some gay men, hiring a surrogate may be a morally unacceptable means of obtaining a child.[79] To those for whom coming out involved the desire to avoid exploitative relationships, surrogacy may be viewed as an individual or societal reversion to bad habits.[80]

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76. *See generally* KENNETH B. MORGAN, GETTING SIMON (1995) (documenting the expense and myriad difficulties faced by a gay couple—both doctors—in finding a surrogate mother). Tellingly, in a society in which there are more than 30,000 donor inseminations yearly, there were only 600 known surrogate births by the late 1980s. *See* OFFICE OF TECHNOLOGY ASSESSMENT, ARTIFICIAL INSEMINATION PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY, 100th Cong., 2d Sess. 3 (1988) (estimating that there were 30,000 births through AID (artificial insemination by donor) between 1986 and 1987); Megan D. McIntyre, *The Potential for Products Liability Actions When Artificial Insemination by an Anonymous Donor Produces Children with Genetic Defects*, 98 DICK. L. REV. 519, 522 (1993) (a 1987 survey indicated that 11,000 physicians in the United States had performed artificial insemination on a total of 172,000 women in the past year); RHODE, *supra* note 67, at 221 (stating that each year there are an estimated 20,000 births resulting from artificial insemination). However, statistics would fail to include noncommercial surrogacy arrangements, in which a woman decides to bear a child for a male—possibly gay—friend. Some experts estimated that the number of private arrangements has totalled 5,000. *Id.*

77. In re Baby M., 217 N.J. Super. 313 (Super. Ct. Ch. Div. 1987), *aff'd in part and rev'd in part*, 109 N.J. 396 (1988).

78. Polikoff, *This Child Does Have Two Mothers*, *supra* note 14, at 469 (footnote omitted). *See also* BENKOV, *supra* note 26, at 128-34 (noting that surrogacy is more available to heterosexual couples than to gay men).

79. The expense, possible illegality, and necessity for frequent contact between the father and surrogate ensure that the moral questions of surrogacy are not easily overlooked. For discussion of these questions, see, e.g., Anita L. Allen, *Surrogacy, Slavery, and Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139 (1990); Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER J. 17, 30 (1991) ("It has been said many times before, but it bears repeating: tolerating practices that convert women's wombs and children into valuable market commodities threatens to deny them respect as equals. Commercial surrogacy encourages society to think of economically and socially vulnerable women as at its disposal for a price."). *See also* Roberts, *supra* note 4, at 251 (noting that "feminist arguments against surrogacy focus on the commodification of women's wombs").

80. *See* BENKOV, *supra* note 26, at 129 (describing gay couple's fears of financial exploitation of surrogate mother).

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For many gay men, a better option—morally and practically—is a co-parenting arrangement.[81] While some men choose to co-parent with heterosexual women,[82] parenting with a lesbian mother has a number of advantages: a mutual interest in creating a new family form; a commonality of experience that permits complete candor; and a symmetry that should increase the stability of the arrangement.[83]

Gay and lesbian parenting groups and newsletters began working to arrange such matches in the early 1980s.[84] Bulletin boards in gay coffeehouses carried advertisements placed by lesbians looking for prospective fathers, and vice versa.[85] In some cities, social gatherings were held for the express purpose of introducing prospective fathers and mothers. A phenomenon described by the media as the "gayby boom"[86] was underway.

In the mid 1980s, after AIDS spread through the gay community, potential lesbian mothers were advised against obtaining semen from gay donors.[87] However, in the late 1980s, with the emergence of reliable HIV screening, gay/lesbian cooperation flourished. By 1988, Cheri Pies advised

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81. Some men seek ways to split parenting duties with the child's mother, 50-50. MARTIN, *supra* note 70, at 81. For a description of one such arrangement, and the problems it creates, see, e.g., BENKOV, *supra* note 26, at 134-37 (describing child who divides time between two households). *See also* David Sheff, *If It's Tuesday, It Must Be Dad's House*, N.Y. TIMES, Mar. 26, 1995, §6 (Magazine), at 64 (describing problems faced by children who divide time between two households). Other donors are content with more limited roles.

82. *See generally* WHITNEY, *supra* note 43, at 188-209.

83. *See* KATH WESTON, FAMILIES WE CHOOSE: LESBIANS/GAYS/KINSHIP 177 (1991). *See also* Philip Gambone, *The Kid I Already Have: On Considering Fathering a Child with a Lesbian*, *in* SISTER & BROTHER, *supra* note 59, at 251 (describing a gay man's thoughts on deciding whether to father a child with a lesbian friend).

One lesbian mother, after deciding to parent through artificial insemination, sought these traits in a donor:

> 1. A gay man who knew the reality of the AIDS world I was immersed in; someone who would understand the delight of bringing life to a death-saturated environment;
>
> 2. someone who was willing to be known as the father . . . ;
>
> 3. someone whose politics I respected—someone who could offer a child a perspective on gay and lesbian activism I would be proud to share;
>
> 4. someone I could trust not to take a child from me, and whose biological family would never be in a position to attempt something similar.

Yvette Perreault, *Another Kind of Baby Story*, *in* LESBIAN PARENTING: LIVING WITH PRIDE AND PREJUDICE 31, 34-35 (Katherine Arnup ed., 1995).

84. WESTON, *supra* note 83, at 175.

85. In Boston, the Conception Connection newsletter ran advertisements for lesbians and gay men who want to conceive children together. Bruni, *supra* note 63, at H3. *See also* Dorothy Atcheson, *Semen Envy*, OUT, Oct. 1995, at 116, 120 ("A California group called Prospective Queer Parents of Berkeley throws periodic 'sperm-egg mixers' for lesbians and gay men.").

86. *See, e.g.*, Bruni, *supra* note 63, at H3 ("gayby boom"); Jane Gross, *New Challenge of Youth: Growing Up in Gay Home*, N.Y. TIMES, Feb. 11, 1991, at A1 (describing the experience of growing up with a gay parent).

87. *See, e.g.*, WESTON, *supra* note 83, at 177.

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lesbians considering parenthood that "[i]f a known donor is used, it is strongly suggested that he be gay."[88]

The gay and mainstream media carried accounts of families in which the biological father was a sperm donor who took an active interest in his children. Such arrangements were described enthusiastically by both donors[89] and mothers. One lesbian co-mother "said it [had been] important to find a donor who wanted to play an active role in [her] child's life. 'When he's older, he'll spend some weekends with his daddy. . . . But he has two mamas too.'"[90] Similarly, *The New York Times* reported that a

> North Carolina lesbian couple . . . obtained sperm from a gay man they knew. He and his lover are helping bring up the girl, now 2 years old. She spends one-third of her time with the men and two-thirds of her time with the women. "For all of us, it has been a really joyful experience," said the mother's partner.[91]

B. *Lesbian Mothers*

1. *Planned Lesbian Families*

The 1980s and 1990s saw a dramatic increase in the number of planned lesbian families. Ellen Lewin, an anthropologist surveying such families in California in the early 1990s, described the desire of many lesbian mothers to provide their children with known fathers:

> [T]he consensus of [these] women . . . centers on the children's presumed need to have a known social father in order to understand something vital about their origins. Unless they have access to the same knowledge of their biological roots that children in conventional families have, how will they know who they are?[92]

Lewin interviewed some mothers who saw

> fathers as necessary to the children's development in a variety of ways: as sources of ongoing material and parental support, as role models for their sons, and as sources of biological connectedness to anchor the child in a world defined by the presumed resilience of kinship ties. . . . Lesbian mothers . . . are sure that knowing

88. CHERI PIES, CONSIDERING PARENTHOOD 225 (1988).

89. *See, e.g.*, WESTON, *supra* note 83, at 175 (describing co-parenting gay father who was "ga-ga" over his child).

90. Harris, *supra* note 56, at A26.

91. Gina Kolata, *Lesbian Partners Find the Means to Be Parents*, N.Y. TIMES, Jan. 30, 1989, at A13. *See also* Louise Rafkin, *Planning Parenthood*, THE ADVOCATE, May 30, 1995, at 37 ("I have gone as far as having the 'donor talk' with one possible daddy. I am fond of the man, . . . and I spent some time fantasizing about our amazingly creative offspring, our country home, *our extended family*.") (emphasis added).

92. ELLEN LEWIN, LESBIAN MOTHERS: ACCOUNTS OF GENDER IN AMERICAN CULTURE 146 (1993).

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one's father is a good thing [even when] hard put to explain why.[93]

In fact, there is wide variation among the mothers in Lewin's book in their attitudes toward fathers. Of those who prefer known donors, some think it is important for children to have male role models. Others report they have been told so often that children should have male role models that they believe it, although they are not sure exactly what a father adds. Others seem to think that, if they do not give their children fathers, they will be blamed; a "good" mother in our society, Lewin suggests, feels obliged to provide her child with a father.[94] And some mothers are pragmatists who believe that the best way to make "father" the most important person in a child's life is to keep him away, allowing the child the chance to glorify the unknown.[95]

Using a known donor has been described as advantageous to the extent that it "eliminates potential difficulties in gaining access to medical information, permits the prospective mother to [choose the donor] herself, and allows the child access to paternal roots."[96] Moreover, it permits the mother to postpone decisions about how much contact the child will have with the father (possibly until the child's views can be considered).[97]

One lesbian mother who chose to use an anonymous donor said she now regrets that decision: "We hang out with a heterosexual couple for whom the daddy is the main caregiver. Whenever the girls are together, [our daughter] Megan starts crying, 'Daddy, Daddy.' It feels like a knife in my heart. . . . I would like to use . . . a known donor if I have another

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93. *Id.* at 144-45.

94. *Id.* at 145-46.

95. *Id.* at 143-46. This possibility is seemingly exemplified by a six-year-old girl who had just met her father for the first time:

> Sometimes I thought I would never meet my dad. My parents kept saying I might not meet him, but I didn't believe them. You have to believe you are going to meet him some day. I think it depends on what kind of person you are. . . . I *really* wanted to meet my dad.

Zea & Aarin, *Like Sisters*, *in* DIFFERENT MOTHERS: SONS AND DAUGHTERS OF LESBIANS TALK ABOUT THEIR LIVES 122, 127 (Louise Rafkin ed., 1990).

96. Patricia A. Kern & Kathleen M. Ridolfi, *The Fourteenth Amendment's Protection of a Woman's Right to Be a Single Parent Through Artificial Insemination by Donor*, 7 WOMEN'S RTS. L. REP. 251, 256 (1982). In addition, using a known donor permits the selection of a man who is supportive of lesbian-headed families. An unknown donor who appeared on the scene later could be homophobic. *See* Elovitz, *supra* note 15, at 443 (describing "benefits to knowing the identity of the sperm donor").

97. Sandra Pollack quotes a mother who was unable to decide in advance how involved she wanted her child's father to be, because, "I . . . thought that if I had a boy, I'd possibly like to have the father around." Sandra Pollack, *Two Moms, Two Kids: An Interview*, *in* POLITICS OF THE HEART 120 (Sandra Pollack & Jeanne Vaughn eds., 1987).

See also LISA SAFFRON, CHALLENGING CONCEPTIONS: PLANNING A FAMILY BY SELF-INSEMINATION 9 (1994) (describing advantages of using known donors, including the mother's desire to have "an image [of the donor] as a real person"); Atcheson, *supra* note 85, at 120 ("For some lesbian couples, sperm banks are not a viable option because they want their children to know the father.").

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child."[98] Another of the lesbian mothers interviewed by Lewin says, "I feel a responsibility that when [my son] is a teenager [he can] locate his biological father. But I haven't set it up so . . . that can happen and I feel a little bad about that."[99] Rafkin observed that for children of anonymous donors, "not knowing the identity of their fathers was usually a deep worry. One ten-year-old tells of watching men on the street who fit the . . . description of her father, trying to figure out who could 'be the one.'"[100]

Yet, many lesbian mothers have good reasons for preferring anonymous donors.

2. Exit the Known Donor

On February 10, 1994, *The New York Times* published what was almost certainly its first lesbian birth announcement. The item reported that Gerri Wells and Brigitte Weil, who had met during an ACT UP[101] demonstration several years before, had had a daughter.

> "This is the second generation of ACT UP," said Ms. Wells, 39, a building contractor, who gave birth to the child, conceived by artificial insemination through an anonymous donor. . . . "Every week you get a call that someone has taken very ill," Ms. Wells said. "A lot of the original members of ACT UP have become sick or passed on, and it is really a pleasure to be celebrating life at the other end of the spectrum, to go to a baby shower rather than a funeral."[102]

The announcement is one that, at first glance, should make both lesbians and gay men proud: it acknowledges gay/lesbian political cooperation; it signals the willingness of the media to recognize same-sex relationships; and it accepts the desires of same-sex partners to become parents. However, it also contains an ominous subtext: gay men die; lesbians have children. Although there is a man in the story, we never meet him, and he will never meet his child.

The birth announcement exemplifies a trend-within-a-trend: of those lesbians becoming mothers, more and more are using unknown donors. Louise Rafkin, who interviewed thirty-eight children for her book *Different Mothers: Sons and Daughters of Lesbians Talk About Their Lives*,[103] observed that anonymous donors were common among the younger children. "[T]he younger interviewees . . . said that they had heard bad things about

98. Kate Hill, *Mothers by Insemination: Interviews (Sarah)*, *in* POLITICS OF THE HEART, *supra* note 97, at 117.

99. LEWIN, *supra* note 92, at 154 (interview with Grace Garson, the mother of a three-year-old boy).

100. Louise Rafkin, *Introduction* to DIFFERENT MOTHERS, *supra* note 95, at 9, 15.

101. ACT UP, the AIDS Coalition to Unleash Power, is an advocacy group founded in 1987. *See* MILLER, *supra* note 53, at 456-62 (describing founding and history of ACT UP).

102. Nadine Brozan, *Chronicle*, N.Y. TIMES, Feb. 10, 1994, at B9.

103. Rafkin, *supra* note 100, at 10.

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fathers."[104] One child told Rafkin, "Almost all of the kids I know who have lesbian moms have [anonymous] donors."[105]

Heather Has Two Mommies, the book that has explained lesbian parenting to millions of school children, features an insemination via anonymous donor:

> Kate and Jane went to see a special doctor together. After the doctor examined Jane to make sure that she was healthy, she put some sperm into Jane's vagina. The sperm swam up into Jane's womb. If there was an egg waiting there, the sperm and the egg would meet, and the baby would start to grow.[106]

There are a number of reasons women give for choosing anonymous donors. Some women may simply disagree with Lewin about the advantages of having fathers around, receive all the support they need within the lesbian community, and make enough money to avoid trading parental rights for financial support.[107] Others may be more strongly separatist.[108] Some may agree with Nancy Polikoff that lesbians must use parenting as a way of "strengthening lesbian culture."

> If we are to . . . pass down to our children . . . a vision of a world less dominated by patriarchy and other oppression, . . . we have to understand the political dimensions of all of our apparently personal choices.[109]

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104. *Id.* at 16.

105. Carl E. Cade, *Two Moms, No Hamburger!*, *in* DIFFERENT MOTHERS, *supra* note 95, at 50, 52.

106. LESLÉA NEWMAN, HEATHER HAS TWO MOMMIES 13 (1989).

107. For a thoughtful account of the decision not to use a known donor, see Laura Barry, *Do I Have a Dad?*, *in* LESBIAN PARENTING, *supra* note 83, at 202-03:

> I am not a man-hater. I just don't want a man involved with the raising of our child. . . . Though the grass may seem greener on the other side of the fence, at least Rachel has two people to whom she can turn. She receives all the attention from my partner Dawn that a father might (and I stress, might) provide.

Cf. MORGAN, *supra* note 76, at 37 (describing male couple's decision to employ a surrogate mother who would have no parental rights: "We were so married, having our child's birthmother in his life with any authority would feel intrusive.")

108. *See, e.g.*, Ann Nemesis, *The Family Is Obsolete*, *in* LESBIAN CONTRADICTION: A JOURNAL OF IRREVERENT FEMINISM, Winter 1994, at 6.

> Why should lesbians, who choose the society of women, desire to be in any way associated with a family . . . , [a] horrible patriarchal institution. . . [?] [I]f the gay community is to be family, and the patriarch, of course, is . . . male, . . . this "alternative" community [replicates] the oppressive gender roles which most lesbians are trying to escape.

Id. One grown daughter of a lesbian mother reports: "[I] experienced separatism as a constant level of anger and negativity. Separatism . . . comes from loving in others what you love about yourself . . . , but there was also a down side . . . ." Kyneret Hope, *Of Lesbian Descent*, *in* DIFFERENT MOTHERS, *supra* note 95, at 56, 79.

109. Nancy D. Polikoff, *Lesbians Choosing Children: The Personal Is Political Revisited*, *in* POLITICS OF THE HEART, *supra* note 97, at 48. In speeches and articles on lesbian motherhood, Polikoff has repeatedly "criticized the [suggestion] that the choices involved are purely personal. . . . I have asked [other lesbian mothers] to examine, as I continue to

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Nonetheless, given Lewin's extensive discussion of the advantages of having fathers in their children's lives, it seems likely that *some* lesbian mothers would prefer to parent with known donors, but are scared to do so in light of the threats posed by known donors to the planned lesbian family.

3. *Threats to the Planned Lesbian Family*

As long ago as 1978, a popular parenting guide noted that lesbian mothers have a history of feeling vulnerable to attacks that can come at any time; of having to be better than straight parents; and of being forced to live under constant scrutiny, a struggle they described as costly to themselves and to their children.[110] More recently, Lewin noted that "[l]esbians who become pregnant through . . . donor insemination are fearful of future interference by the biological father. These anxieties may conflict with the desire that many of them feel to share their child with him."[111]

Like gay male parenting, lesbian parenting has come in waves. "In the 1970s, lesbian mothers were primarily women who had given birth to children in the context of heterosexual marriages."[112] "'Mostly these . . . women . . . were unaware of their [l]esbian tendencies until after they married and had children.'"[113] When their families broke up, the courts often deprived them of parental rights[114]—a brand of homophobia that continues to surface in the 1990s.[115] Lesbians are, in the eyes of the law, unmarried. Moreover, in many cases, they are violating the law.[116] In addition, they

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examine, how the institution of motherhood functions to maintain and promote patriarchy." Nancy D. Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. Rev. L. & Soc. Change 907, 909 (1986) [hereinafter Polikoff, *Lesbian Mothers, Lesbian Families*].

110. The Boston Women's Health Book Collective, *Parents Who Are Gay, in* Ourselves and Our Children: A Book by and for Parents 173 (1978).

111. Lewin, *supra* note 92, at 69.

112. Polikoff, *This Child Does Have Two Mothers, supra* note 14, at 464-65.

113. *Id.* at 465 (quoting P. Lyon & D. Martin, Lesbian/Woman 141 (1972)).

114. *See, e.g.*, S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (denying lesbian mother custody because show of affection between two women in front of children presented an "unhealthy environment"); S.L.H. v. D.B.H., 745 S.W.2d 848, 849 (Mo. Ct. App. 1988) (stating that "placing primary custody of a minor child with the non-homosexual parent is in the best interests of the child.").

115. *See* Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995) (revoking a lesbian mother's custody of her two-year-old son after she moved in with her partner because the court felt that her behavior was immoral and placed an intolerable burden on her child), *described in* Nancy Wartik, *Virginia Is No Place for Lesbian Mothers*, Ms., Nov./Dec. 1993, at 89; *Lesbian Loses Custody: Judge Rules Mother Unfit Because of Gay Relationship*, A.B.A. J., Dec. 1993, at 24; *Virginia Supreme Court Deprives Bottoms of Custody; Finds "Active Lesbianism" a Bar*, Lesbian/Gay Law Notes, May 1995, at 65; Chicoine v. Chicoine, 479 N.W.2d 891, 896 (S.D. 1992) (restricting mother's visitation rights until "she can establish . . . that she is no longer a lesbian living a life of abomination") (Henderson, J., concurring in part, dissenting in part). For a discussion of the unjust treatment of many lesbian mothers, see Phyllis Chesler, Mothers on Trial: The Battle for Children and Custody 111-20 (1991).

116. Twenty-three states and the District of Columbia have statutes criminalizing sodomy. *See* Ala. Code §13A-6-65(a)(3)(1982); Ariz. Rev. Stat. Ann. §§13-1411-13-1412 (1989); Ark. Code Ann. §5-14-122 (Michie 1987); D.C. Code Ann. §22-3502 (1989); Fla.

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frequently have less money than those who might try to obtain custody of their children.

The understandable result of discriminatory treatment in the family courts is fear. One author reports that, "given the realities that many lesbian mother custody cases are lost, that the legal system is homophobic, and that court battles are long and expensive, . . . the overwhelming fear among lesbian mothers is that they will lose their children . . . . *One can never really feel safe as a lesbian mother.*"[117]

The new-found self-confidence that helped spawn the lesbian baby boom[118] has not eliminated this fear; instead, it has empowered lesbian mothers to take steps to ensure their independence. Recently, Lewin described one mother who felt threatened "because she was acquainted with the gay man who donated sperm when she wanted to conceive a child. . . . She never told him her real name and [moved to another state] as soon as she knew she was pregnant . . . ."[119] Most mothers, however, opt for less drastic means of achieving legal independence, notably the use of anonymous donors.

Theoretically, a prospective lesbian mother has a number of choices: to co-parent with her child's biological father (often a gay man[120]); to obtain semen from a known donor whose rights and responsibilities are limited by contract or by statute;[121] or to use an anonymous donor. In

STAT. ANN. §800.02 (West 1992); GA. CODE ANN. §16-6-2 (Michie 1992); IDAHO CODE §18-6605 (1987); KAN. STAT. ANN. §21-3505 (1988); LA. REV. STAT. ANN. §14:89 (West 1986); MD. CODE ANN. art. 27, §§553-54 (1957); MICH. COMP. LAWS ANN. §§750.158, 750.338 (West 1991); MINN. STAT. ANN. §609.293 (1992); MISS. CODE ANN. §97-27-59 (1972); MO. REV. STAT. §566.060 (Supp. 1992); OKLA. STAT. tit. 21, §886 (Supp. 1992); R.I. GEN. LAWS §11-10-1 (1981); S.C. CODE ANN. §16-15-120 (Law. Co-op. 1985); TENN. CODE ANN. §39-13-510 (1991); UTAH CODE ANN. §76-5-403 (1990); VA. CODE ANN. §18.2-361 (Michie 1988). Because these statutes tend to refer vaguely to "acts against nature" or "perverted sexual practices" involving "sexual organs," there is often confusion as to whether the statutes apply to two women. *See, e.g.*, Hughes v. State, 14 Md. App. 497, 504 n.6 (1972) (indicating uncertainty as to whether lesbian activity is within the ambit of Maryland's sodomy statute). Nonetheless, the existence of a state sodomy statute is often cited as a negative factor in custody cases involving lesbian mothers. *See, e.g.*, Thigpen v. Carpenter, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) ("The people of this state have declared, through legislative action, that sodomy is immoral, unacceptable, and criminal conduct. This clear declaration of public policy [may be considered] in child custody cases where, as here, the custodial contestant has declared her fixed determination to continue that course of illegal conduct for the rest of her life. . . .") (Cracraft, J., concurring).

117. Sandra Pollack, *Lesbian Mothers: A Lesbian-Feminist Perspective on Research, in* POLITICS OF THE HEART, *supra* note 97, at 316, 318-19 (emphasis added).

118. *See, e.g.*, Kolata, *supra* note 91, at A13.

119. LEWIN, *supra* note 92, at 153.

120. *See, e.g.*, PIES, *supra* note 88, at 225. In addition to recognizing that "many lesbians enjoy the feeling of 'gay pride' that having a gay donor brings," *id.* at 211, Pies also offers this more practical reason for choosing a gay donor: "If a gay man were to file for child custody, the two biological parents would most probably be at an equal disadvantage." *Id.* Moreover, a gay man is unlikely to bring a "replacement mom" into the picture. *Id.*

121. In many states, there is a statutory method for ensuring that a sperm donor does not obtain parental rights. *See, e.g*, CAL. FAM. CODE § 7613(b) (Deering 1995) (obtaining

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practice, lesbian parenting literature (which parallels the advice given by private attorneys and lesbian rights organizations) narrows those choices. As April Martin, whose *Lesbian and Gay Parenting Handbook* has become the bible of the gayby boom, writes:

> The only way to insure that a lesbian family will not suffer the disruption of a donor suing for parental rights is to use an anonymous sperm donor and have the insemination done . . . through the auspices of a physician. . . . Any other arrangement whereby you and the biological father are known to each other involves some legal risk.[122]

Martin herself was not willing to accept this risk; she reveals that her two children were conceived through anonymous donation.[123] Although this means that her children will "never know[ ] half of their biological roots" and may "experience a period of mourning,"[124] these problems did not, for Martin, outweigh the problems she associates with the use of known donors.

In fact, the literature of lesbian parenting is replete with warnings of what known donors can do to undermine the planned lesbian family.[125] All of the admonitions make essentially the same point: legally, parenthood is all-or-nothing; once a donor obtains parental status, he will have the right to interfere in every decision the mothers make. The National Center for Lesbian Rights warns that "[w]ith no grey area, it does not take much to tip the scales from donor to father, and there virtually is no room for your ambivalence about the donor's legal role with your child."[126] Martin concurs:

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semen through a physician intermediary prevents the donor from establishing paternity even when the donor and the mother know each other). California's rule applies to both married and unmarried mothers. *See also infra* note 143.

122. MARTIN, *supra* note 70, at 86-87. *See also Legal Considerations for Lesbian and Gay Parents*, LGNY (Lesbian & Gay New York), Apr. 24, 1995, at 17 ("[Lawyer Paula] Ettelbrick feels the safest way for two lesbian parents to have a child is through an unknown donor.").

123. Martin and her partner became pregnant, simultaneously, by different donors. MARTIN, *supra* note 70, at 60.

124. *Id.* at 199. "If . . . my children do [someday] feel a sense of loss or pain about never knowing half of their biological roots, we are prepared to give them . . . our empathy and compassion. . . . Ultimately, we trust that if our children experience a period of mourning over this, it will eventually resolve itself in the context of our love and support." *Id.* However, not all psychologists believe that resolution will be so easy. Organizations representing adopted children are adamant in their belief that denying children access to their biological roots causes them persistent psychological harm. *See generally* Brief *Amicus Curiae* of the Council for Equal Rights in Adoption in Support of Petitioner-Appellant, Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994) and sources cited therein.

125. *See, e.g.,* Pollack, *supra* note 97, at 120, 123 (expressing fear that if her child's donor becomes involved, then his entire family will follow, and "I have fears that at some point they might want to take the child away.").

126. National Center for Lesbian Rights, *Lesbians Choosing Motherhood: Legal Implications of Donor Insemination and Co-Parenting* 1-7 (1991), *reprinted in* LESBIANS, GAY

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> In terms of the law, there is nothing between a completely non-participating sperm donor and a fully privileged father. . . . If the donor is considered a legal father, he is entitled to *all* the legal rights and responsibilities of parenthood, including custody, visitation, financial support, and decision making with respect to the child's education, religion, geographic residence, health care, etc.[127]

Maria Gil de Lamadrid, an attorney specializing in parenting issues, asserts that "there are no gray areas in the law here, and when in doubt the courts tend to grant donors full parental rights."[128]

Nancy Polikoff, likewise, has repeatedly warned lesbian mothers of the dangers of using known donors. In a speech given in 1986 and later published, she stated that "[i]n the present system, known sperm donors who originally intend to remain unidentified and uninvolved can later change their minds and gain full parental rights."[129] For this proposition, Polikoff cited only one case, *Jhordan C. v. Mary K.*[130] In *Jhordan*, the California Court of Appeals granted limited parental rights to a sperm donor who had been involved in his child's life from birth. Despite its ambiguous facts[131]

MEN, AND THE LAW 543, 547 (William B. Rubenstein ed., 1993). The Center recommends the following guidelines for lesbians who wish to have children through artificial insemination: (1) use an anonymous donor, (2) comply with state statutory provisions which sever the sperm donor's rights, (3) sign a written agreement with a known sperm donor that he will not have any parental rights or obligations, (4) do not allow a relationship to develop between the known donor and the child, and (5) do not act inconsistently with severance of the sperm donor's parental rights. *Id.*

127. MARTIN, *supra* note 70, at 85, 163 (emphasis added).

128. *Id.* at 164-65 (quoting de Lamadrid). *See also* SAFFRON, *supra* note 97, at 143-51 (describing parallel situation in England).

129. Polikoff, *Lesbian Mothers, Lesbian Families, supra* note 109, at 911.

130. *Id.* at 911 n.14 (citing Jhordan C. v. Mary K., 179 Cal. App. 3d 386 (Ct. App. 1986)). In *Jhordan*, Mary and Victoria, lesbians who lived miles apart but spoke on the phone or saw each other every day, decided to become co-mothers. A male friend, Jhordan, provided the semen. Mary gave birth. Jhordan was a significant presence in his daughter's life before he sued for visitation. The California court granted visitation, noting that the mother had not only failed to take advantage of the physician intermediary rule, which provides that obtaining semen through a physician intermediary prevents the donor from establishing paternity, but had also allowed Jhordan into her daughter's life. *Jhordan C.*, 179 Cal. App. 3d at 392 (citing CAL. CIV. CODE §7005, *recodified as* CAL. FAM. CODE §7613(b) (Deering 1995)). The court was careful to hold that, had the mother either availed herself of a physician's services or not allowed Jhordan to act as a father, *she* would have prevailed. *Id.* at 396. The court was also careful to note that it was not disapproving of the mother's parenting choices. *Id.* at 397.

131. Jhordan never intended to remain unidentified and never intended to remain uninvolved (and thus cannot be said to have changed his mind). The *amicus* brief in support of the mothers in the *Steel* case, authored by Polikoff, notes that the *Jhordan* court "found 'no clear understanding' that the donor would have no parental relationship with the child. Indeed, the court found that 'the parties' conduct indicates otherwise.'" *Amicus* Brief, *supra* note 10, at 235 (citing *Jhordan C.*, 179 Cal. App. 3d at 396).

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and its measured holding,[132] the case has come to symbolize the willingness of courts to allow donors to invade lesbian-headed families.[133] In light of such decisions, lesbians who choose to use a known donor may feel compelled to keep donor and child apart. Martin warns,

> Any contact the donor has with the child could be interpreted as fathering. The longer the contact goes on, and the older the child becomes, the more likely he is to be viewed as a father. . . . "If you use a known donor and you don't want him to be a father, then don't let him develop a relationship with your child."[134]

That donor-child contact "could be interpreted as fathering" is ostensibly a complaint about the legal system. Perhaps, however, Martin and others are simply observing that when lesbian mothers encourage a loving relationship between a child and her father, they are permitting contact that may be interpreted as fathering *by the child.* The court may simply be acknowledging a relationship that has become important from the child's perspective.

Nonetheless, some lesbian mothers believe paternal feelings are to be discouraged. One of the most popular guides for prospective lesbian mothers warns: "The problems . . . with choosing a known donor relate to the probability that he will see and know the child. This may lead to more 'paternal' feelings than he expected . . . ."[135] Martin agrees, stating that "[m]en who agree, in good faith, to be uninvolved sperm donors often find that reality hits them differently."[136]

Poignantly, the lesbian mother of a fifteen-year-old girl, asked to name the biggest problems in her life, exclaims, "Fear of Satya's father trying to take custody away from us, which made us scared to share our life with

132. Jhordan did not gain full parental rights. *Jhordan C.*, 179 Cal. App. 3d at 391 (reiterating trial court holding). The court was explicit in granting him only limited visitation, awarding "sole legal and physical custody to Mary, and den[ying] Jhordan any input into decisions regarding Devin's schooling, medical and dental care, and day-to-day maintenance." *Id.* Polikoff has cited this decision for the proposition that courts can confer some of the incidents of parenthood without others. Polikoff, *This Child Does Have Two Mothers*, *supra* note 14, at 489 n.144.

133. Polikoff, *This Child Does Have Two Mothers*, *supra* note 14, at 489. *Cf.* Carolyn Kott Washburne, *Happy Birthday from Your Other Mom*, *in* POLITICS OF THE HEART, *supra* note 97, at 142, 143 (describing warnings from lesbian friends that an involved father would eventually try to take her child away); SAFFRON, *supra* note 97, at 18 ("Women without male partners often choose anonymous donors because of fear that a donor may change his mind at some time in the future about his parenting role. . . . Too close an involvement with their child's biological father could make them feel at risk."); *id.* at 15 (quoting Kath, a lesbian co-mother: "It was very important to me that Judy's donor was anonymous because I didn't want to have to confront at any point some kind of threat or challenge from a person who had no other connection with us apart from being the donor.").

134. MARTIN, *supra* note 70, at 165 (quoting Paula Ettelbrick, former Lambda Legal Defense & Education Fund legal director).

135. PIES, *supra* note 88, at 218.

136. MARTIN, *supra* note 70, at 86 (describing known donors' paternal feelings as a problem).

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him."[137] Martin advises lesbian mothers to resist their children's pleas to "increase . . . contact with the other biological parent."[138]

> If you do not feel safe making contact with a donor, however, for fear of that person's jeopardizing your family structure, it is probably best to tell your child that the arrangement you originally made . . . is the one you all plan to adhere to. You can explain that the donor never had an intention of parenting. . . .[139]

These fears may deprive some children of sources of love and care in a world not known for a surplus of either. Yet, it is understandable that lesbian mothers would choose to be cautious in an effort to protect their families from very real threats. Gay men hoping to preserve an important route to fatherhood must work to minimize these threats. Unfortunately, the *Steel* litigation has only underscored the dangers faced by lesbian mothers.

II.
THE *STEEL* CASE[140]

A. The Facts

In 1981, Robin Y. and Sandra R., committed lesbian partners, made the decision to have a child through donor insemination.[141] Friends introduced them to Thomas Steel, a civil rights attorney. Steel agreed to become Robin Y.'s donor.[142] According to Robin Y., he also agreed, in a series of conversations, that he would not assert parental rights. Although Sandra R. is an attorney, the mothers neither put this agreement in writing nor utilized a "physician intermediary," which would have limited Steel's rights by statute.[143] The mothers told Steel that they wanted him to be

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137. Anne Rhodes & Satya Conway-Rhodes, *Family Matters: Mother-Daughter Conversation, in* POLITICS OF THE HEART, *supra* note 97, at 268, 271.

138. MARTIN, *supra* note 70, at 198.

139. *Id.* at 198-99.

140. Thomas S. v. Robin Y., 599 N.Y.S.2d 377 (Fam. Ct. 1993), *rev'd*, 618 N.Y.S.2d 356 (App. Div. 1994). The procedural history of the case is described in Kevin J. Hellman, *Introduction to Thomas S. v. Robin Y.*, 3 J.L. & POL'Y 427 (1995).

141. *Thomas S.*, 599 N.Y.S.2d at 377-78.

142. *Id.* at 378.

143. *Id.* at 378 & nn.3-4. (citing CAL. CIV. CODE § 7005(b), *recodified as* CAL. FAM. CODE § 7613(b)). *See* CAL. FAM. CODE § 7613(b) (Deering 1995) ("The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."). Unlike some donor insemination statutes, California's law applies to married and unmarried women. *See Jhordan C.*, 179 Cal. App. 3d at 392 ("[T]he California Legislature has afforded unmarried as well as married women a statutory vehicle for obtaining semen for artificial insemination without fear that the donor may claim paternity . . . ."). The statute applies even if insemination is accomplished at home, as long as the semen is provided via a physician. *Id.* at 394. *But see id.* at 393-94 (acknowledging reasons a woman may want to perform insemination without a physician intermediary). *See also* discussion of *Jhordan*, *supra* note 130-32. *Jhordan* was decided five years after Ry's conception.

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available to his child if and when she asked to meet her biological father. Steel agreed to this condition.[144]

After a successful insemination in California, Ry was born on November 16, 1981.[145] The family—which included a daughter born to Sandra R. by another donor—soon moved to New York.[146] Steel, who lived in San Francisco, initially had little contact with the family.[147] However, when Ry was three, her older sister, Cade, asked about her father.[148] In response, Sandra R., Robin Y., and their daughters flew to San Francisco. By all accounts, their visit with Steel was a success. As the family court judge later found, "it appears that all parties concerned developed a comfortable relationship with one another."[149] Robin Y. wrote a letter to Steel that stated: "You have become a very important part of all our lives; we're so happy that we have grown together as a family."[150]

Over the next six years, Steel had repeated contact with Ry.[151] According to the judge, "[p]hotographs included in the exhibits depict a warm and amicable relationship between [Steel] and Ry, and there are numerous cards and letters from Ry . . . in which she expresses her love for [Steel]."[152] In support of his position that Ry felt fatherly affection for him, Steel presented several letters in which Ry referred to him as "Dad" and wrote that she "loved him and missed him."[153]

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144. *Thomas S.*, 599 N.Y.S.2d at 378.

145. Blood genetic marker tests established the probability of Steel's paternity at 99.98%. *Thomas S.*, 618 N.Y.S.2d at 358.

146. *Id.* For a description of the R.-Y. household, *see* William A. Henry III, *Gay Parents: Under Fire and on the Rise*, TIME, Sept. 20, 1993, at 66.

147. *Thomas S.*, 618 N.Y.S.2d at 358.

148. *Id.* Cade's donor, identified in court documents as Jack K., had also agreed to be available to meet with his daughter, but he later became ill. *Thomas S.*, 599 N.Y.S.2d at 377-78 & n.2. As a result, Robin Y. and Sandra R. asked Steel to treat both girls equally, as sisters. *Id.* at 379. Steel apparently complied. Nonetheless, *amici curiae* alleged in their brief that the fact that Steel sued for visitation with Ry was only driving a wedge between the children. *See Amicus* Brief, *supra* note 10, at 248-51. This is a significant point. Steel, as far as I can ascertain, never seriously considered suing for visitation with both girls. Such a strategy would have been inconsistent with his legal theory, that a biological father of a child born to an unmarried woman must be granted paternity under New York law, but would have been consistent with any number of more progressive theories. *See, e.g.*, Sears, *supra* note 27, at 579 (advocating a legal theory that "does not reflect any single, codified definition of family or parent, and that recognizes relationships that resemble neither of these constructs").

149. *Thomas S.*, 618 N.Y.S.2d at 358.

150. *See* Brief for Petitioner-Appellant at 12, Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994) [hereinafter Brief for Petitioner-Appellant].

151. *Thomas S.*, 618 N.Y.S.2d at 358. Steel testified that he spent time with Ry on twenty-six cross-country visits. *Id.*

152. *Id.*

153. *See* Brief for Petitioner-Appellant, *supra* note 150, at 15 & n.10 (internal citations omitted). According to Steel's Brief:

> Ry consistently indicated that she considered Tom Steel to be her father. She wrote to him telling him, "You are the best dad I ever loved." She sent him Father's Day cards that she had made herself. She wrote to him telling him that she

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When Ry was nine years old, Steel requested that Ry spend part of her summer vacation with him and his extended family. The mothers ultimately refused his request.[154] The mothers later testified that Steel was, in effect, transforming Ry into the child of a broken home—that is, a child who divides her time between two families. As they explained to the court, Ry's family—consisting of two mothers and two daughters—was by no means incomplete.

Relations between Steel and the mothers broke down. Opportunities at compromise were lost to rancor.[155] At the end of the summer that he had planned to spend with Ry, Steel sued for visitation.

B. *The Trial Court Decision*

Family Court Judge Edward M. Kaufmann heard twenty-six days of testimony between April and October of 1993.[156] During the trial, Steel made clear that he was asking for *full* parental rights. Asked what he thought should happen if Robin Y. were to die while Ry was still a minor, Steel said that Sandra R. could continue to care for her, with his permission. An independent, court-appointed psychiatrist testified that Ry considered Robin Y. and Sandra R. to be her parents and never viewed Steel as a third parent.[157] According to the psychiatrist, Ry felt betrayed by Steel and viewed the court proceeding as "an attack on and threat to her positive image of herself and her family."[158] Judge Kaufmann found that Steel was not entitled to an order of filiation—a prerequisite to visitation.[159] Steel appealed the trial court's ruling.[160]

> missed him and loved him and wanted to be with him. She introduced Steel as her father in a variety of school and other social settings.

Id. at 15 (internal citations omitted). Petitioner's Exhibit 42 is an audiotape of a song entitled "Dear Dad" that Ry and Cade composed, sang, and sent to Steel as a birthday present. *Id.* at 16.

154. *Thomas S.*, 618 N.Y.S.2d at 358.

155. Steel later claimed, "We weren't able to work it out. I suggested mediation or going to a counselor." *See* David W. Dunlap, *Sperm Donor Is Awarded Standing as Girl's Father; Gay Man Had Donated for Lesbian Couple*, N.Y. TIMES, Nov. 19, 1994, at 27 (quoting Steel).

156. According to one published account, Kaufmann "offered the litigants the unusual solution of creating a three-parent family. He would allow [Sandra R.] to adopt Ry if Steel were given standing as Ry's father. But the women, holding to their identity as a two-parent family, refused, and the case proceeded." Day, *supra* note 27, at 15-17.

157. *Thomas S.*, 599 N.Y.S.2d 377, 380 (Fam. Ct. 1993), *rev'd* 618 N.Y.S.2d 356 (App. Div. 1994).

158. *Id.*

159. *Id.* at 382. At the time of the *Steel* litigation, New York law ostensibly required Steel to establish that he was a parent as a prerequisite to obtaining visitation. N.Y. DOM. REL. LAW § 72:1 (McKinney Supp. 1994).

160. Steel argued his own case before the New York State Supreme Court, Appellate Division, on Feb. 24, 1994. *Gay Father's Rights Case in N.Y. Court*, STONEWALL NEWS, Mar. 7, 1994, at 1; Edward A. Adams, *Sperm Donor Seeks Visitation With Child*, N.Y. L.J., Feb. 25, 1994, at 1.

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C. *The Father's Brief*[161]

Steel might have filed a conciliatory brief in which he recognized the autonomy interests of lesbian mothers—biological mothers and their partners—while advocating limited visitation for those donors who form relationships with their children at the mothers' invitation.[162] Instead, he chose a strategy that, by confirming the worst fears of lesbian mothers, will disadvantage all other gay men who hope to parent in cooperation with lesbian mothers.[163]

Steel's brief addressed the appellate judges as if they were unaware of the gay/lesbian context of the case. It stated:

> The only legal defense to an action to establish paternity is that the putative father is not the father of the child . . . . It is undisputed that Mr. Steel had repeated "access" to [Robin Y.] during the period of conception. Not one iota of proof has ever been offered to establish that some other man is Ry's father.[164]

The brief went on to argue that nothing stands in the way of declaring Steel a father because "a known donor of a child conceived by an unmarried woman as the result of artificial insemination is the legal father of the child."[165]

With its focus on Steel's "access" to Robin Y. and its description of Robin Y. as an "unmarried" woman, when Steel knew her to be part of a committed lesbian couple, Steel's brief seems to constitute proof that men will exploit heterosexist, patriarchal aspects of the legal system when it is in their immediate interest to do so.

The brief is notable for its offhand, even cynical, dismissal of gay/lesbian concerns. For example, it cites one New Jersey case for the proposition that public "policy favors the requirement that a child be provided with a father as well as a mother . . . ."[166] It further argues that estoppel can defeat a claim of paternity only where the mother is married and the paternity order would defeat the child's legitimacy,[167] as if lesbian couples

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161. In addition to Steel's brief, an *amicus* brief was filed on his behalf by the Council for Equal Rights in Adoption.

162. For a Model Presumption, see *infra* part IV.B.

163. *Cf.* Arlene Zarembka, *Community Ethics in Court*, OUTNOW, Sept. 5-18, 1995, at 15 (arguing that gay men and lesbians must exercise responsibility to the community in selecting arguments to make in court).

164. Brief for Petitioner-Appellant, *supra* note 150, at 27 (internal citations omitted).

165. *Id.* at 28.

166. *Id.* at 31-32 (citing C.M. v. C.C., 377 A.2d 821, 825 (N.J. Super. 1977) (stating that "it is in the child's best interests to have two parents wherever possible" and expressly declining to make a distinction between children conceived naturally and those conceived through artificial insemination)).

167. Describing legitimacy as "one of the strongest social policies known to the law," *id.* at 41, the brief goes on to argue that "there is no precedent for estopping a known father from asserting paternity . . . except where 'legitimacy' . . . is at stake." *Id.*

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have no equivalent autonomy interests to protect.[168] The brief declared that, to the extent the trial court responded to the story told by the mothers, it had been distracted by the lesbian aspects of the case.[169]

Steel's attorney had no difficulty explaining why she chose to underemphasize the gay/lesbian context in which the dispute arose. First, she says, the courts cannot deal with gay issues. "They look at us like we're from Mars."[170] Second, she says, "New York is '*Alison D.* land'[[171]]—a place where, to win visitation, you have to be a parent or a grandparent and nothing else."[172]

Neither assertion is entirely correct. First, the courts can and do deal with gay issues.[173] Judge Kaufmann, in this very case, explicitly recognized the interests of lesbian mothers. For example, he acknowledged the mothers' fears that Ry

> might be exposed to people who might question and undermine the concept of family they had worked to instill in the children—two lesbian mothers raising two children, equally, and two children responding to each other as sisters and responding to two mothers, equally, without regard to biological ties.[174]

Moreover, Judge Kaufmann cited Polikoff's history of the planned lesbian family.[175] For lesbian mothers, the opinion contained long-awaited validation, not the dismissive attitude Steel's attorney foresaw.

Second, while Steel would have to be declared a father to obtain custody in New York, this rule is less forbidding than it sounds. Parenthood is a bundle of rights, and courts are able to divide the bundle.[176] Steel could

168. Before the Appellate Division, Steel argued that estoppel applies "only when the facts of paternity have been hidden from the child, and the current father would be displaced," but that "naming him as [Ry's] father would displace no one." Adams, *supra* note 160, at 1. By contrast, *amici* argued that estoppel is properly invoked when an order of paternity would "rock the child's cosmos." *Amicus* Brief, *supra* note 10, at 243. Taking this to mean that estoppel should properly be invoked when an order of paternity would conflict with a child's beliefs about her family, it is difficult to see how, in the *Steel* case, an order of paternity, in and of itself, would do that.

169. Brief for Petitioner-Appellant, *supra* note 150, at 28.

170. Telephone interview with Emily Olshansky (Dec. 9, 1993).

171. *See* Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (denying parental rights to lesbian co-mother).

172. Telephone interview, *supra* note 170.

173. For example, in In re Evan, 583 N.Y.S.2d 997 (Sup. Ct. 1992), a New York court affirmed a lesbian second-parent adoption. *See also* In re Jacob, Nos. 195, 196, 1995 WL 643833 (N.Y. Nov. 2, 1995), in which the New York Court of Appeals permitted a "best interests" standard to trump the ostensible meaning of a state adoption statute.

174. Thomas S. v. Robin Y., 599 N.Y.S.2d 377, 379-80 (Fam. Ct. 1993), *rev'd*, 618 N.Y.S.2d 356 (App. Div. 1994).

175. *Id.* at 381-82.

176. *Cf.* Polikoff, *This Child Does Have Two Mothers*, *supra* note 14, at 471 (explaining that, "customarily, legal parenthood is an all-or-nothing status," but that sometimes "courts . . . impose *some* parental obligations or confer *some* parental rights") (emphasis in original); *id.* at 489 n.144.

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have sought visitation while deferring to the mothers' superior claim. Instead, he demanded full—that is to say, unlimited—parental rights. Audre Lorde has noted that "[o]ur society forces us to think in an either/or mode—kill or be killed, dominate or be dominated . . . ."[177] Litigation encourages this mode of thinking. However, as Katharine Bartlett has observed, "Rights talk is not always . . . the most appropriate voice."[178]

D. *Amicus Brief in Support of the Mothers*[179]

The brief authored by Nancy Polikoff on behalf of five *amici curiae*[180] begins by announcing its intention: to educate the court about the planned lesbian family. It quotes one mother who praises her child's donor for "'describ[ing] himself as father, but not a parent.'"[181] It then argues that, in the planned lesbian family, even a very young child understands the difference between a biological father and a parent.[182]

Having introduced this distinction, the brief goes on to argue that estoppel is properly used to defeat a claim for paternity that would undermine a child's understanding of her family. It states: "[Steel's] argument that a paternity order cannot be detrimental when there is no other father because it will only add to, rather than take away from, the child's life is misguided. . . . [H]is 'addition' as a parent [would be] an intrusion into and a destabilization of [Ry's] family."[183]

This argument is a brilliant melding of legal theory and legislative fact.[184] After attempting to establish that, in the planned lesbian family,

177. Audre Lorde, *Raising Sons*, Ms., Nov./Dec. 1993, at 35.

178. Bartlett, *supra* note 33, at 295.

179. In an effort to evaluate the most significant documents in the case, this Article focuses on the *amicus* brief in support of respondent-appellee, authored by Nancy D. Polikoff (and signed by Polikoff, Abby Abinanti, and Bobbi C. Sternheim), on behalf of five organizations, *see supra* note 10.

180. For list of *amici*, see *supra* note 10.

181. *Amicus* Brief, *supra* note 10, at 228-29 (quoting Nancy Zook & Rachel Hallenback, *Lesbian Co-parenting: Creating Connections, in* POLITICS OF THE HEART, *supra* note 97, at 120). However, the quotation is part of a larger passage—omitted from the brief—in which the mother says, "Our relationship with our daughter's father has become a source of joy for all of us. . . . [W]e have been able to discuss our concerns and actively support each other in our varied roles." Zook & Hallenback, *supra* this note, at 91. It seems clear that this mother would not argue for the right to sever her daughter's relationship with her father at will. Yet that is the right *amici* are claiming.

182. *Amicus* Brief, *supra* note 10, at 229-31.

183. *Id.* at 249.

184. Adjudicative facts are the facts of a particular case. Legislative facts, by contrast, "are those which have relevance to legal reasoning and the law making process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." FED. R. EVID. 201(a) Advisory Committee note. *See also* Peggy C. Davis, *"There is a Book Out. . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987).

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the distinction between donors and fathers is clear—even to young children—Polikoff reminds the court that its role is, whenever possible, to protect the child's family as she knows it.

Thus, with her estoppel argument, Polikoff asks the court to preserve Ry's status quo. That Steel is part of that status quo is not conceded, however.[185] Kill or be killed: the father asks for all; the mothers offer nothing. It is the court's job to effect a compromise, if one is possible, but neither party suggests how such a compromise could work.

In a summation of their legal argument, *amici* ask the court to accept three principles:

> (1) a biological connection is neither a necessary nor a sufficient basis for establishing parenthood; (2) agreements, particularly when coupled with an ongoing course of conduct, establishing the intent of a biological parent either to share parenting with another person or to relinquish parental rights should be upheld; and (3) a child's experience of his or her family, which may include two, less than two, or more than two parents, is critical to any legal analysis.[186]

The first point is obviously correct. If biology were sufficient to establish parenthood, a donor who had had no relationship with his child would be entitled to the same rights as an involved donor.[187] Legal protection of biological relationships should be conferred only when the biological relationship is accompanied by affinity.

The second argument is troubling, however, since a prenatal agreement has no relationship to the best interests of a child who has reached the age of nine, Ry's age when the litigation commenced. Best interests cannot be predetermined by contract.[188] If, as Polikoff suggests, a custodial parent's partner who functions as a co-parent can obtain parental rights, there is no principled reason for denying a biological parent the same opportunity—that is, to obtain status through conduct.

The third principle, that courts must protect the child's view of her family, begs the central question of the case: was Steel a member of Ry's

185. This stands in sharp contrast to Polikoff's arguments, articulated early in *This Child Does Have Two Mothers*, *supra* note 14, in favor of inclusion. *See infra* text accompanying notes 220-34.

186. *Amicus* Brief, *supra* note 10, at 218.

187. Likewise, birth parents of adopted children would be able to turn up, unannounced, and claim parental rights.

188. *Cf.* Straub v. B.M.T., 645 N.E.2d 597, 598 (Ind. 1994) (an agreement signed by an unmarried woman and a sperm donor relieving the donor of child support obligations was void as against public policy, since, under "best interests standard," neither parent can contract away rights that belong to the child). *But see* Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L. J. 329, 333 (arguing that parental rights should be governed by enforceable prenatal contracts). *See also* Dowd, *supra* note 22.

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family? This Article suggests that estoppel can be used not only to preserve a relationship, but also to prevent it from becoming something it was not, thus protecting the child's world as she knows it. Mutual estoppel serves the child's interests without requiring that each relationship be labeled parental or nonparental.

E. *The Appellate Court Decision*

Nearly 11 months after hearing oral argument in *Thomas S. v. Robin Y.*, the appellate court issued a bitterly divided opinion.[189]

1. *The Majority*

The majority—three of the five members of the panel[190]—began by explicitly rejecting the trial court's assertion that the case involved a threat to an "established family unit."[191] Instead, the court argued, the question before it was whether it could "cut off the parental rights of a . . . biological father" without complying with the procedures for terminating parental rights under New York's Social Services Law.[192] By way of analogy, it noted, "No one would suggest that, in the typical case of divorce or remarriage of a mother, a father's parental rights should thereupon be subject to termination because his intimate involvement in the child's upbringing is no longer feasible or welcome."[193]

In so framing the question, the court had telegraphed its answer, since the procedures for terminating parental rights had obviously not been followed. As for the prenatal agreement, the court dismissed it as "unenforceable for failure to comply with explicit statutory requirements for surrender of parental rights."[194]

The court added that if anyone should be estopped, it is the biological mother.

> If respondent now finds petitioner's involvement in his daughter's life to be inconvenient, she cannot deny that her predicament is

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189. Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994), *rev'g* 599 N.Y.S.2d 377 (Fam. Ct. 1994). *See also* Arthur S. Leonard, *Sharply Divided N.Y. Appellate Court Grants Sperm Donor's Petition for Filiation; Orders New Hearing on Visitation*, LESBIAN/GAY LAW NOTES, Dec. 1994, at 142.

190. The unsigned opinion was joined by Justices Eugene Nardelli, Israel Rubin, and Milton Williams.

191. *Thomas S.*, 618 N.Y.S.2d at 358.

192. *Id.* (citing N.Y. SOC. SERV. LAW § 384; N.Y. FAM. CT. ACT § 516). N.Y. Soc. Serv. Law §384 provides that

> [a] putative or unwed father who wishes to relinquish whatever rights he has to the child and who acknowledges that he is the father of the infant, should sign a Waiver by Father. The waiver signed by the father of the child who had not married the mother must be in writing, signed, witnessed, and acknowledged before a Notary Public or Commissioner of Deeds.

193. *Thomas S.*, 618 N.Y.S.2d at 360.

194. *Id.* at 361.

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> the result of her own action .... The Court cannot simply ignore the events that have transpired since Ry's third birthday .... Having initiated and encouraged ... the relationship between petitioner and his daughter, respondent is estopped to deny his right to legal recognition of that relationship.[195]

The court then offered strong opinions on the parties' conduct, in and out of court.

> Petitioner is portrayed as the villain of this case for having the temerity to request that Ry and her sister accompany him on an unsupervised visit .... The record, however, indicates that it was Robin Y. and Sandra R. who opposed this visit and does not reflect any initial resistance on the part of Ry.[196]

Moreover, the court noted, Steel has been

> vilified for failing to sufficiently undertake his parental responsibility to provide ongoing support for the child and her education, without any consideration for whether support was necessary, solicited, or even deemed desirable by her mother or Sandra R. .... At the same time, petitioner's desire to communicate with his daughter is portrayed as a threat to the stability and legitimacy of the family unit.... It is distressing that [Steel] ... is proposed to be compensated for his understanding by judicial extinguishment of his rights as a father.[197]

Finally, the court rejected the assertion that granting Steel parental rights would "pose a shock to the child's sensibilities."[198] It dismissed "Ry's recently expressed desire to sever contact with petitioner" as "based on concerns communicated to her by Robin Y. and Sandra R."[199] Then, as if its words were not already divisive enough, the court added: "The notion that a lesbian mother should enjoy a parental relationship with her daughter but a gay father should not is so innately discriminatory as to be unworthy of comment."[200]

The court remanded the case to the family court for a determination of Steel's rights, including, but not limited to, visitation. "Custody and visitation," the court noted, "are matters for subsequent hearings."[201]

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195. *Id.* at 362.
196. *Id.*
197. *Id.* at 360.
198. *Id.* at 362.
199. *Id.*
200. *Id.* at 361.
201. *Id.* at 360.

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2. The Minority

The minority[202] dissented from virtually every syllable of the majority opinion. It found fault with the court's tone ("[This case is not] a referendum on the comparative parenting abilities of lesbian mothers versus gay fathers, a gratuitous rhetorical inquiry posed by the majority."[203]); the court's statutory interpretation ("The complexity of the human relationships that permeate this case and the contemporary reality of millions of households that maintain alternative family life styles strongly militate against the rigid, abstract application of legal principles not designed for situations such as this."[204]); and the court's framing of the question. Because, the minority noted, petitioner had

> at no time, for almost 10 years prior to the commencement of this proceeding, established any parental rights either by way of a legal proceeding or by way of fulfilling any of the duties and responsibilities incidental to parenthood . . . the majority's characterization of the denial of the petition as akin to the "termination of . . . parental rights" is both puzzling and inaccurate.[205]

Biology, the justices noted, is not paternity. For example, an unwed father can obtain parental rights only by "manifest[ing] his willingness to take on parental responsibilities" soon after the child is born.[206] "In this case," the justices noted, "there is no question that petitioner has never sought to contribute to the ongoing support of the child, or to see to her educational or other needs despite the fact that he is a professional of substantial means."[207] The justices observed that Steel

> was not there when [Ry] cut her baby teeth, started to walk, was sick, or [was] in need of parental comfort or guidance, nor did he seek to involve himself in the everyday decisions which are peculiarly the domain of parents—decisions as to what schools she should attend, what camps, what doctors should be consulted . . . .[208]

For this and other reasons, the justices concluded, "petitioner's conduct . . . fell far short of manifesting the willingness to take on the parental responsibilities necessary to invest him with any . . . parental 'rights' which could be terminated subject to the provisions of Social Services Law . . . ."[209] Indeed, they described Steel's role as "that of a close family friend or fond

202. Justices Betty Ellerin and Ernst Rosenberger, in an opinion by Justice Ellerin.
203. *Thomas S.*, 618 N.Y.S.2d at 364.
204. *Id.* at 363.
205. *Id.* at 364.
206. *Id.* at 365 (citing Quilloin v. Walcott, 434 U.S. 246 (1977) (holding that father who had not shouldered significant responsibility could not block the adoption of his child)).
207. *Id.*
208. *Id.* at 363.
209. *Id.* at 365.

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surrogate uncle who, while acknowledging that he was her biological sperm donor, fully recognized that her family unit consisted of her two mothers and her sister."[210]

The minority then applied its own estoppel theory. Rejecting the argument that estoppel could prevent an assertion of paternity only when legitimacy is threatened, the justices noted that, "[o]n the contrary, the paramount purpose of the equitable estoppel doctrine is to promote fairness and justice . . . ."[211]

The minority opinion thus explicitly looked to the best interests of the child. In evaluating those interests, the minority gave credence to Ry's fears that "parental authority over her life may [now] rest in the hands of someone whom she had never viewed as a parental figure and whose wishes are diametrically opposed to those of the two people she does view as her parents."[212] Further, the dissent noted,

> a declaration of paternity . . . would be counter to [Ry's] best interests because it clearly would be only the first step in ongoing litigation which will inevitably cause severe traumatic consequence to the child and her family . . . . Indeed, even were visitation never to be granted and further litigation never to succeed, the constant, frightening potential for it is a burden this child, who is already aware that her family is vulnerable to attack on a number of fronts, should not have to bear.[213]

Thus, the justices argued, the best interests standard demanded that the order of filiation be denied. As for the warring adults, they noted, "[i]f the child's best interests are to be the touchstone . . . neither petitioner's nor respondent's feelings of aggrievement are [germane]."[214]

Within hours, the mothers announced their intention to appeal.[215] The New York Court of Appeals stayed the Appellate Division ruling, pending decision on appeal.[216] Steel, stating that his health was worsening,[217] declined to oppose the appeal, leaving his "victory" on the books but ending the litigation without legal resolution or personal reconciliation.[218]

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210. *Id.* at 363.
211. *Id.* at 366.
212. *Id.* at 367.
213. *Id.* at 368.
214. *Id.* at 367.
215. Dunlap, *supra* note 155, at 27. The Appellate Division granted leave to appeal. *See* In re R., Y., Ry., S. Thomas, Y. Robin, 623 N.Y.S.2d 105 (App. Div. 1995) (granting motion for leave to appeal). Nancy Polikoff again agreed to author an *amicus* brief for the mother. NCLR Newsletter (Nat'l Center for Lesbian Rights, San Francisco, CA), Spring 1995, at 9.
216. Thomas S. v. Robin Y., 86 N.Y.2d 779 (1995).
217. Telephone Interview with Thomas Steel, April 20, 1995.
218. *Id.* As Nancy Polikoff has noted, Steel's decision to withdraw from the litigation "leaves intact the appeals court decision vesting donors with full rights of parenthood." Polikoff, *What's Biology Got To Do With It?*, *supra* note 2, at 16.

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III.
INCLUSION/EXCLUSION

A. Polikoff's Rule

Nancy Polikoff's article, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*,[219] has been cited by a number of state courts considering questions raised by parenting outside of traditional families.[220] Understanding Polikoff's views is essential to understanding the genesis of legal rules pertaining to gay and lesbian and other alternative families.

As she describes it in her introduction, Polikoff's mission is simple: to expand the definition of parent to include co-mothers. Describing a family emblematic of the lesbian parenting boom of the 1980s—that of Susan Love, Helen Cooksey, and their daughter—Polikoff notes that if Love and Cooksey were to separate, or if the biological mother were to die, the courts might be unwilling or unable to protect the child's best interests.[221] The problem, she explains, is that the mothers, though functionally co-parents, "stand as a parent and a nonparent" according to the law.[222] Consequently, the biological mother could leave the co-mother without any rights, or, in the case of the biological mother's death, her family could terminate the child's relationship with the co-mother, to the detriment of the child.

Polikoff argues that both women should be legally recognized parents.[223] That they are not, she explains, is part of a larger problem: courts' willingness to go "to great lengths to provide every child with precisely one mother and one father."[224] Thus, she sets out to give the courts a new way of looking at parenthood that would allow children to have two or more

219. Polikoff, *This Child Does Have Two Mothers, supra* note 14.

220. *See, e.g.*, In re Tammy, 416 Mass. 205, 214 (1993) (noting that, "[a]s the case law and commentary on the subject illustrate, when the functional parents of children born [into a lesbian co-mother family] seperate or one dies, the children often remain in legal limbo"); Blew v. Verta, 420 Pa. Super. 528, 538 (1992) (stating that courts should design rules to serve children's best interests); In re B.L.V.B. & E.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993) (noting that "commentary on the subject details the years of litigation spent in settling these difficult issues while the children remain in limbo").

221. Polikoff, *This Child Does Have Two Mothers, supra* note 14, at 463. *But see Tammy*, 416 Mass. at 214 (granting second-parent adoption in Love-Cooksey household).

222. Polikoff, *This Child Does Have Two Mothers, supra* note 14, at 463. An intriguing approach to this problem is for one partner to gestate a child conceived from the other's egg. This option has been described as creating two biological mothers, each of whom should be able to obtain legal rights. *See* Katherine A. O'Hanlan, *Lesbian Mothers: Coequal at Last*, THE ADVOCATE, June 27, 1995, at 51.

223. Polikoff, *This Child Does Have Two Mothers, supra* note 14, at 537. Polikoff advises courts that "to serve the best interests of the children in lesbian-mother families, they must be more flexible. Courts must redefine parenthood; use some version of equitable parenthood, equitable estoppel, or *in loco parentis*; or reinterpret third-party status to recognize the parental rights of the legally unrecognized mother." *Id.*

224. *Id.* at 469.

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parents of either sex, in keeping with the realities of the child's life. Courts, she says,

> can and should use existing legal doctrines to protect a child's perception of his or her parents. In this way, they can protect functional parent-child relationships until legislatures are willing to recognize that a rigid definition of parenthood disserves the . . . increasing numbers of children who live in nontraditional families.[225]

To demonstrate the narrowness of the traditional view of parenthood, Polikoff describes the predicament of Michael H.,[226] who sued for paternity when his child was one and a half years old. He had lived with the mother and child for three months, starting when the child was five months old, and had maintained a relationship with the child before and after the period of cohabitation. When she was not living with Michael H., the mother resided with her husband.[227] The trial court denied Michael H.'s paternity action, citing the conclusive presumption under California law that the child of a married woman cohabitating with her husband is a child of the marriage. The California Supreme Court and the United States Supreme Court affirmed.[228]

Polikoff critiques this opinion as avoiding proper resolution of the "conflict between accepting the truth of family complexity and maintaining the fiction of family homogeneity."[229] She states:

> The courts should protect children's interests within the context of nontraditional families, rather than attempt to eradicate such families by adhering to a fictitious, homogeneous family model. . . . "If children can adjust to stepfathers, adoptive fathers, live-in fathers, intermittent fathers and absent fathers, they can adjust to having two fathers."[230]

Similarly, Polikoff describes the result in *In re Baby M.*[231] as another example of unnecessarily narrow judicial thinking. The New Jersey courts, Polikoff concludes, were hampered by their assumption "that Baby M.

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225. *Id.* at 575.

226. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989).

227. Polikoff, *This Child Does Have Two Mothers, supra* note 14, at 477-78 (citing Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1000-01 (Ct. App. 1987)).

228. *Id.* at 478 (citing 191 Cal. App. 3d 995, 1006-07, 1009, 1010 (Ct. App. 1987) and 491 U.S. 110 (1989) (plurality opinion)).

229. *Id.* at 482.

230. *Id.* (quoting Linda Shoemaker, *Bastardizing the Legitimate Child: The Colorado Supreme Court Invalidates the Uniform Parentage Act Presumption of Legitimacy in R. McG. v. J.W.*, 59 DEN. L.J. 157, 172 (1981)) (alteration in original).

231. 217 N.J. Super. 313 (Super. Ct. Ch. Div. 1987), *aff'd in part and rev'd in part*, 109 N.J. 396 (1988).

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could have only one mother. This premise is flawed . . . ."[232] Children "can adjust to having two mothers."[233]

Thus, in her analysis and critique of the *Michael H.* and *Baby M.* cases, Polikoff has identified two cases where a child should have three parents—two custodial, one not. She then argues that

> "[t]hird parties" who have functioned as parents to a child, . . . should be able to obtain visitation under the standard applicable to parents. Thus, even jurisdictions in which nonparents can be awarded visitation have not gone far enough. In these jurisdictions the grant of visitation is discretionary with the court or requires [proof] that visitation is in the best interests of the child. . . . *[Instead, d]enying visitation should be predicated on the same grounds as it is between legally recognized parents—only upon proof of detriment to the child.*[234]

Next, Polikoff addresses the doctrine of equitable estoppel. As used to prevent biological parents from denying the rights of co-parents, the doctrine's strength

> is that it focuses on the actions and intent of the legally recognized parent. That person must take certain actions (or nonactions) on which the legally unrecognized parent relies. Thus, the doctrine preserves the core value of parental autonomy, which lies at the heart of preferring parents over nonparents in custody disputes. A person cannot inadvertently achieve parental rights under equitable estoppel. Rather, a legally recognized parent must create the factual circumstances in which the additional parent-child relationship develops. At that point, estoppel serves the best interests of the child, who will have developed the additional parental relationship in reliance upon the actions of the legally recognized parent.[235]

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232. Polikoff, *This Child Does Have Two Mothers, supra* note 14, at 475.

233. *Id.* at 482.

234. *Id.* at 521 (emphasis added).

235. *Id.* at 501-02. Polikoff also explores the doctrine of *in loco parentis*, observing that its appeal "is that the legally recognized parent does not have the power to terminate the relationship" once it is established. *Id.* at 507. Polikoff goes on to examine an Oregon law that permits anyone who "'has established emotional ties creating a child-parent relationship with a child'" to petition for custody or visitation. *Id.* at 486 (quoting Or. Rev. Stat. § 109.119(1) (1989)). The statute requires a minimum of six months' cohabitation with the child before a custody action can be brought. *Id.* at 488 (citing Or. Rev. Stat. § 109.119(4) (1989)). This requirement, to Polikoff, "is not an appropriate proxy for establishing parenthood. The interests of children and families," she writes, "would have been better served by a statute that focused not on residency, but solely on the parent-child relationship and the biological parent's cooperation in its development." *Id.* at 489.

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By this point in her article, Polikoff has argued that children can have more than two parents; that courts should recognize the realities of children's lives; that children should not be shielded from complexity or conflicting loyalties; and, most importantly, that a parent can be estopped from denying the existence of a parental relationship once she has cooperated in its creation. In short, she could be writing the brief for Thomas Steel, or for any other biological parent who was invited to have a relationship with his or her child, then somehow excluded.

But Polikoff has a particularized focus, as she reminds the reader by returning to a series of cases in which the rights of lesbian co-mothers are at issue. The cases involve either the death of the biological mother ("[T]he best interests of the children ... require that the surviving lesbian mother be considered a parent."[236]) or the break-up of the lesbian couple ("[T]he legally recognized parent has asserted sole parenthood in a blatant repudiation of the family that both mothers fully participated in creating."[237]). Polikoff describes the problems that arise when children are separated from nonbiological co-mothers, including feelings of abandonment and rejection.[238] In one case, "the child became hysterical when she was told that she could no longer live with [her co-mother]."[239] The need to recognize co-mothers' parental status is clear.

In each of the cases she cites, the donor is either anonymous or absent, precluding consideration of the role, if any, of *these* potential parents. The only exception is *Jhordan.*[240] Polikoff has described the *Jhordan* decision as proof that lesbians are victims of "an alien legal framework structured to preserve and perpetuate patriarchy."[241] Yet she fails to explain why her

236. *Id.* at 532.

237. *Id.* at 537. Polikoff has no patience for the biological mothers in these cases, who "have asserted reprehensible positions." *Id.* at 542. She warns that "[c]ourts do not preserve the bonds of parenthood ... because it is easy for parents; they preserve the bonds because courts consider it critical to a child's well-being to protect the child from the traumatic and painful loss of a parent." *Id.*

238. *Id.* at 527-42.

239. *Id.* at 532.

240. Jhordan C. v. Mary K., 179 Cal. App. 3d 386 (1986). For a discussion of the case, *see supra* notes 130-32.

241. Polikoff, *Lesbian Mothers, Lesbian Families, supra* note 109, at 910-11. In *This Child Does Have Two Mothers, supra* note 14, Polikoff mentions *Jhordan* three times: at 468 n.30 (noting that a lesbian mother is "vulnerable to a paternity claim even if the child was born as a result of artificial insemination"); at 489 n.144 (implying that the court was correct to grant visitation rights to Victoria, the nonbiological mother, who did not live with either the biological mother or the child); and at 527 n.384 (noting that the court granted visitation to Victoria without deciding her parental status). In the *amicus* brief, Polikoff seems to suggest that the *Jhordan* decision was correct, given that "the court found 'no clear understanding' that the donor would have no parental relationship with the child. Indeed, the court found that 'the parties' conduct indicates otherwise.'" *Amicus* Brief, *supra* note 10, at 235 (quoting *Jhordan C.*, 179 Cal. App. 3d at 396).

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expanded definition of parenting would include the co-mother but not the donor, neither of whom cohabitated with the biological mother.[242]

To be fair, Polikoff could have come up with a definition of "functional parent," involving daily or near-daily contact with the child, that would include most lesbian co-mothers and exclude most donors. Yet, instead of a definition, she offers a list of indicia of functional parenting by lesbian couples: "A lesbian-mother family can hold itself out as including two mothers.... A child can have the last names of both mothers. The child's birth announcement can list two mothers. A legally unrecognized mother can contribute to the child's financial support and the legally recognized mother can accept such payment."[243]

Elsewhere, Polikoff has declined to adopt the "psychological parent" theory of Goldstein, Freud, and Solnit[244] precisely because "[e]xtending the theory increases the likelihood that a lesbian mother will lose custody of her children."[245]

> [A]s we think about obtaining legal rights for unrecognized lesbian mothers, it is tempting to argue for expanded rights for nonparents. However, we must bear in mind that if we ask judges to stretch case law and statutes to reach such a result, those very

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242. *See supra* notes 130-32.

243. Polikoff, *This Child Does Have Two Mothers, supra* note 14, at 499. Far from describing parenthood according to function, Polikoff's list is highly formalistic.

244. *See* JOSEPH GOLDSTEIN, ANNA FREUD, AND ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979) (positing that children must be allowed to maintain ties with "psychological parents"). The primacy of psychological parent theory—with its emphasis on the child's relationship to a primary caregiver—is being challenged by theories that focus on "networks" of caregivers. Neil S. Binder, *Taking Relationships Seriously: Children, Autonomy, and the Right to a Relationship*, 69 N.Y.U. L. REV. 1150 (1994). *See also* James H. Bray, *Psychological Factors Affecting Custodial and Visitation Arrangements*, 9 BEHAVIORAL SCIENCES AND THE LAW 419, 423 (1991) (citations omitted): "The idea of 'one psychological parent' or 'the primary caretaker' is a concept often emphasized . . . within legal circles [but one that] . . . has very little empirical support. There is usually a hierarchy of attachment figures, each of whom may have qualitatively different types of relationships with the child." *See also* Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 N.Y.U. REV. L. & SOC. CHANGE 557 (1984). Professor Davis, a former family court judge, has written that her research and experience

> suggest that we must heed Goldstein, Freud, and Solnit's advice that biological and psychological family disruptions are harmful to children.... But [they have also] convinced me that we must take equal care to avoid rigid systems that preclude consideration of other psychological needs of children, the complexities of human development, and the limits of our ability to interpret and predict human behavior.

Id. at 559-60. Professor Davis notes that some children, "'while wanting stable living arrangements, prefer and are able to cope with several parent figures, . . . drawing strength from each.'" Id. at 569 (quoting Bush & Goldman, *The Psychological Parenting and Permanency Principles in Child Welfare: A Reappraisal and Critique*, 52 A.J. ORTHOPSYCHIATRY 223, 234 (1982)).

245. Polikoff, *Lesbian Mothers, Lesbian Families, supra* note 109, at 910.

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interpretations may be used against lesbians and political or non-traditional heterosexual women in other cases.[246]

Thus, while Polikoff hints that the *sine qua non* of functional parenting is cohabitation—a notion consistent with the Goldstein, Freud, and Solnit definition, which involves daily attention to the child's basic needs—she never says so. Instead, she calls for the expansion of "the definition of parenthood to include anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental."[247] This is a version of the traditional rule that mothers can confer parental status on their husbands,[248] a presumption that Polikoff denounces in her analysis of *Michael H.* on the ground that it ignores the complex realities of many children's lives.[249]

Having used the *Michael H.* and *Baby M.* cases to make the simple and important point that the law errs when it tries to give each child two—and no more than two—parents, Polikoff argues for two—and no more than two—parents in the planned lesbian family.[250] Thus, Polikoff criticizes Katharine Bartlett for her "willingness to dilute the legal significance of parenthood so that nonparents can obtain legal protection for at least some of their claims with respect to children with whom they have significant

246. *Id. But see* Sears, *supra* note 27, at 559, 572. Sears critiques the work of Polikoff and Paula Ettelbrick for following a "functional family" approach in which relationships are recognized only to the extent they "resemble the law's image of the traditional family"—*i.e.*, a family headed by two parents. Sears, *supra* note 27, at 573. Sears argues for a "queer approach" to family law that would recognize that the traditional nuclear family has betrayed many gay people, and therefore should not be held up as a model. "For many lesbians and gays, the 'autonomy' of parents [in the traditional nuclear family] create[d] an isolated structure that [left] them vulnerable to psychological and physical abuse." *Id.* at 579. Thus, Sears argues for a family structure "that does not reflect any single, codified definition of family or parent." *Id.*

247. Polikoff, *This Child Does Have Two Mothers*, *supra* note 14, at 464.

248. Polikoff's attempt to import one of the traditional prerogatives of marriage is ironic given her denunciations of gay marriage as "an attempt to mimic the worst of mainstream society." Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993).

249. It is, after all, a vestige of the one-mother, one-father model.

250. It should not go unnoted that such rules exact a price from those who impose them. Brad Sears makes this point forcefully. Critiquing Polikoff's "functional family" approach, he notes:

> These recommendations, in accepting the parent/stranger fiction, ask lesbians to curtail their freedom in defining their families in deference to that dichotomy. . . . To win the arguments that the dominant construct and images of family law required them to make, each of the parties had to "lose" the ways in which their lives and relationships differed from those of a traditional heterosexual nuclear family.

Sears, *supra* note 27, at 571-73.

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relationships."[251] Writes Polikoff, "Under my definition, all those considered parents would be accorded the rights and responsibilities of parenthood. I retain the concept of parenthood as an exclusive status."[252]

B. *Polikoff and Gay Men*

It is true, as Polikoff states in an early footnote, that her analysis "applies equally to two-father gay families."[253] This is a hollow assurance, however, given that men cannot give birth.[254] Later, in support of an unrelated proposition, Polikoff notes that surrogacy contracts are void as against public policy in at least one state[255] and that in other states the legal status of surrogacy is murky.[256]

Yet, Polikoff fails to note the implications of this observation—that most gay men will never become custodial parents,[257] and thus, under the rule she proposes, will never obtain parental rights.[258] Moreover, she fails to address the implications of a rule that would seem to give gay men an incentive to become full-time parents even when they are better prepared

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251. Polikoff, *This Child Does Have Two Mothers, supra* note 14, at 473 n.51 (citing Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Promise of the Nuclear Family Has Failed,* 70 VA. L. REV. 879, 944-61 (1984)).

252. *Id.* Polikoff further notes that while "Bartlett favors visitation statutes for grandparents and other relatives, . . . I oppose such statutes as unwarranted intrusions on the parent-child family unit." *Id.*

253. *Id.* at 462 n.3.

254. It is reminiscent of the holding of Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974) (Stewart, J.) ("The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."). Criticism of *Geduldig* has become "a cottage industry" among feminist writers. Law, *supra* note 34, at 983. *But see* Dolgin, *supra* note 23, at 643 ("[R]eproductive technology offers the future possibility that men, as well as women, will be able to gestate fetuses"). *See also* Dowd, *supra* note 22, at 930 ("Because family relationships change over time . . . [f]lexibility is necessary, and that suggests avoiding a rights analysis that presumes potential conflict within a static set of relationships.").

255. Polikoff, *This Child Does Have Two Mothers, supra* note 14, at 574 n.614.

256. *Id.*

257. The work of many feminist thinkers on the need to accommodate the biological reality that only women can bear children would seem to suggest reciprocal treatment for men. For example, Herma Hill Kay, recognizing that the capacity to become pregnant is one of the few immutable sex differences that distinguish women from men, seeks to build a model of equality that will accommodate women's fertility and thereby neutralize it as a barrier to personal achievement. Herma Hill Kay, *Models of Equality,* 39 U. ILL. L. REV. 39, 40 (1985) (citations omitted). There is no logical reason why this same immutable sex difference—men's incapacity to become pregnant—should not be accommodated, to the extent possible, by policy choices that neutralize it as a barrier to personal (in this case, parental) achievement.

258. Elsewhere in her article, Polikoff inexplicably excludes gay men. For example, while urging reform of adoption laws to allow second-parent adoption by functional parents, she notes that "[l]esbian-mother families are not the only families that would benefit from a modification of the adoption laws. Change in the law would permit unmarried heterosexual couples to secure their child's relationship with both functional parents." Polikoff, *This Child Does Have Two Mothers, supra* note 14, at 525. Here, Polikoff has either forgotten

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to become co-parents; to try to obtain children by using surrogates, despite the human or financial costs; or to seek custody even where visitation is the more appropriate solution.

Polikoff has noted, when decrying family court decisions that discriminate against lesbian mothers, that "[n]o state statute . . . lists promotion of a social or political ideology as a criterion relevant to determining the best interests of the child."[259] Yet she has traveled, in the course of 70,000 words, from a one-mother, one-father model to a two-mother model.

IV.
RECONCILIATION

A. *The Trouble With Donors*

If parenthood is to be available only to custodial parents and their partners,[260] then most gay men will never become parents. To those who would define parenthood as an exclusive status, this is as it should be: gay men, the argument goes, are free to father children through surrogacy.[261] If they choose, instead, to become donors, they should not expect society to offer them parental rights, but must accept their status as nonparents.[262]

This argument, which assumes that gay men and lesbians can make similar choices, reflects a gap between the rhetoric and the reality of parenthood.[263] In a society that prides itself in moving toward a model in which fathers can do everything mothers can do, and in a subset of society ostensibly dedicated to rejection of socially-constructed gender roles, gay men who want to parent should, we are told, want to parent full-time.[264] A man who chooses to be less than a full-time parent is marginalized by a world that views surrogacy (for men) and donor insemination (for women)

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that gay men exist, or acknowledged, tacitly, that few gay couples are able to "obtain" children, a fact she otherwise fails to consider. Later, Polikoff notes that "*lesbian-mother families may make the most compelling unit for which to redefine parenthood.*" *Id.* at 543 n.473 (emphasis added).

259. *Id.* at 547 n.492.

260. Essentially, this is the rule proposed by Polikoff in *This Child Does Have Two Mothers, supra* note 14. For a fuller description of Polikoff's arguments, see *supra* part III.A.

261. This ignores very real differences between surrogates and donors. *See supra* notes 70-80 and accompanying text.

262. *Cf.* FINEMAN, *supra* note 6, at 235 ("[I]f men are interested in acquiring legal rights of access to children . . . they *must* be Mothers in the stereotypical nurturing sense of that term . . . .") (emphasis in original).

263. This same gap has undermined efforts to protect the rights of mothers in a variety of contexts. *See, e.g.*, Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653 (1992) (assessing the evolution of the symbolic aspects of "Mother" in modern family law reform); MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991) (arguing that "advances" in family law merely reinforce male advantage).

264. For women, a desire to parent less than full-time has been traditionally regarded as suspect. *See generally* HARRIET EDWARDS, HOW COULD YOU?: MOTHERS WITHOUT CUSTODY OF THEIR CHILDREN (1989).

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as equivalents and sees all gay men and lesbians as social pioneers. The danger, of course, is that disapproval imported from other settings may obscure the best interests of the children in *this* context. The tendency is to focus, either explicitly or implicitly, on whether the father *deserves* parental rights,[265] the exchange-based thinking Katharine Bartlett has decried.[266] The real issue is the importance of each existing relationship to the child.

In the *Steel* case, the value of "periodic parenting" was clearly at issue. Yet, having chosen to base his argument on caselaw suggesting that every child must have a father, Steel had no incentive to defend his record as a parent. Instead, he listed numerous cases in which even abusive fathers obtained visitation in New York.[267] Thus, the worth of Steel's periodic parenting—which does not resemble the full-time parenting of Ry's mothers, but which may nonetheless be important to the child—was never squarely addressed.

Although the involvement of donors in their children's lives can vary widely, from daily to weekly to monthly visitation, donors tend to share some general characteristics. First, donors may not know, at the time they agree to become donors, how much involvement they will want. Second, involved donors see their children less often than do custodial parents. This section shows that objections to these characteristics are carried over from other contexts in which they do, in fact, pose problems, and that neither of these traits—initial uncertainty and periodicity—should stand in the way of protecting a donor-child relationship once it has developed.

1. Initial Uncertainty

Some gay men who agree to become sperm donors report confusion about how involved they want to be.[268] Thus, a donor may be willing to forego the rights of parenthood if he must, but still hope to have a relationship with his child. Seen another way, these men are willing to adapt to the

265. This approach reflects, in part, frustration that men consistently receive disproportionate credit for their childcare contributions, an observation that is both cliched and true. *See, e.g., Mr. Mom's Easy Marks*, 80 A.B.A. J. 42 (1994) (quoting Justice Ruth Bader Ginsburg: "A woman who does less than everything for her child is seen as a terrible mother. A man who does more than nothing is seen as a wonderful father."); *see also* CHESLER, *supra* note 114, at 53 (describing double standard); Sibyl Frei, *Protecting Our Lesbian Family, in* LESBIAN PARENTING, *supra* note 83, at 154, 155 (describing author's "struggle[ ] with a system that would award joint custody of a child to someone who could do nothing more than play with her once in a while").

266. *See* Bartlett, *supra* note 33, at 314-15 (arguing that awarding parental rights should not turn on an exchange, e.g., trading parenthood for financial responsibility).

267. Brief for Petitioner-Appellant, *supra* note 150, at 62, 63.

268. Thomas Steel stated that he was in this category of initially uncertain donors. Telephone interview with Thomas Steel (Dec. 13, 1994).

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mothers' wishes up to a point: the point at which feelings for the child blossom. To penalize men for their initial ambivalence *after* a relationship has formed is to confuse prenatal feelings with postnatal facts.[269]

Thomas Steel conceded that at the time Ry was conceived, he had no idea how he would feel about her.[270] This uncertainty is consistent with any number of accounts in which fathers—gay and straight[271]—describe the burgeoning of paternal feelings after their children are born. Social scientists have described the same phenomenon:

> An important . . . study by Greenberg and Morris (1974) found that fathers of newborns showed "engrossment" in their infants, a sense of bonding, absorption and preoccupation in their child, which Greenberg and Morris interpreted as an innate potential in fathers which was "released" by exposure to the infant.[272]

There is no necessary connection between a father's initial uncertainty and the quality of the ensuing relationship as experienced by the child. Thus, initial uncertainty is unrelated to a best interests determination.[273]

In other milieus, the absence of prenatal father-child attachments may cause serious social problems (for example, desertion of pregnant women by boyfriends or husbands). However, in the planned lesbian family, it is the emotionally bonded father who is suspect. In his *Steel* opinion, Judge Kaufmann observed, as if to chastise Steel, that "[h]e was not able to put biology aside . . . ."[274]

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269. The Supreme Court has noted, in describing the relationship between father and child, that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." Lehr v. Robertson, 463 U.S. 248, 262 (1982). *See also* Hill, *supra* note 3 (describing views of fatherhood revealed in *Lehr* and other Supreme Court opinions); Roberts, *supra* note 4, at 273 (suggesting that genetic tie is properly understood as "a bond, among others, that forms the basis of a more important relationship developed in love and caring.").

270. Telephone interview with Thomas Steel, *supra* note 268. Steel explained that the feelings he eventually developed for his child are "the strongest feelings I have ever known." *Id.*

271. *See, e.g.*, BOB GREENE, GOOD MORNING, MERRY SUNSHINE: A FATHER'S JOURNAL OF HIS CHILD'S FIRST YEAR 306 (1984) (describing feelings on his daughter's first birthday: "All I know is that . . . I have a completely different feeling than I ever expected.").

272. Nancy P. Hawley, *Sharing Parenthood*, *in* OURSELVES AND OUR CHILDREN: A BOOK BY AND FOR PARENTS 130, 143 (The Boston Women's Health Book Collective ed., 1978) (quoting MEN AND MASCULINITY (Joseph H. Pleck & Jack Sawyer eds., 1974) and citing Martin Greenberg & Norman Morris, *Engrossment: The Newborn's Impact Upon the Father*, 44 AM. J. ORTHOPSYCHIATRY, 520, 526-27 (1974)).

273. As Katharine Bartlett has observed, a "father should not be disqualified because by [an] earlier decision he has shown that he does not 'deserve' to be a parent." Bartlett, *supra* note 33, at 314-15.

274. *Thomas S.*, 599 N.Y.S.2d 377, 379 (Fam. Ct. 1993), *rev'd*, 618 N.Y.S.2d 356 (App. Div. 1994).

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In fact, Steel did manage to put biology aside until Ry's mothers invited him into her life. By introducing Ry to Steel, the mothers permitted his paternal feelings to develop; at the same time, they gave their daughter a name, a face, and a body to attach to the concept of father. They may wish they had raised their child in an environment in which the concept of father was insignificant, and in fact they may have tried to create such an environment retroactively. Yet their own actions encouraging their daughter to form a relationship with Steel, beginning with a cross-country trip for that precise purpose, suggest that the concept of father was a powerful concept in the R.-Y. household. That Ry understood the importance of father in our culture, and then developed a relationship with the man she knew to be her father, is the key fact of the case.[275]

To be sure, no evidence suggests that the genetic tie alone enhances the quality of a parent-child relationship.[276] However, the child's knowledge of the genetic tie—and of the significance of that tie in this society—cannot be disregarded. As Professor Dorothy Nelkin has observed, belief in the importance of genetic ties may be culturally constructed, but it is, in our society, a universal construct.[277]

2. Periodicity

Ellen Lewin, in reviewing the role of "father" in contemporary American culture, observes:

> Fathers [are] ambiguous participants in the lives of American families. On the one hand, in the "ideal family" immortalized by television programs of the 1950's—*Ozzie and Harriet, Father Knows Best*—Father is a very important person. He provides material sustenance . . . while Mother stays home to see to the family's "physical and emotional needs". . . . [H]e is the person whose activities define the cultural and social status of his family. *On the other hand, documentation of what actual fathers do has shown men to be marginal to the . . . relational core of the family.* Many

275. This is very different from the argument, advanced by some, that every child must be permitted to know his or her biological parents. *See, e.g.*, Edward Feld, *Technology and Halacha: The Use of Artificial Insemination* 7 (1995) (unpublished manuscript on file with *New York University Review of Law & Social Change*) (arguing that, under Jewish law, every child "has a right to [his or her] story"); Peggy Orenstein, *Are You My Father?: Looking for a Donor to Call Dad*, N.Y. TIMES, June 18, 1995, §6 (Magazine), at 28 (describing opinion of some children of anonymous donors that they have been damaged by lack of access to their roots). The Sperm Bank of California has addressed this problem, while supporting the integrity of alternative families, through a program in which donors agree to be contacted by a child who so chooses after reaching age 18. *Id.* at 42, 50.

276. Interview with Dorothy Nelkin, Professor, New York University School of Law, in New York, N.Y. (Sept. 9, 1995).

277. *See* Dorothy Nelkin & M. Susan Lindee, THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON 58-78 (1995) ("The Molecular Family"); *id.* at 59 (noting that in America in the 1990s, "kinship is culturally defined as biological"). The law may have a role in fostering this social construction.

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> men spend little time with their children, contribute little besides money to the ongoing operation of the household, and after divorce have been known to sever relationships not only with their wives but also with their children. Despite claims from some quarters that a new, more engaged, postfeminist fatherhood is on the rise . . . research continues to confirm the familiar picture of fathers as removed from both the affective and instrumental centers of family life.[278]

Without attempting to explain the intractability of traditional parenting roles, it is important to note that gay men who became parents in the 1980s and 1990s were raised in a world of gender distinctions. Consider this description of the 1968 edition of Dr. Spock's widely read childcare guide:

> While Dr. Spock addressed his *Baby and Child Care* to "loving parents," all of the advice is actually directed to mothers; only a handful of paragraphs in the 600-page volume are addressed to fathers. Moreover, it is clear that not too much help should be expected from men in daily child-care tasks. While it's "fine" for fathers "occasionally" to give a bottle or change diapers, "there are some fathers who get gooseflesh at the very idea of helping to care for a baby, and there's no good to be gained from trying to force them [to do so, since] most of them come around to enjoying their children later when they're more like real people."[279]

As recently as 1978, a guidebook for "liberated" parents concluded that

> [a] man who wants to go beyond the traditional definition of the father role encounters resistance because the society he lives in doesn't make either the idea familiar or the practice easy. . . .

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278. *See* LEWIN, *supra* note 92, at 143 (emphasis added). *See also* Orenstein, *supra* note 275, at 28, 31:

> For all the changes in women's roles over the last few decades, there are still fundamental assumptions about motherhood. A woman bears a child. . . . She nurtures it. She raises it. How she does that, exactly, may be a source of controversy . . . but the essence is understood. . . .
>
> Fatherhood has been murkier, a matter of choice rather than imperative: a complicated stew of biology and cultural mores, of acknowledged duty mixed frequently with evaded responsibility. Despite the increasing recognition of fathers' rights by the courts, and the media hoopla over the new involved dads, . . . [a]n unprecedented number of children are the offspring of deadbeat dads—of adult men who impregnate, then abandon, teen-age girls. Yet those men are fathers, too.

279. MAXINE L. MARGOLIS, MOTHERS AND SUCH: VIEWS OF AMERICAN WOMEN AND THE WAY THEY CHANGED 74-75 (1984) (describing BENJAMIN SPOCK, BABY AND CHILD CARE 31, 321 (1968)) (alteration in original).

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> [S]ociety offers them a limited definition of fatherhood . . . which is instilled in them early in life.[280]

Gay men are no exception. As Nancy Polikoff stated, in explaining why lesbians choose to become mothers,

> [w]e were girls before we were aware lesbians, and we were raised by families that expected us to become mothers. We read the same books and saw the same movies as our heterosexual sisters. And today we live in the same world, one which purports to value motherhood above anything else a woman can do.[281]

Similarly, gay men read the same books and saw the same movies as their heterosexual brothers.[282] Nonetheless, the failure of the "new man" to materialize—and the continuing transgressions of the "old man"—are substantial disappointments.[283] To women who are unable to obtain from men—boyfriends, husbands, ex-husbands—the help and support they and their children need, male behavior must seem unrelievedly egregious.

Thus, Polikoff has stated, "Unless and until fathers are willing to undertake primary caretaking or equal co-caretaking during marriage, their claims to custody upon divorce will continue to have a false and self-serving ring."[284] More recently, she disputed the sincerity of men who seek custody of their children: "The truth of the matter is, most of the time men

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280. Hawley, *supra* note 272, at 142. Similarly, child development experts have found that

> [s]everal types of early experience are . . . important to men's future parent roles: These include learning not only patterns of nurturance from parents and caregivers, but also learning about the connection between patterns of nurturance and gender roles. . . . A substantial literature has been established showing that children learn cultural and family proscriptions very early that serve as guidelines for responses believed to be appropriate for males and females in particular situations with children.

Phyllis W. Berman & Frank A. Pedersen, *Research on Men's Transitions to Parenthood: An Integrative Discussion*, *in* MEN'S TRANSITIONS TO PARENTHOOD: LONGITUDINAL STUDIES OF EARLY FAMILY EXPERIENCE 217, 238 (Phyllis W. Berman & Frank A. Pedersen eds., 1987) (emphasis added).

281. Polikoff, *What's Biology Got To Do With It?*, *supra* note 2, at 49.

282. Some gay couples raising children from infancy have had professional training. *See, e.g.*, Fred A. Bernstein, *Great Stories: Three AIDS Babies Rescued from Nightmarish Rounds of Hospitals and Shelters*, METROPOLITAN HOME, Feb. 1991, at 76 (describing adoption of babies with AIDS by gay couple—both experienced pediatric nurses).

For a candid discussion of the difference between the "gentleman father" and a full-time parent, see Sean Elder, *About Men: Dabbling Dads*, N.Y. TIMES, June 11, 1995, §6 (Magazine), at 30.

283. *See, e.g.*, RHODE, *supra* note 67, at 150-51 (describing divorced fathers); Orenstein, *supra* note 275, at 31 (recognizing failure of fathers to live up to the "media hoopla over the new involved dads").

284. Nancy D. Polikoff, *Letter: On Custody Settlements*, N.Y. TIMES, March 13, 1982, at A24.

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don't want custody of their children, and even if they say they do early on, they're using that as an economic ploy."[285]

The question is not whether these observations are true, but whether they have any relevance in the donor/lesbian mother context. In the setting of the planned lesbian family, the periodic father has done nothing wrong; he has taken on as much responsibility as he was offered, and may, in fact, have been denied additional involvement in his child's life. In this context, the notion of parenthood based on exchange is useless. Courts should instead ask whether the donor-child relationship, as it exists, is important to the child. In this regard, the child's knowledge of the biological connection, which may have powerful connotations for the child, is central.

In arguing that the rhetoric of equal parenting can disadvantage women, Martha Albertson Fineman offers no reason why the same could not be said of men:

> The law's reluctance to recognize and accommodate the uniqueness of Mothers' role in child rearing conforms to the popular gender-neutral fetish at the expense of considerations for mothers' material and psychological circumstances. Even if the ultimate goal is gender neutrality, the immediate imposition of rules embodying such neutrality within the family law context is disingenuous. The effect is detrimental to those who have constructed their lives around gendered roles.[286]

This Article examines one context in which the imposition of rules based on notions of gender interchangeability can be detrimental to men who have constructed their lives around gendered roles.[287] While our goal may be equality, we must "recogniz[e] our current distance from that ideal."[288] In this context, it is men who are "caught in the rhetoric of equality that casts their situations in aspirational terms."[289]

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285. Leslie Berger, *Money a Potent Factor in Thomas Custody Case*, L.A. TIMES, Oct. 20, 1993, at A1 (quoting Polikoff).

286. Fineman, *The Neutered Mother*, *supra* note 263, at 666. *See also* FINEMAN, *supra* note 6, at 47-48 (elaborating on concept of "gendered life"); *id.* at 70 (decrying the damage done by "the egalitarian rhetoric of modern reform").

287. *See* Nancy E. Dowd, *supra* note 22, at 935 ("Feminists . . . have argued for a model of parenthood based on the role of mothers, which emphasizes nurturing and caretaking. Men's physical differences in their connections to newborns might justify differences in the treatment of birthmothers and birthfathers; widespread social patterns of fathering might also justify differences in treatment."). *See also* Letter from Prof. Grace Blumberg to author, June 4, 1995, at 2 (noting that the American Law Institute, in discussions of divorce, "has been treating the fragility of the father's connection to his children . . . as the father's risk (or disability) in marriage and procreation, in contrast to the mother's risk, which is largely economic").

288. RHODE, *supra* note 67, at 160.

289. FINEMAN, *supra* note 6, at 75.

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B. Model Presumption

This Article identifies three primary needs: (1) involved sperm donors need to know that their relationships with their children (even if initially unintended and even if periodic) will be preserved; (2) lesbian mothers need to know that the law will protect the families they create; and (3) children of donors and lesbian mothers need to know that relationships with adults they have come to view as important—including relationships with involved biological progenitors—will be protected.

The solution described below does not suggest that every child needs a father, or attempt to decide whether, or how, a donor can achieve parental status. It merely suggests that relationships between donors and their biological children, when encouraged by the mothers, deserve legal recognition. It takes account of, but does not evaluate or judge, the mothers' choices.

MODEL PRESUMPTION

(1) A known semen donor who has contact with his child is deemed an "involved donor."
(2) Absent unfitness, permitting an involved donor visitation at a level that approximates his involvement in his child's life prior to litigation is presumed to be in the child's best interests.
(3) Permitting the involved donor additional parental rights is not presumed to be in the child's best interests.

Under this Model Presumption, permitting Thomas Steel, who had seen his daughter approximately five times a year before suing for visitation, to continue seeing her approximately five times a year, would be presumed to be in her best interests. Thus, while he might not have been allowed to escalate his involvement in his daughter's life, he could not have been entirely excluded.

Of course, the presumption could be overcome by any case-specific evidence that visitation is not in the child's best interests.[290]

290. Parents' rights are relevant only when consistent with children's best interests. For further discussion of the primacy of best interests, see, e.g., Binder, *supra* note 244, at 1150 ("[W]here a child has a strong relational interest, that interest may trump the right of a parent."); *cf.* Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993) (arguing for a child-centered model which emphasizes adults' earned authority rather than genetic connections). Family courts, which are experienced in factoring children's wishes into best interests determinations when, for example, heterosexual couples divorce, would be called upon to make similar determinations in this context.

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C. *Application to Existing Legal Regimes*

In several states, visitation statutes provide for the filing of a petition by any interested adult.[291] In other states, courts have used their equitable powers to award visitation to adults not explicitly covered by visitation statutes.[292] In these states, a court could adopt an approach comparable to the Model Presumption described above. That is, a court could acknowledge that a plaintiff is an involved donor and grant visitation without having to decide whether such a donor is a "father."

In New York, courts generally award visitation only to parents and grandparents.[293] Thus, to obtain court-enforced visitation in New York, an involved donor may have no choice but to be declared a father.[294] Though anathema to the mother(s), and evidence of the limitations of binary laws,

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291. For example, in Oregon, a person may file a petition for "reasonable visitation rights" if that person has "maintained an ongoing personal relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality." OR. REV. STAT. § 109.119(5) (1993). *See also* HAW. REV. STAT. § 571-46(7) (1995) (granting courts discretion to grant reasonable visitation rights unless shown to be detrimental to the best interests of the child); MICH. COMP. LAWS ANN. § 722.27(b) (West 1996) (allowing courts to provide for reasonable visitation of the child by the grandparents or others); WASH. REV. CODE ANN. § 26.09.240 (West 1996) (allowing court to order visitation rights for anyone so long as it will not endanger the child's physical, mental, or emotional well-being). As Brad Sears has aptly pointed out, "This type of law enfranchises those who are currently denied parental rights—not by moving them into the privileged group of 'parents,' but by blurring the line that separates legal parents from legal strangers." Sears, *supra* note 27, at 516.

292. *See, e.g.*, Daly v. Morse, 665 P.2d 797 (Nev. 1983) (step-grandmother); *Ray v. Ray*, 407 S.E.2d 592 (N.C. App. 1991) (same).

293. *See, e.g.*, Emanuel S. v. Joseph E., 78 N.Y.2d 178 (1991) (granting visitation to grandparent); Alison D. v. Virginia M., 77 N.Y.2d 651 (1991) (denying visitation to lesbian co-mother).

The statute that permits grandparents to sue for visitation, N.Y. DOM. REL. LAW § 72 (McKinney Supp. 1994), suggests a possible legislative solution for involved sperm donors. Grandparents, like involved donors, are not parents but genetic forebears who may or may not be involved in their children's lives. For a thorough discussion of the treatment of grandparent visitation cases by the New York courts, see Harriet Holtzman, *To Grandmother's House We Go?: Grandparent Visitation Rights Update*, FAM. L. REV. (journal of the Family Law Section, New York State Bar Association), Mar. 1995, at 11 (demonstrating that grandparents, even after establishing standing to sue, have generally been unable to convince courts that mandated visitation was in the child's best interests). Another example of legislative expansion of the right to visitation can be found in N.Y. Social Services Law § 383(c). The New York Court of Appeals recently noted:

> [Under § 383(c)], New York law now allows parties to an agency adoption to "agree to different terms" as to the nature of the biological parents' postadoptive relationship with the child. The statute thus expressly permits parties to agree that the biological parent will retain specified rights—such as visitation with the child—after the adoption, thereby authorizing "open adoptions" for the first time in this State.

In re Jacob, Nos. 195, 196, 1995 WL 643833, at *8 (N.Y. Nov. 2, 1995) (citing N.Y. SOC. SERV. LAW § 383(c) (Supp. Practice Commentaries, Supp. 1995 at 69)).

294. *But see Jacob*, 1995 WL 643833. The broad language of *Jacob* suggests the New York Court of Appeals could place the best interests of a child over the statutory language requiring an order of paternity as a prerequisite to visitation.

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this requirement need not stand in the way of achieving the goals described in this Article. In a carefully worded opinion, the court could grant a sperm donor paternity *solely for the purpose of permitting visitation.* The court would have to make clear that its objective is to continue the donor-child relationship at its pre-existing level, and otherwise acknowledge the superior claims of the lesbian co-mothers. Though the donor—now a father—would be able to sue for additional rights, an unequivocal statement that he would stand no chance of succeeding would render such further litigation unlikely. Though not an elegant solution, a well-drafted opinion could have the same practical effect as the Model Presumption.

This solution is both sex- and sexual orientation-blind. With minor substitutions, it can be applied to cases involving gay men and surrogate mothers, to cases involving heterosexual couples and surrogates or donors of semen or eggs, and to open adoptions. It is not intended to guide judges and legislators solely. Instead, it is meant to prevent disputes from reaching the courts in the first place. It is a standard designed to be enforced primarily through the cooperation of parents and prospective parents operating in the shadow of—or, more often, in anticipation of—the law.[295]

V.
EPILOGUE

A. *Telling Stories II*

The goal of Polikoff's amicus brief was simple: to tell the story of the planned lesbian family. The argument section begins: "This case concerns the future of a child born into a 'planned lesbian family'"[296]—not an argument but a story, with the court asked to supply the happy ending. "[T]his court, and all courts," the brief continued, "must understand the extent and nature of such families."[297]

Steel did not respond in kind. As this Article suggests, Steel could have told the rich and moving story of an involved donor. Had he done so, he would have been inviting the court to evaluate his claim in the context in which it arose. Although he was declared a father by the intermediate appellate court, that court's opinion was acontextual in the extreme. Thus, the holding is unpersuasive, and will be accorded little weight if and when an analogous case reaches the New York Court of Appeals.[298]

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295. *Cf.* Robert H. Mnookin & Lewis Kornhauser, ***Bargaining in the Shadow of the Law***, 88 YALE L.J. 950 (1979).

296. *Amicus* Brief, *supra* note 10, at 219.

297. *Id.* at 221.

298. *See* Alison D. v. Virginia M., 77 N.Y.2d 651, 658 (1991) (acknowledging the "crucial . . . bonds" between children and their lesbian co-mothers) (Kaye, J., dissenting). That Kaye is now the Chief Judge of New York and the author of the majority opinion in *Jacob*, 1995 WL 643833 (discussed *supra* notes 19, 293-94), suggests that the Court of Appeals would, at the very least, examine the context in which such a case arose.

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The Appellate Division's treatment of the context in which the case arose is largely a product of Steels' litigation strategy.[299] In fairness to Steel, the lack of literature on gay male parenting may have contributed to his acontextual approach. There is no legal literature of gay fatherhood comparable to the extensive body of work on lesbian motherhood.[300] The lack of a story may be self-perpetuating. How does one tell a story no one else has told?

Facts can be presented in an infinite variety of ways; caselaw, likewise, lends itself to myriad interpretations. In our system, the lack of a story is tantamount to incoherence. Consequently, the dearth of literature, particularly legal literature, of the involved sperm donor poses a number of interrelated problems. A standard for donor visitation must emerge from within the lesbian and gay community. A consensus standard can be created only if both sides can be heard. The invisibility, rhetorically, of the involved sperm donor, especially when weighed against the extensive data on the motivations of lesbian mothers, makes it difficult for donors to be heard. And those who cannot easily be heard often end up demanding, rather than discussing.

B. Gay/Lesbian Cooperation

The story of gay men's and lesbians' aspirations of parenthood and their struggle to form families in a society reluctant to recognize them as parents is properly understood as part of the larger story of gay/lesbian liberation and gay/lesbian cooperation.

The gay liberation movement, in its early days, was largely a movement by and for men. As one lesbian leader remembers, "we were an afterthought, the 'female homosexuals.'"[301] Lesbians were both ignored by gay activists and, in many cases, engaged in the parallel fight for women's

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299. *See supra* part II.C.

300. Possible reasons include the preoccupation of gay men with other issues, including AIDS, *see supra* notes 57-62 and accompanying text, and the fear of marginalization within the profession. "The fact that gay fatherhood is a sensitive area has further limited . . . research activity. . . . At some institutions . . . the topic of homosexuality is not considered a bona fide area of research for tenure and promotion." BARRET & ROBINSON, *supra* note 43, at 149. According to Barret & Robinson, "[T]he topic of gay fathers is perhaps the least discussed and researched area in the fatherhood spectrum. The apparent incompatibility of being both gay and a father has led to large-scale neglect by social scientists." *Id.* Barret & Robinson continue:

> [G]ay fatherhood has received little empirical attention, presumably because gay fathers are a difficult population to reach. . . . Another reason, however, is the traditional . . . neglect of the role of fathers in the family and parenting literature. Margaret Mead's famous comment that "fathers are a biological necessity but a social accident" accurately reflects the limited role expected of men in families.

Id. at 148-49.

301. Telephone interview with Paula Ettelbrick (Dec. 10, 1993). *See also* Kay Gilbert, *What's in a Name?*, LAWYERS FOR HUMAN RIGHTS REPORTER (Los Angeles), Fall 1995, at 2 (describing linguistic shift from use of "gay" (to describe men and women) to "gay and lesbian").

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liberation.[302] However, by the 1980s, lesbians had assumed prominent roles in many national gay rights organizations. Among the factors contributing to this shift were the success of the women's movement in creating leaders, the outpouring of lesbian support for the AIDS-embattled gay male population,[303] and the effects of that illness. "I don't want to be morbid," said one lesbian organizer, "but a lot of the leadership in the gay men's community has died."[304]

The entry of women into positions of power in the movement created a remarkably successful coalition.[305] However, in the early 1990s, the equilibrium again began to shift. This time, it was men who felt disempowered. Some of this is peevishness—"[w]hen women get a little power, men think it's a lot"[306]—while some is founded on actual differences between the lesbian and gay agendas.[307] In 1990, Roberta Achtenberg, then the executive director of the National Center for Lesbian Rights, told a reporter that

> lesbians are now ready to focus on their own concerns. "I think that we're at a point now where women want to reassert some of the issues that we've willingly allowed to lay dormant as we've fought to deal with this hideous epidemic." [T]hose issues include

302. *See* MILLER, *supra* note 53, at 374-78 (describing role of lesbians in feminist movement); *id.* at 374 ("[W]omen felt that [Gay Liberation Front] men were just not sufficiently sensitive to . . . issues of particular concern to lesbians."). *But see generally* SISTER & BROTHER, *supra* note 59 (describing emotional bonds between lesbians and gay men).

303. *See, e.g.*, KRAMER, *supra* note 48, at 47 (praising AIDS advocacy of National Gay Task Force president Virginia Apuzzo); *see also* MILLER, *supra* note 53, at 452-53 (describing AIDS activism of lesbian leaders). *See also* A LOVING TESTIMONY: REMEMBERING LOVED ONES LOST TO AIDS (Lesléa Newman ed., 1995) (including tributes by lesbians to gay male friends). Anthropologist Kath Weston has noted that AIDS simultaneously drew gay men to women: "As they encountered the lack of government support for AIDS research, programs, and drug trials, many newly politicized gay men learned firsthand the meaning of the feminist slogan, 'the personal is political.' They began to build bridges, however imperfectly constructed, to the feminist sector of the lesbian population." WESTON, *supra* note 83, at 176-77.

304. Elaine Herscher & David Tuller, *SF Lesbians at Top of Gay Leadership*, S.F. CHRONICLE, Nov. 9, 1990, at A6 (quoting Melinda Paras, director of multicultural affairs at the Shanti Project, an AIDS program in San Francisco).

305. For example, the Lambda Legal Defense & Education Fund, which has argued gay rights cases in nearly every U.S. jurisdiction, has since the 1970s had a policy of gender parity for its board of directors. Interview by Robert Murphy with Judge William J. Thom (Lambda founder) (Oct. 29, 1993).

306. Telephone interview with Paula Ettelbrick, *supra* note 301.

307. *See* Herschler & Tuller, *supra* note 304, at A6.

> "In the past decade, historical tensions between gay men and lesbians have given way to a united effort to fight AIDS. . . . [Consequently,] lesbian leaders are just now identifying their own needs and priorities . . . . The emergence of lesbians on the political scene, locally and nationally, is an outgrowth of gay political power, with women paying their political dues and finally getting their turn," said Urvashi Vaid, executive director of the National Gay and Lesbian Task Force in Washington, D.C.

Id.

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> . . . family-related matters such as adoption, child custody and child care.[308]

In some situations, gay men and lesbians have different priorities; in others, their interests may appear to be in direct conflict. The *Steel* case is an example of a situation in which the needs of gay men and lesbians seem to be in opposition. The divisiveness of the case was evident in the decision of the National Center for Lesbian Rights to participate in the filing of the *amicus* brief for the mothers, a decision it described as unavoidable given "the legal system's attempts to impose heterosexual family models on us."[309] To Steel, who saw his suit as an attempt to preserve his relationship with his daughter, it was the mothers' insistence that there be only two parents that seemed to be based on a heterosexual model. Gay rights organizations were split,[310] and a vociferous debate has raged in the gay and lesbian community.[311]

However, as this Article has attempted to show, that conflict may be more apparent than real. A presumption that would permit an involved donor to remain an involved donor—someone who is neither in danger of losing everything nor capable of taking everything away—could defuse what may otherwise appear to be intractable disputes. The *Steel* case "demonstrates how far we have to go—how much lesbians and gay men have yet to sort out about the meaning of family and what constitutes ethical behavior toward each other and toward children. If we are to invent new family forms, we cannot rely on old definitions . . . ."[312]

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308. *Id.* (quoting Achtenberg). *See also* Lillian Faderman, *Sisters and Brothers*, THE ADVOCATE, Nov. 28, 1995, at 88 ("As lovely as the notion of 'sister and brother' is, as much as lesbians and gay men need each other—for good fellowship, to battle common enemies, to help in sickness and in health—lesbians . . . still need to reserve for ourselves a space where things *female* are the focus.") (emphasis in original).

309. *Our Day In Court—Against Each Other: Intra-Community Disputes Threaten All of Our Rights*, NCLR NEWSLETTER (National Center for Lesbian Rights, San Francisco, CA), Winter 1991-1992, at 1. In taking the mothers' case, the NCLR abandoned a long-standing policy against litigating cases in which both parties are gay. *Id.*

310. Although one prominent lesbian attorney, Abby Rubenfeld, supported Steel, most mainstream gay organizations, including the Lambda Legal Defense & Education Fund, came in as *amici curiae* for the mothers. *See* organizations listed in note 10, *supra*. For Rubenfeld's views of the *Steel* case, see Abby Rubenfeld and Dennis DeLeon, op-ed article, LESBIAN/GAY LAW NOTES, Apr. 1995:

> How ironic it is that in this day and age when the absence of parents from the family, both physically and spiritually, is so bemoaned, there are those who seem unable to recognize what the child in this case, in fact, is fortunate enough to have: three parents, all of whom love her very much. . . . The [appellate] court thus embraced the reality of this extended family [, restoring] to the child the opportunity for a relationship with a loving and supportive parent and the only father she will ever have.

311. *See, e.g.*, sources cited in note 28, *supra.*

312. BENKOV, *supra* note 26, at 248.

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Conclusion

In her academic writing and her *amicus* brief in *Thomas S. v. Robin Y.*, Nancy Polikoff has argued for a legal definition of parenthood that requires intent to be a parent at the time of conception and full-time or nearly full-time cohabitation with the child. The message to gay men is that if you can obtain physical custody of a child, you can be a parent; conversely, if you are not a full-time parent, your relationship with your child is unworthy of legal protection.

By contrast, Thomas Steel, in his suit to be declared a father, made over-broad and offensive claims that can only exacerbate the legitimate fears of lesbian mothers and prospective mothers, foreclosing parenting options for lesbians and gay men.

This Article has attempted to develop a standard that will facilitate gay/lesbian co-parenting by acknowledging the legitimate fears of lesbian mothers, the hopes of involved donors, and the child's interest in maintaining relationships with two or more significant adults, including mothers, co-mothers, and involved donors.

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