ARTICLES

TOWARDS CONSTITUTIONAL RECOGNITION OF THE LESBIAN-PARENTED FAMILY

KYLE C. VELTE*

* Law Clerk, Justice Alex Martinez, Colorado Supreme Court. LL.M., Harvard Law School, 2001; J.D., *summa cum laude*, Washington College of Law, American University, 1999; B.A., *cum laude*, Hamilton College, 1993. My thanks go out to Professor Elizabeth Bartholet for her insights and encouragement, to Shannon Minter at the National Center for Lesbian Rights for his willingness to keep me abreast of the latest developments in LGBT family law, to the editorial staff at the NYU Review of Law & Social Change for their efforts in making this article the best it could be, and, finally, to Jenn for her endless support.

I.
INTRODUCTION

E. O. is a 37-year-old free lance management consultant who maintains a residence in Martha's Vineyard and in the Boston area.

She had been in a relationship with her son's legal mother, L.M., for 13 years prior to their separation in May of 1998. The couple entered into a co-parenting agreement and had planned to raise children together for years prior to their son's birth. E.O. was in the delivery room when he was born. She cut his umbilical cord and accompanied the newborn when he was weighed, measured, bathed and had post-birth testing done.

> After his birth, E.O. and L.M. raised their son together for [almost] the [full] first three years of his life. E.O. set aside money in a savings account for her son, invested in a college trust fund in his name, and continues to have him on her health insurance policy. In addition, she had planned to adopt him prior to her separation with L.M.
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> It was on May 16, 1998, when the fight of E.O.'s life began. That was when she and L.M. separated and she temporarily lost contact with her son.... E.O. said she attempted to settle the custody dispute out of court, but L.M. was not willing to do so.
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> "When contact was initially ceased, I tried to use the help of legal authorities—the National Center for Missing and Exploited Children and the FBI—because I didn't know where [L.M. and my son] were. What I found is that, legally, I was not a custodial parent and, therefore, I had no rights." She added: "That was the first realization I had of my complete powerlessness, when these agencies that are supposed to be there to help in a custodial kidnapping situation... couldn't help in a lesbian family."[1]

This is one woman's true story. Unfortunately, it is the story of many women, and of many thousands of children, around the country today. This article explores the legal and policy issues that arise when a lesbian couple plans for and brings a child into their family and subsequently separates. Upon separation, the legal parent terminates the relationship between the child and the non-legal parent.[2] One thing is clear: the current legal landscape is insufficient to address the issues of custody, visitation, and child support that surface upon the dissolution of the lesbian-parented family. This paper articulates new models, based on constitutional rights and interests, that can better enable courts to address these issues. Before discussing the plight of dissolving lesbian-parented families and proposing models to deal with the phenomenon, the history and background of gay and lesbian families is necessary by way of introduction.

The late 1980s and early 1990s saw a new social and legal phenomenon in the United States: same-sex couples creating families. Same-sex couples cre-

1. Scott A. Giordano, *Person of the Year*, BAY WINDOWS, Dec. 23, 1999, at 3.

2. Throughout the article, I use the term "non-legal parent" as a term of art, signifying that the adult has no legally recognized relationship with the child through which the adult can assert certain rights (such as visitation) or through which the adult has certain responsibilities (such as financial support). In contrast to its legal meaning, I argue that the non-biological or non-adoptive lesbian mother in a lesbian-parented family is factually a "parent" in every sense of the word except the legal and should be recognized a legal parent. It is important to note that the termination of non-legal parent-child contact by the legal parent is in no way normative, but is instead descriptive of the current situation; not all legal mothers deny visitation between their children and the non-legal mothers. However, the impetus for this article is that at least some lesbian-parented family dissolution end up in the legal system because the legal mother denied visitation or custody to the non-legal mother.

ated families in many ways—through adoption, alternative insemination by known or anonymous donor, in vitro fertilization, and traditional and gestational surrogacy.[3] Current estimates indicate that there are as many as fourteen million children of lesbian and gay parents living in this country.[4] Much has been written about this boom of "alternative" families, and the unique challenges facing such families, both in the popular press and in legal scholarship.[5] These "alternative" families have been predominantly informal in that the couple's relationship and the relationship between the non-legal parent and the child are largely unrecognized by the law. None of the legal rights and responsibilities, such as inheritance, child support, and visitation, therefore, attach to these "alternative" families.[6] In many states, these families are effectively in legal limbo.

As the 1990s came to a close, the increased number of same-sex couples having children led to an increased number of dissolutions of such families as couples ended their relationships. Courts faced issues of child custody and visitation in "alternative" families with correspondingly greater frequency.[7] In some

3. *See generally* Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329 (1995). Donor insemination, either by a known or unknown donor, involves depositing semen inside of a woman, usually with a syringe. *Id.* at 337. In vitro fertilization ("IVF") involves the fertilization of an ovum with semen outside of the woman's body. The fertilized egg is then gestated by a woman who may be the intended parent or a surrogate. *Id.* at 339–40. In traditional surrogacy, a woman "other than the partner of the sperm donor agrees to conceive a child by donor insemination and carry it to term. She also agrees to relinquish the child to the genetic father and his partner at birth." *Id.* at 341. Gestational surrogacy involves IVF and occurs when a fertilized egg is gestated by a woman who did not provide the egg. *Id.* Surrogacy of either type in the context of LGBT families is most commonly used by gay male couples to create a family. IVF has been used by lesbian couples: One partner donates an egg that is fertilized by donor semen and is gestated by the other partner. *See, e.g.*, M.K. and C.P. v. Medical Cntr., Inc., Mass. Prob. and Fam. Ct., Suffolk County, No. 00W-1341 (June 28, 2000, Gould, J.).

4. The number of children actually being raised in lesbian or gay parented families is uncertain, although a wide range of estimates have been offered. Estimates on the high end claim that there are from 6 to 14 million children of lesbian or gay parents in the United States. *See, e.g.*, Ryiah Lilith, *The G.I.F.T. of Two Biological and Legal Mothers*, 8 AM. U. J. GENDER SOC. POL'Y & L. 207, 208 (2001); Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Roles of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 740 n.5 (1999). These figures, however, do not appear to distinguish children originating in heterosexual relationships from those planned for by same-sex couples. On the other end of the spectrum, census data based on self reporting seem questionably low. *See* MICHAEL S. WALD, SAME SEX COUPLES: MARRIAGE, FAMILY, AND CHILDREN 9 (1999), *available at* http://www.law.stanford.edu/faculty/wald/contents.shtml, *citing* U.S. CENSUS BUREAU, MARITAL STATUS & LIVING ARRANGEMENTS: MARCH 1998 (UPDATE), UNPUBLISHED TABLES 71–73 (1998) (estimating that there are 1,674,000 same-sex partnerships in the U.S., with 167,000 same-sex couples living with one or more child under the age of sixteen).

5. *See, e.g.*, Barbara Katrowitz, *Gay Families Come Out*, NEWSWEEK, Nov. 4, 1996, at 50; Tsippi Wray, *Lesbian Relationships and Parenthood: Models for Legal Recognition of Nontraditional Families*, 21 HAMLINE L. REV. 127 (1997); King, *supra* note 3.

6. Although no state currently recognizes same-sex marriage, several states do permit lesbian couples with children to obtain a "second parent adoption." *See infra*, Part II.A.

7. *See, e.g.*, David Crary, *Lesbians Face Custody Battleground Law: When Female Partners Separate After Rearing Children, One May Find Herself Cut Off and Without Recourse*, L.A.

of these cases, the legal parent refused to allow the non-legal parent visitation or custody of the child(ren). The impact of such a decision by the legal parent is devastating for both the child and the non-legal parent. As one non-legal lesbian mother describes it, "[i]n this situation, as with many lesbian families, if a child loses one parent... [he or she] loses the entire [second] family. He lost his grandparents, aunts and uncles and cousins."[8] Stories abound in the Lesbian, Gay, Bisexual, and Transgendered ("LGBT") press, as well as in the mainstream press, about the plight of these children and non-legal parents.[9] Some non-legal parents, wary of facing homophobic and heterosexist courts, accept that they are forever cut off from their children, treating the loss as if the child had died, and move on through grief and mourning.[10] Others choose to fight in court over several years and at the cost of tens of thousands of dollars.

During this past decade of rapid change in the legal landscape of lesbian and gay family law,[11] legal practitioners and scholars have written much about the plight of the non-legal parent in the same-sex dissolution cases. While most commentators have argued from the perspective of the non-legal parent,[12] most courts have denied standing to the non-legal parent in visitation and custody proceedings.[13] Early decisions on this issue were overwhelmingly in favor of the legal parent.[14] Courts tended to focus on the legal parent's rights while treating the child's interests as included in the parent's rights or as presumptively laying with the parent.[15] More recent cases have revealed a trend towards grant-

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TIMES, Oct. 24, 1999, at A1; Mike McKee, *Gay Guardianship Rights Get Boost*, NAT'L L.J., Nov. 27, 2000, at A4 (noting that "[c]ustody disputes between splitting lesbian couples have become increasingly common in the past 10 years").

8. Giordano, *supra* note 1.

9. *See, e.g.*, Giordano, *supra* note 1 (describing, in New England's LGBT newspaper, the fight of a non-legal parent to win visitation and custody with her son after separating from her partner, the legal parent of the child); Deb Price, *Hold Gay Parents to Their Commitments*, DETROIT NEWS, Dec. 18, 2000, at A9 (discussing the trend of legal parents withholding visitation and/or custody from their former partners and urging the LGBT community to stop the practice).

10. *See* Giordano, *supra* note 1.

11. I use the term "lesbian and gay family law" to encompass a wide range of family law issues faced by the lesbian, gay, bisexual, and transgendered community. The use of the term "lesbian and gay" is not an attempt to ignore the bisexual and transgendered constituencies of the "queer" community, but is instead used for convenience. I will also use the acronym "LGBT" to refer to the lesbian, gay, bisexual, and transgendered community throughout the article.

12. *See, e.g.*, Nicole Berner, *Child Custody Disputes Between Lesbians: Legal Strategies and Their Limitations*, 10 BERKELEY WOMEN'S L.J. 31 (1995) (proposing legal presumption of parenthood for unmarried coparents in order to protect parent/child relationships within lesbian families).

13. *See, e.g.*, Kathleen C. v. Lisa W., 84 Cal. Rptr. 2d 48 (Ct. App. 1999). *But see* J.C. v C.T., 711 N.Y.S.2d 295 (Fam. Ct. 2000).

14. *See, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1991). *See also* McKee, *supra* note 7, at A4 ("California law has consistently sided with the birth mother and has not even given the other "parent" standing to seek custody."). For a discussion of case law, see *infra*, Part II.

15. *See generally* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1785 (1993).

ing standing to the non-legal parent in such custody and visitation cases.[16]

This article addresses visitation, custody, and child support issues that are raised when lesbian couples plan for and create a family together (either through adoption or reproductive technologies) and subsequently separate.[17] Many of the arguments offered on behalf of non-legal parents have been based on statutory interpretation or equitable principles. Very few proponents of non-legal parent visitation or custody have articulated constitutional arguments to support their views. This article proposes three new constitutionally-based models for custody, visitation, and child support disputes in dissolved lesbian-parented families.[18] The United States Supreme Court's recent decision in *Troxel v. Granville*[19] is the point of departure for two of the proposed models. The article asserts that *Troxel* represents a unique moment in the Court's family law jurisprudence—a rare opportunity to build new constitutional rights, namely a constitutional liberty interest in the non-legal lesbian parent and in the child to maintain bonds with family members. All three models also build upon Professor Martha Fineman's reformulation and rearticulation of the family unit into a caretaker-dependent model.[20]

The first two proposed models, which I have labeled the Parental Status Model and the Constitutional Interests Model, focus on the interests of the non-legal lesbian parent and the child in maintaining the relationship between them. The Parental Status Model recognizes the interests of both the non-legal lesbian mother and the child in maintaining family bonds with each other as constitutional liberty interests. These liberty interests, coupled with actual parenting by the non-legal lesbian mother, result in a finding that the non-

16. *See, e.g.*, J.C. v C.T., 711 N.Y.S.2d 295 (Fam. Ct. 2000).

17. The article focuses on lesbian families, as opposed to gay male families or other queer family structures, because the lesbian-parented family is presently far more common in the LGBT community than the gay male-parented family. *See* Chris Bull, *The New Activism*, THE ADVOCATE, June 22, 1999, at 53. Thus most, if not all, of the LGBT family dissolution cases that have reached the courts have involved lesbian-parented families that are dissolving.

18. The article is thus narrow in its focus. The article does not discuss in any depth those states that afford protection to lesbian-parented families, such as those states in which non-legal partners may obtain a "second parent" adoption. *See generally* Lambda Legal Defense and Education Fund, *Overview of State Adoption Laws* (1999), *at* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=399. Nor does the article discuss claims made by known sperm donors against lesbian-parented families for visitation or custody. *See, e.g.*, Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994) (granting order of filiation to sperm donor who was known to the child as her father). This article does not track the plight of LGBT persons to adopt and become foster parents or the recent development in a few states to grant legal parent status to non-legal lesbian parents without any adoption at all, but instead to grant such parent status under the state's version of the Uniform Parentage Act ("UPA"). *See, e.g.*, In the Interest of Twin A.V.N. and Twin B.V.N., Colo. Dist. Ct., Boulder County, No. 99-JV-385, Division 2 (Sept. 30, 1999). The article's focus is narrow because its purpose is narrow: to address a particular and increasingly widespread problem with suggested solutions, informed by constitutional principles and feminist legal theory.

19. 530 U.S. 57 (2000).

20. *See* MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1994).

biological mother is a legal parent to the child, thus triggering the state's statutory scheme for resolving child custody, visitation, and support issues.

Recognizing that the Supreme Court may hesitate to create a new category of legal parentage, I propose the Constitutional Interests Model. In this model, the non-legal lesbian mother, while not achieving the status of legal parent, nonetheless has a constitutional liberty interest in the family bonds with her child, just as the child has a constitutional liberty interest in maintaining her relationship with the non-legal lesbian mother. As a result, all three constitutional interests are balanced—that of the legal mother, the non-legal mother, and the child. Under this model, standing cannot be denied to the non-legal lesbian mother in custody and visitation cases.

The third model, which I have labeled the Equal Protection Model, proposes a more modest approach in the form of an equal protection challenge. Specifically, children of dissolved lesbian-parented families are denied their Fourteenth Amendment equal protection guarantees when courts re-fuse to permit non-legal parents a hearing on the merits of their visitation/custody claims.

The models, which are explained fully in Part III.E, are summarized in the following chart:

Model	Summary of Argument in Support of Model	Outcome of Model's Application
Parental Status Model	Supreme Court precedent, culminating in the recent *Troxel v. Granville* decision, compels a shift in the non-legal lesbian parent's status to the status of a legal parent.	Both women are legal parents to the child(ren) for purposes of the state's statutory scheme for resolving disputes involing visitation, custody, and child support. There are thus no issues of standing for the non-biological or non-adoptive lesbian mother.
Constitutional Interests Model	Supreme Court precedent permits recognition of (i) a new constitutional interest in the non-legal lesbian parent to maintain a relationship with the child(ren), and (ii) a new constitutional interest in the child(ren) to maintain a relationship with the non-legal lesbian parent.	The interests of the non-legal lesbian parent and the interests of the child are balanced against the rights and interests of the legal lesbian parent to resolve disputes involving visitation, custody, and child support. There are no issues of standing for the non-legal lesbian parent.
Equal Protection Model	Supreme Court's precedent addressing children of unmarried parents should include children of lesbian-parented families, thus triggering intermediate scrutiny.	Non-legal lesbian parent is granted standing because a denial of standing would violate the child's equal protection rights.

It is important to note that several solutions to these issues have been formulated through creative litigation and open-minded courts. For example, some states permit second-parent adoptions. In a second-parent adoption, the non-legal mother is permitted to adopt her partner's child without the legal parent having to terminate her own parental rights.[21] Once a second-parent adoption is completed, both women are legal parents to the child and carry all of the rights and responsibilities of parenthood.[22] Currently, only six states and the District of Columbia permit second-parent adoptions, while some cities and counties in another seventeen states permit it.[23]

Another solution available in a very limited number of jurisdictions is a declaration of the non-legal lesbian mother's parenthood through an action brought pursuant to the state's version of the Uniform Parentage Act ("UPA").[24] The UPA, ratified by the National Conference of Commissioners on Uniform State Laws in 1973,[25] and adopted in various forms by eighteen states,[26] establishes the requirements for legal recognition of the parent and child relationship.[27] The UPA presumes that the woman who gestates the child is the child's legal mother.[28] However, the UPA also permits the substitution of "maternity" for "paternity" when applicable.[29] The UPA provides that paternity can be established in several ways, including receiving the child into one's home and openly holding the child out as one's own natural child,[30] or by filing a written acknowledgment of paternity, along with a written statement by the mother that she does not dispute the father's claim of paternity, with the court or registrar of vital statistics.[31] Thus, lesbian couples have filed UPA actions together, seeking a declaration that the non-legal parent is a legal parent using

21. *See* National Center for Lesbian Rights, *Second Parent Adoptions: An Information Sheet, at* http://www.nclrights.org/publications/pubs_2ndparentadoptions.html (last updated July 16, 2001).

22. *See id.*

23. *See id.*

24. Uniform Parentage Act, 9B U.L.A. 287–345 (1987).

25. Alan J. Toback & Rebecca B. Feinberg, 3 ILLINOIS FAMILY LAW § 25.2 (Supp. 2001).

26. *See* Lilith, *supra* note 4, at 234.

27. In 2000, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Parentage Act, 2000 ("UPA (2000)"). *See* UPA (2000), 9B U.L.A. 295–376. In doing so, the National Conference of Commissioners on Uniform State Laws withdrew all earlier uniform acts dealing with parentage. *Id.* at 297–98. However, the cases implicating the UPA in this article cite to the 1973 version of the UPA because that was the version adopted by the states in the cases herein discussed. Because the court discussions noted in this section of the article are based on the 1973 version of the UPA, a detailed discussion of the substantial changes in the 2000 UPA is beyond the scope of this article.

28. UPA (1973) § 3(1), 9B U.L.A. 391.

29. *See* UPA (1973) § 21, 9B U.L.A. 494 ("any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this Act applicable to the father and child relationship apply").

30. *See* UPA (1973) § 4(a)(4), 9B U.L.A. 393.

31. *See* UPA (1973) § 4(a)(5), 9B U.L.A. 394.

these sections of the UPA. A few counties in California have permitted such actions,[32] as has at least one in Colorado.[33]

Notwithstanding the availability of effective nonconstitutional solutions in some jurisdictions,[34] children and non-legal lesbian parents in many states go unprotected, either because such solutions have not been proposed or because courts in those states have expressly rejected them. Accordingly, the article proposes solutions of constitutional magnitude to bridge the gap in the protection of children that results from the patchwork nature of family law.

Part II lays out the general law pertaining to custody, visitation, and child support for all families. Part II also outlines the past and present legal landscape for lesbian couples with children who separate and seek the assistance of the courts in resolving custody and visitation as well as child support disputes. Finally, Part II introduces the theoretical framework used to consider the legal and policy issues involved in these lesbian-parented family dissolution cases, namely the concept of a normative universe, or *nomos*, as articulated by Robert Cover. Part III discusses the constitutional rights and interests of legal parents, non-legal parents, and children, and argues that the Court should recognize a constitutional liberty interest in the child to maintain family bonds and should recognize a constitutional liberty interest in the non-legal mother to maintain family bonds. Part III explains in detail the three models that arise from these new constitutional rights and interests. Part IV discusses the advantages and disadvantages of a legislative response to these issues. Part V concludes the article.

II.

LEGAL LANDSCAPE FOR LESBIAN COUPLES WITH CHILDREN WHO SEPARATE

Issues of sexual orientation in the context of family law emerged in the 1970s and resulted from the dissolution of heterosexual marriages upon the woman's "coming out."[35] Typically, the legal issues raised included the lesbian mother fighting to retain custody of the child(ren) in the face of a challenge, based on the woman's sexual orientation, by the father.[36] A new wave of lesbian-parented families emerged in the 1980s, as lesbian couples created families through reproductive technologies.[37] These technologies include alter-

32. *See, e.g.*, In the Matter of L.M. and L.S., Cal. Super. Ct., San Francisco County, No. FL032006 (May 24, 1999, Hitchens, J.).

33. *See* In the Interest of Twin A.V.N. and Twin B.V.N., Colo. Dist. Ct., Boulder County, No. 99-JV-385, Division 2 (Sept. 30, 1999).

34. Other courts have utilized equitable doctrines such as equitable estoppel, psychological parent, and *de facto* parent to find that these disputes may be resolved in a full hearing on the merits. These doctrines are discussed more fully in Part III, *infra*.

35. Nancy Polikoff, *The Limits of Visibility: Queer Parenting Under Fire*, GCN, 1999, at 38, 39 [hereinafter *Limits of Visibility*].

36. *See id.* at 39–40.

37. *Id.* at 41, 42–43.

native insemination by a known or unknown donor,[38] one partner gestating an egg donated by the other partner and fertilized using sperm from a known or unknown donor,[39] and the placement of DNA from one partner's egg in a donor's sperm casing that is then used to fertilize the other partner's egg.[40] This section summarizes the current state of the law for lesbian-parented family dissolution cases, for this landscape informs the articulation of the new constitutional interests that are proposed.

A. Custody and Visitation

1. Custody and Visitation Law Generally

In the heterosexual context, both legal parents have custody rights. In the event of a divorce, courts routinely decide which parent will have legal custody, or if both parents will share legal custody. Custody vests authority in the adult to make decisions that affect the child's life.[41] Custody usually implies that the child is in the physical possession of the adult.[42] Although custody has been described as "seldom explicitly defined"[43] and a "slippery word,"[44] it "distills down to the right to supervise, care for and educate the child."[45] Legal parents have a constitutionally protected right to custody of their children—however, that right is not absolute.[46] In custody actions involving third parties, parents are generally accorded more heightened protection than in visitation actions involving third parties.[47]

Upon divorce, courts also decide issues of visitation, which is closely related to custody. In contrast to custody, visitation is usually granted to the non-custodial parent as a response to the creation of separate homes after the separation of the children's parents.[48] Visitation rights for legal parents are well-established: such rights are granted to the non-custodial parent unless it is against the best interests of the child. Such rights will be denied only when the

38. *Id.* at 42–43.

39. *See, e.g.*, M.K. & C.P. v. Medical Ctr., Inc., Mass. Fam. and Prob. Ct., Suffolk County, No. 00W-1343 (June 28, 2000, Gould, J.).

40. *See* Kyle C. Velte, *Egging on Lesbian Maternity*, 7 AM. U. J. GENDER SOC. POL'Y & LAW 431 (1999).

41. *See* JAMES C. BLACK AND DONALD J. CANTOR, CHILD CUSTODY 21 (1989).

42. *Id.* at 21–22.

43. *Id.* at 22, citing HOMER H. CLARK, LAW OF DOMESTIC RELATIONS 573 (1968).

44. *Id.*

45. *Id.*

46. *See* Elizabeth Weiss, *Nonparent Visitation Rights v. Family Autonomy: An Abridgement of Parents' Constitutional Rights?*, 10 SETON HALL CONST. L.J. 1085, 1092 (2000).

47. *See* Eric G. Anderson, *Children, Parents, and Nonparents: Protected Interests and Legal Standards*, 1998 BYU L. REV. 935, 953 (1998).

48. BLACK AND CANTOR, *supra* note 41, at 59; Weiss, *supra* note 46, at 1092.

non-custodial parent "has relinquished his or her right of visitation by some action or if the parent's visitation would be adverse to the child's welfare."[49]

Visitation rights for non-legal parents are not as well recognized. At common law, legal parents possessed the right to control with whom their children associated, which resulted in very few awards of visitation to non-legal parents.[50] The standard used in *visitation* actions (as opposed to *custody* actions) brought by non-legal parents is less stringent than the standard used in custody actions brought by non-legal parents.[51] In a visitation action, the non-legal parent need only convince a court to interfere with the legal parent's rights for some limited amount of time, whereas in an action to remove custody of the child from the legal parent and award custody to the non-legal parent, the non-legal parent must convince a court to end the legal parent's right to raise her child completely and permanently.[52] Courts consider several factors in resolving visitation actions by non-legal parents, including prior continuous contact between the child and the non-legal parent and any *in loco parentis* status achieved by the non-legal parent.[53] In both custody and visitation actions, however, courts regard the "best interest of the child" standard as the final criterion.[54] Further, both custody and visitation may be modified or taken away for cause.[55]

In recent years, all fifty states have enacted non-parent visitation statutes, predominantly statutes recognizing grandparent visitation.[56] Only 12 of the fifty

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49. Weiss, *supra* note 46, at 1092–93.

50. *Id.* at 1093.

51. *See Visitation Rights of Persons Other than Natural Parents or Grandparents*, 1 A.L.R.4th 1270, 1272 (1980) [hereinafter *Visitation Rights*].

52. *Id.* at 1272–73.

53. *See* Weiss, *supra* note 46, at 1095.

54. *See Visitation Rights, supra* note 51.

55. *See* BLACK AND CANTOR, *supra* note 41, at 60.

56. *See* ALA. CODE § 30-304.1 (1989); ALASKA STAT. § 25.20.065 (1998); ARIZ. REV. STAT. ANN. § 25-409 (2000); ARK. CODE. ANN. § 9-13-103 (1998); CAL. FAM. CODE § 3104 (West 1994); COLO. REV. STAT. § 19-1-117 (1999); CONN. GEN. STAT. § 46b-59 (1995); DEL. CODE ANN., tit. 10, § 1031(7) (1999); FLA. STAT. ANN. § 742.01 (1997); GA. CODE ANN. § 19-7-3 (1999); HAW. REV. STAT. § 571-46.3 (Supp. 2000); IDAHO CODE § 32-719 (Michie 1996); 750 ILL. COMP. STAT. 5/607 (West 1993); IND. CODE ANN. § 31-17-5-1 (West 1999); IOWA CODE ANN. § 598.35 (West 1999); KAN. STAT. ANN. § 38-129 (2000); KY. REV. STAT. ANN. § 405.021 (Banks-Baldwin 1992); LA. REV. STAT. ANN. § 9:344 (West Supp. 2000); ME. REV. STAT. ANN., tit. 19A, § 1803 (1998); MD. CODE ANN., FAMILY LAW § 9-102 (1984); MASS. GEN. LAWS ch.119, § 39D (1993); MICH. COMP. LAWS ANN. § 722.27b (Supp. 1999); MINN. STAT. ANN. § 257.022 (1998); MISS. CODE ANN. § 93-16-3 (1994); MO. REV. STAT. § 452.402 (1999); MONT. CODE ANN. § 40-15-102 (1979); NEB. REV. STAT. § 43-1802 (1998); NEV. REV. STAT. § 125C.050 (Supp. 1999); N.H. REV. STAT. ANN. § 458:17-d (1992); N.J. STAT. ANN. § 9:2-7.1 (West Supp. 1999-2000); N.M. STAT. ANN. § 40-9-2 (1999); N.Y. DOMESTIC RELATIONS LAW § 72 (McKinney 1999); N.C. GEN. STAT. § 50-13.2 (1999); N.D. CENT. CODE § 14-09-05.1 (2001); OHIO REV. CODE. ANN. § 3109.051 (2001); OKLA. STAT. ANN., tit.10, § 5 (1997); OR. REV. STAT. § 109.121 (1999); 23 PA. CONS. STAT. ANN. § 5311-5313 (West 1991); R.I. GEN. LAWS § 15-5-24.1 (2000); S.C. CODE ANN. § 20-7-420 (2000); S.D. CODIFIED LAWS § 25-4-52 (1999); TENN. CODE ANN. § 36-6-306 (1999); TEX. FAM. CODE ANN. § 153.433 (2000); UTAH CODE ANN. § 30-5-2 (1998); VT. STAT. ANN., Tit. 15 § 1011-1013 (Supp. 2000); VA. CODE ANN. § 20-124.2 (2000); WASH. REV. CODE § 26.10.160 (1987); W. VA. CODE

states provide a statutory vehicle for third party visitation actions, not including grandparent visitation.[57]

2. Custody and Visitation Law in Lesbian-Parented Family Disputes

Instability characterizes the present legal landscape of lesbian-parented family disputes. Jurisdictions that deny standing to non-legal lesbian mothers harm these parents and their children by eliminating the parent-child bond that was once an integral part of the life of both the parent and the child, causing emotional and economic damage to both the child and the parent. In these jurisdictions, there is no chance that the non-legal parent-child relationship will be preserved by the courts. In jurisdictions that grant standing to the non-legal parent, there is a very strong chance that the non-legal parent and child will be able to continue their relationship. Thus, the protection of the non-legal parent-child relationship depends solely on jurisdictional location of the lesbian-parented family when it dissolves. In advocating for recognition of non-legal parents, LGBT family law practitioners, as well as courts, should seek consistency and predictability in these cases. Concern over the present inconsistency in state laws and adjudication animates the three proposed models. Adopting a constitutionally based model immune from change through legislation or lower court decision would engender more predictable and consistent results.

Disputes over custody and visitation upon the separation of the lesbian mothers lead to the exposure of private family structures to the public world of the law. The case law in this area reflects a movement from outright rejection of the lesbian-parented family in earlier cases to greater, although not uniform, acceptance in more recent cases. These cases are significant when situated in the legal context of parenthood. In many jurisdictions, lesbian mothers who are neither adoptive parents nor biological parents lack all of the rights and responsibilities of parenthood, including the right to spend time with and visit the child and the right to make parenting decisions such as educational, legal, and medical decisions. In the absence of second-parent adoption or some other legal mechanism to establish legal parenthood, non-biological, non-adoptive lesbian mothers become legal strangers to the children they helped to plan for and to raise. When the legal parent banishes the non-legal parent from the child's life, the non-legal parent is left with no recourse except to assert a claim in court.

ANN. § 48-2B-1 to 48-2B-7 (1999); WIS. STAT. ANN. § 880.155 (1993); WYO. STAT. ANN. § 20-7-101 (2001).

57. The states that provide statutory authority for third party visitation actions are Alaska, Arizona, California, Colorado, Connecticut, Kentucky, New Mexico, Ohio, Oregon, Texas, Utah, Virginia, and Wyoming. For relevant statutes, see *supra*, note 59.

The legal questions raised by the dissolution of a lesbian couple with children first reached courts in the late 1980s.[58] Non-legal mothers brought actions demanding visitation with the children they helped to plan for and parent. In the majority of these cases non-legal lesbian mothers lost. As Professor Nancy Polikoff writes:

> These cases... have presented courts with two options—recognize planned lesbian and gay families and adapt family law principles to protect the interests of children and parents in such families, or obliterate the reality of children's lives with their gay and lesbian parents by rigidly adhering to a definition of parenthood grounded in a biologically-based, heterosexual norm. Courts have overwhelming[ly] chosen this latter option.[59]

The cases illustrate the distinct normative universes warring in the lesbian-parented family dissolution. Professor Robert Cover articulated the concept of a normative universe, which he calls a "*nomos*."[60] A *nomos* is composed of the "rules and principles of justice, the formal institutions of the law, and the conventions of a social order," as well as the narratives that give it meaning.[61] Cover further states:

> Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative—that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative.... Law is a force, like gravity, through which our worlds exercise an influence upon one another, a force that affects the courses of these worlds through normative space.... The codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative.... To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible state of affairs.[62]

Cover's concept of *nomos* provides a framework for consideration of the lesbian-parented family dissolution cases. It is helpful to situate these cases within a framework of two distinct *nomoi*. One normative universe can be thought of as the traditional/legal *nomos*. This *nomos* is defined by and created through heterosexist laws. These laws mandate that a child can have only one legal mother and insist on creating, supporting, and recognizing the two-parent, heterosexual family unit as the standard and the goal of family law. The

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58. *See Limits of Visibility*, *supra* note 35, at 44.

59. *See id.*

60. *See* Robert M. Cover, *The Supreme Court 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

61. *Id.* at 4.

62. *Id.* at 9–10.

traditional/legal *nomos* thus excludes other family structures. The laws in the traditional/legal *nomos* clash with what can be thought of as the LGBT/extra-legal *nomos*. The LGBT/extra-legal *nomos* is the normative universe of the lesbian-parented family, which, in many jurisdictions, exists outside of the traditional/legal normative universe.[63] It is "extra-legal" because in no state can lesbian partners marry,[64] and in many states both lesbian mothers cannot become legal parents to their children.

a. Case Law Denying Standing to the Non-Legal Lesbian Parent[65]

Many courts deny the non-legal mother standing even to commence a case and to have a hearing on the merits. For instance, in *Kathleen C. v. Lisa W.*,[66] the California Court of Appeals upheld a trial court's denial of a petition for guardianship filed by a woman seeking visitation rights with the two children of her former live-in lesbian partner, the legal mother of the children.[67] The non-legal lesbian mother asserted that she was a de facto parent to the children. The notion of de facto parenthood is an equitable theory of parenthood in general family law jurisprudence—thus not confined to LGBT family law—that defines a parent as one who "on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's needs and his psychological need for affection and care."[68] The court held that the non-legal mother was not entitled to visitation rights as a de facto parent of the children even though she exhibited the characteristics of a de facto parent during her relationship with the legal mother.[69]

The social reality of the two parent lesbian family was again denied in *West v. Superior Court.*[70] Although the trial court awarded visitation to the non-legal

63. Even though Cover's concept of *nomos* is restricted to the legal world (as its name suggests), I use the term to encompass normative universes which may not yet have been touched by the "formal institutions of law."

64. *But see* VT. STAT. ANN. Tit. 15, §§ 1201–1204 (Supp. 2000) (describing "civil unions," available to same-sex couples in Vermont, that include all of the rights and responsibilities of marriage under Vermont law).

65. This discussion does not constitute an exhaustive list of cases in which the *non-legal* mother fails in her attempt to gain visitation or custody, but serves only as a sample of such cases for background and illustration. There are other decisions against the *non-legal* mother. *See, e.g.*, Kulla v. McNulty, 15 Fam. L. Rep. (BNA) 1355 (Fla. Cir. Ct. 1989); Kazmierazak v. Query, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999); Music v. Rachford, 654 So. 2d 1234 (Fla. Dist. Ct. App. 1995); Lynda A.H. v. Diane T.O., 673 N.Y.S.2d 989 (App. Div. 1998).

66. 84 Cal. Rptr. 2d 48 (Ct. App. 1999).

67. *Id.* at 50–51.

68. Kimberly P. Carr, *Alison D. v. Virginia M.: Neglecting the Best Interests of the Child in a Nontraditional Family*, 58 BROOK. L. REV. 1021, 1052 n.137 (1992) (citing In re B.G., 253 P.2d 244, 253 n.18 (Cal. 1974)). *See generally* 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).

69. *Kathleen C.*, 84 Cal. Rptr. 2d at 50–51.

70. 69 Cal. Rptr. 2d 160 (Ct. App. 1997).

mother,[71] the California Court of Appeals reversed upon the legal mother's appeal. The Court of Appeals held that the trial court lacked subject matter jurisdiction over a petition for visitation rights filed by a nonparent in a lesbian relationship.[72]

Nancy S. v. Michele G.[73] demonstrates the availability of heterosexist laws and procedures to legal parents, who can wield such laws against their former partners the moment a separation occurs. In *Nancy S.*, the legal mother took the preemptive approach of filing an action for a declaration that: (1) her lesbian partner was not a parent of the children, (2) that she (the legal mother) was entitled to sole legal and physical custody of the children, and (3) that the non-legal lesbian mother was entitled to visitation only upon the legal mother's consent.[74] The trial court found for the legal mother, and the lesbian partner appealed. The California Court of Appeals held that the non-legal lesbian mother, who was not a legal or adoptive parent, was not a parent within meaning of Uniform Parentage Act.[75] The appellate court further held that custody could not be awarded to the non-legal mother over the objections of legal mother absent a finding that parental custody by the legal mother would be detrimental to the children.[76] Finally, the appellate court refused to recognize the existence of the non-legal parent's relationship with the child when it rejected the non-legal lesbian mother's arguments that she should be declared a legal parent under the theories of de facto parent, *in loco parentis*, equitable estoppel, and functional parenthood.[77]

The dueling normative universes are clearly demonstrated in the case of *In re The Matter of Visitation with C.B.L. v. H.L.*[78] In *C.B.L.*, the former same-sex partner of a woman who was artificially inseminated and gave birth to a child brought a petition for visitation with that child.[79] The Illinois Court of Appeals upheld the trial court's dismissal, stating that standing to petition for visitation may be found only in the visitation provisions of the Illinois Marriage and Dissolution of Marriage Act, and that the non-legal lesbian mother lacked standing under that statute.[80]

A final example of a court denying the existence of a long-term parenting relationship between a non-legal lesbian mother and her child is *In re Thompson*.[81] In *Thompson*, two non-legal lesbian mothers sought visitation with

71. *Id.* at 161.
72. *Id.* at 162.
73. 279 Cal. Rptr. 212 (Ct. App. 1991).
74. *Id.* at 214.
75. *Id.* at 215.
76. *Id.* at 216.
77. 279 Cal. Rptr. at 216–19.
78. 723 N.E.2d 316 (Ill. App. 1999).
79. *Id.* at 317.
80. *Id.* at 320–21.
81. 11 S.W.3d 913 (Tenn. Ct. App. 1999).

the children planned for and brought about during their relationships with the legal mothers.[82] Two lower courts dismissed the claims. The non-legal lesbian mothers' appeals were consolidated, and the Tennessee Court of Appeals held that the former partners were not entitled to visitation.[83] The court stated:

> While Tennessee's legislature has generally conferred upon parents the right of custody and control of their children, it has not conferred upon one in [the non-legal lesbian mother's] position . . . any right of visitation. Absent statutory authority establishing such a third-party's right to visitation, parents retain the right to determine with whom their children associate. Accordingly, both [non-legal lesbian mothers] lacked standing to assert their claims to visitation, and the trial courts were correct in dismissing the same.[84]

b. Case Law Granting Standing to the Non-Legal Lesbian Parent

In a more recent trend, some courts have granted standing to non-legal lesbian mothers raising custody and visitation claims. These courts utilize existing statutory and common law to allow lesbian families the protections afforded to families traditionally recognized and sanctioned by the state. These decisions tell non-legal lesbian parents and the children of these families that their social reality will not be ignored but rather accommodated within the traditional/legal *nomos* for the purpose of resolving the current conflict.[85]

For example, in the Pennsylvania case of *T.B. v. L.R.M.*,[86] the non-legal lesbian mother filed a complaint for shared legal custody and visitation with the child that she and her former partner had planned for and brought into the world. The trial court granted visitation to the non-legal lesbian mother, and the legal mother appealed.[87] The intermediate appellate court held that the non-legal

82. *Id.* at 914–15.

83. *Id.* at 922–23.

84. *Id.* at 923. This case illustrates the legislative gaps that are present in many states' family law statutory schemes. Although this article does present comprehensive arguments about the benefits of fighting for legislative change, it does acknowledge that such efforts are important. The article focuses on constitutional protections for lesbian-parented families because of the permanency of protections that is afforded by the finding of constitutional rights and interests, as well as the nationwide comprehensive protections that would result from the recognition of the constitutional interests argued for here. *See* Part IV, *infra*.

85. Again, this discussion does not detail every case in which the non-legal lesbian mother succeeds in her attempt to gain visitation or custody. For other examples, see Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (holding that family court could enforce the parties' written agreement to allow non-legal lesbian mother to have visitation upon dissolution of the relationship); LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000); Laspina-Williams v. Laspina-Williams, 742 A.2d 840 (Conn. Super. Ct. 1999); A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992).

86. T.B. v. L.R.M., 753 A.2d 873 (Pa. Super. Ct. 2000).

87. *Id.* at 876–77. The reviewing court and the lower court both cited J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996). In *J.A.L.*, the non-legal lesbian mother petitioned for partial custody of child. The Court of Common Pleas denied standing, and she appealed. The Superior Court held that the evidence that the non-legal lesbian mother and the child were comembers of

lesbian mother had standing to seek visitation.[88] Stating that "cognizable rights to seek full or partial custody may rise by virtue of the parties' conduct,"[89] the court found that the evidence supported a finding that the non-legal lesbian mother had standing because she had assumed a parent-like role with the child.[90]

Other courts have also articulated that protections should be afforded to a lesbian family which acts in all ways like a family, even if its structure is not explicitly sanctioned by state laws. For example, in *J.C. v. C.T.*,[91] the non-legal lesbian mother petitioned for visitation with the children and the legal mother moved to dismiss the petition for lack of standing. The New York City Family Court held that the lack of legal relationship was not an absolute bar to the non-legal lesbian mother's petition for visitation.[92] The court articulated the following test:

> [I]f a non-legal or non-adoptive person, who is not otherwise granted statutory standing, seeks visitation with a child or children with whom he or she alleges a parental relationship, they must demonstrate: (1) that the legal or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by undertaking significant responsibility for the child's care, education and development, including contributions to the child's support monetary or otherwise, without the expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship which is parental in nature.[93]

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nontraditional family was sufficient to establish that partner stood *in loco parentis* to the child and that she had standing to seek partial custody. *Id.* at 1318.

88. *T.B.*, 753 A.2d at 888.

89. *Id.* at 886.

90. *Id.* at 888.

91. 711 N.Y.S.2d 295 (Fam. Ct. 2000).

92. *Id.* at 299. *But see* Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (holding that same-sex partner was a legal stranger to the child that she and her partner had planned for, rejecting claim that she was a de facto parent and thus was statutorily entitled to commence a visitation action). The *J.C.* court distinguished the case before it from *Alison D.*:

> While the majority . . . in [*Alison D.*] rejected the petitioner's assertion that she was a "parent by estoppel" within the meaning of [the statute], the issue of whether a legal parent may be equitably estopped from denying a same-sex partner visitation, due to his or her own actions in creating, nurturing and encouraging a parent-child relationship, was not directly addressed. Accordingly, this Court determines that it is not foreclosed from considering whether the equitable estoppel doctrine should be applied to this matter.

711 N.Y.S.2d at 298.

93. *Id.* at 299. In crafting this test, the *J.C.* court relied on V.C. v. M.J.B., 725 A.2d 13 (N.J. Super. Ct. App. Div. 1999). In *V.C.*, the non-legal mother sought joint legal custody of children. The Superior Court denied a request for joint custody and terminated all visitation with children and the non-legal mother appealed. The Superior Court, Appellate Division, held that the non-legal

The court thus denied the legal mother's motion to dismiss the visitation petition, implying that when a lesbian couple and their child *look like a family* and *act like a family*, the court will not allow the legal parent to use the narrow strictures of heterosexist law to deny the social existence of that family.

At least two high courts have employed equitable doctrines to grant standing to a non-legal lesbian mother. In *E.N.O. v. L.M.M.*,[94] the Supreme Judicial Court of Massachusetts held that the trial court had equity jurisdiction to grant visitation rights to the non-legal lesbian mother as the child's de facto parent.[95] The court held that although no statute expressly permitted the non-legal lesbian mother to seek visitation, the court retained equity jurisdiction in the matter.[96] The court also rejected the legal mother's assertion that such a holding violated her fundamental liberty interest in the custody of her child, stating that parental rights are not absolute.[97]

Finally, in *Holtzman v. Knott*,[98] the Wisconsin Supreme Court held that although the non-legal lesbian mother could not assert a claim to custody or a statutory claim to visitation, a trial court has equitable power to hear the petition for visitation when it determines that the non-legal lesbian mother has a parent-like relationship with child, as originally encouraged and fostered by the legal mother.[99] The relevant statute required any visitation proceeding to be brought pursuant to an underlying legal action affecting the child's family.[100] Because the lesbian couple could not marry, there was no underlying dissolution action pursuant to which the non-legal lesbian mother could pursue her visitation claim.[101] The Wisconsin Supreme Court decided that in enacting the visitation statute, the legislature did not intend to strip the court of its equitable power to protect the child's best interests.[102] Exercising this power, the court determined that the non-legal lesbian mother had standing to pursue her visitation claim if she could demonstrate that a parent-like relationship existed with the child and that there had been a "significant triggering event" that threatened that relationship.[103]

The *Holtzman* court articulated tests for determining the parent-like relationship and the significant triggering event. To prove a parent-like relationship, the non-legal lesbian mother must show: (1) that the legal or adoptive parent consented to, and fostered, the petitioner's relationship with the

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mother was not entitled to custody of children, but was entitled to visitation with children.

94. 711 N.E.2d 886 (Mass. 1999), *cert. denied,* 528 U.S. 1005 (1999).

95. *Id.* at 890 n.4.

96. *Id.* at 889–90.

97. *Id.* at 893.

98. 533 N.W.2d 419 (Wis. 1995), *cert. denied* 516 U.S. 975 (1995).

99. *Id.* at 421.

100. *Id.* at 424.

101. *Id.* at 430, 424–25.

102. *Id.* at 430.

103. 533 N.W.2d at 421.

child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.[104] In effect, the non-legal lesbian mother must show the court that although society may define her parental role in terms of the LGBT/extra-legal *nomos*, her relationship with the child nonetheless mirrors the norms of parenting from the dominant traditional/legal *nomos*.

To establish that a significant triggering event warrants court intervention, the non-legal lesbian mother must show that the legal mother has interfered substantially with the non-legal lesbian mother's relationship with the child.[105] Further, the non-legal lesbian mother must show that the visitation action was brought within a reasonable time after the significant triggering event.[106]

B. Child Support

1. Child Support Law Generally[107]

Child support orders are issued against parents based on the principle that parents have an obligation, imposed by an order of the court upon the non-custodial parent, to support their children financially throughout childhood, even upon dissolution of the adult relationship.[108] Parenting rights and responsibilities typically go together: If you are a legal parent, you have both; if you are not a legal parent, you have neither.

Although child support orders are most often issued to heterosexual legal parents upon divorce, courts have utilized equitable doctrines to order support from non-legal parents.[109] For example, in *L.M.S. v. S.L.S.*,[110] the court held

104. *Id.* at 436.

105. *Id.*

106. *Id.*

107. This article does not attempt to provide a detailed history and explanation of child support laws in the United States. Such explication is unnecessary to the purpose of this article. Instead, the article merely outlines the basic history of and principles behind child support laws in order to situate lesbian-parented families in the current legal framework. *See generally* Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41 (1998) (discussing history of child support and related issues).

108. *See* June Carbone, *Child Support Comes of Age: An Introduction to the Law of Child Support*, *in* CHILD SUPPORT THE NEXT FRONTIER 3, 10–11 (J. Thomas Oldham & Marygold S. Melli, eds., 2000).

109. For further examples, *see generally* Laurence C. Nolan, *Legal Strangers and the Duty of Support: Beyond the Legal Tie—But How Far Beyond the Marital Tie?*, 41 SANTA CLARA L. REV. 1 (2000); Polikoff, *This Child Does Have Two Mothers*, *supra* note 68, at 492–495.

110. 312 N.W.2d 853 (Wis. Ct. App. 1981).

that a husband who consented to his wife's alternative insemination was liable for child support:

> A husband who participates in the arrangement for the creation of a child cannot consider this a temporary relation to be assumed and disclaimed at will. Such an arrangement imposes an obligation to support the child for whose existence he is responsible. To permit a husband's parental responsibilities under these circumstances to rest on a voluntary basis could place the entire burden of support on the child's mother and, if she is incapacitated the burden is then on society.[111]

This case illustrates a trend in cases involving alternative insemination. Some states, through common law or by legislation, have found that the use of alternative insemination by heterosexual couples imposes all of the rights and duties of parenthood on the male partner, including the obligation of support.[112] In contrast, other courts have rejected equitable principles as the basis for finding a non-legal parent liable for child support and have adhered to the general rule that non-legal parents do not have support obligations.[113] Even in cases involving heterosexual non-legal parents, courts have ruled inconsistently.

2. Child Support Law in Lesbian-Parented Family Disputes

The situation in which the legal mother seeks child support from the non-legal mother upon dissolution of the relationship has seldom been litigated until recently. Actions for child support differ from actions involving custody and visitation in that the legal parent requesting child support is seeking *the integration* of the LGBT/extra-legal *nomos* into the traditional/legal *nomos* in order to reap the protections afforded in the latter. Child support actions are thus diametrically opposed to the child custody and visitation cases, in which the legal parent seeks *the maintenance* of the LGBT/extra-legal *nomos*-traditional/legal *nomos* divide. These child support actions thus represent a unique moment in LGBT jurisprudential development.

Now that child support claims are being asserted by legal parents against non-legal parents, *both* sides of the lesbian-parented family are arguing from *opposing sides* of the *same* issue at different points in the intra-family conflict. When arguing issues of child custody and visitation, the legal parent argues from her position within the traditional/legal *nomos*; when child support becomes the issue, the non-legal parent argues from her position within the traditional/legal

111. *Id.* at 855–56.

112. *See generally* Brief of *Amici Curiae*, National Center for Lesbian Rights, Youth Law Center, Children of Lesbians and Gays Everywhere, and Northwest Women's Law Center in Support of Appellant at 5–6, Kove v. Naumoff (No. 45264-9-I) [hereinafter *NCLR* Kove *Brief*] (noting the following case law: People v. Sorensen, 66 Cal. Rptr., 7 (1968); Levin v. Levin, 645 N.E.2d 601 (Ind. 1994); K.S. v. G.S., 440 A.2d 64 (N.J. Super. Ct. 1981); Gursky v. Gursky, 242 N.Y.S.2d 406 (Super. Ct. 1963)).

113. *See, e.g.*, Drawbaugh v. Drawbaugh, 647 A.2d 240 (Pa. Super. Ct. 1994).

nomos. As long as it was just the non-legal parent arguing for recognition of her parental rights, it was easy for courts to maintain the line between the traditional/legal *nomos* and the LGBT/extra-legal *nomos*. Now that the legal parents have begun to assert claims that effectively request a finding of legal parenthood in the non-legal lesbian mother, however, courts face a more difficult challenge in maintaining that line. The current state of tension may turn out to be critical moment in the evolution of the law.

The current legal landscape for lesbian-parented family dissolution cases involving a claim for child support offers valuable insight for several reasons. First, it illustrates the divergent results that emerge from courts around the country that are confronted with these cases. Second, it captures the essence of a problem inherent in family law—that the state-based nature of family law leads to divergent results for children and non-legal parents around the country. Finally, these cases provide a context for the proposed models and suggest that there may be an opening for the creation and recognition of constitutionally-based rights in the child and the non-legal parent.

Only one published case currently exists, and the facts of the case are an anomaly in the lesbian-parented family dissolution scenario. In *Karin T. v. Michael T.*,[114] the Department of Social Services, as an assignee of petitioner Karin T., brought a proceeding for the support of two minor children against the respondent, Michael T., pursuant to the Uniform Support of Dependants Act.[115] Michael T. had lived her life as a man since she and Karin T. became a couple.[116] The couple had even been issued a marriage license by the state of New York.[117] Thus, Karin T. alleged that Michael T. was the father of the children.[118] Michael T. filed an answer including an affirmative defense that "the Respondent is a female and she is not the father of the said children. That the children were artificially inseminated."[119] The court noted that Michael T. had earlier signed an agreement stating that the children were Michael T.'s "own legitimate" children.[120]

In ruling that Michael T. was required to pay child support, the court relied on New York case law holding that where extraordinary circumstances require, non-parents may be held responsible for the support of children.[121] The court

114. 484 N.Y.S.2d 780 (Fam. Ct. 1985). The facts of the *Karin T.* case are not, however, anomalous in the context of LGBT family law cases. In current LGBT family law, *Karin T.* would fit more neatly under the category of trangendered family law. Because that label was rarely used in the 1980s when *Karin T.* was decided, the court instead categorized it as a dispute between lesbian partners.

115. *Id.* at 781.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 782.

121. *Id.*

further held that "under the unique facts of this case, respondent is indeed a 'parent' to whom such responsibility attaches."[122] Lacking an appropriate legal framework, courts often find it difficult to address child support issues arising out of lesbian-parented family dissolution cases. *State of Washington v. Wood*[123] exemplifies this phenomenon. In *Wood*, a lesbian couple, Tracy Wood and Kelly McDonald, planned for and conceived a child through alternative insemination.[124] McDonald carried the child. During the pregnancy, Wood terminated the relationship, but signed an agreement to provide financial support to McDonald during and after the pregnancy.[125] Wood performed under the agreement until the child was about ten months old, but then stopped making payments.[126] As a result, McDonald had to apply for public assistance from the state, which filed the case against Wood on McDonald's behalf. The trial court found in Wood's favor, ruling that Wood was not a legal parent and could therefore not be held responsible for child support. The trial court's ruling is currently before the Washington Court of Appeals.

In *Kove v. Naumoff*,[127] a lesbian couple planned for and conceived several children together. The women agreed to have children through alternative insemination by an anonymous donor, and it was agreed that plaintiff Kove would have the first child.[128] Kove delivered a son in December, 1990, followed by quadruplets in 1993.[129] The couple and their five children lived together until the couple separated in the fall of 1997.[130] The children resided primarily with Kove in Southern California, but both parties shared legal and physical custody rights pursuant to an order of the Pennsylvania court.[131] However, defendant Naumoff failed to provide any financial support for the children.[132] Kove filed suit against Naumoff for child support. The trial court held that although the non-legal lesbian mother is not a "parent" under Pennsylvania's child support statute, she is equitably estopped from denying child support liability by her conduct in participating in the insemination decision and in raising the children.[133] The case is currently on appeal.

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122. *Id.* at 784. The court "left to another forum at another time" the issues of custody, visitation, and inheritance. *Id.*

123. no. 45264-9-I (2000).

124. *See NCLR* Kove *Brief, supra* note 112, at 2.

125. *Id.* at 3.

126. *Id.*

127. No. 98-0422, Court of Common Pleas of Cumberland County Pennsylvania (Dec. 15, 2000).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* Naumoff brought a custody action to establish her *in loco parentis* status. *Id.* The court held that she stood *in loco parentis* and was entitled to custody and visitation pursuant to J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. 1996). *Id.*

132. *Id.*

133. *Id.* at 7–8.

Finally, the absence of a suitable legal framework with which to deal with these issues is illustrated by *Liston v. Pyles*,[134] a hybrid case which combines issues of child support and visitation, both asserted by the non-legal lesbian mother. In *Liston*, the non-legal lesbian mother filed an action for a child support determination in an effort to gain visitation rights, in hopes that gaining a court ruling that she was obligated to pay child support would then allow her to prevail in an action for visitation.[135] The non-legal lesbian parent asserted her claims under various sections of the Ohio Code as well as under the doctrines of *in loco parentis* and equitable estoppel.[136] The Ohio Court of Appeals upheld the trial court's determination that the non-legal lesbian mother lacked standing to pursue her child support claim because she did not meet the definition of "parent" set out in the relevant statute and was thus not obligated to pay child support.[137] Further, because she lacked standing to pursue her child support claim, the appellate court held that she also lacked standing to pursue her visitation claim.[138] In basing its holding on strict statutory interpretation, the court asserted institutional competency principles, reasoning that the power to recognize non-legal lesbian mothers rested with the legislature rather than the courts.[139] The court also rejected her equitable estoppel and *in loco parentis* arguments.[140]

Finally, the court rejected constitutional arguments presented by the non-legal lesbian mother. Liston asserted that both she and the child had constitutionally protected interests in maintaining their relationship with each other. In rejecting this assertion, the Ohio Court of Appeals stated:

> We agree with appellant's premise that the liberty interest in a familial relationship is entitled to the highest constitutional protection. However, we also agree with the trial court's finding that no United States Supreme Court case nor our Ohio Supreme Court has extended this protection to include family relationships stemming from a homosexual union. As noted by the trial court, the relationship between appellee and appellant is not legally recognized by the United States or the Ohio Constitutions, thus any "parental" transactions which arise as a result of their relationship cannot be legally enforced by the domestic/juvenile court.[141]

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134. No. 97APF01-137, 1997 WL 467327 (Ohio Ct. App. Aug. 12, 1997).

135. *Id.* at *2. Although the court did not specifically note that Liston filed her child support action in order to prevail in her visitation action, the timing of her filings leads to that inference.

136. *Id.* at *1–*2.

137. *Id.* at *3.

138. *Id.*

139. *Liston*, 1997 WL 467327 at *4.

140. *Id.* at *5, *7.

141. *Id.* at *4.

The state court's rejection of the constitutional arguments in *Liston* demonstrates the need for the United States Supreme Court to articulate constitutional rights and interests in the non-legal lesbian parent and the child.

The paucity of non-legal lesbian mother child support cases, and the fact that two of the cases are in the appellate process, makes identification of any trend difficult. Because many courts have rejected the theories advanced in cases such as *Liston* when raised by non-legal lesbian mothers for the purposes of visitation and custody, it does not seem likely that similar arguments will be accepted in the context of child support.[142] Thus although advocates have made arguments based on existing statutes and have analogized the lesbian-parented family cases to cases addressing heterosexual couples,[143] the constitutional models articulated in this piece fill a gap in the legal strategies currently in play.

III.
NEW CONSTITUTIONAL RIGHTS AND INTERESTS IN THE NON-LEGAL LESBIAN PARENT AND THE CHILD

For decades, the United States Supreme Court has grounded its family law jurisprudence in the rights of the legal parent to the exclusion of almost all other interests. Nonetheless, within this framework the case law is not static. The doctrinal movement over the years supports the argument that the Court may be open to the creation and recognition of new constitutional rights and interests, namely of the child and of the non-legal lesbian mother.[144] This section considers Supreme Court precedent and asserts that the caselaw may be construed to leave space around the presumed near-total rights of the legal parent for the creation and consideration of new rights.

These new constitutional rights and interests inform the Parental Status Model and the Constitutional Interests Model. I use the Parental Status Model, supported by existing caselaw, to argue that the non-legal lesbian parent should be deemed a legal parent based on her de facto parental role. The Constitutional

142. *But see* Karin T. v. Michael T., 484 N.Y.S.2d 780 (1985); M.K. and C.P. v. Medical Ctr., Inc., Mass. Prob. and Fam. Ct., Suffolk County, No. 00W-1341 (June 28, 2000, Gould, J.) (holding that a lesbian couple who had conceived a child by fertilizing the egg of one partner and implanting it into the other partner were both legal parents to the child, and thus "each parent is financially responsible for the child, and in the event the plaintiffs separate, the custodial parent will be entitled to support from the other").

143. *See, e.g.*, NCLR *Kove* Brief, *supra* note 112. The article does not seek to disparage the statutorily based arguments previously articulated. On the contrary, the author believes those arguments to be valid, persuasive and articulate. The models proposed in this article are meant to supplement and not to displace, past and current arguments, with the hope that courts will reach child-centered decisions more frequently and consistently if there are more grounds for such decisions.

144. Such doctrinal movement occurs in the Supreme Court's unwed father cases, which demonstrate the Court's ability to move beyond social opprobrium of certain family forms and reach the point of extending some protections to unwed fathers where those fathers engaged in active parenting.

Interests Model presents a less ambitious proposition—that the non-legal lesbian parent, while not rising to the level of a legal parent, has a constitutionally-recognized interest that should be balanced against the interests of the legal parent. From this model, I also argue that the child has a constitutional liberty interest in maintaining her familial relationship with the non-legal lesbian parent. The case law summary and analysis in this section explains how United States Supreme Court precedent may permit the recognition and adoption of the models proposed.

A. The Challenge of Creating New Constitutional Rights

I admit that the recognition of new constitutional rights, particularly in the child, is an ambitious goal.[145] The creation of new constitutional rights is an arduous process for advocates and must take place incrementally, especially in family law.[146] Professor Barbara Bennett Woodhouse, a noted family law scholar and advocate for children's rights, explains that, through early Supreme Court decisions that conceptualized children as a form of private property and the parent-child relationship as a private liberty interest of parents, "the Court gave constitutional force to traditional hierarchies of power and erected barriers to the recognition of children's rights that advocates for children are now struggling to dismantle."[147] She goes on to articulate obstacles to constitutionalizing of children's rights:

> In the United States, . . . advocates seeking to secure a place for children in the constitutional scheme face substantial doctrinal and political barriers. The doctrinal barriers are complex and rooted in our own Constitution's peculiar history and structure. Our written Constitution is silent on rights for juveniles . . . . Parental rights established a constitutional foothold seventy-five years ago, during the heyday of substantive due process . . . . But the same door may not be open to rights for children. . . .[148]

Woodhouse also suggests that because children do not vote, they are not a strong political force.[149] Further, both the political left and the political right are reluctant to recognize clear rights in children: the right rejects the concept of children's rights as a threat to "family values," while the left fears that strong rights in children will threaten women's autonomy.[150]

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145. *See* Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 1–7 (1999) [hereinafter *The Constitutionalization of Children's Rights*].

146. *Id.* at 6–7.

147. *Id.* at 8.

148. *Id.* at 2.

149. *Id.*

150. *Id.*

Despite challenges to the possibility of constitutionalizing children's rights, Woodhouse asserts that "avenues for constitutional growth"[151] do exist in the American constitutional scheme. Notwithstanding the very real challenge of obtaining the recognition of new constitutional rights, I nonetheless advocate such a possibility. I persist in articulating this ambitious goal to honor the value of aiming at utopia and resisting the impediment of limiting oneself within the bounds of present possibilities. Although I aim to provide viable models for change, I nonetheless recognize that these solutions, while ultimately fair and just, are unlikely to be adopted by courts. Professor Martha Fineman articulates why thinking outside the bounds of easily attainable is important:

> [R]ethinking on this scale is a quite grandiose objective, requiring massive reconsideration of many assumed roles and institutions on an ideological level as well as a structural one. It is certainly utopian to assume that such an endeavor would be undertaken, or even if it were, that it would result in a significant shift in the way we, as a society, order intimacy.... The production of practical suggestions is not the only justification for theory, however. Sometimes re-visioning, even if utopian, is valuable simply because it forces us to look at old relationships in new lights and thereby understand some things about how we perceive the natural and normal, as well as how we create the deviant.[152]

I thus propose several constitutional models: the Parental Status Model, the Constitutional Interests Model, and the Equal Protection Model. First, I argue for the creation of new constitutional rights in the child and in the non-legal lesbian mother, which are reflected in the Parental Status Model and the Constitutional Interests Model. Given the reality of the difficulty in obtaining these new constitutional rights, however, I also articulate an alternative constitutional model, the Equal Protection Model, based on the well-recognized and often-accepted equal protection paradigm. All of these suggestions, however, are an attempt to provide courts with a framework, or alternative frameworks, for recognizing the existence of the LGBT/extra-legal *nomos* and for integrating it into the traditional/legal *nomos* to the benefit of children and non-legal lesbian mothers.

151. *Id.* at 10.

152. FINEMAN, *supra* note 20, at 232.

B. The Rights and Interests of Legal Parents

1. Supreme Court Parental Autonomy Jurisprudence: When May the State Intervene in the Family?

United States Supreme Court decisions suggest that "it is constitutionally permissible for a state to prefer [legal] parents in . . . third-party custody disputes."[153] The cases demonstrate our society's deeply held value that families should be shielded from state intervention. Protection of legal parent-child relationships and abhorrence of state intervention into the family form the core of the traditional/legal *nomos*.

The Supreme Court began shaping its jurisprudence of the family in the 1920s. The following cases from this era provide the framework in which the lesbian-parented family dissolution cases must be considered. The Court's articulation of an extremely high level of protection for the legal parent contextualizes my proposals for constitutional rights of children and non-legal parents and simultaneously demonstrates the potential difficulty of prevailing on such proposals.

In *Meyer v. Nebraska*,[154] the Court examined a statute that forbade teaching foreign languages to children.[155] In holding the statute unconstitutional, the Court found that the Fifth and Fourteenth Amendments give parents a protected liberty interest in the right to marry, to establish a home, and to bring up their children.[156] The statute at issue intruded on the parents' liberty interest in making child-rearing decisions. In *Pierce v. Society of Sisters*,[157] the Court relied on the principles of a parent's liberty interest and the right to family autonomy articulated in *Meyer* in holding unconstitutional an Oregon law requiring children to attend public school.[158]

The Court has stated, however, that the constitutionally protected right to parent is not without limits.[159] Although the right is fundamental, the state can in some instances restrict or regulate the family through exercise its police or *parens patriae* powers.[160] That the Court allows the state to intervene in the family holds significance for the lesbian-parented dissolution cases: the non-

153. Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045, 1071 (1996).

154. 262 U.S. 390 (1923).

155. *Id.* at 399.

156. *Id.*

157. 268 U.S. 510 (1925).

158. *Id.* at 399–403.

159. *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

160. *See generally* Fern L. Frolin and Jennifer A. Fabriele, *After* Troxel v. Granville: *Grandparent Visitation in Massachusetts*, 44 BOSTON B.J. 8, 23–25 (2000) (summarizing Supreme Court jurisprudence on the parent-child relationship).

legal lesbian mother should recognize this opportunity and seize upon the Court's approval of outside intervention in the family. For example, in *Prince v. Massachusetts*,[161] the Court upheld the conviction of a guardian who allowed her ward to sell religious literature on the street in violation of a state child labor law.[162] The Court held that the state's interest in protecting children from employment, especially in public places, outweighed the guardian's right to encourage certain religious practices in her ward.[163] *Prince* demonstrates the limits of parental authority, which must be considered when crafting proposals that implicate parental rights.

Wisconsin v. Yoder[164] further defines the scope of parental rights. In *Yoder*, the Court held a Wisconsin statute compelling secondary school attendance unconstitutional because it violated the free exercise rights of Amish parents.[165] The Court distinguished *Yoder* from *Prince*, noting that the state interference in *Prince*—curtailing child labor—was designed to prevent physical or psychological injury to children.[166] In contrast to the action of the guardian in *Prince*, the decision by the Amish parents to withdraw their children from school did not expose the children to health or safety risks, or present "a potential for significant social burdens."[167]

Recently, the Supreme Court issued an opinion with important implications for the tensions presented in the lesbian-parented family dissolution cases. In *Troxel v. Granville*,[168] the Court addressed the issue of legal parents' constitutional rights vis-à-vis third parties seeking visitation with their children by examining a Washington statute that provided that "[a]ny person" "at any time" may petition for visitation and that a court may grant such visitation when it is in the child's best interest.[169] The Court recognized that such statutes reflected a valuable effort on the part of States to adjust protections for family relationships while recognizing the changing nature of the American family.[170] The Court still found the statute unconstitutional, holding that parental decisions regarding whom a child may visit represent a fundamental child-rearing activity entitled to constitutional protection pursuant to the Fourteenth Amendment.[171] However, the Court significantly declined to apply the strict scrutiny standard to a parent's right to make decisions concerning the rearing of her children, but instead stated

161. 321 U.S. 158 (1944).
162. *Id.* at 171.
163. *Id.* at 165–66.
164. 406 U.S. 205 (1972).
165. *Id.* at 216–19.
166. *Id.* at 230.
167. *Id.* at 234.
168. 530 U.S. 57 (2000).
169. *Id.* at 57.
170. *Id.* at 63–64.
171. *Id.* at 57–58, 73–74.

that such decisions should be accorded "special weight."[172] Thus, *Troxel* may represent an opening in the Court's family law jurisprudence allowing for the recognition of constitutional liberty interests of the child and the non-legal lesbian parent.

2. Supreme Court Unwed Father Jurisprudence: Who is a Legal Parent?

Lesbian-parented family dissolution cases turn on the question of what qualifies a person as a legal parent. This article argues, in part, that the relationship between the non-legal lesbian parent and the child should be determinative in defining the non-legal lesbian as a legal parent. The Parental Status Model represents this position. Supreme Court precedent provides the basis for parental recognition based on relationship in a line of cases addressing this question in the context of unmarried fathers. These cases are instructive for the issues raised in lesbian-parented families because they discuss the extent to which a biological connection is necessary to trigger the constitutional protections of parenthood.

The Court demonstrated its ability to decide cases consistent with changing social realities in a litany of unwed father cases that began with *Stanley v. Illinois*.[173] In *Stanley*, the state had initiated a dependency hearing upon the death of the children's mother pursuant to an Illinois statute mandating that children of unwed fathers became wards of the state upon the death of the mother.[174] On appeal, the Supreme Court held that the unwed father, who had lived intermittently with and helped raise his children, was entitled to a hearing on his fitness as a parent pursuant to the Due Process Clause of the Fourteenth Amendment.[175] The Court reiterated its prior holdings, which had focused on the nature of parental rights: "The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and 'rights far more precious . . . than property rights.'"[176] *Stanley* supports the models proposed, particularly the Parental Status Model, because its holding demonstrates that (1) the Court has in the past been able to shift its jurisprudence as family forms shifted, and (2) marriage is not determinative of parental status.

The Court continued to craft the definition of a parent in *Quilloin v. Walcott*.[177] This case is significant because it suggests that biology alone is not determinative of legal parenthood. Thus, the fact that one of the mothers in the lesbian-parented family is not the biological parent of the child is not determinative of her status as a legal parent. The case is also important because it signifies

172. *Id.* at 69, 73.
173. 405 U.S. 645 (1972).
174. *Id.* at 646.
175. *Id.* at 658.
176. *Id.* at 651 (internal citations omitted).
177. 434 U.S 246 (1978).

that the presence of a biological link does not hermetically insulate that relationship from state intervention.

In *Quilloin*, the State of Georgia rejected an unwed father's authority to prevent the adoption of his son by the child's stepfather pursuant to a statute that required only the consent of the mother for the adoption of a child born out of wedlock.[178] The trial court granted the adoption after determining that the adoption was in the child's best interest, and because the father, having failed to obtain a court order granting legitimization, lacked standing to object to the adoption.[179] The Supreme Court held that under the circumstances of this case, in which the unwed father never sought custody of this child, the father's due process rights were not violated by the trial court's application of the best interests standard.[180] Further, the Court held that the father's equal protection rights were not violated because, unlike a married father who is separated or divorced from the child's mother, this unwed father "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[181] *Quilloin* provides support for the proposition that biology alone is not enough to define parenthood, instead aligning with the non-legal lesbian mother's position that it is the act of parenting, not biology, that determines who is a parent.

The Court's decision in *Caban v. Mohammed*[182] indicates that active parenting, rather than marriage between the child's parents, is an important factor in deciding who will be deemed a legal parent, and thus whose relationship with the child will be protected. In *Caban*, an unmarried couple had two children and then separated. The father maintained continuing contact with his children and objected when the children's stepfather attempted to adopt them.[183] The New York statute required the consent of an unwed mother to an adoption but did not require consent from the unwed father.[184] The Supreme Court found that the statute violated the equal protection clause[185] and included language to distinguish this case from *Quilloin*:

> In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child. . . . But in cases such as this, where the father has established a substantial relationship with the child and has admit-

178. *Id.* at 247–48.
179. *Id.* at 251–52.
180. *Id.* at 255.
181. *Id.* at 256.
182. 441 U.S. 380 (1979).
183. *Id.* at 382–83.
184. *Id.* at 385.
185. *Id.* at 393.

> ted this paternity, a State should have no difficulty in identifying the father even of children born out of wedlock.[186]

The father's involvement in the children's life was a key factor in the Court's ability to distinguish *Caban* from *Quilloin*, despite the fact that their respective statutory schemes operated in a similar manner.[187] Under *Caban*, therefore, an opportunity exists to carve out a constitutional liberty interest of the non-legal lesbian parent. The heterosexual family as depicted in *Caban* intersects with the lesbian-parented family in which the two mothers cannot marry under the law of any state or under federal law. This point of intersection is important because it indicates that courts should not use the laws of marriage as a barrier to finding the non-legal lesbian mother to be a legal parent.

In *Lehr v. Robertson*,[188] the Court again emphasized that while parenting in the biological sense garners constitutional protections, the mere fact of biological parenting does not command such protections. Instead, the Court's vision of parenting goes beyond the mere act of procreating and encompasses a culturally informed vision of parenting as an activity of nurturing and raising children. In *Lehr*, an unwed father challenged a New York statute that did not notify him of the adoption of his child by the mother's husband.[189] The Court upheld the statute, relying heavily on the unwed father's failure to develop or maintain a relationship with his child:

> The 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. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.[190]

Finally, the Court's decision in *Michael H. v. Gerald D.*[191] deserves discussion because of its seeming departure from the line of reasoning in the previous unwed father cases and its concomitant influence on the contours of the legal definition of family. In *Michael H.*, the Court revealed that there are some instances in which both biological *parenthood* and active *parenting* do not compel constitutional protection. Although at first blush the holding in *Michael H.* seems to offer little support for the position of the non-legal lesbian mother, it is nonetheless important because it illustrates that the Court views legal parenthood not as a static, rigidly defined status, but instead as a status with flexibility

186. *Id.* at 392–93.
187. *See* Kaas, *supra* note 153, at 1076.
188. 463 U.S. 248 (1983).
189. *Id.* at 251–52.
190. *Id.* at 262.
191. 491 U.S. 110 (1985).

in its definition. This flexibility in defining a legal parent, taking into consideration biology, marriage, and activities of parenting at different times, with different degrees of importance, and in different contexts is significant and important to non-legal lesbian mothers. The flexibility is significant because it signifies a space within the traditional/legal *nomos* into which the reality of the LGBT/extra-legal *nomos* can be integrated and considered.

Michael H. involved a California statute that created a presumption that a child born to a married woman living with her husband was the husband's child.[192] The mother in *Michael H.* had engaged in an extra-marital affair, which resulted in the birth of a daughter.[193] The mother and her child lived intermittently with both the husband and the child's biological father, and the child developed a close relationship with both men.[194] Eventually, the mother and the husband reconciled, at which time the mother refused to allow the biological father to continue his relationship with the child.[195] The biological father brought suit, and the California courts relied on the marital presumption statute to deny him the opportunity to establish paternity.[196] The United States Supreme Court affirmed.[197]

The Supreme Court has never ruled that a parent has an absolute or preemptive right to his or her child's custody without regard to the child's interests and welfare. Arguably, *Michael H.* may be read to support the assertion that the legal mother, once she enters a same-sex relationship and agrees to co-parent a child, does not have an absolute liberty interest that is impermeable to other interests and considerations. *Michael H.* supports this proposition because the Court in that case looked beyond the biological tie between the father and his daughter in deciding parenthood. That the *Michael H.* Court also looked beyond the actual parenting that the biological father gave to his daughter and determined that this actual parenting was undeserving of constitutional protection is not fatal to the non-legal lesbian mother in a lesbian-parented family dissolution case. *Michael H.* contained an important factual difference from the lesbian-parented family dissolution case: In *Michael H.* there was a third parent seeking a declaration of legal parenthood, and that third parent was the husband of the legal and biological mother. Further, that third parent enjoyed the protection of the marital presumption statute. In the lesbian-parented family dissolution case, there is no such third parent vying for recognition and protection and there is no such statutory scheme at issue. *Michael H.*'s holding that biology alone is not enough to create legally protected parenthood is helpful to the non-legal lesbian parent. The foregoing decisions also demonstrate that the Court

192. *Id.* at 118.

193. *Id.* at 113–15. Blood tests revealed that the father of the child was not the husband but was the lover.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 132.

considers functional parenting fundamentally important to any definition of a legal parent. The caselaw thus supports the assertion of the Parental Status Model that the non-legal lesbian parent, through fulfilling parental duties, should be legally recognized as a parent. Further, the precedent supports the Constitutional Interests Model, which alternatively asserts that even if the Court does not consider the non-legal parent's status to be equivalent to that of the legal parent, her interests nonetheless rise to the level of a constitutional liberty interest that must be weighed against the legal mother's constitutional rights and interests.

C. The Rights and Interests of Non-Legal Parents/Third Parties

1. Supreme Court Foster Care Jurisprudence: What Does Smith v. O.F.F.E.R. *Mean for the Non-Legal Lesbian Parent?*

The Court has begun to define the rights of non-parents vis-à-vis children within the traditional/legal *nomos* with important implications for lesbian-parented families in the LGBT/extra-legal *nomos*. In *Smith v. Organization of Foster Families for Equality and Reform*,[198] the Supreme Court addressed extent of constitutional protections afforded to non-legal parents in the context of the foster parenting relationship. The Court acknowledged that "the most limited constitutional liberty in the foster family" might exist, even though that interest was outweighed by the principles of contract law.[199] This suggests that in the absence of a statutory scheme governing the foster parents' relationships with foster children, there may be space in which the foster parents could assert a constitutional right to maintain a relationship with their foster children. That possibility is of great consequence in the lesbian-parented family context because no overriding statutory scheme governs the creation and maintenance of lesbian-parented families.

In *Smith*, foster families challenged New York statutes that permitted the state to remove foster children from their care without a full adversarial hearing.[200] The foster families argued that they were psychological parents to the foster children and thus had a constitutional liberty interest in maintaining the family unit.[201] The Court rejected this argument and upheld the statutes, resting its holding on contractual nature of the relationship between the state and the foster parents.[202] Specifically, the Court reasoned that the foster family relationship has a contractual source—the state—that makes it different from a legal family's liberty interest in its relations, which arise not from state law but

198. 431 U.S. 816 (1977).
199. *Id.* at 845–46.
200. *Id.* at 823–33.
201. *Id.* at 839.
202. *Id.* at 856.

from intrinsic human rights.[203] The *Smith* Court felt able to elevate principles of contract law above the parental relationship that develops between a foster parent and a foster child because family law has not historically situated the foster parent-foster child unit within the contours of the traditional definition of family. Further, the Court noted that although ties did develop between the foster parents and the foster children, where

> . . . the claimed [liberty] interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties. In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional "liberty" in the foster family.[204]

The contractual nature of the foster parents' relationship with foster children is importantly distinguishable from the lesbian-parented family. Contrary to the foster family relationship, lesbian-parented families are by definition unregulated and private. In the lesbian-parented family, both partners plan for and bring a child into their family unit. Both partners have the expectation that they will be full parents to the child. There is often no state involvement in the process of creating a lesbian-parented family;[205] on the contrary, these families are often created solely through private ordering.[206] The Court's reasoning in *Smith,* by which the contractual nature of the relationship compelled the rejection of "any but the most limited" fundamental liberty interest in foster parents, arguably mandates the opposite conclusion in the case of the non-legal lesbian mother.

There are other distinctions, not present in the foster family context but present in lesbian-parented families, that might convince the Court not to recognize a constitutional liberty interest in the non-legal lesbian mother. For exam-

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203. *Id.* at 845–46. The Court also supported its holding by noting that the legal family's interest in reunification weakened any interest of the foster family in staying together. *Id.* at 846–47.

204. *Id.* at 845–46.

205. There is no state involvement when the lesbian couple utilizes reproductive technologies. However, when one partner adopts a child, ostensibly as a single parent, there is state involvement to the extent that the adoptive parent pursues the adoption through state agencies. However, even when the state is involved in such an adoption, the non-adoptive lesbian mother has the full expectation of acting as the second parent to the child. In fact, if the state allowed it, both lesbian partners would have opted to become legal parents to the child through adoption. Thus, even when there is state involvement in the adoption context, the involvement is distinguishable from the state involvement in *Smith* because in the adoption context there is no expectation that the child will be removed from the adoptive parent; in contrast to foster care, adoption is the permanent placement of a child in the adoptive home and the creation of a legally recognized family.

206. *See generally* Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299 (1997). *See also* Elizabeth Bartholet, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION (1999) (noting the contrast between the highly state-regulated adoption process in contrast to the near lacuna of state regulation or involvement in the reproductive technology market).

ple, the Court might decline to recognize the new liberty interest by relying on the fact that no state allows same-sex couples to marry.[207] However, the Court has previously held that marital status is not dispositive in the determination of legal parentage.[208]

Further, the Court may point to the states that do not permit lesbians and gay men to adopt children as grounds for declining to recognize the new constitutional right.[209] However, these non-legal lesbian mothers are not asking for the right to adopt and are thus not asking the Court to infringe upon the right of the states to determine adoption laws and policies. On the contrary, these non-legal lesbian parents are asking the Court to determine that: (1) they have constitutionally protected relationships with children that *already exist*, (2) they are *already in a parent-child relationship*, and (3) they are *already part of a functional family* that was not created in violation of state or federal law. Thus, no state law is directly implicated. These children exist and will continue to exist whether the Court recognizes these families or not.

Although the *Smith* Court denied foster parents constitutional protection, it made distinctions in the constitutional protections available according to the form of the family involved in a manner relevant to the lesbian-parented family. For example, the majority noted that "freedom of personal choice in matters of... family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[210] This arguably supports the notion that a same-sex family, rejected by many in society, is nonetheless permissible and deserving of recognition and protection because matters of the family, even those same-sex families that are often not accepted by the majority of society, are the result of such a 'freedom of personal choice in matters of family life.' Importantly, the Court stated that "[t]he legal status of families has never been regarded as controlling: 'Nor has the [Constitution] refused to recognize those family relationships unlegitimated by a marriage ceremony.'"[211] Thus, the fact that lesbians cannot currently marry[212] is arguably not relevant to the Court's current

207. *See* Deb Price, *Kids in Gay Families Deserve Safeguards*, DETROIT NEWS, May 15, 2000, at A11. Although no states allow same-sex marriage, Vermont permits "civil unions." *See* VT. STAT. ANN. Tit. 15, §§ 1201–1204 (Supp. 2000).

208. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972).

209. *See generally* Lambda Legal Defense and Education Fund, *Overview of State Adoption Laws* (1999), *at* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=399.

210. *Smith*, 431 U.S. at 842.

211. *Id.* at 845, *quoting Stanley*, 405 U.S. at 651.

212. *See* Defense of Marriage Act, 1 U.S.C.A. § 7 (1996) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife."); 28 U.S.C.A. § 1738C ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."). *See*

family law jurisprudence and should not preclude a determination that the non-legal lesbian mother should be accorded constitutional protections vis-à-vis the child. At minimum, then, *Smith* offers some ammunition for lower courts that might be more sympathetic to the expansion of the traditional/legal *nomos* to include some of the LGBT/extra-legal *nomos*.

The *Smith* Court went on to recognize that "although considerable difficulty has attended the task of defining 'family,'"[213] some elements of family were well-recognized: "First, the usual understanding of 'family' implies biological relationships, and most decisions treating the relations between parent and child have stressed this element.... But biological relationships are not exclusive determination of the existence of a family."[214] The Court explained:

> The importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children [citations omitted], as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.[215]

Thus, the fact that the non-legal lesbian mother has no genetic or legal connection to the child should not prevent the Court from recognizing the non-legal lesbian mother's liberty interest in maintaining a parenting relationship with her child. The context in which a lesbian-parented family emerges—a loving, committed relationship between the mothers, the planning for and rearing of a child in which both women engage in the "intimacy of daily association" and "instruction of children," and the lack of state involvement—weighs in favor of the Court's recognition of a liberty interest in the non-legal lesbian parent. The Parental Status Model argues that this liberty interest rises to the level of triggering full legal parental status, while the Constitutional Interests Model alternatively argues that this interest should be weighed, along with the child's liberty interest, against the legal parent's constitutional rights and interests.

The possibility that the Court could recognize a liberty interest in the non-legal lesbian parent may be improved even further by the lesbian-parented

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also Lambda Legal Defense and Educ. Fund, 2000 Anti-Marriage Bills Status Report (May 25, 2000), *at* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=578. Further, no state has legalized same-sex marriage. Vermont has come the closest to legalizing same-sex marriage, enacting a "civil union" law that grants same-sex couples the same state benefits and obligations as marriage does. *See* VT. STAT. ANN. Tit. 15, §§ 1201–1204 (Supp. 2000), enacted pursuant to Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that the Vermont Constitution's Common Benefits Clause prohibited different treatment of same-sex couples and leaving to the legislature the task of passing appropriate legislation).

213. *Smith*, 431 U.S. at 842.

214. *Id.* at 843.

215. *Smith*, 431 U.S. at 844 (internal citations omitted).

family child support cases that are beginning to percolate in the lower courts. The finding of a support obligation against a non-legal lesbian mother in essence means that the non-legal lesbian mother is burdened with the *responsibilities of legal parenthood.* The support obligation is very rarely imposed on an individual who is not the legal parent of the child, even when that individual is biologically related to the child.[216] Further, those few non-martial, non-biologically related individuals who have been found liable for child support have been considered parents of the child, either through marriage or other conduct.[217] Thus, now that courts have begun to impose child support obligations upon non-legal lesbian mothers, an even stronger case for a parental liberty interest exists because courts should not impose the *responsibilities* of parenthood without simultaneously finding that the *rights* of parenthood exist in that same individual.

2. Supreme Court Third Party Visitation Jurisprudence: What Does Troxel v. Granville *Mean for the Non-Legal Lesbian Parent?*

The Court recently weighed in on the rights of legal parents in the context of a visitation dispute. The Court's opinion in *Troxel* represents an important moment in the Court's family law jurisprudence, a moment that is pivotal for lesbian-parented families. The *Troxel* opinion arguably provides further support for the finding of a liberty interest in the non-legal lesbian mother.

In *Troxel*, grandparents sued for visitation with their two granddaughters under a Washington State statute, over the objection of the children's legal mother.[218] In holding the statute unconstitutional as applied to the legal mother,[219] the Court recognized the trend towards enacting non-parental visitation statutes, but noted that such statutes impose a "substantial burden" on

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216. *See* Laurence C. Nolan, *Legal Strangers and the Duty of Support: Beyond the Legal Tie—But How Far Beyond the Marital Tie?,* 41 SANTA CLARA L. REV. 1, 4 (2000) ("As a general rule, persons other than parents, with a biological tie to a child are treated as legal strangers and have no duty to support that child.").

217. *See id.* at 7–13 (noting that stepparents, adoptive parents, and husbands whose wives have undergone alternative insemination with their husbands' consent have all been held liable for child support pursuant to statutes or equitable doctrines such as *in loco parentis* and equitable estoppel).

218. WASH. REV. CODE § 26.10.160(3) (1987). This statute permits any person to petition a superior court to grant such visitation rights at any time whenever the visitation is in the best interests of the child.

219. Troxel v. Granville, 530 U.S. 57, 75–76 (2000). The Court further stated:

> Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context.

Id. at 73.

the traditional parent-child relationship.[220] Specifically, the Court noted that "[t]he liberty interest at issue in this case—the interests of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[221] The Court considered the statute constitutionally infirm because it gave "no special weight" to the legal mother's determination of her children's best interest, which in turn "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child."[222]

The Court's holding in *Troxel* may not be fatal to the non-legal mother's claim to constitutional protection. Some of the Court's language in *Troxel* could be used to support the non-legal lesbian mother's contention that her relationship with the child deserves constitutional protection and that a recognition of such an interest would not infringe on the legal mother's constitutional liberty interest. For example, the *Troxel* plurality recognized that the heterosexual nuclear family is not the only form of family. The Court may in the future find that the law should thus protect other forms of family, such as the lesbian-parented family.[223]

Importantly, the Court did not apply strict scrutiny in *Troxel*, but instead applied an intermediate-level scrutiny balancing test.[224] This shift renders the legal lesbian mother's liberty interest more susceptible to balancing against other interests, potentially including that of the non-legal lesbian mother. The language of the *Troxel* plurality, coupled with the absence of strict scrutiny, represents an opening in the Court's jurisprudence, an opening through which the non-legal lesbian parent's reality may enter. The Parental Status Model asserts that this constitutional liberty interest of the non-legal lesbian parent should rise to the status of full, legal parent, while the Constitutional Interests Model alternatively argues that this interest should be weighed against the legal parent's constitutional rights and interests.

The *Troxel* Court also found constitutional infirmity in the Washington statute's broad language of "any person" at "any time" in defining who could petition for visitation. The non-legal lesbian mother's liberty interest in her family would exist independently of any statute. Thus, even if statutes do not denote that someone in the position of the non-legal lesbian mother may petition for custody/visitation, she would have a constitutional ground independent of statutory authority on which to pursue her claim.[225]

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220. *Id.* at 64.

221. *Id.* at 65.

222. *Id.* at 69.

223. *See id.* at 63 ("The demographic changes of the past century make it difficult to speak of an average American family").

224. *Id.* at 67–74. Only Justice Thomas opined that strict scrutiny was required. *Id.* at 80 (Thomas, J., concurring).

225. This is not to argue that statutory responses to the lesbian-parented family dissolution case are not advisable or suggested. *See* Section VI, *infra*, for a discussion of the pros and cons of a statutory response to the non-legal mother scenario.

Increasingly, courts are faced with disputes between legal parents and non-parent adults who are caregivers and nurturers.[226] These disputes illustrate that the construction of the heterosexual, nuclear family, exalted in the traditional/legal *nomos*, is no longer the social reality for many families. As in *Troxel*, such persons are often grandparents. However, such adults are not always biologically related to the children, as in the non-legal lesbian mother cases previously discussed. Courts in states around the country are recognizing the social facts and rendering decisions that are favorable to the situation of lesbian-parented families. Many states "properly pay attention to a child's powerful psychological ties to people who may not fit the legal status of 'parent' at a given moment in time."[227] "When children's sense of 'family' extends beyond one or both parents and other de facto parents to third parties, [it] may on occasion be necessary for state[s] to protect these ties."[228]

In summary, the Supreme Court's recent decisions, representing the epitome of the traditional/legal *nomos*, provide spaces into which the LGBT/extra-legal *nomos* can move and be recognized. As noted in the above discussion of Supreme Court precedent, the Court has recognized that the "intangible fibers"[229] that connect and sustain children's familial relationships are not determined by biology alone, and can in fact exist in the absence of a biological tie.[230] In fact, the Court's definition of family in the context of constitutional inquiries has included the view that parental rights or family are determined by biology alone. Nor has the Court found that "'parents' is a term constitutionally limited to a child's biological progenitors. Cousins, aunts, and grandparents living together are a family and are entitled to the same constitutional protection as an ostensibly more 'traditional' family consisting of a mother, father, and their legal offspring."[231]

3. Non-Constitutional Legal Arguments and Precedent: How Do They Support New Constitutional Rights and Interests?

Scholars and practitioners have articulated equitable theories of parenthood in support of the non-legal parent's rights and interests. Although these theories are not constitutional arguments, they nonetheless provide important support for the notion that non-legal lesbian mothers are functional parents to their children and that children of lesbian-parented families consider both women to be full parents. They also provide further support for the argument that underlies the

226. *See* Brief of *Amicus Curiae* Nat'l Ass'n of Counsel for Children in Support of Respondent, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138) [hereinafter *NACC* Troxel *Brief*].

227. *Id.* at 10.

228. *Id.* at 17.

229. *Lehr*, 463 U.S. at 256.

230. *See NACC* Troxel *Brief*, *supra* note 226, at 17 (discussing Lehr v. Robertson, 463 U.S. 248, 261 (1983); Smith v. O.F.F.E.R., 431 U.S. 816, 843 (1977)).

231. *Id.* at 17–18 (citing Moore v. East Cleveland, 431 U.S. 494 (1977)).

Parental Status Model and the Constitutional Interests Model, namely that the non-legal lesbian parent functions as a parent and should thus be deemed to have a constitutional liberty interest in maintaining her relationship with the child, either by being deemed a legal parent (as in the Parental Status Model) or by granting her standing in a custody/visitation dispute and then weighing her liberty interest against the legal parent's interest (as in the Constitutional Interests Model). The theories also support the Equal Protection Model, which asserts that because the non-legal lesbian parent is a functional parent to the child, it would violate the child's equal protection rights to deny standing to the non-legal lesbian mother in a custody/visitation case.

Coupled with lower court holdings and Supreme Court holdings to the effect that (i) legal parents do not have absolute constitutional rights vis-à-vis their children and (ii) that non-legal parents are not absolutely barred from claiming constitutional protections vis-à-vis the children they raise, these theories present a strong basis upon which the Supreme Court could recognize the non-legal lesbian mother's constitutional right to maintain a parental relationship with the child.

The doctrine of de facto parenthood has been argued to courts, some of which have accepted the theory in holding that the non-legal lesbian mother nonetheless has the rights and interests of a parent deserving of protection.[232] A de facto parent is one who "on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's needs and his psychological need for affection and care."[233]

The "psychological parent" theory has also been espoused by advocates of non-legal lesbian mothers. A psychological parent is "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality fulfills the child's psychological needs for a parent, as well as the child's physical needs."[234] Although this theory clearly supports the argument that a child has a liberty interest in maintaining a relationship with a non-legal parent,[235] it also provides support for a non-legal lesbian mother's assertion that through her actions in raising the child, she has parental rights that deserve protection.

The doctrine of equitable estoppel has also been used to support the rights of non-legal lesbian mothers.[236] Equitable estoppel prevents the legal mother from denying the existence of a parental relationship between the non-legal mother and the child when (1) the legal mother's actions or inactions induces (2) reli-

232. *See, e.g.*, E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999). *But see* Curiale v. Regan, 272 Cal. Rptr. 520 (Ct. App. 1990); Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1991); Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); In re Z.J.H., 471 N.W.2d 202 (Wis. 1991).

233. *Carr, supra* note 68, at 1052 n.137 (citing In re B.G., 253 P.2d 244, 253 n.18 (Cal. 1974)); *see generally* Polikoff, *supra* note 68.

234. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 98 (2d ed. 1979).

235. *See* discussion regarding the rights and interests of children, *infra*, at Part III.D.

236. *See, e.g.*, Liston v. Pyles, 1997 WL 467327 (Ohio Ct. App., Aug. 12, 1997); Nancy S. v. Michelle G., 279 Cal. Rptr. 212 (Ct. App. 1991).

ance by the non-legal mother, (3) to the non-legal mother's detriment.[237] This argument has also been used in child support cases filed by the legal lesbian mother.[238]

Finally, the doctrine of *in loco parentis* has been presented to support the claims of non-legal lesbian mothers.[239] *In loco parentis* literally means "in the place of the parent"; a person stands *in loco parentis* when she has "assumed the status and obligations of a parent without formal adoption. Whether one assumes this status depends on whether that person intends to assume that obligation." [240] Further, a legal tie between the child and the adult standing *in loco parentis* is irrelevant; the adult retains her *in loco parentis* status for as long as she and the child intend that it should.[241]

These theories, when applied to the facts of a particular case, fill in for the court the picture of the lesbian family situated within the LGBT/extra-legal *nomos*. This picture is important because it demonstrates that the lesbian-parented family does not look drastically different than the heterosexual, nuclear family that is situated within the traditional/legal *nomos*.

I argue that the Supreme Court should recognize the non-legal lesbian parent's constitutional right to maintain a parental relationship with the child. The Parental Status Model proposes that these rights transform the currently non-legal lesbian parent into a legal parent. The Constitutional Interests Model alternatively proposes that the non-legal lesbian parent's constitutional rights and interests (along with the liberty interest of the child, discussed below) should be balanced against the legal parent's constitutional rights and interests.

D. The Rights and Interests of Children

In *Michael H.*, the Supreme Court was presented with the question of whether a child has a constitutional liberty interest in maintaining family bonds. The Court declined to address it, stating: "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here . . . ."[242] That the question has not yet been answered is an important impetus for this article.

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237. *See* Carr, *supra* note 69, at 1049–50 (citing Gribble v. Gribble, 583 P.2d 64, 66 (Utah 1978)).

238. *See* NCLR *Kove* Brief at 5–6.

239. *See, e.g.*, C.B.L. v. V.H.L., 723 N.E.2d 316 (Ill. Ct. App. 1999); *Nancy S.*, 279 Cal. Rptr. 212 (Ct. App. 1991).

240. Carr, *supra* note 69, at 502–08.

241. *Id.*

242. 491 U.S. at 130 (1989). The Court did not need to reach the question because it was able to render its holding on other grounds. The Court tends to render its decisions on the narrowest grounds possible, meaning that it declines to address constitutional questions that are not necessary to resolve in order to resolve the issues in the case at bar.

1. Recent Supreme Court Jurisprudence on Children's Rights and Interests: Troxel v. Granville

In the Court's recent decision in *Troxel*, Justice Stevens stated in his dissent:

> While this Court has not yet had occasion to elucidate the nature of a child's liberty interest in preserving established familial or family-like bonds, 491 U.S., at 130 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.[243]

Justice Stevens disagreed with the plurality's "as applied" test, stating that the statute "plainly sweeps in a great deal of the permissible."[244] Further, Justice Stevens also rejected the Washington State Supreme Court's finding that the Constitution requires a showing of actual or potential harm to the child before a court may order visitation, stating that such a finding finds no support in the Court's case law:

> [W]e have never held that the parent's relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm. The presumption that parental decisions generally serve the best interests of their children is sound, and clearly in the normal case the parent's interest is paramount. But even a fit parent is capable of treating a child like a mere possession.[245]

Justice Stevens's dissent provides strong language to support the argument that the Court should recognize a liberty interest in children to maintain family or family-like bonds, and that the child's liberty interest should be independent from the parent's liberty interest in the care, custody, and control of the child. For example, Justice Stevens reminds the plurality that a parent's liberty interest is "a function, not of 'isolated factors' such as biology and intimate connection, but of the broader and apparently independent interest in family."[246] Justice Stevens notes that the limits on parental liberty interests arise from the Court's recognition that the parent's interest must be balanced against the state's interest at *parens patriae*,[247] as well as against the child's "own complementary interest

243. Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting).

244. *Id.* at 85.

245. *Id.* at 86.

246. *Id.* at 88.

247. *Id.* at 88. The *parens patriae* power stems from the state's responsibility to protect the welfare of children. The responsibility is "a sovereign right and duty to care for a child and protect him from neglect, abuse and fraud during his minority." Theresa A. Nitti, *Stepping Back from the Psychological Parenting Theory: A Comment on In Re J.C.*, 46 RUTGERS L. REV. 1003, 1009 (1994) (quoting State v. Perricone, 181 A.2d 751 (N.J. 1962)).

in preserving relationships that serve her welfare and protection."[248] Justice Stevens states that although he is not advocating for the child's interest to be equal to the parent's interest, he is asserting that the Court should

> . . . recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a "person" other than a parent. The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a legal parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily. . . . It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.[249]

This language, when considered with the Court's prior precedents that biology alone does not define the constitution of a family, weighs in favor of the recognition of a liberty interest in the child to maintain a relationship with her non-legal lesbian mother.

Justice Stevens's dissent, coupled with the plurality's language regarding the contemporary forms of family, shows that the Court has the potential for recognizing the factual reality of the LGBT/extra-legal *nomos*. Although such a goal is ambitious and may not be adopted by the current Supreme Court, this article maintains that the legal bases are present and the Court's existing decisions do not preclude such a finding.

The *Troxel* plurality does not rule out such a determination. The plurality did not articulate a specific liberty interest in children, but it did opine that states may enact third party visitation legislation to "ensure the welfare of the children" by "protecting the relationships . . . children form with such third parties," who "undertake duties of a parental nature in many households."[250] "*Troxel* thus marks an important step in the Court's family law jurisprudence. At best, *Troxel* promotes intrafamily diversity, preserves parents' liberty interest, and protects children."[251] Again, this is significant to the extent that it demonstrates the Court's awareness of, and indeed acceptance (at least to the extent it accepts the factual reality) of family forms that are outside of the traditional/legal *nomos*.

In sum, although the *Troxel* Court never mentions lesbian-parented families, its discussion of the varied forms of the contemporary family is promising for the families situated in the LGBT/extra-legal *nomos*. Further, the plurality's rejection of the strict scrutiny standard of review is also important because it

248. *See Id.* (citing Santosky v. Kramer, 455 U.S. 745, 760 (1982)).

249. *Id.* at 90.

250. *Id.* at 64.

251. Alessia Bell, Note, *Public Child and Private Child:* Troxel v. Granville *and the Constitutional Rights of Family Members*, 36 HARV. C.R.-C.L. L. REV. 225, 244 (2001).

demonstrates that the Court will permit other interests to be balanced against the interests of the legal parent, possibly including the child's interest. Together, these two characteristics of the *Troxel* plurality render the decision a significant one for children and non-legal parents of lesbian-parented families.

2. Past Supreme Court Jurisprudence on Children's Constitutional Rights and Interests: From In re Gault *to* Casey v. Population Services

Although the Supreme Court has not recognized the specific constitutional right of children to maintain family or family-like bonds, it has opined that children have constitutional protection in other areas. These cases are important because they reveal that the Court is not completely adverse to recognizing constitutional rights in children generally and that the Court is not prohibited by its own precedent from recognizing the constitutional interests of the child in the lesbian-parented family in particular.

For example, in *In Re Gault*,[252] the Court cited a line of cases holding that a child is a person for the purpose of determining constitutional protections to support its holding that juveniles are entitled to due process protection. In *Reno v. Flores*,[253] the Court stated that "[c]hildren, too, have a core liberty interest in remaining free from institutional confinement. In this respect, a child's constitutional '[f]reedom from bodily restraint' is no narrower than an adult's."[254] In *Tinker v. Des Moines Independent Community School District*,[255] the Court found that students have a right to free expression under the First Amendment in order to support its holding that a school cannot ban students from wearing armbands to protest the Vietnam war. In *Carey v. Population Services*,[256] the Court struck down as unconstitutional a state statute prohibiting the distribution of contraceptives to minors.[257]

Further, the Court has previously opined that family and family-like relationships—which grow out of shared experience, nurturing and interdependence—are "an intrinsic element of personal liberty."[258] The constitutional shelter afforded family relationships between adults reflects the

252. 387 U.S. 1 (1967).

253. 507 U.S. 292 (1993).

254. *Id.* at 316.

255. 393 U.S. 503 (1969).

256. 431 U.S. 678 (1977).

257. *But see* Ohio v. Akron Ctr. For Reproductive Health, 497 U.S. 502 (1990) (upholding a state statute that prevented a physician from performing an abortion on an unmarried, dependent minor without first providing notice to the minor's parents); Hodgson v. Minnesota, 497 U.S. 417 (1990) (holding a state's 48-hour waiting period before an abortion following parental notification constitutional); Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) (upholding a statute requiring parental notification or judicial consent before a minor could obtain an abortion); Parham v. J.R., 442 U.S. 584 (1979) (upholding the constitutionality of procedures that permitted parents to commit their children to a mental institution without a full, adversarial hearing, reasoning that parents presumably act in the best interests of their children).

258. Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984).

realization that individuals derive much of their emotional enrichment from close ties with others.[259] The "emotional enrichment" garnered by children from their families sustains them as they grow to maturity. Finding a liberty interest in children to maintain a relationship with parent-like individuals would thus "protect children against the unwarranted loss of psychological and emotional ties to their established families."[260]

These cases illustrate that the Court has recognized that children have constitutional rights and interests in some contexts. The Court has thus determined that children deserve constitutional protections from arbitrary state action, usually in institutional settings. It is acknowledged that these cases do carve out constitutional protections for children in very limited contexts, particularly in criminal or quasi-criminal proceedings in which a child's interests are most like those of an adult.[261] However, these cases are nonetheless important as a starting point for the proposition that children have been accorded constitutional protections in some limited circumstances, and that the extension of such protections is not prohibited by the Court's precedents. The Court should extend these constitutional protections to the institution of the family because "[a]s with schools and other institutions, the protective nature of the family should not insulate the child from receiving the guarantees of the Constitution."[262]

Children's advocates have articulated arguments for extending the Court's vesting of constitutional rights in children to include a child's liberty interest in maintaining family or family-like bonds. Most recently, the National Association of Counsel for Children (NACC) articulated such an argument in its *amicus curiae* brief in *Troxel*, stating: "Children are persons under our Constitution; the parent-child relationship involves two parties. Rights arising from that relationship are not reserved for either exclusively, but flow in both directions."[263] NACC observed that because children are the weakest members of our society and thus in greatest need of Supreme Court recognition of their constitutional rights and interests, ignoring or invalidating a child's constitutional rights and interests is particularly egregious.[264] Thus, "the state is often the only societal mechanism available to protect their interests."[265]

259. *Id.* at 619.

260. *NACC* Troxel *Brief*, *supra* note 226, at 16.

261. *See generally* In Re Gault, 387 U.S 1 (1967); Reno v. Flores, 507 U.S. 292 (1993).

262. Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 387 (1994).

263. *NACC* Troxel *Brief*, *supra* note 226, at 6.

264. *Id.* at 13.

265. *Id.*

3. State Court Jurisprudence on Children's Constitutional Rights and Interests: In re Jasmon *and* In re Bridget R.

In the family law context some state courts have expressly recognized that children have interests of constitutional magnitude. In *In re Jasmon*, the highest court in California stated that "children are not simply chattels belonging to their parent, but have fundamental interests of their own."[266] That same court, in *In re Bridget R.*, held that such fundamental interests are constitutional in nature.[267] These state supreme court cases provide a base for the Court to build upon and extend should it recognize a constitutional interest in the child to maintain family-like bonds.

4. Non-Legal Arguments: Psychological Research in Support of New Constitutional Rights and Interests in Children

Psychological research regarding a child's attachment to his or her parents further supports the argument for the recognition of a child's liberty interest in maintaining family or family-like bonds.[268] Although this research and the arguments that arise from it are neither constitutionally-based nor necessarily legally recognized, they reveal the factual reality of the lesbian-parented family within the LGBT/extra-legal *nomos*, and the child's factual reality within that family, much as the theories of equitable parenthood demonstrated the reality of the non-legal parent in the LGBT family.

Attachment, defined as "the sense of special connection that babies who are psychologically well-cared-for feel towards their caregivers,"[269] is crucial to a child's development. A child's "experiences with attachment, its disruption or its secure continuity, can influence the capacity to form important relationships and to sustain them over time during adult life."[270] This attachment, which may be created between non-legal lesbian mothers and their children, provides yet another basis for finding a constitutional interest in a child to maintain ties to her non-legal lesbian mother:

> If a child is removed from the only secure home she has known, she is at risk for difficulties in human interaction and relationships, underachievement, and failure to successfully parent the next generation. Disruption of an existing, safe, secure, and loving relationship can prevent a child from exercising a liberty interest in

266. *In re Jasmon*, 878 P.2d 1297 (Cal. 1994).

267. In re Bridget *R.*, 41 Cal. Rptr. 2d 507 (1996), *cert. denied*, 519 U.S. 1060 (1997).

268. *See* Marcus T. Boccacini & Eleanor Willemson, *Contested Adoption and the Liberty Interests of the Child*, 10 ST. THOMAS L. REV. 211, 217–220 (1998).

269. *Id.* at 217.

270. *Id.* at 219.

pursuing the ordinary activities of life known as normal development.[271]

Further, the current consensus among child development experts is that children benefit from continued contact with their non-custodial parents, that parental influence is not determined by biology, and thus that a functional definition of "parent" is necessary and appropriate.[272]

Even courts that have refused to find a liberty interest of the child or the non-legal parent have opined that the relationship between these two individuals is safe, secure and loving.[273] Although these courts have not found that the child has a constitutional liberty interest in such a relationship, their acknowledgement of the safe, secure, and loving parental relationship demonstrates that the Supreme Court will have to act before these courts will be able to transform their mere passing recognition of, and simultaneous proclaimed inability to protect, these all-but-legal-parental relationships into legally protected relationships. The fact that these courts acknowledge the character of these families but feel compelled to decline the provision of legal protections demonstrates that these courts need a firm rule, articulated by the Supreme Court, by which they can transform their passing positive characterization of these families into legally cognizable rights that would enable protection of these families. A Supreme Court decision finding a constitutional liberty interest in the child to maintain ties with her non-legal lesbian mother would untie the hands of these lower courts.

Considered together, the facts, precedent and arguments call for a long overdue statement from the Supreme Court that children have a constitutional right to maintain ties to all individuals who parent them. More specifically, the Court should find that children of lesbian-parented families have a constitutional right to maintain their relationship with their non-legal lesbian mother upon dissolution of the lesbian relationship. Recognition of a child's liberty interest would merely "balance[] both [the parent's and the child's interests] equitably, rather than relegating one to categorical dismissal."[274] A finding of such a constitutional right would also implicate child support cases, requiring courts to consider the interests of the child who considers the non-legal lesbian mother a parent, and issue a child support order.

271. *Id.* at 219–220.

272. *See* Holmes, *supra* note 262, at 389–90.

273. *See, e.g.*, Kathleen C. v. Lisa W., 84 Cal. Rptr. 2d 48 (Ct. App. 1999).

274. *NACC* Troxel *Brief*, *supra* note 226, at 14.

E. The Rights and Interests of the Legal Parent, the Non-Legal Parent and Children: The New Models

1. Theoretical Framework of the Three Models

a. Martha Fineman and the "Sexual Family"

The legal mother's refusal of visitation/custody to the non-legal mother is usually an arbitrary act that "neither serve[s] nor [is] motivated by the best interests of the child."[275] Instead, the legal mother's refusal usually arises out of feelings of bitterness and anger about the dissolution of what Professor Martha Fineman has called the "sexual family."[276]

Fineman describes her concept of the "sexual family" as a meta-narrative that places the heterosexual, nuclear family as the norm.[277] Fineman emphasizes that it is the intimate, sexual, and romantic affiliation between one man and one woman—a relationship she describes as "horizontal"—that defines the institutional concept of the family, which results in the marginalization of "vertical" relationships, such as other intergenerational relationships.[278] This dominant paradigm of the sexual family is viewed as fundamental and foundational and is thus accorded legal recognition and protections. Because of the privileged position of the sexual family in law and society, same-sex couples often strive to fit their relationships into it and seek protection of these horizontal relationships through measures such as domestic partnership ordinances.[279]

Fineman criticizes such attempts at reform as merely reinforcing "the idea of the sexual family. By duplicating the privileged form, alternative relationships merely affirm the centrality of sexuality to the fundamental ordering of society and the nature of intimacy. . . . [Thus,] [b]y analogy, these nontraditional unions are equated with the paradigmatic relationship of heterosexual marriage."[280] She also contends that the horizontally organized intimacy is a "crucial component of contemporary patriarchal ideology in that it ensures that

275. Troxel v. Granville, 530 U.S. 57, 91 (2000) (Stevens, J., dissenting).

276. FINEMAN, *supra* note 20.

277. *Id.* at 143.

278. *Id.* at 145.

279. *Id.* at 145.

280. *Id.* at 143. Fineman's theory has proved true in one state. In 2000, the Vermont Supreme Court held that, under the state constitution's common benefits clause, same-sex couples may not be denied the rights, benefits and obligations of marriage, and delegated to the state legislature the task of creating the statutory vehicle for these unions. *See* Baker v. State, 744 A.2d 864 (Vt. 1999). In response to this decision, the Vermont legislature passed "Civil Union" legislation that bestows upon same-sex couples all the benefits and obligations of civil marriage. VT. STAT. ANN. Tit. 15, §§ 1201–1204. Further, the Vermont legislature provided that "[t]he rights of parties to a civil union with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage." *Id.* at § 1204(f).

men are perceived as central to the family. . . . Alternatives to the nuclear family are cast as threatening and dangerous to society, destructive to cherished values."[281] Fineman further problematizes the sexual family as the core organizing principle of the concept of family:

> The privileging of the sexual tie stands as an eloquent statement about our understanding of the nature of family and intimacy. It also impedes the development of solutions to real family problems. One negative consequence flowing from the obsession with sexual affiliation, for example, is that in policy and reform the inevitable focus seems to be on "doing justice" between sexually affiliated adults.[282]

Finally, Fineman articulates a re-visioning of the family. Because Fineman believes that the focus on the sexual affiliation between the man and the woman in the sexual family has resulted in the deflection of social attention and consideration away from children,[283] she presents two proposals in an attempt to shift away from this dominant paradigm to a paradigm reflective of a support for caretaking.[284]

First, Fineman recommends the abolition of legal supports for the sexual family, namely the abolition of marriage as a legal category.[285] As a result, interactions between sexually affiliated men and women would be governed by existing legal rules relating to contract and property, and the state's interest in supporting the institution would dissolve.[286] A benefit of the state's disinterest would be that all sexual relationships between adults would be allowed, including homosexual relationships.[287] Fineman argues that the abolition of marriage as a legal institution is necessary because it is incapable of reform:

> As long as it exists, it will continue to occupy a privileged status and be posited as the ideal, defining other intimate entities as deviant. Instead of seeking to eliminate this stigma by analogizing more and more relationships to marriage, why not just abolish the category as a legal status and, in that way, render all sexual relationships equal with each other and all relationships equal with the sexual?[288]

Second, Fineman suggests the "construction of protections for the nurturing unit of caretaker and dependent exemplified by the Mother/Child dyad."[289] Fineman explains that this new vision of the family would consist of dependents

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281. FINEMAN, *supra* note 20, at 146.

282. *Id.* at 148.

283. *Id.* at 217.

284. *Id.* at 228.

285. *Id.*

286. *Id.* at 229. Fineman notes that this idea is not farfetched because we already encourage and enforce pre-nuptial agreements. *Id.*

287. *Id.*

288. *Id.* at 230.

289. *Id.*

and their caretakers, and that "[t]he caregiving family would be a protected space, entitled to special, preferred treatment by the state. The new family line, drawn around dependency, would mark the boundary of the concept of family privacy. The unit would also have legitimate claims on the resources of society."[290]

Fineman's focus on the mother-child dyad and away from the sexual family fits neatly with arguments presented in this article for the recognition of constitutional rights in the child and the non-legal lesbian parent. Her theoretical approach arguably enables a court to recognize the social reality of the lesbian-parented family because it is no more than two mother-child dyads in need of protection. Conceptualizing the relationships in the LGBT/extra-legal *nomos* in this way then arguably permits a court to integrate those relationships into the traditional/legal *nomos*: recognizing the suggested independent liberty interest in the child would shift the focus away from the relationship between the legal mother and the non-legal mother to the caregiver-dependent relationship that is, fundamentally, the crux of the issue. Further, recognizing the suggested constitutional interest in the non-legal lesbian mother to maintain ties to her child would also refocus the analysis away from the adult-adult relationship and toward the child-caregiver relationship. Recognizing such interests would represent a step toward Fineman's mother-child dyad and a step away from state intervention in and regulation of private, consensual, adult sexual relationships.[291]

This focus on the parent-child relationship would arguably be more palatable to courts than a focus on the same-sex adult relationship. This is because same-sex couples are viewed in a more negative light by society, legislatures, and courts than are children of lesbians or gay men. For example, in several states sexual activity between same-sex couples is criminalized, while the same sexual activity between opposite sex couples is not.[292] Further, the ban on same-sex marriage in 35 states[293] illustrates the animosity towards the same-sex "sexual family." In contrast, far fewer states prohibit lesbians and gay men from becoming adoptive parents, at least as single parents,[294] and several states and even more local jurisdictions have permitted second-parent adoptions for lesbian-parented families,[295] or have permitted a finding of legal parent status

290. *Id.* at 231.

291. FINEMAN, *supra* note 20.

292. *See* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, STATE-BY-STATE MAP OF SODOMY LAWS, *at* http://www.lambdalegal.org/cgibin/pages/states/sodomy-map (last visited Oct. 16, 2001) (noting that Kansas, Oklahoma, and Texas have sodomy laws applicable only to same-sex sexual activity).

293. *See* NATIONAL GAY AND LESBIAN TASK FORCE, SPECIFIC ANTI-SAME-SEX MARRIAGE LAWS IN THE U.S.-JANUARY 2001, *at* http://www.ngltf.org/downloads/marriagemap0201.pdf.

294. *See generally* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, OVERVIEW OF STATE ADOPTION LAWS (1999), *at* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=399 (last modified Mar. 10, 1999).

295. *Id.*

for the non-legal lesbian mother through a UPA action.[296] Finally, the Supreme Court has held on several occasions in the context of children born out of wedlock, that children should not be punished for the status or acts of their parents.[297] Thus, Fineman's model suggests a viable underlying theory upon which to pursue the constitutional rights suggested in this article and represented in the three models.

b. State Intervention in Lesbian Parented Families

It is important to note at the outset that any model adopted by courts to resolve disputes between lesbian mothers represents state intervention into the family. Those courts that have denied non-legal lesbian mothers standing to pursue custody/visitation under the rhetoric of the fundamental right of parents to be free from state intervention did not act in non-interventionist ways.[298] These courts rendered decisions that reflect the public policy choice of non-recognition of nontraditional, lesbian families, of children's interests, of non-legal lesbian mothers' interests, and of society's interest in rearing healthy children for the future. These decisions, in essence, tell these functional lesbian families that their reality will indeed remain extra-legal.

Similarly, the courts that have recently decided that non-legal lesbian mothers have standing to bring custody/visitation actions reflect the shifting mores and values in American culture regarding lesbian-parented families. Courts thus intervene into the lesbian-parented family as a means of protecting the interests of the child, the non-legal lesbian mother, and of the larger society. At first blush, it may appear that the intervention of the courts granting standing to the non-legal lesbian mother are "more interventionist" than the courts that deny such standing because these courts are recognizing and protecting families that many would not consider worthy of the label "family." Further, in recognizing these families and treating them as equivalent to the exclusive, heterosexual family that pervades the traditional/legal *nomos*, such courts might be considered "activist" and thus extremely interventionist vis-à-vis the legal parent-child relationship that is the polestar of constitutional protections of the autonomous family.

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296. *See, e.g.*, In the Interest of Twin A.V.N. and Twin B.V.N., Colo. Dist. Ct., Boulder County, No. 99-JV-385, Division 2 (Sept. 30, 1999).

297. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968); Trimble v. Gordon, 430 U.S. 762 (1977) (both finding equal protection violations in disparate treatment of illegitimate and in-wedlock children under state laws).

298. *See* Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985). Olsen suggests that the terms "intervention" and "nonintervention" in the family law context are largely meaningless. She labels her argument as the "incoherence argument." The incoherence argument rests on Olsen's assertion that as general principles, the terms "intervention" and "nonintervention" are indeterminate. Olsen argues that "[a]s long as a state exists and enforces any laws at all, it makes political choices. The state cannot be neutral or remain uninvolved, nor would anyone want the state to do so." *Id.* at 836.

This article, however, proposes that the levels of intervention are the same. The social reality of the lesbian-parented families, and the disputes that arise in those families are the same in every case presented to every court. What differs is the cultural, moral, and normative result of the courts' decisions. In denying standing to a non-legal lesbian mother, a court intervenes to the extent that it makes an affirmative decision to render the LGBT *nomos* extra-legal. In other words, regardless of whether the court recognizes that family unit, the two women and their child have functioned as a family and considered themselves as a family before the dissolution; the social fact of the family cannot be denied.

Court action allowing one (legal) parent unilaterally to sever familial ties between the child and the other (non-legal) parent puts the court's endorsement on such action, which rises to the level of state intervention into the family. In particular, the child has known nothing other than a family unit with the two mothers. Thus, the courts that deny standing to non-legal lesbian mothers are intruding into that reality by, in effect, destroying family ties between (non-legal) parent and child. In short, the court has intervened into the family that is situated in the LGBT/extra-legal *nomos* by superimposing the law of the traditional/legal *nomos* on the LGBT/extra-legal *nomos*, which the law does not expressly recognize.[299]

Admitting this state intervention is important to the success of the models proposed in this article. For, if courts view protecting the legal mother-child relationship (to the exclusion of the non-legal mother) as the sacrosanct goal of family law jurisprudence and as the goal of a non-interventionist approach, then any model that proposes consideration of factors other than the legal parent's interests will be rejected as interventionist and thus inappropriate. In contrast, once courts view *any* decision regarding custody of a child as an act of state intervention, including a decision to deny standing to the non-legal mother, the determination of these cases will arguably become more just and fair. Once state intervention is accepted as inevitable, courts will be faced with the inescapable social reality of the lesbian-parented family. Once the factual, social reality of that *nomos* is squarely on the table, courts will arguably have a more difficult time denying that the law should integrate the LGBT/extra-legal *nomos* to protect children and non-legal parents.

2. The Parental Status Model

The Parental Status Model is based upon recognition of the constitutional liberty interests of the non-legal lesbian parent. This model argues that this interest compels a conclusion of constitutional law that the non-legal parent is, in

299. This is one area where legislative changes would be helpful and thus a strategy toward changing existing law or introducing new legislation would be fruitful. As discussed in Part VI, *infra*, in arguing for constitutional protection for the lesbian-parented family, I in no way intend to suggest that other strategies to achieve such protections, such as legislative strategies, are ineffective or unadvisable.

law as well as in fact, a legal parent. The family is thus no longer extra-legal, but is instead validated in the traditional/legal *nomos* by the finding that the non-biological or non-adoptive lesbian mother is a legal parent. Once integrated into the traditional/legal *nomos*, this aspect of the family—the mother-child dyad—becomes subject to all of its laws. As a result, the state scheme of resolving parental custody and visitation disputes, as well as child support issues, would take over.

3. The Constitutional Interests Model

The Constitutional Interests Model, more realistic and pragmatic than the Parental Status Model, appreciates that the Supreme Court is likely to be hesitant to recognize a non-biological, non-adoptive mother as a full-fledged legal parent with the same rights as those of a legal or adoptive parent. Although the Court may recognize the new constitutional interests as suggested, such recognition may not translate the interest of the non-legal lesbian mother into the status of a legal parent.

The Constitutional Interests Model begins with the recognition that the legal or adoptive mother holds the privileged position in the current legal landscape; she is recognized to have a fundamental constitutional liberty interest in parenting the child and make child-rearing decisions, including with whom the child will spend time. Thus, the legal mother's constitutional rights constitute the "floor" from which any model must be constructed. However, the model also recognizes that the legal mother's constitutional rights are neither absolute nor limitless. There is thus a space surrounding the legal mother's constitutional rights, a space into which other interests may permissibly intrude and reside. This space allows courts to employ the Constitutional Interests Model of decision-making in these lesbian-parented family dissolution cases. The Constitutional Interests Model proposed here is designed to fill this space with the constitutional rights and interests of the non-legal mother and the child.

Earlier in this article, I proposed that the recognition of rights and interests of the non-legal mother is of constitutional import. These rights and interests arise from the non-legal mother's parenting actions on a functional level. The non-legal mother has acted as a caregiver to the child since the child's birth; in the child's eyes, the non-legal lesbian mother is a parent in every sense of that word. The non-legal lesbian mother's interests should be constitutionalized as privacy and liberty rights, which in the Constitutional Interests Model would at a minimum give rise to a procedural due process right to petition for visitation and custody.[300]

300. *See generally* Bell, *supra* note 251, at 274–77 (arguing that the United States Supreme Court should bestow upon psychosocial parents privacy, liberty, and procedural due process rights in the context of visitation disputes).

I also suggested that the children of lesbian-parented families should be recognized as having a constitutional liberty interest in maintaining a relationship with the non-legal lesbian mother. The issue that deserves further comment, however, is the weight that this interest should be accorded, given that children in these disputes are just that—children—and thus are legally unable to represent their own interests.

I suggest that the Supreme Court recognize a constitutional right of the child that is more limited than the constitutional protection afforded the legal mother.[301] While the child would have a recognized liberty interest that is fundamental, that interest would not be conflated with the legal mother's interests.[302] This approach is constitutionally sound because it recognizes that children's constitutional rights, by virtue of their status as a minor, can be infringed upon more readily than those of adults; there are state interests that justify infringing upon the child's constitutionally protected rights and interests more often than there are state interests that justify infringing upon the legal mother's constitutionally protected rights and interests.[303] Further, the Court has noted that the child's interest is commonly presumed to be subsumed within the legal parent's interest; the legal parent is presumed to act to support and further the child's interest.[304] Thus, in this proposed model the child's interests should be articulated and represented, through the appointment of a guardian *ad litem* or similar advocate, but the child's interests should not be co-equal with the legal mother's liberty interest.

The question remains, then, how the Court should balance the three sets of constitutional rights and interests: of the child, the legal mother, and the non-legal mother. The Constitutional Interests Model responds to the concern of balancing these interests. Courts should consider the constitutional interests of the child, through the court-appointed guardian *ad litem* as discussed above, and the interests of the non-legal lesbian mother and should weigh these two interests against the interests of the legal mother. In effect, the legal mother's liberty interests are on one side of the conceptual scale, while the non-legal lesbian

301. *Id.* (arguing that it is unwise to recognize a cognizable constitutional right in children for the purposes of non-parent custody and visitation disputes).

302. *See, e.g.,* Troxel v. Granville, 530 U.S. 57, 89 (2000) (Stevens, J., dissenting) ("This is not, of course, to suggest that a child's liberty interest in maintaining contact with a particular individual is to be treated invariably as on a par with that child's parents' contrary interests").

303. *See Constitutionalization of Children's Rights, supra* note 145, at 29–30 ("The difficulty of constructing a theory of children's rights on the foundation of the American constitutional doctrine arises in part from the fact that children are different from adults, and our constitution deals badly with real difference"). Thus, the constitutional liberty interest in the child argued for here is narrowly limited to the liberty interest to maintain family-like bonds with the non-legal lesbian mother. The liberty interest in the child asserted here would not give to child any right, for example, to challenge her parents' decisions regarding school choice, or choice of religion, or other child-rearing activities which the Court has found are the province of the legal parent. Instead, the liberty interest in the child would go only as far as maintaining the relationship with the non-legal lesbian parent.

304. *Troxel,* 530 U.S. at 89.

mother's constitutional rights and the child's constitutional rights are on the other side of that conceptual scale.

The Constitutional Interests Model does not suggest that the interests of the child be equated with the interests of the non-legal parent to the extent that the child's interests are presumed to be absorbed into and represented by the non-legal parent's interests. Instead, the Constitutional Interests Model proposes that the interests of the child be placed on the same side of the conceptual scale with the interests of the non-legal parent as a factor independent of either the legal parent's interest or the non-legal parent's interest. Placing the child's interests on the same side of the conceptual scale as the non-legal parent's interests may provide a counterweight to the very strong constitutional presumption that the legal parent has a near absolute right to rear her child as she sees fit. Thus, the coupling of the interests of the child and the non-legal parent is an attempt to make the Court more comfortable with recognizing these interests in the first instance. If the Court felt that it had to consider the rights and interests of the child and the non-legal parent as equivalent to the legal parent's rights and interests, it would arguably reject the recognition of the non-legal parent's and the child's interests entirely. The balancing approach suggested here is an effort to fit the reality of the lesbian-parented family that exists in the LGBT/extra-legal *nomos* more comfortably into the Court's vision of the family in the traditional/legal *nomos*.

I further propose that the foregoing balancing scheme occur within an overarching framework of the "best interests of the child" standard. The "best interests of the child" standard is used by courts in all states but West Virginia to resolve custody disputes and in all but three states in resolving visitation disputes.[305] It has been described as "[e]verything that is most suitable for a child's proper growth [and] development[;] . . . [a] psychological milieu and environment best conducive to healthy normal relationships[; and] . . . two basic needs, themes interwoven during the developmental stage. They are a closeness to be loved and to love—to feel nurtured and a sense of oneness with the opportunity to be separate—to develop one's own ideas and feeling, to be independent."[306]

I acknowledge that the "best interests of the child" standard has been criticized by scholars and courts alike for being indeterminate and lacking objectivity.[307] However, as previously stated, one of the goals of this article is

305. *See* Bell, *supra* note 251, at 252.

306. *In re Baby M.*, 525 A.2d 1128, 1167 (N.J. Super. Ct. 1987), *rev'd on other grounds*, *Matter of Baby M.*, 537 A.2d 1227 (N.J. 1988).

307. *See* Bell, *supra* note 251, at 252–55 (citing Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 289–91 (1975)). *See also NACC* Troxel *Brief*, *supra* note 226, at 8 ("Where competing fundamental interests are at stake, the best interests standard is not helpful because it provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores.") (internal citations omitted).

to propose practical models that courts may consider adopting. Because the "best interests of the child standard" is well-established and often utilized, courts will not be prone to reject it as a principle for deciding lesbian mother disputes. Using the "best interests of the child" standard in a framework in which competing constitutional rights are considered is less determinative than a straightforward best interests analysis would be in the absence of a recognition of constitutional rights and interests in the child and the non-legal lesbian mother.

Take, for example, the typical lesbian couple dissolution case. In such a case, a lesbian couple resides together as a family and plans for and brings a child into the world. Upon the birth of the child both women share all parenting rights and duties; in the eyes of the women, the child, and the community, both women are parents to the child, functionally if not legally. No mechanism for obtaining legal parenthood is available to the non-legal lesbian mother. When the child is four years old, the couple separates and the legal lesbian mother refuses custody or visitation to the non-legal lesbian mother. At that point, the non-legal lesbian mother commences a court action.

Under the Constitutional Interests Model, the court would begin by recognizing a triumvirate of constitutional interests. First, the court would recognize and acknowledge that the legal lesbian mother possesses constitutional protections allowing her to raise the child as she sees fit. Next, the court would recognize and acknowledge that the child's relationship with the non-legal lesbian mother demands constitutional protection. The court would appoint a guardian *ad litem* or similar advocate to represent the child's interests. Finally, the court would recognize and acknowledge that the non-legal lesbian mother has constitutional rights and interests in maintaining a relationship with the child by virtue of her active parenting of the child.

Once these interests were on the table, the court would engage in a balancing of the interests within a framework of the "best interests of the child" principle. The court would note that the legal mother's liberty interest is not absolute. By planning for and conceiving a child together with the non-legal mother, and by permitting the non-legal lesbian mother to parent the child fully and equally, the legal mother's liberty interest is no longer the paramount and determinative interest, contrary to the conclusion in some of the lesbian dissolution cases.[308] To enable this line of reasoning, the legal mother's liberty interest must shrink enough to permit the consideration of the non-legal lesbian mother's liberty interest in continuing to parent the child. Further, because the legal mother has permitted the child to be fully and equally parented by the non-legal lesbian mother, the legal mother's liberty interest must shrink even further to permit consideration of the child's liberty interest in continuing to be parented by the non-legal lesbian mother.

308. *See, e.g.,* Kazmierazak v. Query, 736 So.2d 106 (Fla. Ct. App. 1999).

None of these constitutional rights or interests completely trumps the others. At a minimum, the Constitutional Interests Model would ensure that non-legal lesbian mothers are granted standing to pursue relief in the custody and visitation context, and that legal mothers can assert a demand for child support against the non-legal lesbian mother. Once the court proceeds to the case on its merits, it would weigh all three constitutional interests while simultaneously considering the best interests of the child. If the child's growth, development, her need to be loved and to love, and her need to feel nurtured and to be independent, are all fostered and encouraged by a continued relationship with the non-legal mother, then the court should consider issues of custody, visitation, and child support as if the non-legal mother were a legal parent. Pursuant to the Constitutional Interests Model, courts would no longer encounter barriers to granting custody and/or visitation to non-legal lesbian mothers, nor would courts encounter barriers to issuing and enforcing support orders against non-legal lesbian mothers.

The Constitutional Interests Model is more than a simple best interests application. It does not abdicate the legal mother's longstanding and deeply entrenched liberty interests. It merely permits non-legal lesbian mothers and children to assert and have heard their constitutional interests in the matter. The fact that constitutional interests are vested *only* in non-legal lesbian *mothers*—women who have parented the child fully and equally alongside the legal mother, with the legal mother's consent, during the child's entire life—allays the often-cited fears regarding babysitters or family friends achieving standing to pursue custody and visitation actions.[309] It thus mirrors the vision of the family historically contemplated in the traditional/legal *nomos* in that it does not radically alter which adult caretakers receive the protections of parenthood.

Further, the Constitutional Interests Model removes the barriers that are present and discussed in the some of the cases, namely that the non-legal mother be required to demonstrate the parental unfitness of the legal mother, extreme detriment to the child, or extraordinary circumstances[310] before being allowed to state a claim or prevail on a claim. Again, because the child and the non-legal lesbian mother both have interests that are constitutionally significant, the removal of these barriers (by removing the non-lesbian mother's custody/visitation claim from coverage under the statute because those statutes contemplate adjudicating claims asserted by someone with no recognized constitutional interest in maintaining a relationship with the child) would not constitute an unconstitutional infringement upon the legal mother's liberty interest.

The bestowal of a constitutional right in the non-legal lesbian mother to maintain a parenting relationship with the child mandates a concomitant bestowal of parental obligations in the non-legal lesbian mother. Thus, the finding of a constitutional liberty interest in the non-legal lesbian mother benefits the

309. *See, e.g.*, Nancy S. v. Michelle G., 279 Cal. Rptr. 212 (Ct. App. 1991).

310. *See, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991).

legal lesbian mother to the extent that she can assert (and prevail on) a child support case against the non-legal lesbian mother.

4. The Equal Protection Model

This article proposes a third model, also constitutionally based, for the protection of families situated in the LGBT/extra-legal *nomos*: the Equal Protection Model. This proposal, based on equal protection doctrine, is arguably the least radical of all of the proposals because its premise is more rooted in the vision of the family and the promulgation of the law in the traditional/legal *nomos* than the premises of the prior proposed models: the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause commands that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[311] The Equal Protection Clause seeks to ensure that legislation based on different kinds of classifications does not violate the United States Constitution. The Supreme Court has, in essence, held that the guarantee of equal protection mandates that similarly situated individuals or groups will be treated equally by the law.[312] Further, any classification that arbitrarily burdens one group in relation to a similarly situated group is violative of this constitutional guarantee and is thus constitutionally infirm.[313]

The Supreme Court has developed a three-tiered analytic model to address such classifications when they occur.[314] These three standards of review are rational basis review, intermediate scrutiny review, and strict scrutiny review. Rational basis review is the minimum constitutional threshold that a law must meet. Under this standard, legislation is presumed constitutional if the classification employed by the law is "rationally related to a legitimate state interest."[315] The Court has opined that a rational basis standard is met when "any set of facts reasonably can be conceived that would sustain it."[316]

The intermediate scrutiny standard of review is applied when a quasi-suspect classification is implicated.[317] Presently, only classifications based on gender and legitimacy have been accorded quasi-suspect status.[318] Intermediate

311. U.S. CONST. amend. XIV, § 1.

312. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 216 (1982).

313. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 683–84 (1973).

314. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439–43 (1985) (explaining the history of equal protection jurisprudence and the three levels of judicial scrutiny).

315. *Id.* at 440.

316. Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

317. A "quasi-suspect" class is one whose members share some characteristics of a suspect group, yet do not qualify as a "discrete and insular minority." *See generally City of Cleburne*, 473 U.S. at 440–47.

318. *See* Mathews v. Lucas, 427 U.S. 495, 505–06 (1976) (holding that illegitimacy-based classifications demand heightened scrutiny); Frontiero v. Richardson, 411 U.S. 677, 682 (1972)

scrutiny, also known as heightened scrutiny, requires that the quasi-suspect classification be substantially related to an important government interest.[319]

Finally, strict scrutiny is the most difficult standard for a law to survive. This standard involves no deference to the legislature or electorate; instead, the judiciary undertakes an independent review of the law in question.[320] Strict scrutiny is triggered in two circumstances: when a fundamental right is implicated in the law or when the classification involved is deemed suspect.[321] In order for a law to survive strict scrutiny, it must be "suitably tailored to serve a compelling state interest."[322]

The equal protection classifications presented in this situation are the children of lesbian parents and the children of heterosexual, unmarried parents.[323] Not long ago, children of unmarried parents lived in a social reality not unlike the social reality inhabited by children of lesbian mothers today. Children of unmarried couples, called "illegitimate" or "bastards," were stigmatized both socially and legally. Society rejected these children as products of immoral or sinful relationships, arguments that are often asserted against lesbian couples and their children today.[324] The level of social opprobrium wielded against unmarried couples and their children carried over into the legal realm in the form of permissible discrimination against children born out of wedlock. Again, the parallels to the children in the contemporary lesbian-parented families are unmistakable: both classes of children were or are punished by the law for the actions or status of their parents and both classes of children were or are scorned by the larger society.

The Supreme Court eventually bridged the chasm between the extra-legal *nomos* inhabited by children born out of wedlock and the traditional/legal

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(holding that gender-based classifications demand heightened scrutiny).

319. *See Cleburne*, 473 U.S. at 441.

320. *See id.* at 440–41.

321. *Id.* at 440.

322. *Cleburne*, 473 U.S. at 440.

323. *See generally* Debra Carrasquillo Hedges, *The Forgotten Children: Same-Sex Partners, Their Children, and Unequal Treatment*, 41 B.C. L. REV. 883 (2000) [hereinafter *The Forgotten Children*]. Hedges argues in her article that children of same-sex partners are unconstitutionally denied equal protection when courts deny same-sex partners the mechanism of second-parent adoption. This article builds upon Hedges's assertions and expands it beyond the context of second-parent adoption. Further, this article seeks to address an omission in the Hedges article. Hedges asserts that "The only difference between these two classes of children is the sexual orientation of their parents." *Id.* at 904. However, this article asserts that there is an important distinction between these two classes of children, namely that in the heterosexual, unmarried context both adults are legal parents, based on their biological ties to the child, while in the lesbian-parented family only one of the adults enjoys the status of legal parent. This distinction is discussed below.

324. *See, e.g.*, Family Research Council, *Talking Points: How Homosexual 'Civil Unions' Harm Marriage, at* http://www.frc.org/get/if00e1.cfm (last visited Oct. 16, 2001) ("Many homosexuals and their sex partners may sincerely believe they can be good parents. But children are not guinea pigs for grand social experiments in redefining marriage, and should not be placed in settings that are unsuitable for raising children.").

nomos. In a series of cases beginning in 1968 with *Levy v. Louisiana*,[325] the Court struck down several statutory schemes that discriminated against children born out of wedlock as a class. The Court's jurisprudence on children born out of wedlock culminated in 1988 in *Clark v. Jeter*,[326] when the Court explicitly held that children born out of wedlock constitute a quasi-suspect class for purposes of equal protection.[327] Although these cases dealt with discrimination against children of unwed parents outside of the custody and visitation context, these cases are nonetheless important to the lesbian-parented dissolution case. They are important because they establish that discrimination against children born out of wedlock is subject to intermediate scrutiny. As seen below, this level of constitutional scrutiny will provide children of lesbian-parented families important protection in the dissolution context.

The Court's reasoning and holdings in the illegitimacy cases demonstrate that the Court may, and has, integrated extra-legal *nomoi* into the traditional/legal *nomos*. The similarity of the classifications and the social facts surrounding discrimination against the two classes of children born out of wedlock and animus towards the two classes of parents present a strong argument that children of lesbian mothers should be included in the class of children contemplated in *Levy* and its progeny.

An important distinction exists between these two classes of children, however: in the unmarried, heterosexual context the children have a legally protected relationship with both parents; both parents are biological parents. In the lesbian-parented family, there is an additional challenge, an additional hurdle, and that is securing a finding that the non-legal lesbian mother is a parent to the child. This hurdle is not insurmountable. As discussed in Part III, much research has revealed that children in lesbian-parented families do develop bonds with both women that are identical to any other child-parent bond.[328] Further, this research has been used in courts, with increasing success, in the form of arguments such as "psychological parent" and "*de facto* parent."[329]

Although some courts have rejected these arguments and held that the non-legal parent has no standing to sue,[330] non-legal parents may have a better chance of obtaining standing when arguing under an equal protection claim asserted on behalf of the child. In the context of the cases in which the adult asserts the theories and arguments it is arguably easier for a court to fall back upon the legal parent's fundamental, constitutional right to parent and deny the non-legal parent standing. On the contrary, if such theories and arguments are

325. 391 U.S. 68 (1968).

326. 486 U.S. 456 (1988).

327. *See Clark*, 486 U.S. at 465. *See* Hedges, *supra* note 323, at 898–901 (discussing Supreme Court cases addressing children born out of wedlock).

328. *See* discussion, *supra*, Part III.

329. *Id.*

330. *See, e.g.*, Kathleen C. v. Lisa W, 84 Cal.Rptr.2d 48 (Ct. App. 1999).

presented in the context of an equal protection claim for the child, the court will be faced with competing constitutional interests and protected rights. Thus, re-framing the psychological parenting and de facto parenting arguments within the context of an equal protection claim arguably increases the likelihood of their acceptance by a court. Once a court accepts that the child sees the non-legal parent as a fully participating and functional parent, in this reframed context, the intermediate scrutiny standard is triggered to protect the child's relationship with the non-legal parent.

The most obvious result of placing children of lesbian mothers into this quasi-suspect class with children of unmarried heterosexual parents is that any legislative scheme that classifies children of lesbian mothers, such as statutes governing adoption, particularly in the quest for second-parent adoptions, will fall when subject to heightened scrutiny.[331]

It can also be argued, however, that these children are denied equal protection when courts deny standing to the non-legal lesbian parent in cases that do not involve attempts to complete a second-parent adoption, as in the type of cases that are the focus of this article. Because *Troxel* did not utilize strict scrutiny, the child's equal protection claim will not automatically need to yield to the legal parent's claim. Under the Court's line of illegitimacy cases, the child has a strong argument and probability of prevailing. As a result, courts in these cases will arguably be obliged to hold that the denial of standing to the non-legal parent in fact denies the child her equal protection guarantees.

IV.
LEGISLATION: THE BEST RESPONSE?

Arguing for the recognition of new constitutional rights and interests is an ambitious and aspirational goal. Some may thus assert that the best method of protecting lesbian-parented families, namely that aspect dealing with the dissolution of lesbian families with children, is to lobby and organize for protective legislation through the political process. There are advantages and disadvantages to legislation that addresses the dissolution of lesbian-parented families.[332] An advantage of legislation would be greater consistency, uniformity and predictability. Of course, this uniformity would only be within

331. *See* Hedges, *supra* note 323, at 903–904.

332. For a more extensive discussion of legislation, including proposed legislation, see Kass, *supra* note 153, at 1129–34. *See also* Kristine L. Burks, *Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve*, 24 GOLDEN GATE U.L. REV. 233, 254–55 (1994) (discussing Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984)); Elizabeth A. Delany, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonlegal Lesbian Parent and Her Child*, 43 HAST. L.J. 177 (1991); NACC *Amicus* Brief, *supra* note 231 ("the Constitution does not preclude, and indeed, authorizes the states to legislate in matters affecting personal and family relationships within constitutionally prescribed outer boundaries. A more carefully crafted third party visitation statute should survive constitutional scrutiny").

the boundary of a particular state because family law is state-created and thus varies from state to state.

This state-by-state patchwork of family law also presents a hurdle to legislation as a solution. Unless a model statute was adopted by all states, there would be no national consistency for children of lesbian-parented families. Leaving children of these families at the political whims of state legislatures thus seems unwise and unjust. This is not to say that the pursuit of well-drafted, inclusive legislation is not a laudable, important, and effective project, but many LGBT activists are fearful of the real possibility that such legislation will not be introduced, or if introduced will fail, in state legislatures due to anti-gay bias, reliance on myths about homosexuality, and untrue stereotypes about lesbian parenting.[333]

Further, narrowly drafted legislation might lead to the rejection of other alternative family forms that seek resolution of disputes involving children. In other words, legislation may provide relief for the dissolving lesbian-parented family, but might also prove detrimental for other non-traditional LGBT families and thus result in a narrowing of legally acceptable definitions of family. Although such legislation is arguably a step in the right direction towards protection of children and their functional parents, the threat would nonetheless be present that such legislation would represent the absolute limit of acceptance by states of families that exist in the LGBT community, thus casting other family forms that exist in that community into permanent extra-legal status.

Additionally, the political climate for LGBT civil rights is at best inconsistent and undecided and at worst hostile and violent.[334] Accordingly, convincing state legislatures to introduce and support such legislation is a daunting and not entirely practical task. The federal judiciary, which is appointed and thus arguably not as accountable as politicians to the political whims of the day, is more likely to be sympathetic to recognizing the need to integrate parts of the LGBT/extra-legal *nomos* into the traditional/legal *nomos*.

Accordingly, this article suggests that recognition of the constitutional rights, along with the models for weighing those rights, should be the goal of advocates before, or at least simultaneously with, the pursuit of legislation.

V.
CONCLUSION

The presence of lesbian-parented families that separate and have disputes regarding children is a social reality in need of legal recognition and adjudication. The inconsistent treatment of these disputes by courts around the country reflects both ambivalence toward lesbian-parented families as well as adherence

333. *See, e.g.*, Jean M. Baker, *Homophobia is the Last of the Respectable Prejudices*, ARIZ. DAILY STAR, Sept. 7, 1998, at 17A.

334. *Id.*

to homophobic, heterosexist, and patriarchal institutions and ideologies. In essence, many courts have rejected the social reality of the LGBT/extra-legal *nomos*.

In an effort to reframe these disputes as ones implicating the caregiver-dependent relationship, a relationship commonly and comfortably recognized in the traditional/legal *nomos*, as opposed to implicating the lesbian "sexual family," which is rarely recognized in the traditional/legal *nomos*, I have proposed a recognition of constitutional rights and interests of both the non-legal lesbian mother and the child.

The recognition of these constitutional interests, while an ambitious goal, is not impossible. On the contrary, the plurality's opinion in *Troxel* included language recognizing that there are other forms of family besides the traditional, exclusive, heterosexual married nuclear family that suggests the models proposed in this article are possibilities for the future.[335]

Advocating for these constitutional rights and interests, along with the model for considering them, represents a step along the road to Fineman's mother-child dyad as the legally recognized and protected unit in society. In moving towards this paradigm, our society, which encompasses both the traditional/legal *nomos* and the LGBT/extra-legal *nomos*, is necessarily moving away from the "sexual family" paradigm. Such movement will be liberating not only for children and parents in situations like the dissolving lesbian-parented family, but will also be liberating to individuals in relationships within the LGBT community who do not have children. Because the law will recognize and protect the mother-child dyad, there will no longer be a state interest in regulating intimate, sexual, consensual relationships between adults within the LGBT community.[336] Thus, Fineman's theory will prove transformative for both children and members of the LGBT community.[337] In essence, Fineman's mother-child dyad model and the proposals in this article that result from her model offer an opportunity for the erosion of the chasm between the traditional/legal *nomos* and the LGBT/extra-legal *nomos*.

335. Troxel v. Granville, 530 U.S. 57, 63–65 (2000).

336. *See* FINEMAN, *supra* note 20.

337. *See generally* Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U.J. GENDER SOC. POL'Y & L. 167 (1999).