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ARTICLE
Making Mothers: Lesbian Legal Theory & the Judicial Construction of Lesbian Mothers

Ruthann Robson*

INTRODUCTION
In the children’s book by P.D. Eastman, Are You My Mother?1 a baby bird seeks its mother. To recap the “plot”: A mother bird is sitting on an egg, when she decides that because the egg will soon hatch, she should find some food. As soon as she leaves, a baby bird hatches from the egg. The baby bird’s first words are “Where is my mother?” Not seeing any likely candidates, the baby bird decides to leave the nest and look for her. Not knowing what she looks like, he2 walks past her. He encounters a series of animals—a kitten, a hen, a dog, and a cow—asking each one “are you my mother?” Each animal answers something like, “I am not your mother. I am a dog,” said the dog. The baby bird then encounters a car, a boat, and a plane, asking of each one whether each is the baby bird’s mother, and none of which reply. The climax comes when the baby bird sees what is pictured as an crane-like machine and asks whether it is its mother. “Snort,” replies the machine, scooping up the baby bird in its shovel and finally placing the baby bird back in its original nest. When the baby bird’s mother returns to the nest, she sees the hatched bird and immediately asks “Do you know who I am?” The baby bird answers, yes, exclaiming that she is not a kitten, a hen, a dog, a cow, a boat, a plane, or a snort, but “You are a bird, and you are my mother.” As readers of the book, we believe we can tell the difference between the baby bird’s mother and all others. Children who read the book delight in the knowledge that the kitten, the dog, or the “snort” could not be the baby bird’s mother because they are not birds. They delight in it because it is the story of how the baby bird learns what the children already know.

The judicial construction of motherhood is likewise based upon a belief that a mother can be found in a world of non-mothers, that a mother bird can be recognized among the dogs and snorts. Judicial knowledge, like the knowledge of readers of the children’s book, is primarily based on biology.3 Like the baby bird,

*Professor of Law, City University of New York School of Law. Portions of this Article are based upon a talk at Rutgers Law School sponsored by the Women’s Rights Law Reporter on October 27, 1999 while V.C. v. M.J.B. was being considered by the New Jersey Supreme Court. The author wishes to express her appreciation to the editors and staff of the Reporter, especially Jeanne LoCicero and Koli Mitra, to CUNY Reference Librarian Julie Lim, to CUNY students Donna Canfield and Pavita Krishnaswamy for their research assistance, to the CUNY Professional Development Committee for financial support for research assistance, and to S.E. Valentine.
2. The baby bird is gendered as male, a choice which could well be the subject of feminist analysis itself.
human babies must typically have some genetic link to those who may qualify as their mothers. However, unlike the children's book, the judicial declaration has real consequences upon the lives of mothers and children, because the judiciary possesses the power to create the reality it believes it apprehends. In other words, a court's declaration of whether a person is or is not a mother will have the consequence of making that person a mother or not a mother in a legal sense. The courts can thus deny a person the opportunity to be a mother. Excluded by law from the child's life, such a person's role as mother will gradually diminish, although perhaps not in the memories of the individual considering herself to be a mother.

Judicial pronouncements regarding motherhood concern lesbians when two lesbians become mothers to a child. V.C. v. M.J.B., recently decided by the New Jersey Supreme Court and the focus of this Article, presents a typical scenario. V.C. and M.J.B. were lovers. M.J.B. was inseminated and gave birth to twins. Until the twins were almost two years old, both women acted as parents, although at trial M.J.B. characterized V.C.'s role as "mere helper and not a co-parent." When M.J.B. terminated the relationship with V.C., at first the women pursued arrangements which involved V.C. as a parent in the twin's lives. Soon these arrangements disintegrated and M.J.B. decided that she wants her new lover - and not V.C. - to be the children's other mother. As biological and thus legal mother, M.J.B. exercised what she apparently viewed as her right to deny V.C. all visitation and cut off relations with her. V.C. decided to sue in the New Jersey courts. At trial, the judge denied the request for joint custody and terminated visitation. The appellate division rendered a decision reversing as to

gave one child to M.J.B. to hold and the other to V.C. and took pictures of the four of them together.

4. See id. at 146-47 (discussing the special conditions required to establish legal parenthood absent a biological relationship).

5. In her compelling first person narrative about her experience of being the "other mother" excluded from her child's life, Nancy Abrams writes:

Finally, I could accept, not only that I am a mother — had always been a mother— but, more precisely, what kind of mother I had been. Yes, Norma had been there for Amelia for everyday. She made the hour-by-hour sacrifices that are associated with the term, and by which she could rightly say that she earned this title. [ ] I was a mother on a different plane. My job had not been the daily lunches and lessons, but a broad and amorphous task of loving, of learning and teaching the lesson (if only by my constant doubt and its constant defeat) of the heart's strength and power.


7. The New Jersey Supreme Court does not use this term, but states that the women "are lesbians," characterizes them as "dating" and then having a "relationship," id. at 542, and that an expert "likens their relationship to a heterosexual marriage." Id. at 544.

8. There is some controversy about whether V.C. and M.J.B. "jointly" decided that M.J.B. be inseminated. According to the New Jersey Supreme Court, "V.C. claimed that the parties jointly decided to have children" and "jointly researched and decided which sperm donor to use," while M.J.B. "acknowledged that she consulted V.C." but claimed that "she individually made the final choice about which sperm donor to use" and that V.C. was initially unaware of M.J.B.'s visits to a doctor regarding the insemination. Id. at 542. The Court found that both women attended prenatal and Lamaze classes. Id. at 542. The Court also found that: V.C. took M.J.B. to the hospital and she was present in the delivery room at the birth of the children. At the hospital, the nurses and staff treated V.C. as if she were a mother. Immediately following the birth, the nurses
the visitation and affirming as to the joint custody, with opinions written by each member of the three judge panel. On appeal, a unanimous New Jersey Supreme Court affirmed. New Jersey thus joins the growing number of states which have allowed a lesbian nonlegal mother the ability to have visitation.

I. FORESTALLING LITIGATION

Before discussing the consequences of litigation between two lesbians who agreed to parent a child, it needs to be emphasized that no judicial resolution of the conflict can be an optimal one. The perhaps utopian notion that lesbians and gays should be able and willing to resolve conflicts without resort to an adversarial and patriarchal legal system is one that continues to have resonance. This is not, however, an argument that it is the responsibility of the nonlegal mother to desist from resorting to the courts. It is important to understand that the legal mother’s denial of her former partner’s status as a mother is also a resort to the law: the legal mother relies upon her own legal rights as she understands them.

Lesbian legal theory must continue to interrogate whether legal constructions are serving lesbians, both as individuals and as insuring a broader conception of lesbian survival. Once it was possible to argue that a certain community ethical standard could replace legal mechanisms, but as lesbian identities have grown increasingly diffuse, the cohesiveness necessary for “community ethics” has become illusory. Nevertheless, the idea of ethical behavior between lesbians must not be abandoned. Moreover, there is no established method of determining the degree to which lesbian ethics do influence the decisions of the many lesbians who do not resort to legal solutions to solve conflicts surrounding a dissolution of a relationship to which children have been born.

Furthermore, the notion that resorting to the legal mechanisms and theories may not be productive is not a specifically lesbian perspective. For example, the recently enunciated standards developed by a group of lesbian and gay legal advocates and endorsed by major lesbian/gay legal organizations include such norms as being honest about the nature of the relationships regardless of legal labels, treating litigation as a last resort, and keeping homophobic law and sentiments off limits. The standards proceed from certain premises such as the lack of “divorce” proceedings for same-sex couples and the lack of recognition for children living with lesbian/gay adults. However, the principles could be pertinent even if the law were within oppressed communities; Evan Wolfson, Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-community Critique, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994-5) (discussing the disputed positions with the “community” on same-sex marriage). But cf. Freshman, supra note 18, at 1761-66 (arguing for a community-enhancing understanding of mediation which allows individuals to resolve their disputes consistent with the values of some relevant community, including the gay and lesbian community).

For a more general discussion of the notion of community in legal theory, see Daniel Ortiz, Categorical Community, 51 STAN. L. REV. 769, 769 (1999) (“The communitarian alternative to atomistic individualism in legal theory reproduces the very error it assails in liberal individualism”); Glen O. Robinson, Communities, 83 VA. L. REV. 269 (1997) (an interrogation of the idea of community relative to the larger framework of society).

21. Gay and Lesbian Advocates and Defenders, Protecting Families: Standards for Child Custody in Same-Sex Relationships, 10 UCLA WOMEN’S L. J. 151, 152 (1999) [hereinafter Custody Standards]. In addition to Gay & Lesbian Advocates & Defenders, the other organizations endorsing the standards include Lambda Legal Defense and Education Fund, National Center for Lesbian Rights, American Civil Liberties Union Lesbian and Gay Rights project, and Children of Lesbians and Gays Everywhere. See id. at 163 (Appendix).

22. See id. at 153-55.
comprehensive and offered formal equality. In his introduction to the standards, gay legal scholar William Rubenstein provides an interesting parallel from Jewish traditions regarding the problematic ethical behavior of a Jewish attorney representing a Jewish plaintiff against a Jewish defendant before secular courts.23 Rubenstein poses some of the questions which arise from this example,24 but does not pursue the ultimate question of assimilation, which the analogy raises. A lesbian legal theoretical position which advocated a position similar to the Jewish tradition Rubenstein cites would, I believe, be quickly dismissed as “separatist.”25

In addition to the application of ethical principles, litigation may be forestalled by previous minimal involvement with the law. For example, the gay and lesbian advocates’ standards specifically suggest creating documents supporting the existence of family and taking advantage of any available legal protections.26 This strategy has the “secondary benefit” of being a process during which the parties can uncover, and encourage resolution of, areas where the understanding is vague or contradictory.27 From the perspective of lesbian legal theory, this strategy has the advantage of protecting the relationships from outside interference, although it may also be used by the parties against each other.28

With regard to children, the major protective device available is so called “second parent adoption”.29 Influentially advocated by Professor Nancy Polikoff in 1990, the process has grown increasingly available in the last decade.30 Although it is still difficult to obtain in the majority of jurisdictions,31 second parent adoption has become popular where available

23. Rubenstein, supra note 3, at 147 (citing Sanford Levinson, Identifying the Jewish Lawyer: Reflections on the Construction of a Professional Identity, 14 Cardozo L. Rev. 1577, 1603 (1993)).

24. Rubenstein asks whether “queer parenting” disputes would be better settled in alternative dispute resolution forums, rather than in the courts:

If gay couples opt out of the traditional legal system, can they ever educate the players in that system—who will, inevitably handle cases involving their lives—about them? But if they litigate these difficult disputes there, do they not risk making bad law that reinforce[s] narrow legal versions of what counts as a family, setting back gay rights in other areas?

Id. at 147.

25. For a brief discussion of accusations of separatism applicable to lesbian legal theory, see Robson, Sappho, supra note 17 at 85. For a more textured view of lesbian separatism in legal theory contexts, see Margaret Davies, Lesbian Separatism and Legal Positivism, 13 Can. J. of Law & Society 1 (1998) (comparing legal positivism and lesbian separatism).

26. See Custody Standards, supra note 21, at 156.

27. See id.

28. See Robson, supra note 19, at 119-26 (distinguishing between legal tools that would protect lesbians from nonlesbians by altering the laws which would otherwise operate and legal tools which alter relationships between lesbians). See generally Ruthann Robson & S.E. Valentine, Lovenjets: Lesbians as Intimate Partners and Lesbian Legal Theory, 63 Temp. L. Rev. 511 (1990).


Second parent adoptions have also been successful in Texas, Illinois, and Alaska, see Suzanne Bryant, Second Parent Adoption: A Model Brief, 2 Duke J. Gender L. & Pol’y 233 n.27 (1995). In California second parent adoptions have become relatively routine. See Adoption Options for Same-Sex-Couples: An Interview With California Adoption Lawyer Emily Doskow, 20 Fam. Advoc. 40 (1997) (describing practice consisting of many second-parent adoptions).

31. Jurisdictions which have specifically rejected second parent adoption include Colorado, see In re Adoption of T.K.J. and K.T.K., 931 P.2d 488, 492-93 (Colo. Ct. App. 1996); Ohio, see In re Adoption of Jane Doe, 719 N.E.2d 106, 107 (Ohio 1998); and Wisconsin, see In the Interest of Angel Lace M., 516 N.W.2d 678, 684-85 (Wis. 1994). In Connecticut, the legislature repealed the state supreme court’s decision rejecting second-parent adoption in In re Adoption of Baby Z., 724 A.2d 1035, 1055-56 (Conn. 1999). See CT-LEGIS 90-228 (2000) (amending CT. Stat. § 45a-724 (3) by allowing a parent to enter agreements regarding adoption if parental rights of all other persons have been terminated).

Presently, Florida and Mississippi expressly proscribe adoptions by lesbians and gays. Fla. Stat. § 63.042(3) (“no person eligible to adopt under this statute may adopt if that person is a homosexual”); Miss. Code Ann. § 93-17-3 (2000) (amended to provide “adoption by couples of the same gender is prohibited”). A similar New Hampshire statute, N.H. Rev. Stat. Ann. § 170-B:4 (1990) (providing that any person “not a homosexual” may adopt) (repealed 1999). In Utah the prohibition is clear but not explicit. Utah Code Ann. § 78-30-1(3)(b) (2000) (“a child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state”).
because it allows the nonbiological mother to become a legal parent without terminating the biological mother’s parental rights.32 Analogized to step-parent adoption, it thus allows the child to have more than one mother, each of whom is a legal parent.33

In addition to lesbian theoretical critiques of second-parent adoption,34 one increasingly apparent drawback of second parent adoption is that it requires the development of facts demonstrating that the nonlegal mother is in fact functioning as a parent and that the child has bonded to her in this way. For example, in the case of V.C. and M.J.B., soon after the twins were born, the two women “talked about” a second parent adoption but “were advised to wait until the children were older.”35 When the twins were twenty-one months old, the women consulted an attorney36 and M.J.B. paid a two thousand dollar retainer, with the understanding that they would begin to collect “letters from family and friends indicating that the parties and the twins functioned as a family.”37 These plans were never actually pursued and within two months, M.J.B. terminated her relationship with V.C.38 Thus, even where second parent adoption is available, as it was in New Jersey,39 it may not be useful because of the onerous process involved.40 The more effective course of action may be a device called a “pre-birth decree” recently awarded in California, which purports to adjudicate parenthood from conception.41

Importantly, neither second parent adoption nor pre-birth decrees prevents litigation. These devices merely render both mothers “legal” mothers, in the same legal position.42 Thus, under these approaches, custody and visitation determinations for lesbian parents can be rendered according to the same standards as other parents, most commonly the widely discretionary standard of “best interest of the child.”43


34. See e.g., ROBSON, supra note 17, at 185-88. See generally, Erin J. Law, Taking a Critical Look at Second Parent Adoption, 8 LAW & SEXUALITY 699 (1998); Shapiro, supra note 18.


37. Id. at 544.

38. Id.


40. See Law, supra note 34, at 707.


42. See Shapiro, supra note 18, at 37-40. But see LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000) (recognizing that a petition for joint adoption by the biological mother and a nonbiological mother, but then analyzing the claim for custody by nonbiological mother as that of “non-parent”).

II. ADJUDICATING PARENTHOOD:

A. Survey of Available Theories

Where there are not two legal parents, the legal struggle by the nonlegal parent is to convince the court to treat her as a legal parent and apply the best interest of the child standard. One possible strategy is to prove that the legal parent is unfit and thus "demeote" the legal parent's status. Obviously, this would not be an appropriate strategy for a lesbian nonlegal parent who seeks custody or visitation with her children without divesting the other parent of her rights. Rather, she must attempt either to elevate her own status to that of a legal parent using statutory, constitutional, or contract theories or to prove de facto parent status based on equitable theories.

The problem of defining "parenthood" is two-fold. Even before a nonlegal parent seeking custody or visitation is heard on the merits of her claim, the lack of parent status serves to prevent her from asserting the claim, because she is considered to lack standing. The statutory schemes generally define "parenthood" by a combination of biology and the legal relationship between the putative parent and at least one biological parent. This formulation of parenthood has its roots in common law, wherein legal parenthood was vested in a biological mother and the man married to the biological mother. The modern concept of parenthood generally includes biological fathers, although many statutes continue to provide a presumption of paternity in the man married to the biological mother. Some legislators have sought to further modernize the statutory scheme, especially with regard to expanding eligibility for visitation rights. This innovation has recently been before the United States Supreme Court, which declared in Troxel v. Granville that the application of such a statute could violate a parent's due process rights to make decisions concerning the care, custody, and control of her children.

44. For example, in an unreported case, In re Matter of T.L., No. 953-2340, 1996 WL 393521 (Mo. Cir. May 7, 1996), the nonlegal mother alleged that the legal mother was "not a fit and proper person to raise the minor child and that the best interests of the minor child will be served in the primary custody" of nonlegal mother. Id. at 1. The court did not find the legal mother unfit, but did award visitation to nonlegal mother using the "equitable parent" doctrine. The court also ruled that "during each parent's periods of physical custody, no unrelated person of the same or opposite sex over the age of 12 shall be permitted to spend the night, whether or not in a separate bedroom." Id. at 7.

45. See infra note 63 and accompanying text.


47. See, e.g., N.J. STAT. ANN. § 9:17-43. (West 1993) (providing that a man is presumed to be the father of a child if he is married to the mother and the child is born during the marriage or 300 days thereafter). The presumption of fatherhood through marriage to the mother was held constitutional by the United States Supreme Court in Michael H. v. Gerald D., 491 U.S. 110 (1989). Step parents may also become parents through statutory channels. See Davies, supra note 33, at 1067.

48. Mary Shanley, Unwed Fathers' Rights, Adoption, and Sex-Equality: Gender Neutrality and the Perpetuation of Patriarchy, 95 Colum. L. Rev. 60, 67-69 (1995). Interestingly, although "a man's legal relationship to his offspring was determined by his relationship to their mother", id. at 68, where such legal relationship existed, he, rather than the children's mother had absolute custodial authority over them. Id.

The common law, which largely regulated legal aspects of family relationships well into the nineteenth century, was profoundly patriarchal. . . . Under the common law, a man had complete custodial authority over all children born to his wife, and no legal relationship at all to children he sired out of wedlock. . . . a man's legal relationship to his offspring was determined by his relationship to their mother. If the mother was his wife, a child was "his," so much so that he exercised exclusive custodial authority. If the mother was not his wife, however, the child was "filius nullius," the child of no one.

Id. at 68.

49. See id. at 77.

The determination of biological paternity becomes vitally important when the mother is unwed and may effect adaption. See id. at 75. See also Laurence Nolan, "Unwed Children" and Their Parents Before the United States Supreme Court From Levy to Michael H.: Unlikely Participants in Constitutional Jurisprudence, 28 CAP. U. L. REV. 1 (1999).


The Washington state statute at issue in *Troxel* allowed “any person” to petition for visitation at “any time” and the court to grant such visitation if it served the best interest of the child.\(^{53}\) The Washington Supreme Court had previously found the statute an unconstitutional interference with the parents’ familial rights because the statute did not require a showing of harm to the child if visitation denied.\(^{54}\) Although the United States Supreme Court described the statute as “breathtakingly broad,”\(^{55}\) the Court did not declare the statute facially unconstitutional and specifically did not consider the question of whether such a statute must include a showing of harm to the child.\(^{56}\) The Court stated that it did not and “need not define today the precise scope of the parental due process right in the visitation context.”\(^{57}\) The court stated that the “problem” was not that the state court intervened in the visitation dispute, but “that when it did so, it gave no special weight at all to [the legal parent’s] determination of her daughters’ best interests.”\(^{58}\)

While *Troxel* itself concerned a grandparent’s claim for visitation,\(^{59}\) a claim now allowed by statute in all states,\(^{60}\) the rationale in the case is relevant in the context of visitation generally, and may be useful for nonlegal mothers seeking visitation. After *Troxel*, even if a statute is broad enough to include a lesbian nonlegal parent as a party who may petition for visitation, the application of the statute would require giving “special weight” to the legal parent’s decision to deny visitation.\(^{61}\) After *Troxel* any statutory claim by the nonlegal parent will trigger a constitutional consideration of the legal parent’s Due Process interests.

On the other hand, Constitutional theories can provide independent arguments for allowing visitation to the *nonlegal* parent. One source of Constitutional protection is the Equal Protection Clause of the Fourteenth Amendment. The basis of the Equal Protection argument is that the common law and statutory schemes discriminate against non-birth parents who are lesbian women by denying them legal-parent status while awarding such status to non-birth parents who are male and are married to the birth-parents.\(^{62}\) A somewhat different Equal Protection argument can be made by comparison between lesbian nonlegal parents and heterosexuals who have been deemed equitable or de facto parents under state law.\(^{63}\) New Jersey courts have recognized a de facto, parent-like relationship (eventually termed “psychological” parenthood).\(^{64}\) This equitable standard has been used to award custody to a child’s former stepmother\(^{65}\) and to allow a child’s

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54. *See In re Smith*, 969 P.2d 21, 30 (Wash. 1999). The court held that “short of preventing harm to the child, the standard of ‘best interest of the child’ is insufficient to serve as a compelling state interest overruling a parent’s fundamental rights.” *Id.* While recognizing that “in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological damage to the child” but that the difficulty with the Washington statute is that it did not require any such showing and therefore was facially invalid. *Id.*
55. *Troxel*, 120 S. Ct. at 2061.
56. *Id.* at 2064.
57. *Id.*
58. *Id.* at 2062.
59. The Troxels were the paternal grandparents of the two children subject to the original visitation petition and subsequent litigation. Their son’s relationship with Granville, the children’s mother, dissolved in 1991 and their son later committed suicide. After a period of visitation, Granville sought to limit the Troxel’s visitation to one day per month. *Id.* at 2057.
60. *Id.* at 2064 n.1 (citing 50 state statutes).
61. *See id.* at 2062.
62. For example, the New Jersey statute presumes a man to be the father of a child if he is married to the mother and the child is born during the marriage or 300 days thereafter.
63. *N.J. Stat. Ann.* § 9:17-43 (a)(2) (West 1993). Given this statute, V.C. might argue that if same-sex marriages were legally available, the commitment ceremony between her and M.J.B. would have accorded V.C. the presumption of legal parenthood.
64. *See Watkins v. Nelson*, 729 A.2d 484, 492 (N.J. Super. App. Div. 1999), rev’d and remanded on other grounds 748 A.2d 550 (N.J. 2000) (recognizing that there can be a “psychological parent-child relationship between a child and someone other than the child’s biological parent”) (internal quotations and citation omitted). On appeal, the New Jersey Supreme Court found that psychological parenthood was not established by the facts in this case, 748 A.2d at 569-70, but reaffirmed the idea that “when a third party, such as a step-parent, establishes psychological parentage with the child, the third party stands in the shoes of a natural parent” and can claim custody based on “the child’s best interest test” without showing that the biological parent is unfit. *See id.* at 568-69. That is, the “psychological parent” and the biological parent would be treated as two fit parents, triggering the “child’s best interest test” for determining custody. *See id.*
65. *See Watkins*, 748 A.2d at 569.
66. *See Palermo v. Palermo*, 397 A.2d 349, 350 (N.J. Super. Ct. App. Div. 1978). After the child’s biological mother died, the child lived with her biological father and his new wife. *Id.* at 349. When the father and stepmother separated, custody of the child was awarded to the stepmother.
grandparents to assert a custody claim on equal footing with the child’s biological parent (by not requiring the grandparents to prove that parent was unfit). Using such precedents, a petitioner such as V.C. could argue that failure to consider her claim as a “psychological parent” is attributable only to her sexuality.

Another Constitutional argument is based on the Due Process Clause of the Fourteenth Amendment. A doctrine of “fundamental rights”, often labeled “substantive due process” by its critics, recognizes the Due Process Clause as encompassing a number of fundamental rights, including parental rights. However, before parental Due Process rights may be asserted with any success, it is necessary to establish legal parenthood, which is precisely the disputed issue in most lesbian co-parent actions.

A third approach used in lesbian co-parent litigation are equitable theories specifically address the practical question of how to treat

and the stepmother’s new husband. Id at 350. The Court of Appeals affirmed. Id at 352.

66. See Todd v. Sheridan, 633 A.2d 1009, 1015 (N.J. Super. App. Div. 1993). The New Jersey Appellate Division reversed the Chancellor Division’s award of custody to biological father over grandparents. Id at 1017. The reversal was based on separate evidentiary grounds to be reconsidered on remand. Id. However, it is significant that the Appellate Division agreed that the grandparents stood in parity with the father, although it did allow Chancellor to consider the father’s status as “natural parent”. Id. at 1015.

67. While sexual orientation is not generally considered a “suspect classification” for the purposes of Equal Protection scrutiny: see Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 HARV. L. REV. 1285, 1309 (1985); the United States Supreme Court has occasionally held that classification by sexual orientation failed to meet even the considerably lower Constitutional standard of “rational basis”. See Romer v. Evans, 517 U.S. 620, 632-35 (1996) (holding that a statute expressly prohibiting claims of discrimination based of sexual orientation does not pass the “legitimate government interest” portion of the rational basis test) (citations omitted).


However, the Due Process doctrine of fundamental rights is certainly not universally accepted. See Troxel, 120 S. Ct. at 2067 (Thomas, J., concurring) (noting that he concurs in the judgment with the understanding that the ruling was not an endorsement of the discredited “substantive due process” doctrine). Justice Souter gives a similar warning. See id. at 2065 (Souter, J., concurring) (quoting Justice Powell’s admonition against “turning any fresh furrows in the ‘treacherous field’ of substantive due process.” Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (opinion of Powell, J.).

69. The possibility that the child may have constitutional arguments in this context has not been fully explored. As the Court noted in Michael H. v. Gerald D., the Court has “never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship.” 491 U.S. 110, 130 (1989). For an excellent general discussion, see Gilbert Holmes, The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals, 53 Md. L. Rev. 358 (1994).

70. For example, in Alison D. v. Virginia M., the court stated that Alison D. claimed “to have acted as a ‘de facto’ parent or that she should be viewed as a parent ‘by estoppel.’” 572 N.E.2d 27, 29 (N.Y. 1991).

71. See, e.g., Palermo, 397 A.2d at 352, (affirming a family court decision to award custody to a stepparent over the objection of the biological parent); Watkins v. Nelson, 729 A.2d 484, 485 (N.J. Super. App. Div. 1999), rev’d, 748 A.2d 558 (N.J. 2000) (stating that the trial court recognized grandparents who cared for the child as the child’s “psychological parent”).

72. Alison D., 572 N.E.2d at 29 (the petitioner claimed that her child’s legal mother be estopped from denying her parental rights).


legal parent agreed to the role of the nonlegal parent as a psychological, de facto, or equitable parent. 75 Such contractual agreements are distinct from settlement agreements formed in the course of litigation, which courts generally will enforce, assuming such agreements are in "the best interest of the child." 76

B. State of the Law

More than a dozen states have considered the issue of nonlegal lesbian parental claims for visitation or custody and the issue is attracting widespread attention. 77 A growing minority of these have allowed visitation claims. These states include Wisconsin, 78 Pennsylvania, 79 Connecticut, 80 New Mexico, 81 Massachusetts, 82 Maryland, 83 Minnesota, 84 and the New Jersey. 85 There are also a few unreported trial court opinions on nonlegal parent claims, including


In E.N.O. as well as in Holtzman, the court considers the agreement as part of the determination of whether the circumstances of parenthood existed.

76. LaChapelle v. Mitten, 607 N.W.2d 151, 160 (Minn. Ct. App. 2000), the court rejected the legal parent's appellate argument that she was coerced into agreeing to joint legal custody with her former partner and affirmed the trial court's conclusion that joint custody was in the child's best interest.

77. See, e.g., Nicole Berner, Intent-Based Parenthood Held Inapplicable in Case of Lesbian Mothers, 9 BERKELEY WOMEN'S L. J. 213 (1994) (discussing Georgia P., an unreported California case refusing to enforce parenting agreement); Delaney, supra note 46, at 180 (criticizing California cases that denied lesbian nonlegal parents standing to sue); Paula Ettelbrick, Who Is A Parent? The Need to Develop a Lesbian Conscious Family Law, 10 N.Y.L. SCH. J. HUM. RTS 513 (1993) (discussing nonlegal parents).

See also Denise Glaser Molloy, Another Mother? The Courts' Denial of Legal Status to the Non-Biological Parent upon Dissolution of Lesbian Families, 31 U. LOUISVILLE J. FAM. L. 981 (1992) (focusing on recent developments regarding custody and visitation in lesbian family context); Nancy Polikoff, This Child Does Have Two Parents: RedefiningParenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L. J. 459 (1990) (seminal article analyzing legal problems and prevailing solutions).

See also Carmel Sella, When A Mother is a Legal Stranger to her Child: The Law's Challenge to the Lesbian Nonbiological Mother, 1 UCLA WOMEN'S L.J. 135 (1991).


78. Holtzman, 533 N.W.2d at 434.


82. E.N.O. v. L.M.M., 711 N.E.2d 886, 828 (Mass. 1999) (equity courts may award visitation to a "biological stranger" if it seems this to be in the "best interest" of the child).

83. Gest v. Frederick, 754 A.2d 1087 (Md. Ct. Spec. App. 2000) This was the first court to consider the effect, if any, of Troxel, 120 S.Ct., 2054 (2000), on the issue of a nonlegal lesbian mother’s visitation. See id. at 1101. The Maryland court’s main concern was resolving issues under the Uniform Child Custody Jurisdiction Act. Gest, 754 A.2d at 1100-01. As a part of that resolution the Gest court concluded that "Maryland accords standing to the group of persons who can establish exceptional circumstances which relate to the child's best interests". Id.


84. LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000); but cf. Kulla v. McNulty, 472 N.W.2d 175 (Minn. Ct. App. 1991). In LaChapelle, the court held that the nonlegal mother (who had nonetheless previously adopted the child) had standing to seek custody and awarded the legal mother and the nonlegal mother joint legal custody and further provided that the sperm donor have the “right to participate in important decisions” affecting the child.

The decision in LaChapelle is a departure from the decision in Kulla rendered nine years earlier (and not cited by the court in LaChapelle). In Kulla, a referee had found that Kulla established a prima facie case under the Minnesota third party custody statute, but a court concluded otherwise and dismissed Kulla’s petition for visitation with the child. Kulla, 472 N.W.2d at 177. The child had been born to McNulty while she was in a lesbian relationship with Kulla, who became the child’s care giver, at least while McNulty was “away from home working as an airline attendant.” Id. McNulty subsequently resumed a relationship with the child’s biological father and later married him. Id. at 178. She specifically disavowed any implication that her relationship with Kulla was serious. Id.

The court upheld the trial court’s finding that the petitioner failed to satisfy one of the three prongs of the Minnesota third party visitation statute. The requires a court to find: (1) that visitation is in the best interests of the child; (2) that the petitioner and the child had established emotional parent-child ties; and that (3) the visitation would not interfere with the custodial relationship between the parent and the child. MINN. STAT. § 257.022(2) (b). Here, the third factor, which is subject to the discretion of the trial court, was found to be unsatisfied. Kulla, 472 N.W.2d at 181. Kulla argued that the third prong is essentially impossible to prove without co-
two that have awarded joint custody to the lesbian nonlegal parent.86

On the other hand, courts in New York, Tennessee, California, Illinois, Florida, and Ohio have rejected visitation claims by lesbian nonlegal parents and have not recognized any claim of de facto, psychological, or equitable parenthood.87 In Titchenal v. Dexter the Vermont Supreme Court had held against allowing nonlegal parental rights,88 but two years later declared that denying same-gender marriage rights denied them homosexuals the "common benefits" under the Vermont Constitution,89 which had the curious impact of effectively repealing Titchenal.90 In many jurisdictions, the law remains unclear.91

In this discussion, two opposite approaches to deciding nonlegal parent claims will be referred to as "formalist" and "functionalist" perspectives.92 The formalist viewpoint is exempli-

operation from the biological parent. Id. The court found this complaint unproblematic, because, the court noted, that without the statute a petitioner such as Kulla would have had absolutely no standing. Id.

86. See In re T.L., No. 953-2340, 1996 WL 393521 (Mo. Cir. May 7, 1996) (while awarding "legal custody" and "primary physical custody" to legal mother, court ordered both women to confer and discuss decisions affecting health, education, welfare, extra-school activities, to inform each other of activities, addresses, and medical conditions, to equally share medical expenses and for nonlegal mother to insure child, and imposed a visitation schedule of alternate weeks with holidays rotating in alternate years); Julie Brienza, Lesbian Partner Awarded Joint Custody of Child Following Couple's Breakup, 35(Jan) TRIAL 98 (1999).
87. See Alison D. v. Virginia M., 572 N.E.2d. 27, 29 (N.Y. 1991). Accord Lynda A. v. Diane T. O., 243 A.2d 24, (N.Y. App. Div. 4th Dep't 1998). However, there is some indication that lower courts do not consider Alison D. as creating an across-the-board rule. A recent decision interpreted Alison D. as leaving intact older authority, which have held that a legal parent is equitably stopped from denying some parental rights to certain parties. See In Re J.C. v. C.T., 711 N.Y.S. 2d 295, 297 (Fam. Ct. 2000). Such parties are those who meet the criteria outlined in Holtzman, 533 N.W.2d at 421, 435-6, and adopted by the New Jersey Supreme Court in V.C. v. M.J.B., 748 A.2d at 45.

See also In re Thompson, 11 S.W.3d 913 (Tenn. Ct. App. 1999); Coriale v. Reagan, 272 Cal. Rptr. 520 (App. 3d Dist. 1990); In re Guardianship of Z.C.W., 84 Cal. Rptr. 2d 48 (App. 1st Dist. 1999); Nancy S. v. Michele G., 279 Cal. Rptr. 212 (App. 1st Dist. 1991); West v. Superior Court, 69 Cal. Rptr. 2d 160 (App. 3d Dist. 1997). But see In re Hirenica C., 22 Cal. Rptr. 2d 443 (App. 1st Dist. 1993) (allowing a lesbian co-parent to seek visitation under the doctrine of equitable parenthood in a dependency hearing involving a child who the former partners had attempted to adopt). In re C.B.L., 723 N.E.2d 316, 320 (Ill. App. Ct. 1999) (legal parent’s former same-sex partner lacked standing to sue for visitation with child); Kazmierazak v. Query, 736 So. 2d 106, 109 (Fla. Dist. Ct. App. 4th Dist. 1999) (a parent’s fundamental right of privacy barred alleged "psychological parent" from bringing visitation action, absent a showing of harm to the child); Music v. Rachford, 654 So. 2d 1234, 1234-35 (Fla. Dist. Ct. App. 1995) (former lesbian partner of the child’s biological mother failed to state a cause of action when she sought shared responsibility and visitation with child that was born to the defendant by artificial insemination during domestic partnership with petitioner); Lison v. Pyles, No. 97APF01-137, 1997 WL 467327 (Ohio Ct. App. 1997) (the parties had been domestic partners for six years and jointly decided to “bring a child into their relationship,” with Appellee acting as the birth mother. After they separated, Appellant, who had been the child’s primary caretaker, sought visitation and child support. The court found that she was “not a parent” and thus lacked standing.”)

90. The ruling in the Titchenal case led Vermont Legislature to enact a "civil unions" statute that includes the following provision: The 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. VT. STAT. ANN. tit. 15 §1204 (f) (1999).
91. For example, in Jones v. Fowler, 969 S.W.2d 429 (Tex. 1998), the Texas Supreme Court denied visitation rights to a lesbian nonlegal parent by construing the relevant statute to bar petitions that are not filed within six months of the petitioner’s loss of “care, custody, and possession of the child.” Id. at 431. The text of the statute requires petitioner to have had “care, custody, and possession of the child for not less than six months preceding the filing” but does not contain the word “immediately”. TEX. FAM. CODE ANN. § 102.003(9) (Vernon 2000).

In the unique circumstance of a custody battle between the nonlegal mother and a biological/legal father (upon the death of the legal mother), courts have generally made their decisions based on fact-centered analyses. In Michigan, a nonlegal mother was found to be without standing, although she had lived with the children for eight years, was the subject of a power of attorney executed by the legal mother regarding the children, and had been named in the legal mother’s will as the children’s guardian. See McGuffin v. Overton, 542 N.W.2d 288, 292 (Mich. App. 1995). But see In Re Guardianship of Astonn H., 635 N.Y.S.2d 418 (Fam. Ct. 1995) (upon the death of the legal mother, the family court awarded custody to nonlegal mother over the legal mother’s estranged husband, who was the legal (but non-biological) father of the child. The court considered the nonlegal mother’s “stable, loving presence” in the child’s life as part of a “best interests” analysis). Of course, the applicability of Astonn H., beyond its particular facts is limited by Alison D., 572 N.E.2d at 27.
92. The formalist approach defines a term, here “parent,” with reference to formal relationships, usually dictated by a legal device such as marriage or formal adoption. Correspondingly, the functionalist approach defines the term with reference to the functions or attributes or “realities” operative in the relationships. These disparate views have also been labeled conservative and liberal, respectively, but I prefer the more neutral terminology of formalist and functionalist.
fied by Alison D., decided in 1991 by the New York Court of Appeals, which rejected the lesbian co-parent's claim to visitation based upon her de facto parent status. The Court concluded that the petitioner had no "standing" to bring an action for visitation. In its brief per curiam opinion, New York's highest court rejected the claim "de facto parenthood" as insufficient to overcome the legal definition of parent. Describing the issue as whether "a biological stranger to a child who is properly in the custody of his biological mother has standing to seek visitation with the child," the court easily concluded that although Alison D. "apparently nurtured a close and loving relationship with the child, she is not a parent" within the meaning of the statute. Only the sole dissenting judge, the highly regarded feminist jurist Judith Kaye, gave credence to a functionalist approach supported by empirical findings: in the first paragraph of her opinion she referred to estimates that "more than 15.5 million children do not live with two biological parents, and that as many as 8 to 10 million children are born into families with a gay or lesbian parent." Although not the first case to consider the issue or reach this conclusion, Alison D. demonstrates the paradigmatic functionalist approach. Under its formalist perspective, "parent" is conclusively defined by the formal legal definition, resting upon biology or adoption.

The opposite perspective is the functionalist approach complete with a fact based test, enunciated by the Wisconsin Supreme Court in In re H.S.K.-H., also known as Holtzman v. Knott. The Wisconsin court concluded that the state visitation statute was not the sole means for a court to entertain a visitation petition and the courts had "long recognized equitable power to protect the best interest of the child." In its ruling, the court first held that there must be a "parent-like" relationship between any petitioner and the child, which must be proved by meeting four elements:

1. the legal parent fostered and consented to development of a parent-like relationship between the petitioner and the child
2. the petitioner and child lived together in the same household
3. the petitioner assumed the obligations of parenthood by taking responsibility for the child's care, education, and development, including but not limited to financial contribution, and did not expect financial compensation
4. the petitioner has been in a parent-like relationship a sufficient amount of time to have a bonded relationship.

In addition to these elements, there must be a "trigger" to allow the state to intervene. Namely, there must be a showing that the legal parent has interfered with the relationship between the petitioner and the child, and the petitioner must bring the action within a reasonable time.

In keeping with the formalist perspective employed in Alison D., courts have denied "standing" to lesbians seeking visitation. For example, a Tennessee appellate court considered two consolidated cases each involving petitions for visitation by women the court describes as "nonparents" who "previously maintained same-sex relationships" with the child's biological mother and who "provided care and support" to the child. The court began its analysis with statutory definitions of "parent" which include a child's biological mother and the man married to the biological mother, and in the

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94. Id.
95. See id.
96. Id. at 28 (citing N.Y. DOM. REL. LAW. § 70 (McKinney 1999)).
97. Id. at 30 (Kaye, J., dissenting).
99. Holtzman, 533 N.W.2d at 421. The Wisconsin Supreme Court nevertheless struggled with its previous decisions denying nonlegal parents standing. See e.g., In re Z.J.H., 471 N.W.2d 202 (Wis. 1991) (standing was denied to nonlegal mother although she and the legal, non-biological mother had made the decision to adopt together and both lived with and cared for the child together). The Holtzman court largely distinguished Z.J.H. based on issues of not raised in Holtzman. Holtzman, 533 N.W.2d at 432-33. However, it ultimately concluded that upon "re-examination of Z.J.H. . . . "public policy considerations do not prohibit a court from relying on its equitable powers to grant visitation" and overruled "any language in Z.J.H. to the contrary." Id. at 433.
100. Holtzman, 533 N.W.2d at 421, 435-36.
101. Id.
adoption context, a step-parent. The court then summarily concluded that neither woman was "a parent as is contemplated by our legislature, despite each parties’ characterizations whereby each refers to herself as a 'parent' of the child." The court continued that while "it may be true that in our society the term 'parent' has become used at times to describe more loosely a person who shares mutual love and affection with a child and who supplies care and support to the child" it would be "inappropriate to legislate judicially such a broad definition of the term 'parent' as relating to legal rights relating to child custody and/or visitation."

The Thompson court did note, however, that the functionalist approach articulated in Holtzman has been accepted by other courts. For example, the Supreme Court of Massachusetts in E.N.O. v. L.M.M. recognized a lesbian co-parent as a "de facto" parent and allowed visitation. While not specifically adopting the Wisconsin court's formulation in Holtzman, the Massachusetts court's articulation is strikingly similar. Relying on Massachusetts common law and American Law Institute Principles, the court defined a de facto parent as one who "resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent." The court further noted that the "de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide" and fulfills this role "for reasons primarily other than financial compensation." This formulation meets the first three criteria enunciated in Holtzman and implicitly includes the requirement that the parent-child relationship be of reasonable duration.

The Massachusetts Supreme Court's decision in E.N.O. was a significant turning point as only the fourth time a state supreme court explicitly considered the issue. It was an especially important case because it shifted the balance between the competing perspectives of Wisconsin's Holtzman and New York's Alison D. One issue was the availability of second parent adoptions in Massachusetts a fact that has had special consequences for visitation claims of nonlegal parents in other jurisdictions that have allowed second parent adoption.

The relationship between second parent adoption and nonlegal parent's standing to seek visitation has also been broached by the Vermont Supreme Court in Titchenal v. Dexter. Although not mentioning the Wisconsin and New York cases, the Vermont court found it relevant to note that when the child in Titchenal was "only five months old, at least one Vermont probate court had allowed the female partner of a child's adoptive mother to adopt the child as a second parent" and that it was "more than a year" before the parties' relationship had ended. The Vermont Supreme Court itself had previously permitted "a biological mother's female partner to adopt the mother's child without the mother having to terminate her parental

103. Id. at 918 (citing Tenn. Code Ann. §36-1-102(26) (1996)). In light of the definition that a man becomes a parent by marriage to the biological mother, the court found it "relevant to note" that Tennessee specifically prohibits same-sex marriage by providing that marriage between one man and one woman is the only legally recognized marital contract. Id. at 918 n.2 (citing Tenn. Code Ann. §36-3-113 (1996)).

104. Id. at 918.

105. Id.

106. Id. at 920 n.8.


108. Id. at 891 (citing Youmans v. Ramos, 711 N.E.2d 165, 167 n.3 (Mass. 1999) (citing ALI principles of the Law of Family Dissolution § 2.03 (1)(b) (May, 1998)). See also Julie Shapiro, De Facto Parents and the Unfulfilled Promise of the New ALI Principles, 35 Willamette L. Rev. 769 (1999).

109. E.N.O., 711 N.E.2d at 891(citations omitted).


112. See Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).

113. Compare Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) with In re Jacob, 660 N.E.2d 397 (N.Y. 1995) (In New York, the availability of second parent adoptions has precluded nonlegal parent visitation claims). See also id. at 409 (Bellacona, J., dissenting) (noting that at the time Alison D. was decided, New York had not settled the issue of the availability of second parent adoptions to lesbian co-parents, and therefore availability must not be assumed for the purposes of this decision). But compare Holtzman, 533 N.W.2d 419, with In the Interest of Angel Lace M., 516 N.W.2d 678 (Wis. 1994) (availability of second parent adoption is evidence of policy favoring flexibility, and supports allowance of visitation to nonlegal parents).

114. Titchenal, 693 A.2d at 686-87.

115. Id.
The Vermont court declined to extend any equitable theories in light of the parties’ failure to pursue existing legal remedies, unlike the Massachusetts Supreme Court in *E.N.O.*, which used its previous decision allowing second-parent adoptions to bolster its conclusion that the best interests of the child must include consideration of the child’s relationship with both legal and de facto parents. With *E.N.O.*, the Massachusetts Supreme Court undercut one of the dominant rationales for denying nonlegal parent visitation and evenly split the conclusions among those states whose highest courts had considered the issue.

C. The New Jersey Supreme Court’s Decision in *V.C. v. M.J.B.*

The New Jersey Supreme Court in *V.C. v. M.J.B.* entered into this equally divided territory and in a unanimous opinion clearly tipped the balance toward allowing nonlegal parent visitation, as enunciated in *Holtzman*, and away from the formalism of *Alison D.* While agreeing with the Massachusetts court in *E.N.O.*, the New Jersey court was much more explicit in its adoption of the *Holtzman* criteria, stating that the “most thoughtful and inclusive definition of de facto parenthood is the test enunciated in *Custody of H.S.H.-K*” and that it was “satisfied that the test provides a good framework for determining psychological parenthood in cases where the third party has lived for a substantial period with the legal parent and her child.”

Elaborating on the test, the New Jersey Supreme Court devoted most of its analysis to the first prong, which requires the legal parent to have fostered and consented to development of a parent-like relationship between the nonlegal parent and the child. The court found this requirement “critical” because it makes the legal parent “a participant in the creation of the psychological parent’s relationship with the child.” The requirement of consent precluded the possibility that a “paid nanny or babysitter” could qualify as a person seeking visitation, a contingency that appears troublesome, if remote. Such results are also adequately protected against by the test’s third qualification, which specifically provides that the nonlegal parent did not expect remuneration. The court in *V.C.* used the consent requirement as a springboard to stress that the legal parent retains firm control because she has the “absolute ability to maintain a zone of autonomous privacy for herself and her child.” M.J.B. had argued that, as the legal parent, she has the fundamental right to the care, custody, and control of her children. The court agreed that this right is grounded in the constitution and “deeply imbedded in our collective consciousness and traditions,” and generally deriving from the notion of privacy. But the Court then quickly added that such a right is not absolute and could be limited by the state if the parent endangers the health or safety of the child or if there is some showing of unfitness, abandonment or gross conduct.

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116. *Id.* (citing In re B.L.V.B., 628 A.2d 1271, 1272, 1274 n.3 (Vt. 1993)).
117. *Id.* at 687.
120. Soon after this decision, the contrary decision in Vermont was nullified by the Vermont Legislature, through a “Civil Union” statute. See *Vt. Stat. Ann.* tit. 15 §1204 (f) (1999). See also discussion supra note 90.
121. *V.C.*, 748 A.2d at 551 (citing Holtzman v. Knott, 533 N.W.2d 419, 421 (Wisc. 1995)).
122. *V.C.*, 748 A.2d at 551-52.
123. *Id.* at 552.
124. *Id.* “[T]he legal parent must have fostered the formulation of the parental relationship between the third party and the child” and further clarifies “fostered” to mean that the legal parent ceded “a measure of parental authority and autonomy” and allowed the “third party rights and duties vis-a-vis the child that the third party’s status would not otherwise warrant.” *Id.* The court then concluded that “ordinarily, a relationship based upon payment by the legal parent to the third party will not qualify.” *Id.*
125. M.J.B. had characterized V.C. as a “mere helper.” 748 A.2d at 543. There has been no reported case in which a custody or visitation action was brought by a person who could be accurately described as a babysitter, nanny, or au pair, although this concern has been voiced by courts before. See, e.g., *E.N.O.*, 711 N.E.2d at 891 n.6 (“we do not recognize as a de facto parent a babysitter or other paid caretaker. Even though these caretakers may grow to feel genuine affection for their charges, their caretaking arrangements arose for financial reasons”).
126. *Holtzman*, 533 N.W.2d at 435-36.
127. *V.C.*, 748 A.2d at 552.
128. *Id.* at 548.
130. *V.C.*, 748 A.2d at 548 (citing Wisconsin v. Yoder, 406 U.S. 205, 233- 34(1972); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944)).
jected M.J.B.’s claim that because there was no allegation of unfitness the court could not interfere.\(^{132}\) This position implicitly limits the doctrine which allows a third party to seek custody or visitation only under “exceptional circumstances” with an exception for the “health and safety” of the child. “The ‘exceptional circumstances’ category contemplates the intervention of the Court in the exercise of its \textit{parens patriae} power to protect a child.”\(^{133}\)

The New Jersey Supreme Court could not have been unmindful of the United States Supreme Court’s pending decision in \textit{Troxel},\(^{134}\) which had been argued before the Court in January and had attracted much attention.\(^{135}\) Given the possibility that the United States Supreme Court would affirm the Washington court’s broad invocation of parental autonomy rights to declare the state’s visitation statute unconstitutional,\(^{136}\) the New Jersey Supreme Court in \textit{V.C.} was justifiably concerned with whether granting the nonlegal parent visitation rights would infringe upon the parental autonomy of the legal parent.\(^{137}\) The ready solution is the first requirement in the \textit{Holtzman} court’s formulation of “consent.”\(^{138}\) As explained by the court in \textit{V.C.}, the legal mother can choose to maintain her “zone of autonomous privacy,” but once she abandons it and a “profound bond” between the nonlegal parent and child develops, that bond may not then be “unilaterally terminated” by the legal parent.\(^{139}\)

The court in \textit{V.C.} was careful not to equate the consent requirement with intentionality.\(^{140}\) Intentional parenting is a notion that has gained limited scholarly support.\(^{141}\) According to the New Jersey Supreme Court, the trial court overemphasized the relevance of the parties’ prebirth intentions.\(^{142}\) The court in \textit{V.C.} held that, while “joint participation in the family’s decision to have a child is probative evidence of the legally recognized parent’s intentions,”\(^{143}\) not having participated in the decision does not preclude a nonlegal parent from being a psychological parent.\(^{144}\)

The court in \textit{V.C.} was considerably less attentive to the other prongs of the \textit{Holtzman} test, but did emphasize that the third requirement, that the nonlegal parent assume the obligations of parenthood, is not dependent on financial support.\(^{145}\) While there was apparently no dispute that \textit{V.C.} did contribute financially to the children,\(^{146}\) the court cautioned that financial consideration should not be given “inordinate weight.”\(^{147}\) A “stay-at-home” parent who “undertakes all of the daily domestic and child care activities in a household with preschool children while the legal parent is the breadwin-

\(^{132}\) \textit{Id.} at 549.

\(^{133}\) \textit{Id.}


\(^{136}\) The Washington Supreme Court held that because the statute did not require a showing of harm to the child, the visitation statute was an unconstitutional infringement of the parent’s due process rights. \textit{Troxel} v. \textit{Granville}, 969 P.2d 2, 21, 31 (Wash. 1999).

\(^{137}\) \textit{V.C.}, 748 A.2d at 552.

\(^{138}\) \textit{See id.}

\(^{139}\) \textit{Id.}

\(^{140}\) \textit{Id.}

\(^{141}\) \textit{See, e.g., Janet L. Dolgin, The “Intent” of Reproduction: Reproductive Technologies and the Parent-Child Bond, 26 Conn. L. Rev. 1261, 1263 (1994) (describing the “intent” standard as “deceptively simple... remarkably ill chosen, and remarkably ill-defined.”); Marjorie Maguire Shultz, Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297, 322-23 (advocating intent as the “determining factor” in establishing parenthood, but only in cases of “artificial or assisted reproduction”).

\(^{142}\) \textit{V.C.}, 748 A.2d at 552-53 (“The trial court appeared to view the fact that M.J.B. alone made the decision to have the twins as pivotal to the question of the existence of a psychological parent relationship between V.C. and the children”).

\(^{143}\) \textit{Id.} at 553.

\(^{144}\) \textit{Id.}

\(^{145}\) \textit{Id.}

\(^{146}\) After the twins were born, V.C. and M.J.B. had joint bank accounts for household expenses and savings accounts for the children with one adult named as the custodian for each. \textit{Id.} at 542. After the women separated, V.C. contributed money for the children. \textit{Id.} at 544. V.C. had taken three weeks vacation time from work after the twins were born. V.C. v. M.J.B., 725 A.2d 13, 15 (N.J. Super. Ct. App. Div. 1999), aff’d, 748 A.2d 539 (N.J. 2000). According to Judge Wecker of the Appellate Division, “the evidence was undisputed that V.C. undertook the financial responsibilities of a parent to these children.” 725 A.2d at 27 (Wecker, J., concurring in part and dissenting in part).

ner” could qualify as a psychological parent. The court noted that although the contributions of the stay at home parent could be monetarily measured, such economic valuation was not the point. It “is the nature of what is done that will determine whether a parent-child bond has developed, not how much it is worth in dollars.”

The existence of the parent-child bond is the primary focus of New Jersey’s adoption of the Holtzman test. It is this bond that the parent, once she has fostered it, cannot unilaterally sunder. It requires time to develop, but the amount of time needed is unique in each situation. The existence of this bond and its “actuality and strength,” will generally need to be proven by expert testimony.

Once that bond has been established and the nonlegal parent has met the criteria for being a psychological parent, she stands in parity with the legal parent, so that custody and visitation will be determined under the best interest of the child standard. But this parity is undermined by the court’s acknowledgment that a person’s status as legal parent “plays a part” in the custody or visitation proceedings:

The legal parent’s status is a significant weight in the best interests balance because eventually, in the search for self-knowledge, the child’s interest in his or her roots will emerge. Thus, under ordinary circumstances when the evidence concerning the child’s best interests (as between a legal parent and psychological parent) is in equipoise, custody will be awarded to the legal parent.

Thus, with regard to custody, the psychological parent and the legal parent are both equally entitled to be considered in the “best interest” analysis, but the legal parent will have some substantive advantage because the legal status itself will be a factor considered. Visitation, however, becomes “presumptive” once the nonlegal parent is deemed a psychological parent.

The dissonance between custody and visitation applications is apparent as exercised with reference to V.C. The New Jersey Supreme Court found that the legal mother, M.J.B., was a “fully capable, loving parent, committed to the safety and welfare of the twins.” That the same characterization is accorded to V.C., however, renders her not quite as equal despite the court’s statement in this paragraph that the women are “essentially equal.” While noting that V.C. is seeking legal custody (decision-making) rather than physical custody, the court finds it important that V.C. has not been involved in the decision-making process for the children for nearly four years “due to the pendency of this case” and thus to “interject her into the decisional realm at this point would be unnecessarily disruptive for all involved.” While denying custody, the court finds visitation “another matter,” based in part at least on the fact that V.C. regularly visited the children “during nearly all of the four years since V.C. parted company from M.J.B.” The court notes that “continued visitation” is presumed, yet given its earlier pronouncement that visitation in general is presumptive, the entitlement of a psychological parent to visitation remains a bit unclear.

Nevertheless, there is no ambiguity as to the New Jersey Supreme Court’s position opinion regarding psychological parenthood:

Third parties who live in familial circumstances with a child and his or her legal parent may achieve, with the consent of the legal parent, a psychological parent status vis-a-vis a child. Fundamental to a finding of the existence of that status is that a parent-child bond has been created. That bond cannot be unilaterally terminated by the legal parent. When there

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148. Id.
149. Id. (citing Martha M. Ertman, Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements, 77 Tex. L. Rev. 17, 43 (1998)).
150. V.C., 748 A.2d at 553.
151. Id. (“[T]he fourth prong is most important because it requires the existence of a parent-child bond”).
152. Id. (“How much time is necessary will depend upon the facts of each case including an assessment of exactly what functions the putative parent performed, as well as at what period and stage of the child’s life and development such actions were taken.”)
153. Id.
154. Id. at 554.
155. See id.
156. Id.
157. Id. at 555.
158. Id.
159. Id.
160. Id.
is a conflict over custody and visitation between the legal parent and a psychological parent, the legal paradigm is that of two legal parents and the standard to be applied is the best interests of the child.

Establishing psychological parenthood is not an easy task and the standards we have adopted should be scrupulously applied in order to protect the legal parent-child relationship.  

The New Jersey Supreme Court has undoubtedly adopted a functional approach to defining parenthood and given legal status to those deemed to be psychological parents.

D. Beyond Functionalism

The New Jersey Supreme Court's decision in *V.C. v. M.J.B.* will most likely be lauded by lesbian and gay advocates as a recognition of "our families." Considering the alternative—the absolute denial of any status to a lesbian co-parent—such acclaim is merited. Nevertheless, the functionalist approach as articulated in *V.C., E.L.O.*, and *Holitzman* has some serious problems which could work to the detriment of lesbian parents in future litigation. The functional approach serves to "construct" the ways in which lesbian mothering occurs and is recognized. Thus, the judiciary is constructing lesbian mothers by deciding who qualifies as a "de facto" mother and who does not. This type of judicial conclusion can be determinative. For instance, a nonlegal mother denied access to her child has little, if any, opportunity to be a "mother in fact." While it offers significant benefits, the functionalist approach raises two major concerns, discussed in turn as the problems of "domestication" and "inequality".

1) Domestication

The problem with the functionalist approach is that it enshrines a very conservative and stereotyped view of parenting. Although purportedly based on "reality," its view of reality is unduly static. Any aspirations that lesbians can revolutionize—or even reform—the norms of motherhood are thwarted by functionalist definitions, which tend to exclude from legal recognition precisely those relationships which might "revolutionize" motherhood. As feminist legal theoretician Martha Minow (while discussing her work on Alison D.'s attempt to prove her de facto parenthood) describes the functionalist approach "people should be able to choose to enter family relationships, but not be free to rewrite the terms of those relationships." For example, what the child calls the adults in her life played a surprisingly significant role in the many of the courts' analyses. In a number of cases allowing the nonlegal mother standing to petition for visitation, the court deems a mom-like word noteworthy. In the absence of a mom-like term, the court seems open to another familial-type designation: the child "knew Appellee as 'Aunt

161. Id.
162. There is some concern about the implications of the emphasis placed by the V.C. court on the legal mother's intent to foster the other parent's relationship with the child. See *V.C.*, 748 A.2d at 555. By focusing on intent, the court may be veering close to a contract-based analysis, which makes the child the object of the contract between the adults. Such thinking has been roundly criticized from a feminist perspective. See generally Williams, supra note 74; Radin, supra note 74.

In the gay and lesbian context, Sidney Callahan has declared that any child conceived by third party collaboration becomes a "made to order product of the parent's will and desire to reproduce" and that such children are less than equal in the family because they exist under the pressure of being "optimal babies." Sidney Callahan, *Gays, Lesbians, and the Use of Alternate Reproductive Technologies, in Feminism and Families* 188, 199 (Hilde Lindemann Nelson ed., 1997). Furthermore, the "intent to foster" requirement implicitly operates to counter any argument that the legal mother might raise regarding her constitutional substantive due process rights. By "fostering" the relationship, the legal mother can less persuasively argue that the state (in the form of the judicial process) is interfering with her rights to "care, custody, and control" of her child. It is a troubling possibility that one might forever foreclose the exercise of one's constitutional substantive due process rights without a knowing, voluntary, intelligent, and explicit waiver.

163. For example, it is still focused on the relationship between the adults as definitive in the parent-child relationship.
164. Parenthood is defined by a factual model, which looks very much like a heterosexual stepparent arrangement, rather than by the putative parent and her child.
The “child called Holtzman ‘My San,’ and each year on Father’s Day Holtzman, Knott, and the child celebrated their own special holiday honoring Holtzman.”

One wonders in these cases how a court might interpret a situation in which the child called the adults in her or his life by their first names because the adults believed that titles such as father, mother, or “mommy” created unearned hierarchies. Arguably, the child’s term for the adults, especially if used for both adults, should be insignificant because it does not specifically relate to any of the criteria establishing de facto parenthood.

A judicial construction of lesbian relationships (declaring some cognizable and excluding others) is subject to lesbian critique. As I have argued in other contexts, such an approach “domesticates” lesbian relationships and lesbian existence. Similarly, from a “queer” perspective, Darren Rosenblum has argued that even recent “victories” of the gay and lesbian legal reform movement fail to account for “queer intersectionality,” by discounting people he designates as “poor queers,” “queers of color,” “sexual subversives” and “gender subversives.” New York’s second parent adoption case is among those that Rosenblum thinks have failed to account for “queer intersectionality.” I have similarly concluded that second-parent adoption jurisprudence is problematic from a class perspective. Likewise, Erin Law identifies the class privilege in second-parent adoptions, and further argues that the legal process is invasive and ultimately privileges the birth mother over the nonbirth mother.

In her seminal critique of second parent adoption jurisprudence, Professor Julie Shapiro contends that second-parent adoptions divide the lesbian community in at least two ways. First, they divide by benefiting only some lesbians. The second-parent adoption process does not help a lesbian who is raising children born to her partner’s prior heterosexual relationship, “where the father remains a legal parent.” Secondly, Shapiro argues that second-parent adoptions divide lesbians into classes by income, histories of substance abuse, criminal records, or lifestyles; rendering some lesbians less attractive candidates for judicially conferred motherhood than others.

Thus, according to Shapiro, the availability of second parent adoption may work to the detriment of some lesbians because once the needs of the “most politically powerful members of the lesbian community” are met, these women will consider the issue resolved and “turn to other issues” despite the fact that some women remain excluded. Shapiro also extends the concept of the “but-for” lesbian (that is, a lesbian whose socio-economic status makes her acceptable, but-for her lesbianism) to lesbian families and argues that second-parent adoptions “validate but for” lesbian families reinforcing traditional models and further marginalizing others. Shapiro further contends that the very existence of an available legal remedy such as second-parent adoption may undermine other legal claims.

In addition, Shapiro contends that it is not only the existence of lesbian second parent adoptions but lesbians’ "uncritical acceptance" of such legal devices, that works to domesticate lesbian existence. Shapiro outlines three aspects of this domestication. First, domestication is a response to is powerful incentives to “mold
oneself to fit the 'good lesbian' model" and to
"walk, talk, and act like heterosexual parents" conforming to the nuclear family model.\textsuperscript{184} Second, the possibility of second parent adoptions serves to internalize beliefs that a "real" mother is a legal mother and that nonlegal mothers are not "real" mothers. Lastly, and for Shapiro "perhaps most fundamentally," second parent adoptions domesticate because they "foster the belief that the law will protect rather than con- strain lesbians."\textsuperscript{185}

Shapiro's analysis of lesbian-second parent adoptions is transferable to lesbian functional parenting doctrine. Like second-parent adoptions, functional definitions of parenting divide us because by design such definitions benefit only some lesbian nonlegal mothers. Function- alism in the form of de facto, psychological, or equitable parenting theories, like second parent adoption, will not be available to lesbians raising children in situations where there is a legal father.\textsuperscript{186} no matter what functions the lesbian nonlegal mother performs or whether the legal father performs any functions. As Shapiro con- tends in the second-parent adoption context, this division could serve to divide lesbians into "real" lesbian mothers whose children are not from previous heterosexual relationships and "those other lesbians" whose status as women raising children is diminished.\textsuperscript{187}

Shapiro's argument that there are divisions even among the lesbians for whom second-par- ent adoption is devised\textsuperscript{188} can also be applied to functional parenthood. The differences in income, histories of substance abuse, criminal records, or "lifestyle" which might render a particular lesbian an unattractive candidate for judicially conferred motherhood in the context of a second-parent adoption will likewise render her an unattractive candidate for judicially con- ferred psychological parent status.\textsuperscript{189} The very existence of an available legal remedy such as psychological parent status may undermine other legal claims.\textsuperscript{190}

The New Jersey Supreme Court's instruc- tion that parental-child bonding will generally be proven through expert testimony\textsuperscript{191} should alert lesbians about whom the law is empowering to structure their families. The Court's adoption of substantive criteria for determining parenthood should alert lesbians about what is being dictated as the proper way to structure their families. For instance, the functional parenthood recognized by the Court is the heteroerosexual dyadic model. To qualify as parents, the lesbian adults must be a couple (not a trio or quartet), they must live together and they must be monogamous. The overemphasis on the relationship between the adults is itself troubling, given that the material issue is one of parent-child bonding.

When recognizing lesbians as parents, courts do not hesitate to characterize them in a way that mirrors heterosexual couples. Among factors that courts have found relevant are that their relationship was lengthy, committed, exclusive, and socially memorialized.\textsuperscript{192} The commit- ment of the women to each other is often measured economically, including consideration of their financial relationship before any child is present.\textsuperscript{193} While such arrangements may be pertinent in that they show "financial prepara- tions" for having a child,\textsuperscript{194} such facts really demonstrate no more than that the adults have a spouse-like relationship, a fact whose relevance to child custody or visitation is contingent

184. Id.
185. Id. at 36.
186. Id. at 30.
187. Id.
188. See id. at 31-36.
189. See id. at 32.
190. See id. at 31-33. For instance, a court may reject a second-parent adoption petition or procedurally bar the ac- tion through time limits. See Jones v. Fowler, 969 S.W.2d 429 (Tex. 1998).
192. See, e.g., Laspina-Williams, 742 A.2d at 840, 841 (not- ing that the women "were in a committed lesbian relation- ship for approximately ten years"); E.N.O., 711 N.E.2d at 888 (they "shared a committed, monogamous relationship for thirteen years"); T.B. v. L.R.M., 753 A.2d 873, 877 (Pa. Super. Ct. 2000) ("they had an exclusive relationship").

In V.C. v. M.J.B., 725 A.2d at 15 the court noted that par- ties took part in a "commitment ceremony" and that the chil- dren were present at the ceremony. The parties to Barnae, 943 P.2d at 1038, also observed a ceremony to memorialize their union Id. at 1038. The court stated that whether the cer- emony was an occasion to enter a binding contract was in dispute, thus making the recitation of the ceremony arguably relevant. The court did not, however, explicitly stated it did not reach the merits of the case; see id. at 1040.
193. See, e.g., Laspina-Williams, 742 A.2d at 841 (the par- ties purchased home together two years before the child was born); T.B., 753 A. 2d at 877 (the parties purchased a home "soon" after the parties moving in together and well before the child was born).
194. See Alison D., 572 N.E.2d at 30 (Kaye, J., dissenting).
on the assumption that conventional, marriage-like family formation is central to parenting.

This spouse-like relation that limits the women to a dyadic couple seems to be the standard, although in one case, a court honored an agreement among the parties and granted parental rights to three parties (biological legal mother, the non-biological legal mother by second parent adoption, and the sperm donor/biological father). Even this court, however, subsequently rejected the argument that this was a "triumvirate" parenting scheme based upon the fact that the father's rights were less than those of the mothers, who had joint legal custody. The court thus implicitly agreed that a child can only have two legal parents, even if in fact there are two biological parents and one psychological parent. If a court were to confront a situation where a legal mother lived in a household with two other adults (lovers or otherwise), both of whom acted as psychological parent to the child, it is doubtful that a court would declare both nonlegal mothers to be psychological parents, or grant both of them parental rights.

Lastly, Shapiro's fundamental argument that second parent adoptions domesticate lesbians because they "foster the belief that the law will protect rather than constrain lesbians" correlates to the reality that the availability of litigation to solve the problem of access to a child forestalls other avenues. While there have been some attempts to forge a consensus that litigation may not be the solution, for the most part the efforts of our communities are devoted to legal remedies and reforms rather than the development of ideas and methodologies which might prevent lesbians from suing each other in court. Thus, while the New Jersey Supreme Court's decision in V.C. v. M.J.B. is a mark of progress for lesbian legal reform, the reform is applicable to only some lesbians and has the potential to domesticate all lesbians.

2) Equality

The other shortcoming of functionalism for lesbian parents is that it is clearly "separate but not equal." Functionalist standards are not imposed on persons the law deems parents because of biology. A man may be declared a father based upon a biological paternity test despite the fact that he never intended to be a parent, the legal mother never possessed any intent to foster a parent-like relationship, he never lived in the same household with the child, never assumed responsibility for the child, and had never been with the child for any significant amount of time. Compare, for example, the evidence and expert testimony necessary to deem V.C. a psychological parent, which simply was not required of a biological father in another case, who won custody of a child with whom he had an irregular relationship at best. There was virtually nothing in that case to suggest that the father bonded with the child, or took financial or other responsibility for the child. Neither was there any evidence the biological mother (now deceased) had intended him to act as a parent. His mere biological relation to the child sufficed for a court to declare him a "parent" with not only a claim to custody and visitation, but a presumption in his favor.

Further, not only is there inequality relating to the levels of proof for a person to be deemed a parent, but this inequality persists in the implementation of the standards. According to the V.C. court, the legal parent possesses a preference by virtue of biological connection.

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195. LaChapelle v. Mitten, 607 N.W.2d 151, 161 (Minn. Ct. App. 2000). Interestingly, despite the fact that the court notes that the women's petition for adoption was granted, id. at 157, the court analyzes the nonbiological mother's claim as that of a "non-parent," concluding that she has standing to seek custody under the Minnesota statute. Id. at 158-59.

196. LaChapelle, 607 N.W.2d at 161.

197. While I do not necessarily advocate multiple parents, it is of considerable concern to those who envision non-traditional families that the not only the law of formalism, but also the law of functionalism is structured in ways that would deny them the right to form their kind of families.

198. Shapiro, supra note 18, at 36.

199. See Shapiro, supra note 18, at 36. (discussing Gay and Lesbian Advocates and Defenders, Protecting Families: Stan-

ards for Child Custody in Same-Sex Relationships, 10 UCLA WOMEN'S L.J. 151 (1999)).


201. Initially, the biological father was not awarded custody, because the lower courts found the child's maternal grandparents to be psychological parents and awarded them custody based on the child's best interest standard. See Watkins v. Nelson, 729 A.2d 484, 485 (N.J. Super. Ct. App. Div. 1999). The New Jersey Supreme Court reversed and ordered immediate transfer of the child to her father's custody. Watkins, 748 A.2d at 570.

202. V.C., 748 A.2d at 554-55.
despite the court’s declaration that the legal and psychological parents stand “in parity.” The consequences of legal status as opposed to non-legal status are also demonstrated by the court’s conclusion in V.C. Despite the fact that V.C. is recognized as a psychological parent, V.C. is not awarded the legal custody that she sought because she has been not been exercising decision-making during the four years the suit has been pending. The court elides the fact that M.J.B. has rested upon her legal status as recognized mother to exclude V.C. from such a role. Presumably, the justification for the court’s decision would be that the court is more concerned with the “best interests of the child” than with equality among the adults. Nevertheless, in a situation involving two legal parents, a court might not be as willing to reward the parent who had excluded the other. However progressive the New Jersey Supreme Court’s decision in V.C. v. M.J.B. may be, it nevertheless continues to perpetuate a two-tiered system of legal rights for parents. Lesbian nonlegal parents must act as parents and must prove that have they so acted, and even if they did, their “parity” with legal parents remains a “lesser” parity.

CONCLUSION

Despite significant drawbacks, functionalist definitions of the parent-child relationships point to an improvement over strict formalist applications which deny the realities of lesbian parenting practices. Nevertheless, we must continue to be aware that functionalist definitions are partial and to resist the temptation to believe that “any particular model” of lesbian life embodies lesbian values. More importantly, we must refuse to engage in sentimental politics which merely focus on the awarding of parent-child status to particular adults and children and must further interrogate the specific rewards and responsibilities that flow from such status.

Having begun with P.D. Eastman’s, Are You My Mother? I am now suggesting that we now need to rephrase the question. Instead of “are you mother” or even “are you my mothers?” our inquiries about non-lesbian legal parents must have a deeper purpose. Rather than P.D. Eastman or even the progressive justices of the New Jersey Supreme Court, we might return to theorists in our own community. On the subject of motherhood, Audre Lorde, self-described “Black Lesbian Warrior Poet,” noted:

I believe that raising children is one way of participating in the future, in social change. On the other hand, it would be dangerous as well as sentimental to think that childrearing alone is enough to bring about a livable future in the absence of any definition of that future. For unless we develop some coherent vision of that world in which we hope these children will participate, and some sense of our own

203. Id. at 554.
204. Id. at 555.
205. Cf. Beck v. Beck, 432 A.2d 63, 65 (1981) (in considering custody in the context of divorce, the court stated that “in promoting the child’s welfare, the court should strain every effort to attain for the child the affection of both parents rather than one.” (internal quotes and citations omitted)). The court also noted that parents involved in custody controversies have by statute been granted both equal rights and equal responsibilities regarding the care, nurture, education and welfare of their children. Although not an explicit authorization of joint custody, this clearly related statute indicates a legislative preference for custody decrees that allow both parents full and genuine involvement in the lives of their children following a divorce. This approach is consonant with the common law policy.

206. V.C., 748 A.2d at 556 (Long, J., concurring) (“we should not be misled into thinking that any particular model of family life is the only one that embodies ‘family values’”).

207. For example, litigation between two lesbians might solve the issue of which parent shall add the child to her employee benefit health insurance, but it fails to address questions of whether medical insurance should be a privilege of corporate employment.
responsibilities in shaping that world, we will only raise new performers in the master’s sorry drama.\textsuperscript{208}

In developing a “coherent vision” of a future in which our children will not simply be “new performers in the master’s sorry drama,” we need to eschew individualized solutions that rely on traditional versions of parenting, whether the versions be formalist or functional. As another Black Lesbian theorist, Barbara Smith, formulates the real inquiry: “But how do it free us?”\textsuperscript{209}

\textsuperscript{209} Barbara Smith, \textit{Doing It From Scratch: The Challenge of Black Lesbian Organizing}, in \textit{This Is What A Lesbian Looks Like: Dyke Activists Take on the 21st Century} 245, 250. (Kris Kleindiest, ed. 1999). Smith states that she is adopting this question as originally posed by the poet and activist Sonia Sanchez to assess “the revolutionary content of ideas and actions.” \textit{Id.}