
Articles

Inconceivable: Status, Contract, And The Search For A Legal Basis For Gay & Lesbian Parenthood

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ABSTRACT

With the fight for same-sex marriage in the rearview mirror, legal advocates have turned their attention to legally securing parenting rights for gay and lesbian people against this new landscape. Adults in same-sex couples often share parenting responsibilities for children who are biologically related only to one of them. What, short of adoption, should establish the legal tie between a child and a non-biologically related adult? A consensus answer to that question has emerged among scholars and advocates of gay and lesbian family law: intent to parent and socially functioning as a parent. Using as an entry point the recent decision of the

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U.S. Supreme Court in *Pavan v. Smith*, which extended the “parentage presumption” to married lesbian co-parents, this Article examines the consensus answer closely, characterizing the proposed shift as a move from status (biological parenthood) to contract (parenthood by intent or implied in fact). It invites the reader to consider such a move with particular mindfulness of the drawbacks that may accrue in the most vulnerable sectors of the gay and lesbian community.

Table of Contents

I.	INTRODUCTION	2
II.	<i>PAVAN V. SMITH</i>	4
III.	MATERNAL PRIMACY	10
IV.	DE FACTO (AND OTHERWISE EQUITABLE) PARENTHOOD	18
V.	FROM STATUS TO CONTRACT	25
VI.	CONTRACTUAL BASES FOR GAY AND LESBIAN PARENTHOOD: A FEW CAUTIONARY THOUGHTS.....	27
	A. Remembering Critiques of Contract	27
	B. Norm Production and the Diverse Gay and Lesbian Community	33
VII.	CONCLUSION	38

I. INTRODUCTION

The law reform strategy of the major LGBT advocacy organizations seems premised on an identity of interests between gay men and lesbians. Much of the time, the interests of these two constituencies are in fact aligned, as is the case with anti-discrimination protections. A recent decision of the U.S. Supreme Court, however, exposes the limits of this alignment.

At the end of the 2016 term, the Supreme Court issued *Pavan v. Smith*¹ to little fanfare. The case reversed a decision of the Arkansas Supreme Court² regarding the importance of *Obergefell v. Hodges*³ to an Arkansas statute governing birth certificates. *Pavan* secured a long-sought

1. *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

2. *Smith v. Pavan*, 505 S.W.3d. 169 (Ark. 2016), *rev'd per curiam*, 137 S. Ct. 2075 (2017).

3. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

parenting right for married lesbian couples, ensuring that when one partner gives birth using anonymous sperm donation, the other is a presumed co-parent.⁴

With the campaign for same-sex marriage in the United States now in the rearview mirror, advocates have directed their attention to securing parenting rights for LGBT people against this new landscape. One glaring obstacle to legally securing same-sex parenting arises from the impossibility of a same-sex couple—comprising two cisgender persons⁵—producing a biological child by combining their gametes. To overcome this problem, legal scholars interested in advancing the status of gay and lesbian non-biological parents have urged a turn to contractual concepts for determining parenthood—namely, the intent to parent and functioning socially as a parent. So far, scholarship extolling the promise of an actual shift—one that is already well underway in the doctrine—has largely focused on the benefits to gay and lesbian people seeking to raise children. None have observed that the shift itself, one that has occurred in many fields of law, effectively proposes a move from status to contract, nor have any grappled deeply with the possible costs of such a move for subparts of the internally diverse gay and lesbian population.

Pavan represents an important victory for married lesbians, but it also raises a question too infrequently posed in the context of LGBT progress: who is left behind, and to what extent have their interests been undermined? *Pavan* does absolutely nothing for married gay men, and may even contribute to their degraded status as parents. The interests of gay and lesbian people may in fact turn out to be more fragmented—and even conflictual—than this. In addition to different biological capacities, gay and lesbian people are differentiated by race, class, region, marital status, and lifestyle preferences.

Using *Pavan* as a launching pad, this Article argues that the solution that legal scholars are advancing to overcome the obstacle of biological relation poses differential risks to differently situated members of the gay and lesbian community. Intent and function as bases for parenthood, while likely to advance the interests of the most privileged sectors of the gay and lesbian community, may come to disserve that community's most marginalized members on axes of race, class, region, and sexual lifestyle.

4. See *infra* note 42 for discussion of a more limited reading of *Pavan*.

5. The problem discussed in this Article relies on the assumption that the men and women under consideration are cismen and ciswomen. A transwoman might well be in a position to biologically father a child and a transman might well be impregnated.

After discussing the details and pertinence of this new Supreme Court precedent, this Article traces some of *Pavan*'s antecedents to gain a deeper understanding of its meaning for the law's differential treatment of men and women in the context of parenting. The Article then proceeds to situate *Pavan* in the broader discussion among scholars of gay and lesbian family law, focusing especially on the consensus around parental intent and function. Finally, this Article interrogates the risks that grounding parenthood in these contractual concepts poses to vulnerable sectors of the gay and lesbian community.

II. *PAVAN V. SMITH*

Arkansas law provides that when a child is born, the name of the biological mother appears on the birth certificate.⁶ Further, when a married woman gives birth, the name of the mother's husband appears as the father on the birth certificate,⁷ though there are two exceptions to this general rule. First, if "paternity has been determined otherwise by a court of competent jurisdiction," the husband's name will not appear.⁸ Second, both spouses and a putative father could enter notarized affidavits contradicting the presumption of the husband's paternity.⁹

6. ARK. CODE ANN. § 20-18-401(e) (2010) states that:

For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate. The information about the father shall be entered as provided in subsection (f) of this section. For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate. The information about the father shall be entered as provided in subsection (f) of this section.

Id.

7. "If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child, unless . . ." ARK. CODE ANN. § 20-18-401(f)(1) (2010).

8. ARK. CODE ANN. § 20-18-401(f)(1)(A) (2010).

9. ARK. CODE ANN. § 20-18-401(f)(1)(B) (2010) states that:

The mother executes an affidavit attesting that the husband is not the father and that the putative father is the father, and the putative father executes an affidavit attesting that he is the father and the husband executes an affidavit attesting that he is not the father. Affidavits may be joint or individual or a combination thereof, and each signature shall be individually notarized. In

This is a typical state law regime,¹⁰ and is traceable back at least to the eighteenth-century British jurist Lord Mansfield, who observed “a common-law rule of evidence that disqualifies a husband and wife from testifying as to nonaccess—lack of sexual relations—between them where the legitimacy of a child born or conceived during their marriage is at issue.”¹¹ While Lord Mansfield’s Rule is a rule of evidence, it generally “operates in conjunction with a legal presumption that a child born or conceived during the marriage is legitimate.”¹² Indeed, once the exceptions are considered, it might be most accurate to say that the evidentiary rule has effectively evolved into a widespread presumption in American states.

An additional provision of Arkansas law—Section 9-10-201(a)—renders the presumption of the husband’s paternity conclusive under one circumstance: “Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman’s husband if the husband consents in writing to the artificial insemination.”¹³ This provision admits no exceptions. Its use of the term “natural” makes it clear that the consenting husband of a woman who conceives through artificial insemination of donor sperm need not adopt the resulting child to secure his paternal rights. His paternity is conclusively presumed. This rule, too, predominates among the states.¹⁴

Family law scholars and practitioners have been wondering, at least since *Goodridge v. Dep’t of Public Health*,¹⁵ the case that led

such event, the putative father shall be shown as the father on the certificate and the parents may give the child any surname they choose.

Id.

10. See Douglas NeJaime, *The Nature of Parenthood*, 126 *YALE L.J.* 2260, 2339 (2017) [hereinafter NeJaime, *Nature*].

11. Note, *Prohibiting Nonaccess Testimony by Spouses: Does Lord Mansfield’s Rule Protect Illegitimates?*, 75 *MICH. L. REV.* 1457, 1457 (1977).

12. *Id.* at 1458.

13. ARK. CODE ANN. § 9-10-201(a) (2010). Note that the word “anonymous” does not appear in the section. As Joanna L. Grossman explained, “[m]ost state sperm donor laws do not differentiate between known and unknown sperm donors on their face.” Joanna L. Grossman, *Constitutional Parentage*, 32 *CONST. COMMENT.* 307, 322 (2017). Courts are left to determine whether the statute applies identically in the two circumstances. Wary of attributing too much meaning to the Supreme Court’s ruling in *Pavan* and cognizant that if a known donor were to intervene in such a case and assert his paternity it would raise additional issues, I assume that the decision is limited to instances of anonymous sperm donation unless and until the holding is explicitly extended, or generally applied, to cases involving known donors.

14. NeJaime, *Nature*, *supra* note 10 at 2291, 2367–69.

15. *Goodridge v. Dep’t of Public Health*, 798 N.E.2d. 941 (Mass. 2003).

Massachusetts to become the first U.S. jurisdiction to confer marital status on same-sex couples, whether the parentage presumption would apply in the case of two women. If one of the women in a married lesbian couple gives birth using anonymously donated sperm, is the other woman's parentage presumed? The parentage presumption preserves no less a fiction in the case of a heterosexual married couple that relied on third-party sperm to conceive, but could the fiction bear the weight of a female spouse? Does the conspicuous impossibility of a woman biologically fathering a child render the fiction unsustainable in a lesbian context?

Pavan involved two married lesbian couples.¹⁶ One of the spouses in each couple gave birth to a child conceived using anonymously donated sperm.¹⁷ Both couples sought to have the other spouse named on the birth certificate, but in both cases, the Arkansas Department of Health (ADH) named only the birth mother.¹⁸

The couples launched a challenge in state court, where a sympathetic trial judge ordered ADH to issue amended birth certificates recognizing each birth mother's female spouse as a parent and declaring parts of subsections 20-18-401 (e) and (f) to be unconstitutional in light of *Obergefell*.¹⁹ Nathaniel Smith, the Director of ADH, appealed to the state's highest court, but agreed in the meantime to provide the families with amended birth certificates.²⁰

The Arkansas Supreme Court reversed the trial court's constitutional holding.²¹ It reasoned that while *Obergefell* addressed the marital relation, *Pavan* concerned the parent-child relation.²² Citing a dictionary definition of the term "father" as "a man who has begotten a child," the court observed that while the governing statute instructed that a husband would be named as the father on a birth certificate, it also provided that a court could determine that another man was the father and that affidavits from

16. A third couple presented a related, but slightly different, legal issue not taken up by the U.S. Supreme Court and therefore, not discussed in this Article. This third couple was not yet married at the time of the child's birth, so the question was instead whether the couple could legitimize the child by marrying subsequent to the birth. *See Smith v. Pavan*, 505 S.W.3d 169, 172–73 (2016). The relevant section of the Arkansas code is 20-18-406(a)(2), which contains the rules for legitimation.

17. *See Smith*, 505 S.W.3d. at 172.

18. *See id.*

19. *See id.* at 173.

20. *See id.* at 173 n.1.

21. *See id.* at 172.

22. *See id.* at 178.

the relevant parties could prevent operation of the presumption.²³ The critical policy consideration animating the statute, therefore, was the biological relationship between parent and child.²⁴

An affidavit submitted by Melinda Allen, the Vital Records Registrar at ADH, bolstered this conclusion. Allen stated that “[i]dentification of biological parents through birth records is critical to ADH’s identification of public health trends, and it can be critical to an individual’s identification of personal health issues and genetic conditions.”²⁵ Allen further attested that even in cases of adoption, where an amended birth certificate reflecting the names of the adoptive parents is issued, the original birth certificate is maintained under seal so that biological parenthood can be discovered for health purposes.²⁶ Because biological relation was central to the statutory scheme, and because “[i]t does not violate equal protection to acknowledge basic biological truths,”²⁷ the Arkansas Supreme Court determined that the statute should be upheld.

The Arkansas Supreme Court did not specifically rule on the constitutionality of Section 9-10-201(a), the section specifying that a “husband” who consents in writing to his wife’s artificial insemination shall be named on the birth certificate. Smith, the Director of ADH, actually conceded in the trial court that use of the term “husband” in that section was probably “constitutionally infirm” after *Obergefell*.²⁸ The complaint did not frame that term as the constitutional defect, however, and the trial court did not address it. Then, because that issue was not technically on appeal, the Arkansas Supreme Court also declined to consider it.²⁹

The couples’ petition for a writ of *certiorari* arrived at the United States Supreme Court in February 2017. At the end of June, the writ was granted and the case decided in one fell swoop: no briefs, no oral argument—a.k.a. *summary reversal*. The main opinion in *Pavan* was *per curiam*, representing the positions of at least four and not more than six

23. *Id.*

24. *See id.*

25. *Id.* at 179.

26. *See id.*

27. *Smith*, 505 S.W.3d. at 181.

28. *Id.* at 181.

29. *See id.* The decision elicited three separate dissents from the seven-member court, including a concurrence-dissent by the state’s Chief Justice, who opened with two verses from Bob Dylan’s *The Times They Are A-Changin’*. “Come senators, congressmen / Please heed the call / Don’t stand in the doorway / Don’t block up the hall . . .” *Id.* at 183 (Brill, C.J., concurring and dissenting).

justices. Justices Gorsuch, Thomas, and Alito were in dissent. In fewer than five full pages, the justices behind the *per curiam* opinion found that—contrary to the contention of the state supreme court—“Arkansas law makes birth certificates about more than just genetics.”³⁰ The opinion pointed specifically to the provision granting a consenting husband a place on the birth certificate if his wife was artificially inseminated with donor sperm, notwithstanding the fact that he “is definitively not the biological father.”³¹ The Court concluded that “Arkansas has . . . chosen to make its birth certificates more than a mere marker of biological relationships . . . [and] [h]aving made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.”³²

It is not clear exactly what, if anything, was struck down here. The Supreme Court reversed the judgment of the Arkansas Supreme Court and “remanded for further proceedings not inconsistent with this opinion,”³³ but did not squarely declare any provision of Arkansas law to be unconstitutional. Since the couples had already obtained amended birth certificates, there was also no instruction from the Court on that point.

Justice Gorsuch, for the three dissenters, fixed his attention first on the majority’s decision to use summary reversal.³⁴ That mechanism is supposed to be reserved for matters in which “the law is settled and stable,” which Justice Gorsuch did not think the issue in this case was.³⁵

His second objection was that, if we zoom out, we can see that the overall statutory scheme is designed to record biological relationships for legitimate public health purposes, such as tracking genetic disorders. Naming the birth mother’s husband on the birth certificate where the biological father is in fact a sperm donor is an *exception*. The plaintiffs’ challenges were framed to disrupt the biologically-based birth certificate regime.³⁶ Why didn’t the plaintiffs just attack the constitutionality of the “husband” language in the exception? Considering the entire statutory scheme, Justice Gorsuch, much like the Arkansas Supreme Court, thought that *Obergefell* did not govern—*Nguyen v. INS*³⁷ did. *Nguyen*, which is discussed in greater detail below, upheld a section of the Immigration and

30. *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017).

31. *Id.*

32. *Id.* at 2079.

33. *Id.*

34. *See id.* at 2079 (Gorsuch, J., dissenting).

35. *Id.*

36. *See id.* at 2080.

37. *Nguyen v. INS*, 533 U.S. 53 (2001).

Nationality Act that provided separate rules for unmarried biological mothers and unmarried biological fathers seeking to convey their American citizenship to a child born abroad.³⁸ The case was premised on the significance of biological differences concerning pregnancy and birth. Given *Nguyen*, Justice Gorsuch thought, after the statute's larger purpose was considered, biology also settled the question in *Pavan*.

Finally, Justice Gorsuch noted that by the time of the decision, Arkansas had already put the names of the birth mothers' spouses on the birth certificates, so there was no longer any remedy to be had.³⁹ What, he asked, was supposed "to happen on remand that hasn't happened already"?⁴⁰ Fair question. Should Arkansas have considered its birth certificate statute invalid? That is not specified in the *per curiam* opinion. Perhaps the majority would have liked to see the statutory term "husband" construed to mean "spouse" and applied without regard to the sex of the birth mother's partner, but the majority did not state this precisely.

The question in *Pavan* regarding the operation of the parentage presumption in the case of a married lesbian couple needed an answer. Apparently thinking the safest course is to use glue *and* nails, LGBT advocacy organizations, such as GLBTQ Legal Advocates & Defenders (GLAD) have been advising married lesbian couples to make use of second parent adoption,⁴¹ a mechanism that predates same-sex marriage and enables same-sex couples to secure parenting rights to a child that is biologically related to only one of them. *Pavan* seems to relieve married lesbians of the need to go through a second parent adoption where the birth mother is impregnated using anonymous sperm donation.⁴² Still, *Pavan*

38. *See id.* at 73.

39. *Pavan*, 137 S. Ct. at 2080 (Gorsuch, J., dissenting).

40. *Id.*

41. *See Second Parent Adoption*, GLAD, <https://www.glad.org/overview/second-parent-adoption/massachusetts/> (last visited Aug. 6, 2017).

42. According to one reading of *Pavan*, the holding is limited to birth certificates and does not apply to "the presumption of parentage itself" because "a birth certificate is merely prima facie evidence of the information stated within." Jessica Feinberg, *Whither the Functional Parent?: Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOKLYN L.R. 55, 77 n.125 (2017). If lower courts abide by this conservative reading, then the paternity presumption has not actually been extended to lesbian spouses and *Pavan* accomplishes very little. *Cf. id.* at 88. The distinction between *parentage* and *prima facie evidence thereof* seems an awfully slim reed, however, upon which to deny lesbian spouses the presumption after *Pavan*. My own reading, which I hope is not too hasty or incautious, is that *Pavan* extends the parentage presumption to female spouses in any jurisdiction that applies it to male spouses (i.e., all 50 states, *see* Courtney G. Joslin, *Nurturing Parenthood Through*

may not have been the best case for the Supreme Court to review because the remedy was provided before the case left Arkansas, and the statutory presumption in the case of donor-insemination-with-spousal-consent was not technically on appeal. If the Supreme Court had not granted *certiorari* in *Pavan*, surely a case with similar facts would have arrived before long.

III. MATERNAL PRIMACY

Read one way, *Pavan* is an advance not only for lesbians *qua* lesbians, but also for sex-based equality. Whether the biological mother's spouse is male or female, that spouse is entitled to the same treatment. The case distinguishes itself from cases such as *Obergefell*, however, in that it effectively, if silently, leaves a legal distinction between married lesbians and married gay men. That is because the unquestioned assumption upon which both the decision and the underlying statutory scheme rely is the primacy of the biological mother. The biological mother's relationship to the child is never open to question; the fact of her having given birth conclusively provides her with parental rights.

Pavan is hardly the first case to accord primacy to biological mothers over biological fathers, though the distinction typically arises in the context of *non-marital* parents. A long line of cases addresses the rights of non-marital fathers. The foundational case of *Lehr v. Robertson*⁴³ involved

the UPA (2017), 127 YALE L.J.F. 589 (2018), <https://www.yalelawjournal.org/author/courtney-g-joslin>). On my reading, an attempt by a state to distinguish between being recorded as the parent and acquiring the status of a parent would undercut the central message of *Pavan*, that after *Obergefell*, the spouse of the birth mother must be treated equally, regardless of whether that spouse is male or female. The Arizona Supreme Court seems to agree. Shortly after *Pavan* came down, the Arizona Supreme Court applied it to a case that raised essentially the same question, albeit in the context of a dissolution. *McLaughlin v. Jones ex rel. County of Pima*, 401 P.3d 492 (2017), concerned a married lesbian couple that planned for a child borne by one of them using donor sperm. *Id.* at 494. The couple executed a co-parenting agreement specifically contemplating the continuation of the relationship between the non-biological parent and child in the event of a break-up. *Id.* When the child was two, however, the couple split up and the biological mother attempted to prevent contact between her child and her ex-partner, arguing that the Arizona presumption applied only to men. *Id.* at 495–96. The Arizona court, specifically rejecting the application of *Nguyen* while citing *Obergefell*, *Pavan*, and *Morales-Santana*, see *infra* notes 71–81 and accompanying text, determined that to save the statute's constitutionality, it must apply the presumption equally to male and female spouses. *McLaughlin*, 401 P.3d at 500–02.

43. *Lehr v. Robertson*, 463 U.S. 248 (1983).

the adoption of a child, Jessica M., by her biological mother's husband, whom the mother married eight months after Jessica's birth.⁴⁴ Jonathan Lehr, the putative biological father, argued that the adoption was invalid because he was never notified that the adoption petition had been filed.⁴⁵ New York, where the parties resided, maintained a "putative father registry."⁴⁶ A man who filed with that registry was entitled to notice before the adoption of the child whom he asserted he fathered, but Lehr never registered.⁴⁷ Lehr could also have, but did not (according to the majority⁴⁸), seek to have his paternity adjudicated, have his name inscribed on Jessica's birth certificate, live openly with his daughter and hold himself out as the father, provide a sworn statement by the mother that he was the father, or marry Jessica's mother.⁴⁹ Additionally, Lehr did not provide Jessica or her mother with any financial support.⁵⁰ Biological, unmarried mothers, the Court conceded, need not do anything under the statute to merit notice of adoption, and also need not do anything special to benefit from due process protections as a parent.⁵¹ Unmarried fathers, however, could be treated differently. The Court noted:

[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' . . . his interest in personal contact with his child acquires substantial protection under the due process clause . . . But the mere existence of a biological link does not merit equivalent constitutional protection.⁵²

The unwed mother's biological relationship is sufficient to warrant due process protection, but the unwed father's is not.⁵³ Additionally, in the

44. *See id.* at 250.

45. *See id.*

46. *Id.* at 250–51.

47. *Id.*

48. The dissent provides a quite different statement of the facts. According to the dissent, Lehr made a genuine effort to support Jessica and her mother emotionally and financially, but the mother evaded contact, refused to accept money, and married another man before Lehr could secure his parentage. *See id.* at 268–70 (White, J., dissenting).

49. *Id.* at 251–52 (majority opinion).

50. *Id.* at 252. Financial support was not a requirement of the state law, but it was a factor that the Court considered. Again, according to the dissent's telling, Lehr offered support but was rebuffed. *See id.* at 269 (White, J., dissenting).

51. *Id.* at 266–67.

52. *Id.* at 261 (citing *Caban v. Mohammed*, 441 U.S. 380, 382 (1979)).

53. *See also Quilloin v. Walcott*, 434 U.S. 246 (1978) (upholding a Georgia adoption law that dispensed with the need for consent of the unmarried, biological father).

absence of a “substantial relationship” between father and child, no equal protection problem arises.⁵⁴

Unmarried maternal primacy also infects immigration law, though recent developments may have muted the hierarchy. In *Nguyen v. INS*,⁵⁵ the Court upheld a requirement of the Immigration and Nationality Act (INA) that governed conveyance of U.S. citizenship by unwed fathers to their children born abroad.⁵⁶ An unwed father had to take an affirmative step in order to convey his citizenship that neither an unwed mother nor a married parent had to take. While his child is a minor, the unwed citizen father had to legitimate his child (i.e., by marrying the child’s mother), acknowledge his paternity in writing and under oath, or have his paternity established by a court.⁵⁷

The defendant, Tuan Anh Nguyen, was the son of Joseph Boulais—an American citizen working for a military contractor in Vietnam—and a Vietnamese woman.⁵⁸ Boulais brought Nguyen back to the United States and raised him, but never took any of the formal steps necessary to convey his citizenship.⁵⁹ When Nguyen reached adulthood, he was convicted of

54. *Lehr*, 463 U.S. at 266–68.

55. *Nguyen v. INS*, 533 U.S. 53 (2001).

56. 8 U.S.C. § 1409(a)(3) (2012 & Supp. 2017).). Note the *or*; he had to take *one* of these three steps.

57. *Nguyen*, 533 U.S. at 53.

58. *Id.* at 57.

59. *Id.* According to Nguyen’s brief:

Joseph Boulais, an American citizen by birth . . . lived in the United States continuously through his early adulthood . . . In 1960, at age 23, Boulais enlisted in the United States Army. He served in Germany, receiving an honorable discharge in January 1963.

Following his discharge from the army, Boulais relocated to Vietnam. In 1969, while he was working for Pacific Architect Engineer, a military contractor, he began a relationship with a Vietnamese citizen, Hung Thi Nguyen. As a result of that relationship, Joseph Boulais’s son, Tuan Anh Nguyen (“Nguyen”), was born in Vietnam on September 11, 1969.

Soon after his son’s birth, Boulais’s relationship with Hung Thi Nguyen soured. Thus, from early infancy, Tuan Anh Nguyen lived with his father, who later married another Vietnamese national.

In 1975, Saigon fell to North Vietnamese troops. Six year-old Nguyen escaped from Vietnam with the family of Boulais’s wife. Within a few months, Nguyen was paroled into the United States as a refugee, and was reunited with Boulais. In the chaos surrounding the fall of Saigon and his family’s separation, Boulais lost contact with Nguyen’s biological mother.

crimes under state law and subject to deportation as a noncitizen.⁶⁰ If Nguyen’s mother had been the U.S. citizen, Nguyen would have acquired her citizenship without the formal steps required of Boulais and would not be deportable. Consequently, Nguyen and Boulais launched an equal protection challenge based on sex.

For five justices, Justice Kennedy reasoned that the fact of biological mothers necessarily being present at the time of birth meant that the sex-based distinction was based on a “real” difference and therefore survived the equal protection challenge.⁶¹ The majority was persuaded that the sex-based distinction substantially furthered two important purposes. First, the additional process ensured that the father was actually the father, unlike “[i]n the case of the mother, [where] the relation is verifiable from the birth itself.”⁶² Kennedy relied in part on the *Lehr* line of cases,⁶³ which rationalized differential treatment of unwed mothers and fathers. Second, the sex-based distinction in the law afforded the child and citizen father an “opportunity . . . to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.”⁶⁴ For the mother and child, Kennedy thought, such an opportunity “inheres in the very event of birth.”⁶⁵ The father, however, may not even know that the child exists due to the “9-month interval between conception and birth.”⁶⁶ The law could, therefore, impose an additional step to facilitate the father-child relation.

She never again communicated with Boulais, and he does not know whether she survived the war.

Since 1975, Boulais, his wife and Nguyen have lived as a family in the United States. Nguyen adjusted his status to that of lawful permanent resident in 1975 pursuant to the Indochinese Refugee Act. He never returned to Vietnam. While Boulais provided financial support to Nguyen throughout his minority, he did not legitimate or otherwise formally establish his paternity prior to Nguyen’s 18th birthday. In 1997, Boulais underwent a DNA test confirming that Nguyen is indeed his son.

Brief of Petitioners 4–5, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071) (internal citations omitted).

60. *Nguyen*, 533 U.S. at 57.

61. *Id.* at 73.

62. *Id.* at 62.

63. *Id.*

64. *Id.* at 64–65.

65. *Id.* at 65.

66. *Id.*

Justice Kennedy was joined by Chief Justice Rehnquist, as well as Justices Stevens, Scalia, and Thomas.⁶⁷ Justice O'Connor came out swinging in dissent, incensed at the sexist stereotyping, and the more liberal justices (Ginsburg, Souter, and Breyer) joined her.⁶⁸ Justice Kennedy swatted away the charge of stereotyping,⁶⁹ insisting that the difference in the law was based on biological reality and that to ignore it “would be to insist on a hollow neutrality.”⁷⁰

This very same Justice Kennedy, however, joined Justice Ginsburg's majority opinion in *Sessions v. Morales-Santana*,⁷¹ which reached a contrary conclusion—it *diminished* the legal distinction between the maternal and paternal biological relationship in the immigration context. *Morales-Santana* involved a challenge to a subsection of the INA that imposed a ten-year residency requirement on unmarried fathers seeking to pass their U.S. citizenship to a child born abroad.⁷² In contrast, unmarried mothers needed only to reside in the United States for a single year to convey their citizenship.⁷³ Luis Ramón Morales-Santana was born in the Dominican Republic to a U.S. citizen father and non-citizen mother; his parents were not married at the time of his birth and his father's residency in the United States was short of the statutory requirement by twenty days.⁷⁴ As a result, Morales-Santana did not derive citizenship from his father and crimes he committed under the laws of New York rendered him deportable.⁷⁵ If the INA had applied a one-year residency requirement to unwed fathers as it did to mothers, Morales-Santana's father would easily have satisfied the requirement and conveyed his U.S. citizenship to his son, thereby preventing the deportation. Morales-Santana challenged this sex-based distinction as a violation of equal protection.

Justice Ginsburg reviewed the history of the relevant sections of the INA and found an underlying assumption that unwed mothers would

67. *Id.* at 56.

68. *Id.* at 74 (O'Connor, J., dissenting).

69. *Id.* at 68 (majority opinion).

70. *Nguyen*, 533 U.S. at 64.

71. *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).

72. *Id.* at 1686. The statutory provision that applies to unwed U.S. citizen fathers is 8 U.S.C. § 1409(a) (2012 & Supp. 2017). That section refers back to 8 U.S.C. § 1401 (2012 & Supp. 2017), where the rules for married citizens are set forth, and applies the same residency requirement. Congress has since shortened the requirement to five years, but the ten-year rule was in effect when Morales-Santana was born.

73. Unwed U.S. citizen mothers are governed by 8 U.S.C. § 1409(c).

74. *Morales-Santana*, 137 S. Ct. at 1686.

75. *Id.* at 1688.

“natural[ly]” be their children’s “sole guardian.”⁷⁶ She described that view as “stunningly anachronistic”⁷⁷ and agreed with Morales-Santana that the statutory distinction between unwed citizen mothers and unwed citizen fathers violated the equal protection component of the Fifth Amendment.⁷⁸

All of the justices, besides Justice Kennedy, who were on the Court for both *Nguyen* and *Morales-Santana*, lined up the same way each time—they either consistently saw an equal protection violation or consistently rejected the challenge. For Kennedy, however, there was evidently some basis for distinguishing between the two cases, though that basis is not readily identifiable. Put in its best light, the sex-based distinction in the law in *Nguyen* hewed closely to the biological facts of pregnancy and childbirth, while in *Morales-Santana*, the distinction relied on the assumption that unwed fathers disappear while unwed mothers wind up as “sole guardians.”⁷⁹ The former is biology, and therefore “real,” while the latter is stereotyping.

Under scrutiny, this distinction disintegrates. Both the paternity-establishment requirement and the length of residency requirement emerge at some attenuation from the facts of pregnancy and childbirth. Even the rationale that the mother-child relation is evident from the birth falls apart once you consider that the assertion of citizenship in each case occurred years after and miles away from the birth.⁸⁰ Both of these challenged

76. *Id.* at 1691–92.

77. *Id.* at 1693.

78. That was the good news for Morales-Santana. The bad news was that the majority determined that it would overstep judicial authority to award him citizenship as a remedy. *Id.* at 1698. Instead, the Court equalized unwed citizen mothers and fathers by invalidating the shortened requirement for mothers, which is framed in the law as an exception to the general rule. *Id.* at 1699. As a result, Morales-Santana was deportable as a noncitizen. *Id.* at 1699–1701. Until Congress takes steps to reduce the length of the residency requirement for all unwed citizen parents, the longer requirement governs.

Justice Ginsburg did not forget that unwed fathers must demonstrate their commitment to their children. *Id.* at 1692 n.12. Morales-Santana’s father, José Morales, supported his son, married the mother, and added his name to the birth certificate. *Id.* Though it reads as *dictum*, Ginsburg observed in a footnote—citing *Lehr*—that Morales “formally accepted parental responsibility for his son.” *Id.*

79. *Id.* at 1691.

80. Note that it was the birth, not the birth certificate, upon which Kennedy relied. If it were the birth certificate, it would erode the sex-based distinction in the law he upheld, requiring formality of both mothers and fathers. To stress this point, consider the French provision for *anonymous childbirth*. A French woman may deliver a child anonymously and request that her confidentiality be preserved. If, after two months, she does not reclaim the child, “the birth has never officially taken place.” BRUNO PERREAU, *THE POLITICS OF ADOPTION: GENDER AND THE MAKING OF FRENCH CITIZENSHIP* 172 n.94 (Deke Dusinberre

statutory provisions rely on some obscure alloy of biology and stereotyping.⁸¹

Taken together, *Nguyen*, *Morales-Santana*, and *Pavan*, represent a rise, fall, and rise again of biological maternal primacy. Though the Court issued its decision in *Morales-Santana* a mere two weeks before it issued *Pavan*, and the two cases apparently represent the views of roughly the same justices (the same three justices dissented, so there was at least a four justice overlap in the majorities), the two decisions nonetheless point in opposite directions. *Morales-Santana* disrupts maternal primacy and *Pavan* entrenches it. Everyone was married in *Pavan*, so the *Lehr* strand that runs through *Nguyen*—according to which unwed fathers can be required to take steps not required of unwed mothers before enjoying parental rights—does not apply in *Pavan* unproblematically. Still, the current of biological maternal primacy courses through the set, excepting only *Morales-Santana*, where Justice Ginsburg—founder of the ACLU Women’s Rights Project and architect of equal protection law based on sex—put her foot down. With Kennedy on Ginsburg’s side, *Morales-Santana* could almost be read to suggest that biological maternal primacy is on the way out—but then came *Pavan*.⁸²

The pending case of a married, gay male couple, Andrew and Elad Dvash-Banks, who are seeking American citizenship for one of their twin sons, could represent a real push in one direction or the other.⁸³ Andrew is a U.S. citizen and Elad is Israeli.⁸⁴ A surrogate was implanted with

trans., MIT Press 2014). In the absence of an official record establishing the maternal relationship, this law essentially puts an unidentified mother on the same footing as an unidentified father, notwithstanding biological differences.

81. By the time of *Morales-Santana*, perhaps Kennedy shed a little of the mother-child romanticism that animated his opinions in such cases as *Gonzalez v. Carhart*, 550 U.S. 124 (2007). In *Gonzalez*, Justice Kennedy, for the conservative side of the Court, upheld the Partial Birth Abortion Ban Act of 2003. *Id.* at 168. The case was rife with lamentations for an imagined pregnant woman’s grief over her abortion decision (“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained . . . Severe depression and loss of esteem can follow.”). *Id.* at 159. Read together with *Nguyen*, it is hard not to discern a certain sentimentality on the part of Justice Kennedy regarding motherhood.

82. See *infra* Part II. *Pavan* relies on and entrenches biological maternal primacy by making the presumption of parentage a function of marriage to the biological mother.

83. See Complaint for Declaratory and Injunctive Relief, *Dvash-Banks v. U.S. Dep’t of State* (C.D. Cal. Jan. 22, 2018) (No. 18-00523), <https://www.immigrationequality.org/wp-content/uploads/2018/01/Dvash-Banks-Complaint-Filed.pdf>.

84. See *id.* at ¶ 1. Andrew has dual citizenship in Canada. See *id.* at ¶ 39.

anonymously donated ova fertilized with Andrew and Elad’s jointly supplied sperm; she gave birth to fraternal twins in Canada.⁸⁵ One twin is genetically related to Andrew and the other is genetically related to Elad.⁸⁶ Only the former was granted U.S. citizenship by the U.S. Department of State.⁸⁷ Officials treated the twins as “born out of wedlock.”⁸⁸ A child of a heterosexual married couple where only one parent is a U.S. citizen—as we saw in *Nguyen* and *Morales-Santana*—is born with U.S. citizenship status if certain minimum residency requirements are met.⁸⁹ This rule may originate in the assumption that the child is genetically related to both parents, but as we have seen, the parentage presumption, especially its applicability in the case of consented-to anonymous sperm donation, may mean that the child is genetically related only to one. Andrew and Elad seek to have their twins treated as born within wedlock.⁹⁰ If the *Dvash-Banks* case were to reach the U.S. Supreme Court and come out in favor of the couple and their son as an extension of *Pavan*, this would deal a blow to maternal primacy and edge the status of gay male parenthood closer to that of lesbian parenthood.

I am not, however, sanguine on behalf of the *Dvash-Banks* family. Indeed, the most recent version of the Uniform Parentage Act (2017) (UPA),⁹¹ while making numerous changes in furtherance of gender equity, draws the line here: it maintains automatic parenting rights for a birth mother and then presumes parentage for the birth mother’s spouse,⁹² but the spouse of a male biological parent acquires no such presumption. While the surrogate in *Dvash-Banks* is making no claim to parentage, such policy tendencies as those represented in the UPA, as well as the politics of international surrogacy, cannot help but emerge as significant. As a result, we might expect to see a deepening conflict between gay male and feminist/maternal interests.⁹³

85. *See id.* at ¶ 2.

86. *See id.*

87. The U.S. embassy in Toronto made the determination. *See id.* at ¶ 4.

88. *See id.* at ¶ 4.

89. *See Nguyen*, 533 U.S. at 59; *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017). *See also* 8 U.S.C. § 1401(g) (2012 & Supp. 2017).

90. *See* Complaint for Declaratory and Injunctive Relief ¶ 104, *Dvash-Banks* (No. 18-00523).

91. UNIF. PARENTAGE ACT (UNIF. LAW COMM’N 2017).

92. *See* Joslin, *supra* note 42, at 609 (citing UNIF. PARENTAGE ACT § 204 (a)(1)(A) (UNIF. LAW COMM’N 2017)).

93. *See, e.g.,* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 276 (2006) (“I would

As gay men form families and attempt to secure parenting rights, *Pavan* does them no favors and arguably impedes their progress by silently entrenching biological maternal primacy. *Pavan* grounds the second parent's rights in marriage to the birth mother, whose rights go entirely unquestioned; birth mother rights serve as a premise rather than a conclusion. A married gay male couple cannot possibly be treated the same as a married heterosexual or lesbian couple unless and until the law dispenses with that remarkably durable—if barely visible—starting place. What would it mean to attack the tree at its root—the primacy of biological motherhood?

IV. DE FACTO (AND OTHERWISE EQUITABLE) PARENTHOOD

Legal scholars have for some time been envisioning an answer to that question. The prevailing line of argument seems to favor the interrelated contractual concepts of *intent* and *function*, increasing protections for parents who lack a biological connection to their child but who, particularly in the context of assisted reproductive technologies (ART), *intended* to parent and/or have *functioned socially* as a parent to an existing child.

Perhaps the earliest scholar to become well-known for advocating this kind of position is Nancy Polikoff. Polikoff tuned in to the limitations of biology and marriage for lesbian couples long before those couples could marry or adopt. Going back decades, she authored numerous articles and a book advancing a version of family law that would recognize the relationships that are functionally central to people's lives. In a 1990 piece,⁹⁴ Polikoff scanned existing doctrines recognizing non-biological, non-adoptive, parent-child relationships and extracted useful theories for advancing recognition of parent-child relationships based on intent and function. She highlighted equitable estoppel, explaining:

find it impossible to conclude that the . . . pre-birth conduct [of two male co-parents] (or anyone else's behavior during that time) could so overwhelm the parental contributions of the gestating woman that they would satisfy a functional test more certainly than she would. As a result, nothing in this functional analysis answers the question how, *at the time of birth*, a default rule could identify as a child's two (and only two) parents a gay male couple . . ." (emphasis added).

94. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

[f]unctional parents—including lesbian parents—may develop a parent-child relationship in several ways. A lesbian-mother family can hold itself out as including two mothers. It can treat a child as part of both mothers' extended families. A child can have the last names of both mothers. A legally unrecognized mother can contribute to the child's financial support and the legally recognized mother can accept such payment. A written or oral agreement can exist between the two women that they will jointly rear the child. Under any of these circumstances, the legally unrecognized mother should be able to seek the legal status of parent. She should be able to assert that by creating the parent-child relationship and representing that child rearing was a joint endeavor, the legally recognized mother has been estopped from denying the functional parent the status of legal parent.⁹⁵

Since the advent of same-sex marriage, Polikoff has also forcefully argued that marriage should not be a requirement in parentage determinations.⁹⁶ She has even warned against relying on adoption for non-biological parents.⁹⁷ In distinguishing planned lesbian families from step-parent families secured by adoption, Polikoff urged that “[a] lesbian couple . . . plans for a child together. From before birth, the child-to-be has two parents. The nonbiological mother is not a step-parent.”⁹⁸ Polikoff's work consistently emphasizes the importance of *consent*⁹⁹—meaning the formal or informal agreement between adults to co-parent—and *function* as evidence of consent.¹⁰⁰

Other legal scholars have followed Polikoff's lead.¹⁰¹ In his 2012 book, *The Right to be Parents*,¹⁰² Carlos Ball traced the evolution of the

95. *Id.* at 499.

96. *See, e.g.*, 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, 722 (2012); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER LAW* 123 (2008).

97. Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for the Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201 (2009).

98. *Id.* at 206.

99. *See id.* at 233.

100. *See id.* at 237–38.

101. *See, e.g.*, Richard F. Storrow, *Parenthood By Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597 (2002) (developing the concept of intent to parent and arguing that “the law should understand intentional parenthood as subsumed by the notion of functional parenthood” for married and unmarried people). *Id.* at 602.

102. CARLOS A. BALL, *THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD* (2012). This book was dedicated in part to Nancy

law granting or denying recognition to LGBT parents. Some of the stories Ball recounts are harrowing, as legal standards rooted in unfounded stereotypes and formalistic reliance on biology and marriage, threaten, and in many cases destroy, emotional ties. In the progress toward recognition of planned gay and lesbian-headed families, the increasing significance of intent, consent, and function all feature prominently in Ball's account.¹⁰³

Douglas NeJaime has provided the most current and comprehensively argued scholarship urging lawmakers and judges not to “deny the importance of biological ties, but simply . . . to credit social contributions as well” when making decisions about parental recognition.¹⁰⁴ Specifically, NeJaime favors placing an increased value “on factors such as intent to parent, parental conduct, and family formation.”¹⁰⁵ “Same-sex family formation,” NeJaime observes, “features a parent without a genetic or gestational connection to the child; therefore, treating same-sex parents as equals demands recognition on social grounds.”¹⁰⁶

In a related article carefully tracing progress for gays and lesbians in both marriage and parenting domains, NeJaime persuasively argued “marriage equality can facilitate the expansion of intentional and functional parentage principles across family law — not only inside but also outside marriage, for both same-sex and different-sex couples.”¹⁰⁷ NeJaime methodically demonstrated how LGBT advocates shrewdly drew from case law recognizing *biological but non-marital* fathers as well as

Polikoff. See also 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, 656–61 (2012) (arguing that intent is not a sufficient guide without function).

103. See BALL, THE RIGHT TO BE PARENTS, *supra* note 102, at 83–114.

104. NeJaime, *Nature*, *supra* note 10, at 2264. See also BALL, THE RIGHT TO BE PARENTS, *supra* note 102, at 139 (explaining that “[i]t is important . . . to distinguish the argument that biology should not be solely determinative of parenthood from the contention that biology should be irrelevant to that question. Supporters of lesbian and gay parenting have never made the latter claim [A] biological link should be neither necessary nor sufficient to claim parentage status.”).

105. NeJaime, *Nature*, *supra* note 10, at 2264.

106. NeJaime, *Nature*, *supra* note 10, at 2268. Note that biological maternity can be fragmented into genetic and gestational. Fertile women for whom carrying a fetus presents particular risks may resort to surrogacy for gestation only. Further, some lesbian couples have divided biological responsibilities in order to feel that both mothers have contributed to the production of a child. See AMY HEQUEMBOURG, *LESBIAN MOTHERHOOD: STORIES OF BECOMING* 74 (2007).

107. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1190 (2016) [hereinafter NeJaime, *New Parenthood*].

sperm donor cases recognizing *marital but non-biological* fathers to reinvent parenthood on functional grounds.¹⁰⁸ Pressing for *de facto* parenthood featured prominently in this strategy.¹⁰⁹

Massachusetts is among those U.S. jurisdictions to have ratified the *de facto parent doctrine*,¹¹⁰ which affords a custody or visitation claim to a non-biological, non-adoptive parental figure who

resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions . . . 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.¹¹¹

One of the two cases in which this doctrine was incorporated into Massachusetts law, *E.N.O. v. L.M.M.*,¹¹² concerned a child born through

108. *See id.* at 1193, 1196.

109. *See id.* at 1199.

110. For an assessment of each state's degree of acceptance of the doctrine, see *De Facto Parent Recognition*, MOVEMENT ADVANCEMENT PROJECT (Mar. 6, 2017), <https://www.lgbtmap.org/img/maps/citations-parents-de-facto.pdf>.

111. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999).

112. *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999). The other was *Youmans v. Ramos*, 711 N.E.2d 165 (Mass. 1999), which involved an appeal by a child's father from a court order of visitation with a maternal aunt who had served as the child's sole guardian for most of the child's life. *Youmans* preceded *E.N.O.* by a week. The court in *Youmans* invoked the American Law Institute (ALI) Principles of the Law of Family Dissolution, as follows:

We use the terms "legal parent" and "de facto parent" proposed by the Reporters on the ALI Principles of the Law of Family Dissolution. *See* ALI Principles of the Law of Family Dissolution § 2.03(l) (Tent. Draft No. 3 Part 1 1998) (approved at annual meeting May, 1998). The definition of "de facto parent" states in relevant part:

"A de facto parent is an adult, not the child's legal parent, who for a period that is significant in light of the child's age, developmental level, and other circumstances,

"(i) has resided with the child, and

"(ii) for reasons primarily other than financial compensation, and with the consent of a legal parent to the formation of a de facto parent relationship . . . regularly has performed

"(I) a majority of the caretaking functions for the child."

Youmans, 711 N.E.2d at 167 n.3.

Observe the similarity of this doctrine to the estoppel doctrine proposed by Polikoff. Both are equitable doctrines and they rely on roughly the same factors. Note also that in some states, the *de facto* parent is effectively put on equal footing with, or perhaps becomes, a legal parent, while in other states the *de facto* parent has a visitation but not a custody claim against a legal parent. Some states have rejected equitable parenting doctrines altogether as a violation of the legal parent's constitutional prerogatives. *See* Grossman, *supra* note 13, at 333–39; *see also* Feinberg, *supra* note 42, at 66–68 (explaining the variation among

artificial insemination to a lesbian couple. The partner who was not inseminated had no legal relation to the biological mother or child.¹¹³ Marriage was not yet available to same-sex couples, and the couple had launched, but not completed, the process of adoption before their relationship deteriorated.¹¹⁴

The facts of *E.N.O.* were ideally suited to instituting the doctrine of de facto parenthood. The couple had planned for one of them to conceive and “executed a coparenting agreement” that “expressed the parties’ intent that the [biological mother’s partner] retain her parental status even if the [couple] were to separate.”¹¹⁵ The biological mother’s partner cared for the biological mother throughout the pregnancy, acted as her birthing coach, cut the umbilical cord, and took primary financial and domestic responsibility while the biological mother was ill.¹¹⁶ The child addressed the two women as “Mommy” and “Mama.”¹¹⁷

When the child was three, the adults’ relationship ended and the biological mother attempted to terminate contact between her ex-partner and child.¹¹⁸ The ex-partner went to court seeking specific enforcement of the co-parenting agreement, including leave to adopt the child and establishment of a custody and visitation order.¹¹⁹ The trial judge denied the biological mother’s motion to dismiss and established a temporary

jurisdictions as to whether the legal parent is on the same footing as the de facto, or otherwise equitable, parent). Carlos Ball has argued that once a person is deemed a de facto parent, courts should treat that person the same as the legal parent. BALL, THE RIGHT TO BE PARENTS, *supra* note 102, at 114. The latest version of the UPA (2017) includes a de facto parenthood provision according to which de facto parents, once adjudicated as such, “can be recognized as legal parents who stand in parity with any other legal parents, including genetic parents, for all purposes.” Joslin, *supra* note 42, at 602 (citing UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM’N 2017)).

113. *E.N.O.*, 711 N.E.2d at 888–89.

114. *Id.* at 889.

115. *Id.*

116. *Id.* at 888–89.

117. *Id.* at 889.

118. *Id.* Gay and lesbian civil rights lawyers came to call this sadly familiar scenario “lesbians behaving badly.” *Cf.* BALL, THE RIGHT TO BE PARENTS, *supra* note 102, at 89, 102 (discussing how the major LGBT advocacy organizations decided that even though cases like these typically involve two gay or lesbian people, the pro-gay position was to represent de facto parents against biological parents who terminated contact between their ex-lovers and their children, and—when representing lesbians going through dissolution processes—to refuse to argue that non-biological, functional parents had no standing because they lacked a biological relation to a child).

119. *E.N.O.*, 711 N.E.2d at 889.

visitation order “in the child’s best interests.”¹²⁰ The order was vacated by a judge on the Massachusetts Appeals Court, reinstated by a single justice of the Massachusetts Supreme Judicial Court (SJC), and then affirmed by the full court.¹²¹

To reach its conclusion, the SJC had to overcome a significant hurdle. Just a few years before, it had come to the opposite result in a nearly identical case, *C.M. v. P.R.*¹²² In *C.M.*, the non-biological parent had resided with the mother and child and performed every parental function.¹²³ When his relationship with the mother ended and the mother attempted to terminate contact between him and the child, he sought visitation and an order of paternity but lost.¹²⁴ *C.M.* differed from *E.N.O.* in two respects: first, the plaintiff in *C.M.* was a man, and second, the plaintiff in *C.M.* “had not been part of the decision to create a family by bringing the child into the world.”¹²⁵

Justice Fried of the Massachusetts SJC¹²⁶ dissented in *E.N.O.* and charged the majority with subterfuge, noting that while purporting to apply the best interest standard, the majority was actually enforcing a contract between the parties and was doing so because the case involved a same-sex couple.¹²⁷ The majority never explicitly stated that it was granting specific enforcement of the co-parenting agreement,¹²⁸ but it did find that the agreement “revealed [the parents’] beliefs regarding the child’s best interests.”¹²⁹ Fried argued that the “parties’ . . . agreements . . . ha[d] no bearing on determining the child’s best interests but only . . . the expectations of the mother’s former partner.”¹³⁰ Indeed, when the majority

120. *Id.*

121. *Id.* at 888.

122. *C.M. v. P.R.*, 649 N.E.2d 154 (Mass. 1995).

123. *Id.* at 154–55.

124. *Id.* at 155.

125. *E.N.O.*, 711 N.E.2d at 891.

126. Charles Fried has long since returned to his academic post at Harvard Law School. See Charles Fried Faculty Profile, HARVARD LAW SCHOOL, <https://hls.harvard.edu/faculty/directory/10288/Fried> (last visited July 15, 2018).

127. *E.N.O.*, 711 N.E.2d at 895–96 (Fried, J., dissenting).

128. See *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004), specifically disclaiming the existence of “parenthood by contract” in Massachusetts. This case occurred in the context of a lesbian dissolution in which the plaintiff sued her ex-partner for child support for a child she conceived using anonymously donated sperm. *Id.* at 1246. The claim was based on an implied contract. *Id.* No biological, adoptive, or de facto parenting relationship existed between the child and the defendant. *Id.*

129. *E.N.O.*, 711 N.E.2d at 892.

130. *Id.* at 896 (Fried, J., dissenting).

defended itself by arguing that the agreement was not being specifically enforced but merely read to inform the court of the parties' belief about best interests, it set up a syllogism. If a co-parenting agreement, ostensibly supplanted by a best-interest analysis, effectively determines best interest, then the court's best interest determination can hardly be differentiated from specific enforcement. Moreover, Fried reasoned, "events occurring during the child's life are more relevant to the child's well-being than decisions or arrangements concluded between the mother and her partner before the child's birth."¹³¹ The co-parenting agreement should have been irrelevant, and the plaintiffs in *C.M.* and *E.N.O.*, Fried concluded, should have been treated the same.¹³²

The child's best interest in *E.N.O.* happily coincided with the intentions of the two women and the functional role that the non-biological mother played in the child's life. This enabled the SJC to point to best interests while enforcing the understanding of the parties. The importance of Fried's dissent, however, is that it reveals *de facto* parenthood to be, in the end, a creature of contract.¹³³ The non-biological mother's *de facto* parent status was predicated on a combination of the co-parenting agreement and the facts of the child's rearing, including *function* and the biological parent's *consent*. The former is an express contract, and the latter is a contract implied in fact.¹³⁴ This is precisely the direction in which scholars of gay and lesbian family law have been pushing. Rather than determining parenthood status based foremost on biology, scholars of gay

131. *Id.*

132. *Id.* at 896–97.

133. It is worth noting that while contracts cannot, according to established law, override a child's best interest, agreements regarding custody and support are approved by courts all the time, so long as the child's best interest is not compromised. *See, e.g.*, In re Mullen, 953 N.E.2d 302, 305–06 (Ohio 2011) (recognizing that a legal parent can share custody with a non-legal parent by agreement).

Further, two phases of judicial deliberation are to be distinguished: (1) determination of parentage, i.e., who has the status of parent and therefore is vested with due process rights; and (2) what the custody arrangements will be. Theoretically, the latter is determined by the best interest standard, not the former. *De facto* parenthood is doctrinally awkward, because it does not fit perfectly into one of these two distinct phases. In *E.N.O.*, the biological mother argued that the trial court lacked jurisdiction even to consider the non-biological mother's claim because only the biological mother was a parent. *E.N.O.*, 711 N.E.2d at 889–90. The SJC determined that the trial court properly exercised its broad equitable jurisdiction based on the child's best interest—a determination that ordinarily would be expected to come later, in the second phase. *Id.* at 890.

134. "A promise that is implied in fact is merely a tacit promise, one that is inferred in whole or in part from expressions other than words on the part of a promisor." 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS §1.18 (rev. ed. 1993).

and lesbian family law would have courts examine the intentions of the same-sex couple, the non-biological parent's performance of parenting functions, and the biological parent's consent to the non-biological parent's performance of those functions. In other words, scholars seek a move from status to contract. Have we seen this anywhere before?

V. FROM STATUS TO CONTRACT

“[T]he movement of the progressive societies has hitherto been a movement *from Status to Contract*.”¹³⁵ So wrote Sir Henry Sumner Maine in the middle of the nineteenth century, giving us an axiom, albeit one the meaning and accuracy of which is the subject of some dispute.¹³⁶ By *status*, Maine meant “the particular place into which an individual had been born as part of a given family or kinship group exhaustively determined that individual's legal standing: their prospects of trade and marriage and the entitlement to decide what happened to their property after death.”¹³⁷ Contemporary authors observe that “[s]tatus’ today is used in a broader sense than Maine had originally intended. It has come to be understood as encompassing both ‘ascribed’ and ‘achieved’ conditions”¹³⁸ such as employer or employee, which—if in one sense a “status”—is nonetheless “achieved” by contract.¹³⁹ Maine, however, was explicit that in his usage, the term did not refer “to such conditions as are the immediate or remote result of agreement”¹⁴⁰

135. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 165 (Beacon Press 1863) (1861).

136. See, e.g., Robert Redfield, *Maine's Ancient Law in the Light of Primitive Society*, 2 W. POL. Q. 574, 577 (criticizing Maine on anthropological grounds); Bernard S. Cohn, *From Indian Status to British Contract*, 21 J. ECON. HIST. 613, 628 (1961) (observing that the axiom derives from the limited context studied by Maine).

137. Katharina Isabel Schmidt, *Henry Maine's "Modern Law": From Status to Contract and Back Again?*, 65 AMER. J. COMP. L., 145, 151 (2017).

138. *Id.* at 148; see also J. Russell VerSteeg, *From Status to Contract: A Contextual Analysis of Maine's Famous Dictum*, 10 WHITTIER L. REV. 669, 677 (1989) (lamenting the over-interpretation of Maine's concept of status by commentators).

139. Cf. R.H. Graveson, *The Movement from Status to Contract*, 4 MOD. L. REV. 261, 267–270 (1941) (demonstrating the imperfection of the categories and arguing that regulation of industry and corporations, including relationship of employer to employee, represented a shift back in the direction of status).

140. MAINE, *supra* note 135, at 165.

According to Maine's view, even marriage did not count as a status because it is achieved.¹⁴¹ Maine's conception of status is derived principally from the conditions of one's birth.¹⁴² His exclusion of marriage came under particular criticism due to extensive changes in the mid-to-late nineteenth century that affected the rights of married women.¹⁴³ Moreover, as evidenced by Lord Mansfield's Rule, marriage effectively determined paternity prior to the advent of genetic testing, as legitimacy was a status determined by whether one was born to a marriage. Marriage, one could therefore say, was always a hidden feature of status in Maine's work. Still, in the limited sense in which Maine used the term, e.g., being born female, a slave, an eldest son, etc., *status* was what determined a person's rights and obligations in the least evolved legal systems.

Though Maine's axiom was descriptive, he also viewed the shift from status to contract as progress. As the appointed "Anglo-Indian Administrator," Maine spent most of the 1860s "tasked with replacing [India's] alleged status based social order with Western-style legal rules" favoring individual autonomy.¹⁴⁴ He viewed the move as evidence of an improving "moral consciousness."¹⁴⁵

Advocates of an increased role for *intent* and *function* in parentage determinations are effectively pushing for the same kind of progress heralded by Maine. Contractual concepts such as these would increasingly alter parenthood so that sex, biology, and marriage would be drained of determinative power in favor of individual autonomy, manifested in pre-birth co-parenting agreements and contracts implied in fact. Like Maine, contemporary scholars of gay and lesbian family law regard the shift as both an apt description of how progress for gay and lesbian people has occurred and a prescription for further advancement.¹⁴⁶

141. Graveson, *supra* note 139, at 262.

142. *Id.*

143. *See id.* at 262, 267. On the demise of coverture, see NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 52–55 (2000).

144. Schmidt, *supra* note 137, at 151–52.

145. *Id.* at 151.

146. NeJaime, *Nature*, *supra* note 10, at 2268; NeJaime, *New Parenthood*, *supra* note 107, at 1196.

VI. CONTRACTUAL BASES FOR GAY AND LESBIAN PARENTHOOD: A FEW CAUTIONARY THOUGHTS

Reliance on biology cannot help but disadvantage persons in same-sex couples who intend to co-parent with a biological parent. Moreover, reliance on marriage as a guide to parental rights poses risks to the unmarried, and maternal primacy as the key determinative factor erects obstacles for men, both gay and straight. For these reasons, a shift towards intent and function may well hold the most promise for many gay and lesbian would-be parents. Still, it is worth pausing to consider the hazards associated with this form of advancement.

A. *Remembering Critiques of Contract*

In some fields, such as the law of consumer credit,¹⁴⁷ the increasing importance of contract has proven disadvantageous to weaker parties. Consumers, who are less savvy than credit card companies and have little to no input into the terms of their credit card contracts, can find themselves contending with unexpected increases in interest rates, waivers of rights to judicial relief in favor of forced arbitration, and mysterious fees.¹⁴⁸

In the context of family relations, a number of legal writers have proposed a shift toward contract, with the hope that such a move would enhance freedom and autonomy and offer the possibility of equalizing heterosexual relations.¹⁴⁹ Not all scholars of family law, however, are optimistic about the promise of contract to deliver these benefits. Some have expressed the concern that weaker family members face inequities analogous to those faced by consumers and other disadvantaged bargainers. As Martha Minow and Mary Lyndon Shanley have argued,

147. See generally Rashmi Dyal-Chand, *From Status to Contract: Evolving Paradigms for Regulating Consumer Credit*, 73 TENN. L. REV. 303 (2006) (discussing the role of bargaining power in the consumer credit industry).

148. See *id.* at 335–37.

149. See generally MARTHA M. ERTMAN, *LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (2015).

While private ordering has liberating aspects, it also entails more worrisome implications. The assumption that bargains will be freely struck masks configurations of social power that provide the backdrop to any contracts. Generations of labor leaders have pointed out the fallacy of assuming that workers and employers were equally free bargaining agents.¹⁵⁰

The problem is that “[c]ontractual ordering does not alter those background economic and social conditions that curtail the freedom of some and enhance that of others, that create relationships of domination and subordination between men and women as well as between rich and poor.”¹⁵¹

Preuptial agreements, which enable divorcing spouses to supplant state law with privately negotiated terms, have been lauded by some as furthering individual autonomy and shedding antiquated notions of women’s inability to bargain for their own interests.¹⁵² Some feminists, however, have remained skeptical. As one writer observed, “premarital agreements generally disadvantage the economically vulnerable spouse by precluding the protections offered by state law”¹⁵³ Available data “strongly suggests that premarital agreements generally harm women and the children in their care.”¹⁵⁴ Older men often enter such agreements with their younger brides, who have far less wealth and bargaining power in any negotiation.¹⁵⁵

In the domain of same-sex parenting, the risks of relying on contract theory may have less to do with unfair terms negotiated under conditions of unequal bargaining power and more to do with the question of enforcement—i.e., whether a contract is found to exist in the first place. A seminal article by Clare Dalton illustrates this danger.¹⁵⁶ Dalton highlights the nineteenth-century Pennsylvania case of *Hertzog v. Hertzog*,¹⁵⁷ where “an adult son lived and worked with his father until his father’s death, at

150. Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 *HYPATIA* 4, 11 (1996).

151. *Id.*

152. *See, e.g.*, *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

153. Gail F. Brod, *Premarital Agreements and Gender Justice*, 6 *YALE J.L. & FEMINISM* 229, 238 (1994).

154. *Id.* at 241.

155. *See id.* at 243.

156. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997 (1985).

157. *Hertzog v. Hertzog*, 29 Pa. 465 (1857).

which point the son sued the estate for compensation for services rendered.”¹⁵⁸ The question in the case was whether the father’s estate owed a contractual obligation to compensate the son, John.¹⁵⁹ A witness “testified that he ‘heard the old man say he would pay John for the labour he had done.’”¹⁶⁰ The jury understood these words to indicate the existence of a contract, but the estate appealed the jury’s decision and the Pennsylvania Supreme Court read the testimony quite differently.¹⁶¹ The court found that “[t]his is no making of a contract or admission of one; but rather the contrary. It admits that the son deserved some reward, but not that he had a contract for any.”¹⁶² To reach this conclusion, the court read the words in light of the father-son relationship, explaining

If we find . . . that a stranger has been in the employment of another, we immediately infer a contract for hiring But if we find a son in the employment of his father . . . we do not infer a contract of hiring, because the principle of family affection is sufficient to account for the family association, and does not demand the inference of a contract.¹⁶³

The Pennsylvania Supreme Court read the witness testimony through the filter of a preconceived notion about the nature of father-son relationships; namely, that father-son relationships are not ones of contractual exchange.¹⁶⁴ The existence of a contract, Dalton argued, was rooted in a judicial understanding of the relational context in which the events occurred.¹⁶⁵

Judicial conceptions of interpersonal relationships pose obvious dangers to gay and lesbian people, whose intimate partnerships have too often been viewed by judges as roommate relationships or improper relations. Intent is only as good as its signifiers, and its signifiers are only as good as their interpreter.

Of course, judicial goggles can facilitate *or* impede recognition of gay and lesbian familial intent, and in our current historical moment of increasing equality, it might not be the hurdle it once was. State courts’ willingness to recognize *de facto* parents was testament to a judicial

158. Dalton, *supra* note 156, at 1015 (quoting *Hertzog*, 29 Pa. at 465).

159. *Id.*

160. *Id.* (quoting *Hertzog*, 29 Pa. at 465).

161. *See id.*

162. *Id.* at 1017 (quoting *Hertzog*, 29 Pa. at 470).

163. *Id.* (quoting *Hertzog*, 29 Pa. at 469).

164. *See id.* at 1017.

165. *See id.* at 1017–18.

disposition to view gay and lesbian relationships in a tolerant light well before *Obergefell*.

This kind of attitudinal shift has also occurred in other contexts. In the pivotal 1976 case of *Marvin v. Marvin*,¹⁶⁶ the California Supreme Court ushered in new tolerance for the reality of non-marital cohabitation. A longstanding common law doctrine prohibited enforcement of so-called “meretricious contracts” where sex formed part of the consideration.¹⁶⁷ In *Marvin*, a woman who had cohabited with a man for seven years before being kicked out of his house sought a share of property accumulated solely in the man’s name over the course the relationship.¹⁶⁸ Lacking the protections of marriage, she asserted express and implied contract claims based on her career sacrifices and household contributions and his alleged promise to support her¹⁶⁹—claims that might have been expected to fail given the intimate nature of the relationship and the ban on meretricious contracts. The California Supreme Court permitted her claims to proceed, however, based “on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights . . . [s]o long as the agreement does not rest upon illicit meretricious consideration.”¹⁷⁰

The *Marvin* court urged other courts to keep up with changing attitudes and practices. The court stated that “we believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case.”¹⁷¹ The court further stated that “[t]he mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.”¹⁷² Conceding these grounds for its decision, the California court

166. *Marvin v. Marvin*, 557 P.2d 106 (1976).

167. *See id.* at 116.

168. *Id.* at 110.

169. *See id.* at 111–12, 116.

170. *Id.* at 116. The plaintiff in *Marvin*, while prevailing on the motion to dismiss, eventually lost on the merits. *See Marvin v. Marvin*, 176 Cal. Rptr. 555, 556–57 (Cal. Ct. App. 1981).

171. *Marvin*, 18 P.2d at 122.

172. *Id.*

cleared the way for the plaintiff to advance claims of both express and implied contract.

The *E.N.O.* court made a nearly identical statement when it recognized the de facto parent. Specifically, the *E.N.O.* court stated:

The recognition of de facto parents is in accord with notions of the modern family. An increasing number of same gender couples, like the plaintiff and the defendant, are deciding to have children. It is to be expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are legal or de facto.¹⁷³

Justice Fried saw this as a tell that belied the pretense of not having enforced the co-parenting agreement.¹⁷⁴ Read in a more favorable light, this statement was a frank admission by the majority of the values it brought to its deliberations.

Judicial values can also cut the other way, as demonstrated by Dalton.¹⁷⁵ Contrast *Hewitt v. Hewitt*,¹⁷⁶ a decision issued out of Illinois just three years after *Marvin*. *Hewitt* concerned facts similar to those in *Marvin*, but the Illinois court held very different views toward the increasingly widespread practice of non-marital cohabitation. Squashing any possibility of a contractual claim, that court wondered:

Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as “illicit” or “meretricious” relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society?¹⁷⁷

The decision suggests that the *Hewitt* court’s answer was *yes*.

If contractual concepts such as intent and function are to gain determinative power at the expense of status-based concepts such as biological relation, marriage, and sex, we have to be prepared for the range of biases that inevitably will flow through the process of parentage

173. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999).

174. *See id.* at 895 (Fried, J., dissenting).

175. *See Dalton*, *supra* note 156, at 1017–18.

176. *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

177. *Id.* at 1207.

determinations.¹⁷⁸ As Jessica Feinberg has argued, the advent of same-sex marriage and the opening of avenues to gay and lesbian adoption may lead some lawmakers and judges “to conclude that now that such parents have access to formal avenues to establishing legal parent status, equity no longer requires application or adoption of equitable parenthood doctrines;”¹⁷⁹ i.e., where the parties have not married or adopted, same-sex intimate partnerships and gay and lesbian co-parents are at risk of not being recognized for what they are. This is a legitimate concern.

The contrary possibility is worth considering, as well. Some courts might, in their zeal to find parental rights and responsibilities, sometimes assign them where they were *not* intended. In a story entitled *What Makes a Parent?*, Ian Parker told the harrowing tale of a lesbian in New York City who adopted a child after breaking up with her lover.¹⁸⁰ The two women remained close, and the ex-lover spent time with the child and grew attached.¹⁸¹ The day the mother was due to move with her child to her native England, she was summoned to court to respond to a petition from her ex-lover asserting parentage.¹⁸² Every conceivable email and witness account of the relationship between the women, the relationship between the ex-lover and child, and the extent to which the women characterized themselves as family, was entered into evidence.¹⁸³ While the court found against the petitioner, it did take the child’s passport and force the mother to endure a lengthy, costly, and terrifying trial.¹⁸⁴

Such a case could easily have been reversed. The mother could have sought a declaration of parentage and a child support order from her ex-lover, who might never have intended to be a parent but nonetheless functioned enough like one to capture the court’s imagination.¹⁸⁵ As

178. Another way to frame this is that status rooted in biology provides a *rule*, while questions of intent and function are determined by reference to *standards*, and are therefore more discretionary (though the application of rules and their exceptions can admit judicial discretion, as well). See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (exploring the distinction between legal rules and standards).

179. Feinberg, *supra* note 42, at 57.

180. See Ian Parker, *What Makes a Parent?*, THE NEW YORKER (May 22, 2017), <https://www.newyorker.com/magazine/2017/05/22/what-makes-a-parent>.

181. See *id.*

182. See *id.*

183. See *id.*

184. See *id.* The article concludes with an appeal pending. See *id.*

185. So far, the trend has not been in favor of courts assigning child support duties without a biological link, though nothing precludes a turn in that direction as contractual concepts gain more and more traction. Still, surveying the case law, Leslie Joan Harris

Duncan Kennedy has shown, the orthodoxy of intent as the basis of obligation can be followed by findings of “implied intent” and the assignment of duties implied in fact or in law.¹⁸⁶ Doctrinal evolution in this direction effectively substitutes judicial assessments of moral obligation for private intentions.

To the extent that gay and lesbian parenting rights increasingly rely on contract, critiques of contract should be on our radar. Issues of bargaining power, indeterminacy of judicial decision-making, and the slippage between intent and “implied intent” are all worth careful attention.

B. Norm Production and the Diverse Gay and Lesbian Community

My primary concern, however, is that the gay and lesbian community is diverse, and not everyone is likely to advance on the same terms. We should turn a more scrutinizing eye to the question of how exactly intent and function are understood. Homophobic readings are not the only hazard for which we ought to be on the lookout. What aspects of intentional and functional parenting relationships will surface as determinative? As advocates pursue what has emerged as the consensus strategic direction, what norms¹⁸⁷ have they been generating along the way? Who within the gay and lesbian community is most likely to benefit from those norms and who is at risk of exclusion?

observed, “biological parenthood is usually controlling when the issue is liability for child support. Functioning as a parent is considered, if at all, only when the primary issue is custody or access to a child.” Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 *IND. L. REV.* 611, 612 (2009).

186. DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT*, 163–67 (2006), <https://bit.ly/2LIPoX7>.

187. I invoke the term “norm” according to its usage in critical social thought, especially by Michel Foucault, Michael Warner, and Janet Halley. A norm is a fulcrum, or as Halley explains, a “distinction” or “standard” around which a “social, conceptual, and ethical field” is organized. Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 97, 100 n.7 (Robert Wintemute & Mads Andenæs eds., 2001). The term here is meant to probe how specific aspects of relationships—e.g., whether an adult has financially supported a child—have (or will) come to define what it means to be an intentional and/or functional parent, so that the equitable concept of parenthood turns on specific relational factors that may not be equally accessible across the internally diverse gay and lesbian population.

A standout in the lineage of the family's functional definition is the case *Miguel Braschi v. Stahl Associates Company*.¹⁸⁸ The events of this case took place during the peak of the AIDS crisis for gay men in New York City. Leslie Blanchard was the tenant of record in a rent-controlled apartment.¹⁸⁹ When he died, his longtime intimate partner, Miguel Braschi, wished to stay.¹⁹⁰ The landlord, however, had an incentive to evict, as the rent control law provided for "vacancy decontrol"—that is, a return to market-based rent after a tenant vacates the premises.¹⁹¹ If the tenant of record died, "noneviction protection" extended to the "surviving spouse of the deceased tenant or *some other member of the deceased tenant's family* who ha[d] been living with the tenant."¹⁹² Decades before the advent of same-sex marriage in New York, the court had to determine whether Braschi was a member of Blanchard's family.

The sympathetic New York court marshaled the facts to make the case that he was, noting that:

Appellant and Blanchard lived together as permanent life partners for more than 10 years. They regarded one another, and were regarded by friends and family, as spouses. The two men's families were aware of the nature of the relationship, and they regularly visited each other's families and attended family functions together, as a couple. . . .

[A]ppellant's tenancy was known to the building's superintendent and doormen, who viewed the two men as a couple.

Financially, the two men shared all obligations including a household budget. The two were authorized signatories of three safe-deposit boxes, they maintained joint checking and savings accounts, and joint credit cards. In fact, rent was often paid with a check from their joint checking account. Additionally, Blanchard executed a power of attorney in appellant's favor so that appellant could make necessary decisions—financial, medical and personal—for him during his illness. Finally, appellant was the named beneficiary of Blanchard's life insurance policy, as well as the primary legatee and coexecutor of Blanchard's estate.¹⁹³

188. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989).

189. *Id.* at 50.

190. *Id.* at 50–51.

191. *See id.* at 52 (explaining the structure of the New York City rent control law).

192. *Id.* (quoting now-abrogated New York City regulation).

193. *Id.* at 55.

Braschi was an early and important victory for the recognition of same-sex relationships based on their functional reality, but whose relationships are most easily seen by this standard?

The first and second paragraphs emphasize the recognition that *Braschi* and *Blanchard* were fortunate to have from their families and people in their building. Not everyone enjoys this kind of community support, though we can hope that with time, more and more will. In the meantime, gay and lesbian people living in the “closet,” or even in an environment where such easy recognition is less common, will have one less argument.

The third paragraph raises what may be a more intransigent concern. Financial support and interdependence has surfaced as an important factor in functional family law cases. *Braschi* and *Blanchard* jointly held all manner of accounts and safe-deposit boxes.¹⁹⁴ The briefs stressed this evidence of their interdependence. As *amicus*, Lambda described such accounts as “financial necessities of life,”¹⁹⁵ despite the fact that plenty of people do not have them.

The non-biological parent in *E.N.O.* financially supported her family, and this counted in her favor in the de facto parenthood assessment.¹⁹⁶ Paternity cases going back at least to *Lehr* specifically look to financial support when determining a biological, non-marital father’s rights, so this factor has a sturdy lineage. While financially supporting one’s partner or children undoubtedly evidences one’s sense of responsibility toward them, it is much easier to point to this evidence when one has a regular and substantial income. Unemployed and low-income people, as recent critics of the child support regime have argued, often cannot afford to provide regular support.¹⁹⁷ Poor people with court-ordered child support obligations often become trapped in mounting debt, including interest and penalties, and may even find themselves behind bars.¹⁹⁸ Against this

194. *See id.*

195. Brief Amicus Curiae of Lambda Legal Defense and Education Fund in Support of Plaintiff-Appellant 4, *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989) (No. 02194-87) (on file with author). Lambda also pointed to the fact that the couple had “traveled together extensively.” *Id.* Obviously, extensive travel is less likely in the case of a low-income couple and may also prove difficult for mixed immigration-status families.

196. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 892 (Mass. 1999).

197. *See* Libby Adler & Janet Halley, *You Pay, You Play: Feminists and Child Support Enforcement in the United States*, in JANET HALLEY, PRABHA KOTISWARAN, HILA SHAMIR, & RACHEL REBOUCHÉ, *GOVERNANCE FEMINISM: NOTES FROM THE FIELD* (forthcoming, U. Minn. Press 2019).

198. *Id.*

reality, reliance on a history of financial support for non-legal parents is likely to damage the interests of low-income would-be de facto parents.

Relatedly, Braschi and Blanchard had access to costly professionals to prepare their wills and powers of attorney. For low-income sectors of the community, it is difficult to generate this kind of evidence of functional coupledness. The same holds true for co-parenting agreements, assuming they are executed with the benefit of legal advice and/or drafting. Undoubtedly, such instruments are the strongest evidence of joint planning, but that kind of evidence can be pricey.

Indeed, the criterion of planning itself, emphasized in *E.N.O.* in order to distinguish *C.M.*,¹⁹⁹ may disadvantage low-income and African-American gay and lesbian people. Assisted reproductive technologies and private (including international) adoptions are cost-prohibitive for low-income people. Moreover, there is evidence to suggest that low-income and African-American same-sex families are in fact less likely to be planned. According to the Williams Institute, African-American gay and lesbian people are concentrated in locales outside of the urban coastal areas.²⁰⁰ Same-sex couples living in the South, Midwest, or Mountain states are more likely than their counterparts in coastal cities to be raising children, but less likely to be raising adopted children,²⁰¹ which is “likely reflective of . . . different sex relationships earlier in life.”²⁰² Planning, it seems, may be a class-based, racially, and regionally selective luxury.²⁰³

The *Braschi* court also indicated that one of the factors to be considered in determining whether a non-marital intimate partner was “family” for purposes of protection against eviction was the “exclusivity and longevity” of the relationship.²⁰⁴ The *E.N.O.* court, too, in determining

199. *E.N.O.*, 711 N.E.2d at 891–92.

200. Amira Hasenbush, Andrew R. Flores, Angeliki Kastanis, Brad Sears & Gary J. Gates, *The LGBT Divide: A Data Portrait of LGBT People in the Midwestern, Mountain & Southern States*, UCLA WILLIAMS INST. 7 (Dec. 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-divide-Dec-2014.pdf>; Angeliki Kastanis & Gary J. Gates, *LGBT African-Americans and African-American Same-Sex Couples*, UCLA WILLIAMS INST. (Oct. 2013), <https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-african-american-oct-2013/>.

201. Hasenbush et al., *supra* note 200, at 2.

202. *Id.*

203. Jessica Feinberg has made a similar point with regard to *formal* methods of attaining parenthood status, such as marriage and adoption. See Feinberg, *supra* note 42, at 91–95. This is an important point, but should be recognized as an equally significant issue in the context of de facto parenthood.

204. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 55 (N.Y. 1989). The brief for the New York City Bar Association, written in part by well-known LGBT advocate Art

de facto parentage, observed that the couple in that case had “shared a committed, monogamous relationship for thirteen years.”²⁰⁵ If regarded as a criterion, monogamy disadvantages some relational arrangements over others. Gay men disproportionately choose to maintain sexually non-exclusive relationships while still committed to one another.²⁰⁶ Advocates should take a long look at the lifestyle diversity among their constituents and decide if this moral line is the right one to be offering to courts.

The *Braschi* court also referred to the “everyday lives” of couples seeking to establish themselves as “family.”²⁰⁷ Similarly, in *E.N.O.*, the Massachusetts court mentioned “the plaintiff had daily contact with the child and ‘acted in the capacity [of] his other parent in all aspects of his life.’”²⁰⁸ This factor goes to the heart of the functional ideal, and rightly so given the premium on the child’s bond with the parent. It is still worth considering, however, whether some well-meaning gay and lesbian would-be parents will fail to satisfy the standard because they are in the military, work two jobs that keep them out of the home for a double shift, work nights and sleep during the day, or work erratically—say as an Uber driver or in some other capacity in the “gig economy.”

How would it change the *Braschi* case if the two men had a non-monogamous arrangement; not enough money, property, or credit to maintain accounts, credit cards, or safe deposit boxes; not enough money to pay a lawyer to draft a power of attorney or other pertinent documents, and no supportive family members? Would the de facto parenthood doctrine have applied in *E.N.O.* if the non-biological mother did not have the money to hire a lawyer to draft the co-parenting agreement, and if she were on deployment in Iraq when the umbilical cord needed cutting?

The gay and lesbian legal advocacy community fully appreciates the distributive implications of choosing a basis for parentage when contrasting people in heterosexual relationships with those in same-sex relationships, when marital status is determinative, and to a lesser extent, when fathers are contrasted with mothers. It is not at all evident, however,

Leonard, led the court to look at exclusivity and pointed to the “exclusive relationship” of *Braschi* and *Blanchard* no less than three times. See Brief Amicus Curiae of the Association of the Bar of the City of New York In Support of Plaintiff-Appellant 4, 6, 13, *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989) (No. 02194-87) (on file with author).

205. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 888 (Mass. 1999).

206. See generally Colleen H. Hoff & Sean C. Beaughner, *Sexual Agreements Among Gay Male Couples*, 39 ARCHIVES OF SEXUAL BEHAVIOR 774 (2010).

207. *Braschi*, 543 N.E.2d at 55.

208. *E.N.O.*, 711 N.E.2d. at 889.

that the distributive implications along axes of race, class, region, or lifestyle have come into focus. As the movement pushes in the direction of contractual concepts such as intent and function, all of these dimensions should be on the table. The picture of the intended, functional family that advocates and sympathetic courts paint will continue to produce norms. How will those norms differentially affect gay and lesbian people across the array of factors that render the community internally diverse? The track we are on poses dangers to the most marginalized members of that community where it hurts most: their status as parents and the basis upon which their emotional bonds with their children will be recognized—or not.

VII. CONCLUSION

Over the past three decades, gay and lesbian legal advocates have been unmatched at acquiring rights against discrimination, to privacy, to marriage equality, etc. They have not always been as good, however, at thinking through issues of distribution, particularly *within* the LGBTQ community. Our interests sometimes diverge and can even conflict.²⁰⁹ This can happen between gay men and lesbians (as *Pavan* illustrates), between predominantly white gay gentrifiers and LGBTQ youth of color (as struggles over curfews and police harassment in urban neighborhoods, such as Greenwich Village, illustrate²¹⁰), and between “the Good Gay” and “the Bad Queer” (as Michael Warner has shown in the context of marriage²¹¹). A win is not always a win for everybody, and one LGBTQ person’s win may even be a hindrance to fair legal treatment of another. Scholars and advocates should consider the widest possible array of costs and benefits that could accrue to differently-situated LGBTQ people when advancing a theory of parenthood. The difficult strategic decisions that must be made in the name of LGBTQ advancement might well hurt some people even as they help others. This is a brutal fact of most legal advocacy and cannot be avoided. Such strategizing should not be done, however, in a way that is heedless of the many differences among us, or that leaves an

209. See generally Bernard E. Harcourt, *Foreword: “You Are Entering a Gay and Lesbian Free Zone”: On the Radical Dissents of Justice Scalia and Other (Post-) Queers [Raising Questions about Lawrence, Sex Wars, and the Criminal Law]*, 94 J. OF CRIM. L. & CRIMINOLOGY 503 (2004) (wildly fragmenting the stakes in *Lawrence v. Texas*).

210. See CHRISTINA B. HANHARDT, *SAFE SPACE: GAY NEIGHBORHOOD HISTORY AND THE POLITICS OF VIOLENCE* 185–220 (2013).

211. See MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 109–16 (1999).

unintended distribution whereby the most privileged members of the community reap the benefit while leaving the most marginalized—by race, class, region, and sexual practice—behind.