

FROM THIRD PARTIES TO PARENTS: THE CASE OF LESBIAN COUPLES AND THEIR CHILDREN

NANCY D. POLIKOFF*

I

INTRODUCTION

In his groundbreaking 1975 article, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*,¹ Robert Mnookin identified as the first issue dominating academic discussion of child-custody law determining “how much weight should be given to the interests of the natural parents in custody disputes involving third parties.”² He did not define either “natural parent” or “third party,” presumably because he found the meaning of those terms self-evident; a natural parent was a biological parent and a third party was anyone else.³ Two years earlier, the Uniform Parentage Act (UPA) had defined the parent and child relationship as “the legal relationship existing between a child and his natural or adoptive parents.”⁴ The 1973 UPA also lacked a definition of “natural,” but its usage throughout left little doubt that the drafters assumed such a person was a child’s biological parent.⁵ There was no reason for Mnookin to think the phrase lacked clarity or needed explication.

Instead, the term that captured much attention at the time, and that was necessary to the core of Mnookin’s analysis, was the term “psychological parent.” This term also dated to 1973, when it had been unveiled by Joseph Goldstein, Anna Freud, and Albert Solnit in their paradigm-shifting book, *Beyond the Best Interests of the Child*.⁶ The authors defined psychological parent as the person “who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s

Copyright © 2014 by Nancy D. Polikoff.

This article is also available at <http://lcp.law.duke.edu/>.

* Professor of Law, American University Washington College of Law. Special thanks to Katie Wright, J.D., 2014, American University Washington College of Law, for her expert research and editing assistance.

1. 39 LAW & CONTEMP. PROBS. 226 (Summer 1975).

2. *Id.* at 226.

3. Mnookin did, of course, acknowledge parentage acquired through adoption. “Adoption is the legal process by which a child acquires parents other than his natural parents, and parents acquire a child other than a natural child. The resulting legal relationship is identical to that of a natural parent and child.” *Id.* at 244 n.85.

4. UNIF. PARENTAGE ACT § 1 (1973), 9B U.L.A. 296 (1987).

5. *See, e.g., id.* § 3(1) (identifying a natural mother as the woman who gives birth to the child).

6. *See generally* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

psychological needs for a parent, as well as the child's physical needs."⁷

Mnookin accepted the importance of psychological parentage to children.⁸ The general rule that a natural parent would prevail over a third party, he argued, should give way in a factual situation in which the natural parent was not the child's psychological parent and a third party was.⁹ Then, the psychological parent should prevail in a custody dispute.¹⁰

Legal and cultural developments of the past almost forty years have made the template Mnookin developed more complex. Use of assisted reproductive technologies has separated genetics from parentage to a degree Mnookin could not have predicted. The vast increase in the number of children born to unmarried heterosexual couples has also complicated efforts to define parentage.¹¹ Mnookin's model assumed a sharp and easily discernible line between parents and third parties. That line is no longer sharp.

In this article I focus on disputes arising in one illustrative context. A lesbian couple decides to bring a child into their relationship and to raise that child together, with each of them acting as a parent. They have two options. They may adopt, and, although some states allow a joint adoption by the couple, it is common for only one partner to adopt the child. Or they may choose insemination of one partner with donor semen. Usually, both partners select the known donor or the characteristics of an unknown donor, and both participate in the insemination and the prenatal process and birth. Whichever route they select, they welcome the child into their family as two parents, and they raise the child that way for some period of time. Then the couple separates. The child may remain with the biological (or legally adoptive) mother, who permits ongoing contact, even joint custody, by her ex-partner for a period of time. Then, because the biological mother either cuts off contact completely or reduces it dramatically, the nonbiological mother files in court for shared custody or expanded visitation rights.

How do we identify the two parties in this dispute?¹² The woman who gave birth to the child is undeniably the child's "natural parent." In the earliest disputes, courts identified the woman who did not bear the child as a third party.¹³ She was, of course, a psychological parent, and over a decade into the use of that term, advocates argued for her importance in the child's life.¹⁴ But

7. *Id.* at 98.

8. Mnookin, *supra* note 1, at 282.

9. *Id.* at 282–83.

10. *Id.*

11. See Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, NCHS DATA BRIEF, May 2009, at 1, 1 (illustrating the rising trend of births to unmarried women).

12. If the couple has completed a second-parent adoption, they are both, of course, parents. The analysis in this article is therefore unnecessary to resolve disputes over custody or visitation that arise when such a couple separates.

13. See, e.g., *In re Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (per curiam) (discussing appellant's visitation and custody options under a third-party legal regime).

14. These advocates often include national lesbian, gay, bisexual, and transgender (LGBT) rights organizations. In *In re Alison D.*, Alison D. was represented by Lamda Legal. In another third party–

the argument that Mnookin developed for awarding custody to the psychological parent depended upon the absence of the natural parent from the child's life.¹⁵ That was never the factual scenario in these cases. Nor was there customarily a factual basis for arguing that the birth mother was unfit.

In part II of this article, I first describe the cases Mnookin used to illustrate his approach to parent-third party disputes. I then describe the early lesbian-couple disputes on which this article focuses, demonstrating the challenge they presented to the standard Mnookin advocated. In part III, I incorporate the constitutional analysis required under the Supreme Court's ruling in *Troxel v. Granville*,¹⁶ a dispute over visitation rights between a mother and her children's paternal grandparents. I describe how the majority of courts that have applied the case have found that it is not a barrier to claims by nonbiological mothers. I also describe the minority view, which incorrectly sees no difference between the grandparents in *Troxel* and a petitioning nonbiological mother in a lesbian-couple custody dispute. In part IV, I analyze evolving designations of parentage, including the contemporary answer to the question Mnookin did not ask: How to define the term "natural parent"? Finally, I conclude that to preserve Mnookin's values of family autonomy and continuous, stable relationships, courts must correctly identify who is a child's parent.

II

LESBIAN COUPLES RAISING CHILDREN DEFY THE PARENT-THIRD PARTY BINARY

A. Mnookin's Third-Party Cases

At the time of Mnookin's article, the iconic custody dispute between a parent and a third party was *Painter v. Bannister*.¹⁷ It is no surprise, therefore, that Mnookin used it to illustrate his analytical framework. *Painter v. Bannister* arose when a father, Harold Painter, sought return of his son, Mark, from the child's maternal grandparents.¹⁸ Harold embraced the San Francisco bay-area counterculture of the 1960s.¹⁹ The grandparents, Dwight and Margaret Bannister, were a stable, conventional Iowa farm couple.²⁰ Harold sent Mark to live with the Bannisters after Mark's mother and sister died in a car accident.²¹ Nine months later, when Harold sought Mark's return, the Bannisters refused,

parent case, *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Ct. App. 1991), the National Center for Lesbian Rights represented the biological mother's lesbian partner.

15. See Mnookin, *supra* note 1, at 282 (highlighting the harm that would come to a child if placed with a natural parent whom the child viewed as a stranger).

16. 530 U.S. 57 (2000).

17. 140 N.W.2d 152 (Iowa 1966).

18. *Id.* at 153.

19. See *id.* at 154-56 (describing Harold's lifestyle and general beliefs).

20. *Id.* at 154.

21. *Id.* at 153.

and Harold turned to the Iowa courts.²²

The trial court ruled for the father, but the Iowa Supreme Court stayed execution of that judgment and then reversed, granting custody to the Bannisters.²³ The opinion is replete with references to the “arty” and “unconventional” life Mark would have with his father as contrasted to the “stable” and “dependable” life he would have with his Iowa grandparents.²⁴ The court found that Mark was not well-adjusted when he came to his grandparents and had greatly improved in their care.²⁵ It also credited the opinion of an expert witness who said that Mark considered his grandfather to be his father figure and that his placement should not be disrupted.²⁶ Although the court gave lip service to the presumption in favor of a parent,²⁷ it found the presumption could be overcome if returning to the father was “likely to have a seriously disrupting and disturbing effect upon the child’s development.”²⁸

Mnookin had no trouble determining that this ruling was wrong.²⁹ He noted that both the father and the grandparents had a “substantial psychological relationship to the child.”³⁰ Therefore, under his proposal, the father should have prevailed.³¹

The only other third party–parent dispute Mnookin used as illustration was *In re B.G.*,³² a case that turned on application of a new California statute defining when courts could grant custody to third parties.³³ The statute had been enacted expressly “to avoid a *Painter v. Bannister* situation in California,”³⁴ and allowed a third-party custody award only when parental custody was found “detrimental to the child.”³⁵ The statute specifically did not require that the parent be unfit, because its focus was not on the parent but on the issue of detriment to the child.³⁶

In *In re B.G.*, a mother from Czechoslovakia sought return of her two children from their California foster parents.³⁷ The children came to California with their father, a political refugee who left Czechoslovakia with the children

22. *Id.*

23. *Id.*

24. *See, e.g., id.* at 154, 156 (labeling the child’s potential life with his father as “unstable, unconventional, arty, Bohemian, and probably intellectually stimulating”).

25. *Id.* at 156.

26. *Id.* at 157.

27. *See id.* at 156 (noting the court’s sympathy for Harold’s situation).

28. *Id.*

29. *See* Mnookin, *supra* note 1, at 283 (showing what should have happened in *Painter*).

30. *Id.*

31. *Id.*

32. 523 P.2d 244 (Cal. 1974) (en banc).

33. Mnookin, *supra* note 1, at 247.

34. *In re B.G.*, 523 P.2d at 257 (internal citations omitted) (quoting legislative history).

35. *Id.* (citing legislative history).

36. *Id.*

37. *Id.* at 246.

without their mother's consent.³⁸ The father eventually moved into his mother and stepfather's home in California, and a few months later he died.³⁹ After that, the children, ages five and six, went to live with the Smiths, neighbors who had cared for the children while their father was at work.⁴⁰ The Smiths became licensed as foster parents, and the children lived with the Smiths for more than two years before their mother's petition to regain custody was heard in court.⁴¹ The trial court found the mother to be a fit parent but found it in the children's best interests to remain with their foster parents and so awarded them custody.⁴²

The California Supreme Court reversed and remanded the case, noting that the trial judge had not made the statutorily mandated finding that an award of custody to the mother would be "detrimental to the child," and, further, that an award to the foster parents was "required to serve the best interests of the child."⁴³ The supreme court did conclude that the foster parents were "de facto parents," a term it defined using the Goldstein, Freud, and Solnit definition of a psychological parent.⁴⁴ Mnookin considered this a case in which the foster parents should have prevailed because the mother, who had not seen the children in three and a half years, was a "psychological stranger" to them.⁴⁵

There are numerous factual distinctions between these two cases and the lesbian-couple disputes that form the subject of this article. In both cases the third parties claimed a deficiency in the parent-child relationship as a basis for awarding them custody. The Bannisters claimed to be better able to raise Mark;⁴⁶ the Smiths argued they had replaced the children's mother.⁴⁷ Mnookin's opinion about the correct outcome for the two cases depended upon whether the third party had supplanted the biological parent as the child's psychological parent. That question elided the definitional inquiry into the meaning of the terms "third party" and "parent."

B. Lesbian Couples with Children Split Up

When Mnookin was writing, there were certainly court cases involving lesbian mothers. The cases, however, all concerned the placement of children born in heterosexual marriages in which the mother had come out as lesbian in

38. *Id.*

39. *Id.* at 247.

40. *Id.* at 247 & 247 n.3.

41. *Id.* at 247-48. The mother had made prior efforts to secure the return of the children and had not received notice of all the earlier court hearings involving the children's placement with the Smiths. *Id.* at 248.

42. *Id.* at 248-49.

43. *Id.* at 257-58.

44. *Id.* at 253 n.18, 254 (citing GOLDSTEIN, FREUD & SOLNIT, *supra* note 6, at 98).

45. Mnookin, *supra* note 1, at 283.

46. See *Painter v. Bannister*, 140 N.W.2d 152, 154 (Iowa 1966) (highlighting the ability of the Bannister's to provide a "stable" and "dependable" life, as opposed to the "Bohemian" existence of the natural father).

47. *In re B.G.*, 523 P.2d at 254 (noting the Smith's status as de facto parents).

conjunction with the end of her marriage or at a later date.⁴⁸ In some instances, third-party relatives sought custody on the basis of the mother's lesbianism.⁴⁹ In all of those cases, the lesbian mother was the child's psychological parent and the third-party relatives were not.⁵⁰ Mnookin's template would have strongly favored the mothers, and it would have been a welcome corrective to courts that were often quite willing to disregard the parent-child relationship when the parent was a lesbian.⁵¹

Mnookin could not have foreseen the type of custody dispute that would arise between a biological mother and a nonbiological mother who had raised a child together since infancy; the first known contested case involving such facts occurred in 1984.⁵² The earliest cases need not be examined individually, because two prominent early cases illustrate the factual circumstances common to all such cases.⁵³

In *Nancy S. v. Michele G.*, Michele and Nancy had been together for more than ten years.⁵⁴ In 1980, Nancy gave birth to a child, K., who was conceived through donor insemination and planned by the couple together. Michele was listed on the birth certificate as the father.⁵⁵ Four years later, Nancy gave birth to a son, S. Michele was again listed as the father on the birth certificate.⁵⁶ Both children were given Michele's family name.⁵⁷ Both children referred to both women as "mom."⁵⁸

When S. was an infant the couple separated and agreed that K. would live with Michele and S. would live with Nancy.⁵⁹ They arranged visitation so that the children were together four days a week in one parent's home. Three years later, Nancy wanted to change the schedule so that each parent would have both children fifty percent of the time. Michele disagreed.

48. See generally Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 (1976) (discussing a number of these cases).

49. See *Chaffin v. Frye*, 119 Cal. Rptr. 22, 23 (Ct. App. 1975); *Bennett v. Clemens*, 196 S.E.2d 842, 843 (Ga. 1973); *Spence v. Durham*, 198 S.E.2d 537, 541 (N.C. 1973); *Commonwealth ex rel. Ashfield v. Cortes*, 234 A.2d 47, 48 (Pa. Super. Ct. 1967). See generally Hunter & Polikoff, *supra* note 48, at 705-11.

50. *Chaffin*, 119 Cal. Rptr. at 23; *Bennett*, 196 S.E.2d at 843; *Spence*, 198 S.E.2d at 542; *Commonwealth ex rel. Ashfield*, 234 A.2d at 48. See generally Hunter & Polikoff, *supra* note 48, at 705-711.

51. Mnookin, *supra* note 1, at 282-83.

52. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 533-34 (1990) (recognizing a California case, *Loftin v. Flournoy*, No. 569630-7 (Cal. Super. Ct. Jan. 2, 1985), as the first of this kind).

53. *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 214 (Ct. App. 1991); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991) (*per curiam*).

54. *Nancy S.*, 279 Cal. Rptr. at 214.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

At that point, Nancy filed a petition alleging that she was the sole parent of both children and requesting sole legal and physical custody.⁶⁰ Michele responded by alleging that she, too, was a parent of the children. The trial court ruled for Nancy, and the appeals court affirmed based on the fact that Michele was not the children's "natural" or adoptive mother, citing the state's version of the UPA.⁶¹

Michele agreed that she was not the children's natural mother, but she alleged that the UPA was not the exclusive method of determining parentage.⁶² She further alleged that she had the status of de facto parent.⁶³ She specifically asserted that she was the children's psychological parent and that therefore she should be able to seek custody and visitation on the same terms as any legally recognized parent.⁶⁴

Michele also cited *In re B.G.*,⁶⁵ one of the two cases Mnookin had used to demonstrate his principle about psychological parentage.⁶⁶ That case relied on the concept of de facto parent, but the court in *Nancy S.* noted that even if Michele proved she was a de facto parent, she could not obtain custody without showing that custody in Nancy would be detrimental to the children.⁶⁷ This was a fact Michele did not allege and could not have proven. The court also rejected *in loco parentis*, equitable estoppel, and a definition of functional parenthood as bases for awarding custody to Michele.⁶⁸ In the end, the court deemed the situation facing K. and S. "tragic," but it rejected every argument Michele proffered, preferring to leave any solution in the hands of the legislature.⁶⁹

Simultaneously, on the other side of the country, the case of *In re Alison D. v. Virginia M.*⁷⁰ was developing the same way. Alison and Virginia had been living together for more than three years when Virginia gave birth to a child. The couple had planned for the child together, and it was conceived through donor insemination.⁷¹ Alison's last name became the child's middle name.⁷² The couple split up when the child was almost two and a half years old, but for almost three more years Alison had regular visitation with the child, until Virginia terminated contact when the child was six.⁷³ Alison petitioned for visitation.⁷⁴

60. *Id.*

61. *Id.* at 214–15, 219.

62. *Id.* at 215.

63. *Id.* at 216.

64. *Id.* at 215–16.

65. *Id.* at 216.

66. See Mnookin, *supra* note 1, at 283.

67. *Nancy S.*, 279 Cal. Rptr. at 215–16.

68. See *id.* at 217–19 (precluding a parental determination under each of these theories).

69. *Id.* at 219.

70. 572 N.E.2d 27 (N.Y. 1991) (per curiam).

71. *Id.* at 28.

72. *Id.*

73. *Id.* at 28–29.

74. *Id.* at 29.

New York had not adopted the UPA.⁷⁵ Its statute permitted “parents” to initiate claims for custody and visitation.⁷⁶ With “parent” undefined in the statute, Alison argued that as a de facto parent or a parent by estoppel she should have standing to pursue her claim.⁷⁷ In a per curiam opinion, the New York Court of Appeals rejected her arguments, citing *Nancy S. v. Michele G.* in support of their ruling.⁷⁸

In both cases, advocates for Michele and Alison argued the theory of psychological parentage that had animated Mnookin in his article. In this context, however, the child did have another psychological parent who was also what Mnookin would have called a “natural parent.”⁷⁹ It appears that in such circumstances, Mnookin would have favored granting custody to the “natural parent.”⁸⁰

C. The Visitation-Rights Breakthrough and Its Later Impact on Custody Disputes

The breakthrough case for nonbiological mothers in these families occurred in Wisconsin in 1995.⁸¹ The facts of *In re custody of H.S.H.-K.* were familiar enough. Sandra Holtzman and Elsbeth Knott met in 1983, and in 1984 they “solemnized their commitment to each other.”⁸² They decided to have a child together through insemination with an anonymous donor, and in 1988 Knott gave birth to a child.⁸³ Holtzman was present and took three weeks off from work. The couple named the child together, and both women were named as the child’s parents at a church ceremony.⁸⁴ Holtzman’s parents were recognized as the child’s grandparents.⁸⁵ The couple raised the child as two parents.⁸⁶ In 1993, Knott moved out with the child, and the next year she terminated all

75. See N.Y. DOM. REL. LAW § 70 (McKinney 2010).

76. *Id.*; see also *Alison D.*, 572 N.E.2d at 29.

77. *Alison D.*, 572 N.E.2d at 29.

78. *Id.* (citing *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Ct. App. 1991)).

79. See, e.g., Mnookin, *supra* note 1, at 226 (noting the use of the best-interests standard to reject certain claims by a natural parent).

80. See *id.* at 282–83 (“[N]atural parents should be preferred over others.”). Alison was seeking only visitation rights and Michele would have preferred visitation rights to complete exclusion from her children’s lives. *Nancy S.*, 279 Cal. Rptr. at 214; *Alison D.*, 572 N.E.2d at 28. Mnookin was silent on visitation rights for a psychological parent. See generally Mnookin, *supra* note 1. In fact, he did not discuss visitation rights at all in the article. Perhaps the most controversial recommendation made by Goldstein, Freud, and Solnit, and one never adopted into law, was that a child be accorded one omnipotent parent who would even have the power to deny the other parent visitation rights with the child. GOLDSTEIN, FREUD & SOLNIT, *supra* note 6, at 38. Given the importance of Goldstein, Freud, and Solnit’s theories to Mnookin’s article, it would have been hard for him to discuss visitation without addressing that recommendation.

81. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

82. *Id.* at 421.

83. *Id.*

84. *Id.* at 421–22.

85. *Id.* at 422.

86. *Id.*

contact between the child and Holtzman. Holtzman petitioned for custody and visitation.

The court developed a four-part test for evaluating a claim by a person in Holtzman's situation that she was entitled to a continued relationship with a child.⁸⁷ In addition, it permitted a person meeting this test to bring a court action only when two triggering circumstances existed. The four-prong test was

(1) that the biological 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 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.⁸⁸

The triggering circumstances that would allow the individual to bring a court action were "that this parent has interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interference."⁸⁹

Advocates for lesbian and gay families greeted *H.S.H.-K.* with acclaim and relief, but the case was not a clear victory. By meeting all the established criteria, a woman would be able to maintain a relationship with the child she had planned for and raised, but only through visitation.⁹⁰ She was still a third party.⁹¹ She was simply in a class of third parties entitled to visitation rights.⁹² Still, after the total defeat in *Nancy S.* and *Alison D.*, visitation rights looked good indeed.⁹³

The *H.S.H.-K.* criteria had a significant impact on subsequent cases. In 2000, in *V.C. v. M.J.B.*, the New Jersey Supreme Court adopted the test and went farther than Wisconsin in establishing the consequences of meeting all the criteria.⁹⁴ A person meeting such criteria would stand in parity to a legal parent for determinations of custody and visitation.⁹⁵ Five years later, in *In re*

87. *Id.* at 421.

88. *Id.*

89. *Id.*

90. *See id.* at 424 (affirming summary judgment on the custody issue).

91. *Id.* at 430 (discussing visitation of a third party).

92. *See id.* at 436 (remanding the determination of Holtzman's parent-like relationship with the child).

93. *See Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 215 (Ct. App. 1991); *In re Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (per curiam).

94. 748 A.2d 539, 551–52 (N.J. 2000) (per curiam).

95. *Id.* at 554. The court did say that if the evidence stood "in equipoise," custody should be awarded to the legal parent because "in the search for self-knowledge, the child's interest in his or her roots will emerge." *Id.* This peculiar reasoning has not made its way into subsequent decisions, perhaps because the evidence of a child's best interests is rarely in equipoise. (The reasoning is peculiar because if the legal parent is an adoptive rather than a biological parent there is no difference between the parents when it comes to the child's "roots." In addition, even when the legal parent is a biological parent, that parent will receive visitation rights that should be sufficient to satisfy the child's speculative desire to connect to his or her biological roots.)

Parentage of L.B.,⁹⁶ Washington adopted the *H.S.H.-K.* test as a common-law method of determining parentage.⁹⁷ The court deemed such a person a de facto parent and also found that such a person stood “in legal parity” to someone declared a parent under the state’s version of the UPA.⁹⁸

III

THE IMPACT OF CONSTITUTIONAL LAW

A. The Supreme Court Speaks: *Troxel v. Granville*

A reader of Mnookin’s 1975 article cannot help but be struck by its omission of constitutional doctrine.⁹⁹ In the analyses of disputes between parents and third parties, Mnookin did prefer parents, but without declaring such a rule constitutionally mandated.¹⁰⁰ The biological mothers in *H.S.H.-K.*, *V.C.*, and *L.B.* all petitioned for certiorari to the U.S. Supreme Court, requesting reversal of state courts’ rulings on the ground that those rulings violated a parent’s right to raise her child.¹⁰¹ The Court denied the petitions.¹⁰² While *V.C.*’s petition was pending, however, the Supreme Court did address the rights of parents when challenged by third parties in *Troxel v. Granville*,¹⁰³ a case that has shaped all subsequent disputes.

By now, the facts of *Troxel* are well-known. After Brad Troxel, father of two daughters, took his own life, Brad’s parents objected to the minimal visitation the children’s mother, Tommie Granville, wished to accord them.¹⁰⁴ They sued for more frequent contact with the children under a Washington statute that allowed “any person” at “any time” to petition for visitation rights and obtain such rights under a best-interests standard.¹⁰⁵ The trial court awarded the Troxels one weekend a month with the children and one week in the summer.¹⁰⁶ The court reasoned that the contact would allow the children to benefit from “cousins and music.”¹⁰⁷ The judge also expounded from the bench that he had

96. 122 P.3d 161 (Wash. 2005) (en banc).

97. *See id.* at 165, 176.

98. *Id.* at 177. The court ruled that the state’s version of the UPA was not the only way to determine parentage. *Id.* In other words, the Washington Supreme Court adopted the very reasoning argued by Michele G. in California: that the UPA was not an exclusive method of proving parentage. *See supra* text accompanying notes 62–64.

99. *See generally* Mnookin, *supra* note 1.

100. *See id.* at 282–83.

101. *M.J.B. v. V.C.*, 748 A.2d 539 (N.J. 2000), *cert. denied*, 531 U.S. 926 (2000); *In re Parentage of L.B.*, 122 P.3d 161, *cert denied sub nom.* *Britain v. Carvin*, 547 U.S. 1143 (2006); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995), *cert. denied sub nom.* *Knott v. Holtzman*, 516 U.S. 975 (1995).

102. *See* sources cited *supra* note 101.

103. 530 U.S. 57 (2000) (plurality opinion).

104. *Id.* at 60–61.

105. *Id.* at 61 (citing WASH. REV. CODE § 26.10.160 (2005)).

106. *Id.* The court also awarded four hours of visitation on each grandparent’s birthday. *Id.*

107. *Id.* at 62.

greatly enjoyed spending summers as a child with his own grandparents.¹⁰⁸

The Washington Supreme Court, on appeal, found the statute unconstitutional on its face.¹⁰⁹ The court held that a third party could not receive visitation rights over the objection of a fit parent absent evidence that the children would be harmed by a denial of visitation.¹¹⁰ The Troxels petitioned the U.S. Supreme Court, which agreed to hear the case.¹¹¹

No majority opinion emerged in the case. A plurality agreed that the statute was unconstitutional as applied to Tommie Granville, but declined to affirm the Washington Supreme Court's two-part holding, on grounds that either the statute was unconstitutional on its face or that harm was necessary before a third party could be granted visitation rights over a fit parent's objection.¹¹² Instead, the Court criticized the "breathtakingly broad" nature of the statute because it allowed anyone at any time to file for visitation and allowed a trial judge to order such visitation upon satisfaction of a mere best-interests standard, a standard that allowed a judge to inappropriately substitute his or her opinion for that of the child's parent.¹¹³ The Washington statute, the plurality ruled, allowed the decision of a fit parent to be overruled without giving "special weight" to that decision and without the presence of "special factors" that might justify such an intrusion into a parent's due-process liberty interest in raising his or her child.¹¹⁴

The six-person majority for affirming the judgment of the Washington Supreme Court included Justice Thomas, who believed the statute failed strict scrutiny,¹¹⁵ and Justice Souter, who thought the best approach was affirming the state court's holding of facial unconstitutionality and leaving it to the Washington legislature to craft a better statute.¹¹⁶

Justices Stevens and Kennedy wrote separate dissents. Justice Stevens acknowledged that parents have a fundamental liberty interest in "caring for and guiding their children,"¹¹⁷ and noted that "the presumption that parental decisions generally serve the best interests of their children is sound."¹¹⁸ He nonetheless focused on separate rights that a child might have, noting that even

108. *See id.* at 72 ("I look back on some personal experiences . . . We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out.") (alteration in original) (internal quotation marks omitted).

109. *Id.* at 63.

110. *Id.*

111. *In re Custody of Smith*, 969 P.2d 21 (Wash. 1998), *cert. granted*, 527 U.S. 1069 (1999).

112. *Troxel*, 530 U.S. at 73.

113. *Id.* at 67.

114. *Id.* at 68–69.

115. *Id.* at 80 (Thomas, J., concurring).

116. *See id.* at 76, 79 (Souter, J., concurring) ("I do not question the power of a State's highest court to construe its domestic statute and to apply a demanding standard when ruling on its facial constitutionality.")

117. *Id.* at 87 (Stevens, J., dissenting).

118. *Id.* at 86.

a fit parent might treat a child as a “mere possession,”¹¹⁹ and invoking Court precedent to reject the suggestion that parental rights might turn children into “so much chattel.”¹²⁰

Justice Stevens rejected the Washington Supreme Court’s holding that the statute, because it failed to require harm to the child before visitation could be granted over a parent’s objection, was unconstitutional on its face.¹²¹ He reasoned that

[u]nder the Washington statute, there are plainly any number of cases—indeed, one suspects, the most common to arise—in which the “person” among “any” seeking visitation is a once-custodial caregiver, an intimate relation, or even a genetic parent. Even the Court would seem to agree that in many circumstances, it would be constitutionally permissible for a court to award some visitation of a child to a parent or previous caregiver in cases of parental separation or divorce, cases of disputed custody, cases involving temporary foster care or guardianship, and so forth.¹²²

He also articulated a “child’s liberty interests in preserving established familial or family-like bonds,”¹²³ and he referred to “[t]he almost infinite variety of family relationships that pervade our ever-changing society” as a reason not to treat a parent’s liberty interest as something that could be “exercised arbitrarily.”¹²⁴

Justice Kennedy also invoked changing family structures to describe why the Washington Supreme Court was wrong, and why a best-interests standard would sometimes be constitutionally permissible. “Cases are sure to arise,” he wrote, “perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto.”¹²⁵ He continued,

In my view, it would be more appropriate to conclude that the constitutionality of the application of the best interests standard depends on more specific factors. In short, a fit parent’s right vis-a-vis a complete stranger is one thing; her right vis-a-vis another parent or a de facto parent may be another.¹²⁶

The reasoning of both the Stevens and the Kennedy dissents supports the constitutionality of maintaining contact between a child and her nonbiological lesbian mother in the scenarios presented in this article.

In the years since *Troxel*, state courts have split sharply over the case’s application to third-party custody and visitation disputes. In spite of the plurality’s explicit rejection of the harm standard, some state courts have held third-party visitation statutes unconstitutional in the absence of requiring harm

119. *Id.*

120. *Id.* at 89.

121. *Id.* at 85.

122. *Id.*

123. *Id.* at 88.

124. *Id.*

125. *Id.* at 98 (Kennedy, J., dissenting).

126. *Id.* at 100.

from a denial of visitation.¹²⁷ And although *Troxel* held only that the Washington statute was unconstitutional as applied to the facts of that case, several states subsequently held their third-party visitation statutes to be invalid on their face.¹²⁸ Numerous other state courts, however, have upheld the statutes in their respective states.¹²⁹ Of course, even when a statute is constitutional, its application in each case must satisfy a state appellate court's interpretation of *Troxel's* mandate.

B. Lesbian-Couple Custody Disputes After *Troxel*

Troxel increased the stakes in determining who qualified as a child's parent. Alison D. and Michele G. argued that they were parents and lost.¹³⁰ Holtzman argued she was a parent and lost that determination, but she was found eligible for visitation rights if she met the detailed criteria set out by the Wisconsin Supreme Court.¹³¹ The Wisconsin standard was far from the "any person at any time" standard struck down in *Troxel*: It incorporated the very "special factors" that the *Troxel* plurality found unmet on the facts of that case.¹³² When the New Jersey Supreme Court used the Wisconsin standard as the basis for finding that a nonbiological lesbian mother stood in legal parity with the child's biological mother, it was unsurprising that, shortly after ruling in *Troxel*, the U.S. Supreme Court denied the biological mother's petition for certiorari.¹³³

More than a decade after *Troxel*, most courts have found that the case does not bar claims by nonbiological lesbian mothers. In an early case, *Rubano v. DiCenzo*,¹³⁴ the Rhode Island Supreme Court found that *Troxel* did not give a parent an absolute right to arbitrarily terminate a de facto parental relationship that the parent had agreed to and fostered for many years.¹³⁵ In *Bethany v. Jones*,¹³⁶ the Arkansas Supreme Court distinguished claimants standing in loco parentis to a child, like the lesbian nonbiological mother in that case, from the

127. See, e.g., *Doe v. Doe*, 172 P.3d 1067, 1080 (Haw. 2007) ("[W]e believe that a 'harm to the child' standard is constitutionally required . . .").

128. See Sonya C. Garza, *The Troxel Aftermath: A Proposed Solution for State Courts and Legislatures*, 69 LA. L. REV 927, 940–41 n.101 (2009) (listing numerous cases holding their corresponding states' visitation statutes facially unconstitutional).

129. See Garza, *supra* note 128, at 940 n.100.

130. See *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 216, 219 (Ct. App. 1991); *In re Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991) (per curiam) ("[A]lthough petitioner apparently nurtured a close and loving relationship with the child, she is not a parent . . .").

131. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995) (remanding the determination of whether Holtzman's qualified for visitation).

132. *Troxel v. Granville*, 530 U.S. 57, 67 (2000) (plurality opinion) (finding no special factors to justify the state's interference with the mother's fundamental right to raise her children); *H.S.H.-K.*, 533 N.W.2d at 421.

133. See *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000), *cert. denied*, 531 U.S. 926 (2000) (denying certiorari four months after the *Troxel* decision).

134. 759 A.2d 959 (R.I. 2000).

135. *Id.* at 976. For an in-depth discussion of this case see Nancy D. Polikoff, *The Impact of Troxel v. Granville on Lesbian and Gay Parents*, 32 RUTGERS L.J. 825, 835–38 (2001).

136. 378 S.W.3d 731 (Ark. 2011).

grandparents in *Troxel*.¹³⁷ In *Kulstad v. Maniaci*,¹³⁸ the Montana Supreme Court upheld despite a *Troxel*-based challenge a statute that allowed a woman who was not the legally adoptive parent of the child she and her partner had raised together to obtain custody or visitation by showing (1) that she had established a child–parent relationship and (2) that the child’s parent had acted contrary to her child–parent relationship.¹³⁹ The supreme courts of both Kentucky and North Carolina have held that a parent can waive her superior right to custody by acting inconsistently with her paramount parental status and creating another parent figure for the child.¹⁴⁰ It is worth observing that such holdings have come from courts in several states not generally supportive of lesbian, gay, bisexual, and transgender (LGBT) families.

A minority of states, however, have denied a functional psychological parent without legal status the ability to request custody or visitation rights. Although more often such courts have ruled on state-statutory or common-law grounds, some have also cited *Troxel* as a barrier.¹⁴¹ The Maryland Court of Appeals denied a de facto parent the ability to remain in the life of her child, citing extensively from *Troxel*, but leaving the door open for the possibility that the legislature might constitutionally amend its custody laws to allow such a person to petition for custody or visitation.¹⁴² Most significantly, in 2010, in *Debra H. v. Janice R.*,¹⁴³ the New York Court of Appeals upheld its reasoning in *Alison D.*, citing the legislature’s failure to amend its custody statutes in the many years since that ruling.¹⁴⁴ The court also cited *Troxel* in support of Janice’s fundamental right to raise her child.¹⁴⁵

The New York court reasoned that this constitutional right would be threatened by uncertainty if a person could pursue custody or visitation rights based on a test for functional parenthood.¹⁴⁶ Debra had argued that the Wisconsin factors constituted an appropriate method for determining functional or de facto parentage.¹⁴⁷ The court responded that

the flexible type of rule championed by [Debra] H. threatens to trap single biological and adoptive parents and their children in a limbo of doubt. These parents could not possibly know for sure when another adult’s level of involvement in family life might reach the tipping point and jeopardize their right to bring up their children without the

137. *Id.* at 736.

138. 220 P.3d 595 (Mont. 2009).

139. *Id.* at 607, 609–10.

140. *Mullins v. Picklesimer*, 317 S.W.3d 569, 579, 581 (Ky. 2010); *Boseman v. Jarrell*, 704 S.E.2d 494, 505, 550–51 (N.C. 2010).

141. For a listing, see Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL’Y & L. 623, 624 n.4 (2012).

142. *Janice M. v. Margaret K.*, 948 A.2d 73, 74, 89 (Md. 2008).

143. 930 N.E.2d 184 (N.Y. 2010).

144. *Id.* at 194 (pointing out that the legislature did not amend N.Y. DOM. REL. LAW § 70 (McKinney 2010) after *Alison D.* was handed down).

145. *Id.* at 193 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

146. *Id.*

147. *Id.* at 192 n.3.

unwanted participation of a third party.¹⁴⁸

The court also wished to avoid the “contentious, costly, and lengthy” hearings that such a rule might produce.¹⁴⁹ Instead the court ruled that a nonbiological mother is a parent, and she is thereby entitled to custody or visitation only if she has adopted the child or if she and the biological mother were married or in a civil union at the time of the child’s birth.¹⁵⁰

IV

THE EVOLVING DEFINITIONS OF PARENT

A. Assisted Reproduction and Changing Family Structures

Social changes Mnookin could not have anticipated have led to numerous disputes about child custody that have challenged courts to identify the relationship between a child and an individual claiming to be, or not to be, that child’s parent.¹⁵¹ In this part I look at those changes. I then examine the case law and statutory responses to those changes and describe the evolution of the meaning of “natural parent,” the term Mnookin and the drafters of the 1973 UPA found unnecessary to define.

Most contemporary methods of assisted conception, including surrogacy and in vitro fertilization, did not exist in 1975,¹⁵² and they increased the number of parents not genetically related to their children. Although the 1973 UPA established the parentage of a husband who consented to his wife’s insemination with donor semen under the supervision of a physician¹⁵³—

148. *Id.* at 193.

149. *Id.* at 192. For a scathing critique of the New York court’s assumption that the test established in *H.S.H.-K.* produced uncertainty when contrasted with New York’s approach, see Ball, *supra* note 141. Although Justice Kennedy’s dissent in *Troxel* also noted the disruption and cost that contested litigation could bring, he nonetheless suggested that a parent might not be able to veto a claim by a person who had cared for a child for a substantial period and thereby developed a relationship with the child. *Troxel v. Granville*, 530 U.S. 57, 98, 101 (2000) (Kennedy, J., dissenting); see *supra* text accompanying notes 125–126.

150. *Debra H.*, 930 N.E.2d at 191–92, 195, 197. In a subsequent case, a trial court identified another basis on which a nonbiological mother might prevail, ruling that a biological mother who had previously obtained a child-support order against her former partner in an action in which she identified her ex-partner as a parent of their child could not later invoke *Debra H.* to block the former partner’s petition for custody. *Estrelitta A. v. Jennifer D.*, 963 N.Y.S.2d 843, 847 (Fam. Ct. 2013). For a critique of making the parents’ formal relationship status, such as marriage or civil union, the dividing line between children with two parents and children with one parent, see Nancy D. Polikoff, *The New Illegitimacy: Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 721 (2012).

151. See generally Mnookin, *supra* note 1 (omitting a discussion of a scenario where an individual poses as a child’s natural parent).

152. See Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J.L. SCI. & TECH. 505, 509 (2005) (dating the birth of the “world’s first [in vitro fertilization] baby,” Louise Brown, as July 25, 1978). The first known legal agreement between a surrogate mother and intended parents took place in 1976. *History of Surrogacy*, INFO. ON SURROGACY, <http://www.information-on-surrogacy.com/history-of-surrogacy.html> (last visited Apr. 16, 2013).

153. UNIF. PARENTAGE ACT § 5(a) (1973), 9B U.L.A. 301 (1987).

something that had been unsettled before that time¹⁵⁴—it was silent on permutations of that practice: insemination with semen from a known donor, self-insemination with semen purchased directly from a sperm bank, and insemination of an unmarried single woman or an unmarried woman with a male or female partner. The 1973 UPA separated genetics from parentage by declaring that a donor of semen under the delineated situation was not a parent,¹⁵⁵ but it did not address the parental status of a donor under any other scenario. The possibility of a husband and wife commissioning the birth of a child, conceived through sperm and egg from unknown donors, fertilized through in vitro fertilization, with the resulting embryo implanted in the uterus of yet another woman—and the legal disputes such an arrangement could produce¹⁵⁶—would have seemed like science fiction in 1975.

Simultaneously, sexual practices and the composition of American families shifted. The percentage of married women engaging in extramarital sex increased,¹⁵⁷ thereby increasing the chance a mother's husband was not the genetic father of her child. Also, the number of cohabiting heterosexual couples skyrocketed.¹⁵⁸ Without the marital presumption tying a man to a child born to his unmarried female partner, his status was uncertain, especially when she conceived through assisted conception or through sexual intercourse with a different man. Science also entered the picture by perfecting the ability to determine whether a given man or woman was the genetic parent of any particular child.¹⁵⁹

Mnookin also could not have imagined the phenomenon of same-sex couples raising children, conceived through numerous methods: donor insemination of one woman in the female couple, in vitro fertilization of one woman's egg with donor semen followed by implementing into the uterus of the

154. See *id.* § 5 cmt. (“It was thought useful . . . to single out and cover in this Act at least one fact situation that occurs frequently.”). For an example of a pre-UPA case finding a child born of artificial insemination illegitimate, see *Gursky v. Gursky*, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

155. UNIF. PARENTAGE ACT § 5(b) (1973), 9B U.L.A. 301 (1987).

156. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 280, 286 (Ct. App. 1998) (discussing the implications of such a fact pattern).

157. See Tara Parker-Pope, *Love, Sex and the Changing Landscape of Infidelity*, N.Y. TIMES, Oct. 28, 2008, at D1 (discussing the apparent increase in female infidelity and extramarital affairs). In 2011, an Indiana University Kinsey Institute for Research in Sex, Gender, and Reproduction study found an increase to nineteen percent of women participating in extramarital affairs. *Insight Into Infidelity: Study Examines Influence of Sexual Personality Characteristics*, IND. U., <http://newsinfo.iu.edu/news-archive/18977.html> (last modified June 24, 2011). That number put women almost on par with the twenty-three percent of men who were found to engage in extramarital affairs. *Id.*

158. In 1970, there were 523,000 unmarried heterosexual couples living together. U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS P20-365, MARITAL STATUS AND LIVING ARRANGEMENTS 5 tbl.F (1980). By 1977 there were 957,000. *Id.* In 2012, the number of unmarried heterosexual couples living together had jumped to 7,845,000. U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012, at 20 tbl.7 (2012), available at <http://www.census.gov/prod/2013pubs/p20-570.pdf>.

159. See *History of Paternity Testing*, GENESYS, <http://www.paternity-answers.com/history-paternity-test.html#1980> (last visited Nov. 5, 2013) (recognizing the increase in accuracy of paternity testing in the 1970s to 80% and in the 1980s to 99.99%).

other woman for gestation and birth, sexual intercourse of one female partner with a man—with or without the knowledge and consent of the other female partner, or gay male couples using traditional and gestational surrogates. Nor could he have contemplated that within two generations 46.44% of the U.S. adult population¹⁶⁰ and 49.58% of adult gay people¹⁶¹ would live in a state offering formal recognition of gay relationships, including the parentage presumption flowing from marriage.

B. Statutes and Court Rulings Adapt to Assisted Reproductive Technologies and Changed Family Demographics

Both courts and legislatures have responded to the social changes described above. As discussed in part II, some state courts, through common-law adjudication, identified *de facto* parents and gave such persons an equal claim to custody of a child.¹⁶² Other states enacted statutes producing the same result,¹⁶³ and the ALI recommended one such approach in the definition of

160. To deduce this number I divided the adult population of states that have couple recognition (111,561,028) by the total adult population of the United States (240,185,952). *See LGBT Populations, MOVEMENT ADVANCEMENT PROJECT*, http://www.lgbtmap.org/equality-maps/lgbt_populations (select “State Data Table” tab) (last updated May 15, 2014). Couple-recognition states are those with full marriage equality or those with broad relationship-recognition laws. *See States, FREEDOM TO MARRY*, <http://www.freedomtomarry.org/states/> (last updated June 17, 2014).

161. To deduce this number I divided the total number of LGBT adults in the couple-recognition states (4,196,185) by the total number of LGBT adults in all states (8,463,640). *See sources cited supra* note 160.

162. *See supra* text accompanying notes 94–98.

163. For example, after the Delaware Supreme Court ruled against a legally unrecognized mother because she could not meet the definitions in the state’s UPA, *see Smith v. Gordon*, 968 A.2d 1, 16 (Del. 2009), the Delaware legislature amended its UPA. *See 77 Del. Laws 282* (2010). A statutory path to parentage as a *de facto* parent is available in Delaware to a person who can show that he or she

(1) Has had the support and consent of the child’s parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the *de facto* parent;

(2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and

(3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.

DEL. CODE ANN. tit. 13, § 8-201 (2009). In the District of Columbia, a *de facto* parent is a person

(A) Who:

(i) Lived with the child in the same household at the time of the child’s birth or adoption by the child’s parent;

(ii) Has taken on full and permanent responsibilities as the child’s parent; and

(iii) Has held himself or herself out as the child’s parent with the agreement of the child’s parent or, if there are 2 parents, both parents; or

(B) Who:

(i) Has lived with the child in the same household for at least 10 of the 12 months immediately preceding the filing of the complaint or motion for custody;

(ii) Has formed a strong emotional bond with the child with the encouragement and intent of the child’s parent that a parent-child relationship form between the child and the third party;

(iii) Has taken on full and permanent responsibilities as the child’s parent; and

parent by estoppel given in *Principles of the Law of Family Dissolution*.¹⁶⁴ Model acts, including the revised 2002 UPA¹⁶⁵ and the *American Bar Association Model Act Governing Assisted Reproductive Technologies*,¹⁶⁶ addressed parentage of children conceived through assisted reproductive technologies. Four jurisdictions, the District of Columbia, Nevada, New Mexico, and Washington, passed gender-neutral and marital status-neutral statutes creating parentage in an individual who consents to a woman's insemination with donor semen with the intent to be a parent of the child so conceived.¹⁶⁷ These statutes are the logical outgrowth of the 1973 UPA. What applied only to married couples in 1973 needed to expand to the unmarried different-sex couples and same-sex couples that were not on the radar screen at that time.

At the same time that common-law theories and newly enacted statutes were altering the legal-parentage landscape, a remarkable evolution occurred in the definition of the term neither Mnookin nor the 1973 UPA had thought to define: natural parent.¹⁶⁸ It happened first in *In re Nicholas H.*,¹⁶⁹ a California case involving a heterosexual couple.

The original UPA, as adopted in California, created a presumption of parentage for a man who received a child into his home and openly held the child out as his natural child.¹⁷⁰ It was a presumption, like all the UPA paternity presumptions, that could be rebutted.¹⁷¹ Although the term natural child was undefined, the common assumption that it meant biological child was consistent with references going back to Blackstone.¹⁷²

(iv) Has held himself or herself out as the child's parent with the agreement of the child's parent, or if there are 2 parents, both parents.

D.C. CODE 16-831.01(1) (2013). A person who proves the above by clear and convincing evidence is a parent for purposes of determining custody, visitation, and child support. D.C. CODE 16-831.03(b) (2013).

164. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b) (2002).

165. UNIF. PARENTAGE ACT (amended 2002), 9B U.L.A. 4 (Supp. 2010).

166. MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 601–607 (2008).

167. D.C. CODE § 16-909(e) (2013); N.M. STAT. ANN. § 40-11A-703 (2012); WASH. REV. CODE § 26.26.710 (2005). In addition, an Oregon appeals court ruled, on a constitutional equal-protection theory, that the state's statute creating parentage for a husband consenting to his wife's insemination must apply equally to a woman who consents to her partner's insemination with the intent to be a parent of the resulting child. *Shineovich v. Kemp*, 214 P.3d 29, 39–40 (Or. Ct. App. 2009).

168. See generally UNIF. PARENTAGE ACT (1973) § 1, 9B U.L.A. 296 (1987) (defining “parent and child relationship” but not “natural parent,” a term used in the definition of “parent and child relationship”); Mnookin, *supra* note 1 (also omitting a definition of “natural parent”).

169. 46 P.3d 932, 935 (Cal. 2002); see *infra* text accompanying notes 173–190.

170. See CAL. FAM. CODE § 7611(d) (West 2013) (“A man is presumed to be the natural father of a child if . . . [h]e receives the child into his home and openly holds out the child as his natural child.”).

171. See *id.* § 7612 (exploring the ways to rebut the paternal presumption).

172. Historically and at common law, blood relation was the primary means of establishing the legal status of a natural parent. *Belsito v. Clark*, 644 N.E.2d 760, 762 (Ohio C.P. Summit County 1994) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *434. The first adoption statute in the United States was enacted in 1851 in Massachusetts. 1851 Mass. Acts 815. It stripped the “natural parent or parents” of all

In *In re Nicholas H.*, Thomas and Kimberly met when Kimberly was already pregnant.¹⁷³ Both decided that they wanted Thomas to be the child's father, and, when Nicholas was born in 1995, Thomas's name was placed on the birth certificate as the father's.¹⁷⁴ The couple never married, but they lived together with Nicholas intermittently, and Thomas consistently functioned as a father to Nicholas.¹⁷⁵ The relationship between Thomas and Kimberly ended in September of 1999, resulting in Thomas moving out, and Kimberly being unable to properly supervise and protect Nicholas.¹⁷⁶ In early 2000, Thomas filed a petition to establish a parental relationship with Nicholas and to receive temporary custody, alleging, among other things, that Kimberly was in jail for assaulting him.¹⁷⁷

Kimberly subsequently went to the police to report that Thomas had taken Nicholas without her permission, and she showed them a copy of a 1998 restraining order against Thomas.¹⁷⁸ Eventually, the police took Nicholas into custody, and dependency proceedings were instituted.¹⁷⁹ The juvenile court found that Nicholas could not remain with Kimberly as a result of her instability, drug use, homelessness, lack of employment, and violence.¹⁸⁰ Although acknowledging that Thomas had problems, the court found that he was caring and responsible toward Nicholas and that Nicholas loved him and wanted to live with him.¹⁸¹ The court also found that the presumption that Thomas was Nicholas's father was not rebutted.¹⁸²

The court of appeals reversed, concluding that Thomas's admission that he was not Nicholas's biological father rebutted the parentage presumption.¹⁸³ That court reviewed numerous decisions that assumed the term "natural" meant "biological."¹⁸⁴

The California Supreme Court, in a unanimous decision, reversed the appeals court.¹⁸⁵ It cited statutory language that a parentage presumption "*may* be rebutted *in an appropriate action.*"¹⁸⁶ This, the court said, made rebutting the

legal rights to the child. *Id.* § 7, at 816. Once again, the term "natural parent" was not defined, but the statute did confer "all other legal consequences and incidents of the natural relation of parents and children, the same to all intents and purposes as if such child had been born in lawful wedlock of such parents or parent by adoption" to the adoptive parents. *Id.* § 6.

173. *In re Nicholas H.*, 46 P.3d at 935.

174. *Id.*

175. *Id.*

176. *Id.* at 934.

177. *Id.* at 935.

178. *Id.* at 934.

179. *Id.*

180. *Id.* at 935.

181. *Id.* at 936.

182. *Id.* at 934.

183. *Id.* at 936.

184. *Id.* (noting that the court of appeals reviewed family-law decisions that "assumed that natural means biological").

185. *Id.* at 941.

186. *Id.* at 936.

presumption based on lack of biological connection discretionary, not mandatory.¹⁸⁷ The court also quoted the portion of the statute asserting that if there were two or more conflicting presumptions, “the presumption which on the facts is founded on weightier considerations of policy and logic controls.”¹⁸⁸ If the legislature intended the presumption of paternity to be inapplicable to a man who is not a biological father, the court reasoned, it would not have provided for such weighing.¹⁸⁹ Neither would the legislature have intended that an appropriate action for rebutting the presumption would be one that would leave the child with no father.¹⁹⁰ Thus “natural father” and “natural child” did not, in fact, require a biological connection.

California had also enacted another provision of the 1973 UPA, stating that the rules for determining paternity apply to determinations of maternity “[i]nsofar as practicable.”¹⁹¹ Almost immediately after *Nicholas H.*, a California appeals court had occasion to consider the meaning of that provision. In *In re Karen C.*,¹⁹² a birth mother who bore a child in a hospital purposefully misidentified herself as another woman—Letitia C.—so that Letitia’s name would appear on the child’s birth certificate and Letitia would therefore be able to raise the child (the Karen in the case).¹⁹³ Letitia raised Karen as her own child and told Karen she was adopted.¹⁹⁴

When Karen was ten years old she came into the dependency system as a result of allegations of abuse by Letitia.¹⁹⁵ Karen and Letitia joined in a motion for a determination that Letitia was Karen’s mother, a finding that would ensure that Letitia receive services that could lead to her reunification with Karen.¹⁹⁶ They argued that the fact that Letitia had received Karen into her home and held Karen out as her natural child, coupled with the provision applying father–child provisions to maternity actions, made Letitia a presumptive parent.¹⁹⁷ The trial court denied the motion, but the appeals court reversed and remanded in light of the California Supreme Court’s ruling in *Nicholas H.*¹⁹⁸ Because *Nicholas H.* held that “a man does not lose his status as a presumed father by admitting he is not the biological father,” the court held that Letitia also did not lose that status.¹⁹⁹ On remand, the trial court would need to determine whether, in the circumstances of the case, it was appropriate

187. *Id.*

188. *Id.* at 937 (quoting CAL. FAM. CODE § 7612 (West 2013)) (internal quotation marks omitted).

189. *Id.*

190. *Id.* at 940.

191. See CAL. FAM. CODE § 7650(a) (West 2013).

192. 124 Cal. Rptr. 2d 677 (Ct. App. 2002).

193. *Id.* at 678.

194. *Id.*

195. *Id.*

196. See *id.*

197. *Id.*

198. *Id.* at 677 (citing *In re Nicholas H.*, 46 P.3d 932, 938 (Cal. 2002)).

199. *Id.* at 681 (citing *In re Nicholas H.*, 46 P.3d at 938).

to rebut the presumption.²⁰⁰

Just a year later, a California appeals court squarely applied the father–child holding-out presumption to a determination of maternity. *In re Salvador M.*²⁰¹ considered the relationship between a child and his adult half sister, Monica. When Salvador was born, Monica had a baby of her own, and she breast fed Salvador when their (common) mother was unable.²⁰² When Salvador was three, his mother died, and Monica continued to raise him as her son, along with yet another child she gave birth to.²⁰³

When all three children came into California’s dependency system, Monica filed a petition to determine her maternity of Salvador.²⁰⁴ The social worker reported that Salvador believed Monica was his mother.²⁰⁵ Monica presented the following facts:

Our mother died at the scene of an explosive car crash when Salvador was three. I have continued to care for Salvador as my child. He thinks of me as his mother and I think of him as my son. Our family knows of the actual relationship between Salvador and me and I have been truthful in official matters such as school registration, but to the rest of the world, Salvador is my son.²⁰⁶

She argued that the holding-out provision of the California UPA, coupled with the provision for establishing maternity on the same bases as paternity, made her Salvador’s presumptive parent.²⁰⁷ The court agreed, citing *In re Karen C.*²⁰⁸ Then she cited *Nicholas H.* for the proposition that the fact that she was not Salvador’s genetic parent did not automatically rebut that presumption.²⁰⁹ The court again agreed, and it further declared that it would not be appropriate to rebut the presumption because “to sever this deeply rooted mother/child bond would contravene the state’s interest in maintaining the family relationship.”²¹⁰

With these three cases as precedent, in 2005 the California Supreme Court, in *Elisa B. v. Superior Court*,²¹¹ extended the presumption of parentage to a lesbian who had received two children born to her female partner into her home and held the children out as her natural children.²¹² *Nicholas H.* had held that biology did not automatically rebut a presumption based on the holding-

200. *Id.* at 682.

201. 4 Cal. Rptr. 3d 705 (Ct. App. 2003).

202. *Id.* at 706.

203. *Id.*

204. *Id.* at 707.

205. *Id.*

206. *Id.* at 707.

207. *Id.* at 707–08 (citing CAL. FAM. CODE § 7611 (West 2013); *In re Karen C.*, 124 Cal. Rptr. 2d 677, 677 (Ct. App. 2002)).

208. *Id.* at 708 (citing *In re Karen C.*, 124 Cal. Rptr. at 677).

209. *Id.*

210. *Id.* at 709.

211. 117 P.3d 660 (Cal. 2005).

212. *Id.* at 662.

out provision of the UPA.²¹³ *Karen C.* had held the presumption applicable to determinations of the mother–child relationship.²¹⁴ The court found the facts of this case did not present an “appropriate action” upon which to rebut Elisa’s presumed parentage because she “actively consented to, and participated in, the artificial insemination of her partner with the understanding that the resulting child or children would be raised by Emily and her as coparents, and they did act as coparents for a substantial period of time.”²¹⁵ In addition, rebutting the presumption would leave the children with only one parent “as a source of both emotional and financial support.”²¹⁶

More than fifteen years after the California courts had begun considering (eventually rejecting) Michele G.’s claim that she was the parent of the two children she raised with her former partner, it turned out that the theory supporting her parentage had been, the entire time, hiding in plain sight.²¹⁷ The relevant statutes had not changed. But in 1991 it had been “undisputed,” even by the most creative and determined advocates for LGBT families, that Michele G. was not the “natural mother” of her children.²¹⁸

Courts in Colorado,²¹⁹ New Mexico,²²⁰ and, most recently, Kansas,²²¹ have found in the context of disputes by former lesbian partners that under each state’s UPA both women are mothers of the children they planned for and raised together. The Kansas ruling is especially significant. Kansas offers no relationship recognition for same-sex couples; it does not prohibit employment and other discrimination on the basis of sexual orientation; it has not granted second-parent adoptions.²²² In other words, it is not a state with a favorable

213. *Id.* at 667.

214. *Id.*

215. *Id.* at 670, 669.

216. *Id.* at 669.

217. *See Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 215 (Ct. App. 1991). Courts have used this analysis to confer parentage on both mothers in numerous California cases. *See In re Domestic Partnership of C.P. and D.F.*, No. E052672, 2013 WL 2099156 (Cal. Ct. App. May 16, 2013); *Beth C. v. Marcia B.*, No. B233825, 2013 WL 143543 (Cal. Ct. App. Jan. 14, 2013); *L.M. v. M.G.*, 145 Cal. Rptr. 3d 97 (Ct. App. 2012); *E.C. v. J.V.*, 136 Cal. Rptr. 3d 339 (Ct. App. 2012); *Charisma R. v. Christian S.*, 44 Cal. Rptr. 3d 332 (Ct. App. 2006).

218. *See Nancy S.*, 279 Cal. Rptr. at 215. It was a Boulder, Colorado attorney, Barbara Lavender, who in the late 1990s first successfully used these provisions of the UPA to obtain parentage for both women in a lesbian couple bearing a child through donor insemination. The clients she represented obtained parentage judgments from a trial judge which resulted in a new birth certificate listing both women as parents. For an article describing Lavender’s success, see Pam Regsenberg, *Gay Groups Cheer Ruling*, BOULDER DAILY CAMERA, Sept. 8, 2000, available at http://www.barbaralavender.com/articles_gaygroupscheer.htm.

219. The Colorado ruling came at the trial level. *See Colleen Curry*, *Colorado Lesbian Wendy Alfredson Mom Granted Paternity in Custody Battle*, ABC NEWS (May 4, 2012), <http://abcnews.go.com/US/colorado-lesbian-mom-wendy-alfredsen-granted-paternity-custody/story?id=16280117>. Precedent for that ruling was an appellate case finding parentage for the nonbiological mother married to a child’s biological father. *See In re S.N.V.*, 284 P.3d 147, 148 (Colo. App. 2011).

220. *Chatterjee v. King*, 280 P.3d 283, 285 (N.M. 2012).

221. *Frazier v. Goudschaal*, 295 P.3d 542, 558 (Kan. 2013).

222. *See State Profile – Kansas*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/profile_state/KS (last updated May 15, 2014).

climate for LGBT families. Nonetheless, it has parentage statutes that allowed a unanimous three-judge panel of its Supreme Court to find the standards for determining paternity applicable to determinations of maternity.²²³ As a result, children raised by same-sex couples in Kansas are not going to lose one of their parents if those parents split up.

A handful of other states have legal authorities that support identical reasoning.²²⁴ The necessary components for success under this theory are (1) a statutory presumption of paternity based on holding a child out as one's own, (2) case law that lack of genetic connection to the child does not automatically rebut that presumption, and (3) statutory direction to apply the rules for determining paternity to determinations of maternity. Those three components mean that a woman who meets the holding-out requirement is a presumed mother and her lack of genetic connection to the child does not rebut that.

Alabama is an example of a state with these necessary components. Like Kansas, Alabama provides no recognition of same-sex couples and no protection against discrimination on the basis of sexual orientation.²²⁵ In addition, it has a series of court rulings denying custody to a lesbian mother when challenged by a former husband.²²⁶ Nonetheless, it should find that both women who plan for and raise a child together are parents of that child.

Under Alabama law, a man is presumed a child's father if he "receives the child into his home and openly holds out the child as his natural child or otherwise openly holds out the child as his natural child and establishes a significant parental relationship with the child by providing emotional and financial support."²²⁷ The Code also states that "[p]rovisions of this chapter relating to determinations of paternity apply to determinations of maternity."²²⁸ And just last year the Alabama Supreme Court provided strong support for the holding-out presumption and ruled that a man's lack of genetic connection to a child is not a basis for rebutting that presumption.²²⁹

223. *Frazier*, 295 P.3d at 553.

224. Some states have enacted the 2002 UPA rather than the 1973 UPA. The 2002 UPA, without changing substance, rephrases the language on applying paternity presumptions to determinations of maternity as follows: "Provisions of this [Act] relating to determination of paternity apply to determinations of maternity." UNIF. PARENTAGE ACT § 106 (amended 2002), 9B U.L.A. 19–20 (Supp. 2010) (alterations in original). The holding-out provision has been substantively changed to apply only where the parent and child have lived together for child's first two years. Specifically, a man is presumed to be a child's father if "for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own." *Id.* § 204(a)(5).

225. *See State Profile – Alabama*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/profile_state/AL (last updated May 15, 2014).

226. *See, e.g., Ex parte J.B.F.*, 730 So. 2d 1190, 1191 (Ala. 1998); *L.A.M. v. B.M.*, 906 So. 2d 942, 947 (Ala. Civ. App. 2004).

227. ALA. CODE § 26-17-204(a)(5) (2009).

228. *Id.* § 26-17-106.

229. *Ex parte T.J.*, 89 So. 3d 774, 748 (Ala. 2012).

In *Ex parte T.J.*, a maternal grandmother filed a petition for custody of three grandchildren.²³⁰ The following month, T.J. filed a petition for custody of one of the children, alleging that the child had lived with him since her birth and that he was her father.²³¹ Subsequently, the mother filed both a custody petition and a motion for genetic testing.²³² She submitted evidence that T.J. was incarcerated when she became pregnant and that she was five-months pregnant when he was released from prison.²³³

The trial court found that T.J. had established a parent-child relationship with the child, that the child called T.J. “daddy,” that the mother allowed that relationship to grow, and that T.J. had provided for the child emotionally and financially.²³⁴ Nonetheless, the judge granted the mother’s motion for genetic testing, and T.J. sought a writ of mandamus to vacate the order.²³⁵

In reasoning similar to that in *Nicholas H.*, the Alabama Supreme Court sided with T.J. T.J. was entitled to submit evidence that he was the child’s presumed father under the holding-out provision.²³⁶ The statute provided that when there were two or more presumptions, the one “founded on the weightier considerations of public policy and logic . . . shall control.”²³⁷ The legislature would not have adopted such a provision, the court ruled, if only a biological father could be a presumed father.²³⁸ The court continued that “biological ties are not as important as parent-child relationships that give young children emotional stability.”²³⁹ It cited a 1989 case denying an alleged biological father the right to challenge the presumption of paternity accorded the husband of the child’s mother.²⁴⁰ Although that case involved the marital presumption, *Ex parte T.J.* explicitly extended the same principle to a man presumed to be the father under the holding-out provision.²⁴¹

The court further cited with approval the reasoning of the dissenting judge in the lower appellate court. That judge determined that the paternity presumption applied to

a man who openly treats a child in the same manner he would treat his biological child, who openly treats a child in accordance with the way that a father would treat

230. *Id.* at 745.

231. *Id.*

232. *Id.*

233. *Id.* at 746.

234. *Id.* at 750–51 (Murdock, J., dissenting).

235. *Id.* at 746 (majority opinion).

236. *Id.* at 747.

237. *Id.* (quoting ALA. CODE § 26-17-204(b) (2009)).

238. *Id.*

239. *Id.*

240. *Id.* (citing *Ex Parte Presse*, 554 So. 2d 406 (Ala. 1989)). The constitutionality of a California statute that denied a biological father the ability to file a parentage action concerning a child born to a woman who was married to another man at the time of the child’s conception and birth, when the woman and her husband wished to raise the child as their own, was upheld by the U.S. Supreme Court in a plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

241. *Ex parte T.J.*, 89 So. 3d at 748.

his biological child, or who openly treats the child as if the child had assumed the role of his biological child ‘and establishes a significant parental relationship with the child by providing emotional and financial support for the child.’²⁴²

“Read in this way,” that judge continued, “[the statute] serves to promote a significant parental relationship over a mere biological connection.”²⁴³ Because of the provision applying rules for paternity determinations to determinations of maternity, biology is therefore not a necessary component for determining that a woman is a child’s mother.

C. *Troxel* Does Not Bar the Finding that a Child Has Two Mothers

In every instance where a court has found a legal basis to rule that both women are the parents of the children, the court has simultaneously rebuffed an argument that *Troxel* insulates the biological or adoptive mother from a challenge by her former partner.²⁴⁴ Rather, every court has ruled that *Troxel* extends constitutional protection to both women, because both are the child’s parents. For example, in *Smith v. Guest*,²⁴⁵ the Delaware Supreme Court upheld the constitutionality of a statute defining parentage to include a de facto parent meeting specific criteria:

The issue here is not whether the Family Court has infringed Smith’s fundamental parental right to control who has access to ANS by awarding Guest co-equal parental status. Rather, the issue is whether Guest is a legal “parent” of ANS who would also have parental rights to ANS—rights that are co-equal to Smith’s. This is not a case, like *Troxel*, where a third party having no claim to a parent-child relationship (e.g., the child’s grandparents) seeks visitation rights Because Guest, as a legal parent, would have a co-equal “fundamental parental interest” in raising ANS, allowing Guest to pursue that interest through a legally-recognized channel cannot unconstitutionally infringe Smith’s due-process rights.²⁴⁶

V

CONCLUSION: FINAL THOUGHTS ON THE APPLICABILITY OF MNOOKIN’S PRINCIPLES

Mnookin valued family autonomy and continuity and stability in relationships.²⁴⁷ Judges who have used family-autonomy arguments to rule against nonbiological and nonadoptive parents have misidentified the family before them. The family is the one created by the biological or adoptive parent and her partner. Valuing family autonomy means taking that family as it is and making appropriate decisions in the interests of the children. It violates the principle of family autonomy to reconfigure a family with two parents raising

242. *Id.* at 748–49.

243. *Id.*

244. *See, e.g.,* Charisma R. v. Kristina S., 96 Cal. Rptr. 3d 26, 49–52 (Ct. App. 2009) (finding an analogy to *Troxel* “inapposite” because of the different interests asserted by the plaintiff in the immediate case); *In re L.B.*, 122 P.3d 161, 177 (Wash. 2005) (en banc) (rejecting the suggestion that granting de facto–parent status violated the biological mother’s constitutional rights).

245. 16 A.3d 920, 924 (Del. 2011).

246. *Id.* at 931.

247. Mnookin, *supra* note 1, at 264–65.

children into a single-parent family with a live-in third party. As discussed in this article, numerous courts have recognized this.

The importance of stability and continuity is precisely the principle that demands that the law recognize the reality of the child's perspective on his or her family. In 1975, the Goldstein, Freud, and Solnit articulation of psychological parentage was relatively new.²⁴⁸ Today it is a widely understood concept. Mnookin supported the best-interests standard "between two natural parents, neither of whom would endanger a child's physical health, where both are psychological parents."²⁴⁹ He continued that "I do not think that existing psychological theories provide the basis to choose generally between two adults where the child has some relationship and psychological attachment to each."²⁵⁰

The families I describe in this article contain one or more children who regard the couple raising them as their parents, and specifically their psychological parents. Several courts have identified both adults as parents, through common-law adjudication, constitutional analysis, or recognition that the term "natural parent" in a statute is not limited to biological parents, something with which I hope Mnookin would agree today.²⁵¹ Other states have implemented statutory reforms that achieve the same result. The postseparation custody arrangements for such children should be decided using best-interests principles.²⁵²

248. See GOLDSTEIN, FREUD & SOLNIT, *supra* note 6, at 17–20.

249. Mnookin, *supra* note 1, at 283.

250. *Id.* at 286–87.

251. See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 249, 264–66.

252. Because I argue here that the children in the factual scenarios in this article have two parents, I leave for another day other critical questions arising from modern family structures, including whether a child may have more than two parents and when someone who is not a parent, in other words a true third party, should have the ability to demand court-ordered contact with a child. For an early germinal work on the latter subject, see 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). That article could properly be the subject of its own thirty-years-later symposium.