

RECONCEIVING THE FAMILY: CHALLENGING THE PARADIGM OF THE EXCLUSIVE FAMILY

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I. INTRODUCTION

The notion of exclusivity is alive and well as one of the pillars of the traditional nuclear family. This ideology has served the nuclear family¹ effectively by painting and reinforcing a clear picture of the idealized family as a self-contained unit comprised of a married heterosexual couple with children.² It is exclusive in a number of senses. First, a child cannot have more than two parents.³ For example, when a stepparent adopts a spouse's child, the child's other natural parent is no longer legally recognized as a parent.⁴ Single parent families are possible, but cast in the shadow of the ideology of the nuclear family, they are seen as inferior and deficient; as the pejorative term "broken home" illustrates.

Second, the rights and duties which flow from legal parentage are either present or they are not; there is little room for "quasi-parenting." For the most part, parenting is an all-or-nothing proposition.⁵ The ideology of the nuclear family does not script a significant role for the extended family, or for other members of the community who may play key roles in the lives of children.⁶

1. Throughout this article, the term "nuclear family" is used to invoke the norm of the family that consists of two married heterosexual people with children.

2. See *Michael H. v. Gerald D.*, 491 U.S. 110, 113-32 (1989) (holding that a biological father has no constitutionally protected liberty interest in a relationship with a child if the child's mother is married to another man).

3. Compare *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (holding that only a gestational or genetic mother is legally recognized as a child's parent), with *Michael H.*, 491 U.S. at 110 (illustrating that the natural or genetic father loses parental rights to the mother's husband).

4. See *Lehr v. Robertson*, 463 U.S. 248, 261-63 (1983) (stressing that the biological father's rights are only protected if he grasps the opportunity and "accepts some measure of responsibility for the child's future"); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (recognizing the adoption of a child by a stepfather). In both cases, the stepfather was ultimately permitted to adopt the child with the effect of excluding the natural father from playing any role at all. See *Re British Columbia Birth Registration No. 86-09-038808* [1990] *REPORTS OF FAMILY L.3d* [R.F.L.] 203 (B.C.S.C.) (Canadian case denying a natural father access to his children).

5. See Nicole L. Sault, *Many Mothers, Many Fathers: The Meaning of Parenting Around the World*, 36 SANTA CLARA L. REV. 395, 398-401 (1996). Sault identifies three core concepts of American kinship: biology, autonomy, and control. These concepts also underlie the norm of exclusivity. She argues that people do not willingly share control over a child whom they see as their "own." This can be observed in custody disputes following a divorce: "[E]ach parent wants full custody of the child, or complete ownership and control. Visitation rights are not usually awarded to the grandparents, aunts, uncles, or other members of either parent's kin group. Sharing would be interpreted as losing control." *Id.* at 400. See also Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1754-55, 1767, 1810-12, 1861 (1993) (noting that law "overvalue[s] ownership through procreation" and that "[r]ather than seeking to provide adults for children who need them, [the law] seems intent on securing children for adults who claim them").

6. See Sault, *supra* note 5, at 395, 398, 405 (giving numerous examples of various societies throughout the world where children are raised in a larger community context). In some of these cultures, even words such as father and mother are extended to a range of people other than those to whom those terms commonly apply in North America and children are part of a "larger kin group." *Id.* According to Sault, this is very much at odds with what generally hap-

Third, although the law does provide for ending and re-creating family units through divorce, remarriage, and adoption, each new unit legally annihilates the pre-existing unit. The law does not contemplate the reality of overlapping families who reunite for weddings and funerals and share memories, children, and friends. There is no vision of overlapping families, of relationships that develop between present wives and ex-wives, cooperating over blended families or of the reformulated, but continued parental relationships as former spouses.⁷ In this sense, the notion of family constructs boundaries that exclude all but a limited number of relationships as legally relevant.

This Article argues that the norms of exclusivity serve neither the interests of children nor the interests of society as a whole. It severs children and their parents from the broader community, and particularly from certain members of that community who might contribute to the lives of children. These individuals supplement and complement the parents. A list might include stepparents, birth mothers, and gestational mothers.⁸ Social practices challenge the norms of exclusivity, but the law has been slow in responding. For example,

pens in the United States, where "[t]he predominant view of kinship . . . equates family with biological connections, while the associated phenomena of attachment, care-giving, and co-residence are ignored." *Id.* at 398.

7. See Anne Martin, *Life With(out) Brian: The Ex-Wives Club*, THE GLOBE & MAIL, Feb. 8, 1996, at A22 (describing a graphic and humorous relationship that developed between Brian's three ex-wives who got to know each other through the children (all half-siblings) of the various marriages). These networks can be supportive and constructive, especially for the children involved, and yet our legal constructs fail to acknowledge their existence.

8. See Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 393 (1994); see also Woodhouse, *supra* note 5, at 1753 (rightly pointing out that "children know their parents by what they do and not necessarily for what they are"). Woodhouse's argument can be transposed to other relationships, not just parental ones. It is in itself a basis for recognizing the contributions of various actors playing a role in a child's life. The connections worth maintaining should not be limited to vertical relationships, such as those between a child and a stepparent. Horizontal connections should also be recognized in a more inclusive vision of the family. See, e.g., P. (M.A.R.) (Litigation Guardian of) v. Catholic Children's Aid Society of Metropolitan Toronto [1995] R.F.L.4th 95, 105 (Ont. Ct. Gen. Div.) (discussing a woman who brought two orphaned children to Canada from Mexico). For two years, these children lived with and were cared for by her. At the end of that time, however, she decided to adopt only one of the children and to make the other a Crown ward. The latter sought access to his sister. Judge Jarvis directed a hearing on the merits based on the unusual circumstances of this case. While conscious of the effect the proceedings started by the child must have on the adoptive mother and her family, he said that the relationship of brother and sister is a basic human relationship which existed between the two children long before the adoptive mother became involved in their lives. *Id.* at 105. However, the maintenance of horizontal connections is not systematically seen as being worthy of protection. Indeed, courts have concluded that the French word "parent" in article 583 of the CIVIL CODE OF QUEBEC [C.C.Q.] only refers to the father or the mother of an adopted person and does not include brothers or sisters. Droit de la famille - 2046 [1994] RECUEILS DE JURISPRUDENCE DU QUÉBEC [R.J.Q.] 2413 (C.Q.); Droit de la famille - 321 [1987] RECUEILS DE DROIT DE LA FAMILLE [R.D.F.] 1 (Trib. jeun.). See discussion of article 583, *infra* Part III.B.2.

while adoption traditionally severed all links with the biological family in favor of the new family, "open adoption," which allows the birth mother a continuing role, is becoming increasingly common.⁹ Similarly, reconstituted families typically allocate parenting roles among custodial, non-custodial, and stepparents, although the law has delayed acknowledging the contributions of stepparents.¹⁰ Recently, grandparents are demanding greater legal recognition for the roles that they frequently play in a child's upbringing.¹¹ In addition, the reality of gay and lesbian family units challenge the notion that a child can have only one mother or one father. These families have done so, largely by creating units that understand themselves to be a family, and live as such with two mothers or two fathers.¹²

In this Article, I argue for a reconceptualization of the family which would:

- (i) recognize the limitations of the ideology of the exclusive family and articulate a model that includes non-traditional family units as well as the range of roles potentially played by various actors in the life of a child;
- (ii) allocate the ultimate decision-making authority to a particular sphere, such as the primary caretaker or caretakers; this will be referred to throughout the Article as the "core family unit;"
- (iii) having done so, encourage the involvement of those who,

9. See, e.g., Nancy E. Dowd, *A Feminist Analysis of Adoption*, 107 HARV. L. REV. 913, 929-32 (1994) (reviewing ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* (1993) (discussing adoption reform)).

10. See Holmes, *supra* note 8, at 363 (analyzing the development of children's constitutional rights).

11. See Karen Czapansky, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1319 (1994) (calling for the need of legal recognition for grandparents through "co-parenthood rights") [hereinafter Czapansky, *Grandparents, Parents and Grandchildren*]; Karen Czapansky, *Babies, Parents and Grandparents: A Story of Two Cases*, 1 AM. U. J. GENDER & L. 85 (1993) (identifying factors that influenced court decisions to grant adoption by grandparents).

12. See, e.g., Martha L. Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269 (1991) (worrying whether courts or the public will accept a "functional" family unit consisting of two mothers); Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers*, 36 SANTA CLARA L. REV. 375 (1996) (arguing that it is misdirected to blame social ills on the father's absence from raising children and to fail to focus on the needs of the child instead of whether there is a nuclear family); Nancy D. Polikoff, *The Social Construction of Parenthood in One Planned Lesbian Family*, 22 N.Y.U. REV. L. & SOC. CHANGE 203 (1996) (challenging a New York Supreme Court decision and arguing that children from gay and lesbian families should be accorded the full range of protection available to children in heterosexual families); 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) (advocating for an expanded definition of parenthood to include lesbian-mothers in order to serve the best interest of the child) [hereinafter Polikoff, *This Child Does Have Two Mothers*].

while not "legal parents" in the usual sense, have nevertheless established a special relationship with the child. For example, access and visitation might be facilitated and encouraged.

Part II of this Article explores the implications and criticisms of exclusivity in family law in areas that provide some useful insights into issues arising in the context of New Reproductive Technologies ("NRTs"). Although the potential list of topics one could examine for this purpose is long, this Article considers only post-divorce families and the joint custody trend, stepparent adoptions and briefly, open adoptions. These topics have been selected because, while the issues overlap, each topic highlights particular inadequacies or injustices inherent in the concept of the exclusive family. Part III explores the implications of this critique for filiation and related issues arising in the context of NRTs.¹³

A. The Nuclear Family: The Monty Python Parrot

At the outset, it should be emphasized that the ideology of the nuclear family and the ideology of the exclusive family, while overlapping, are distinct. The ideology of the nuclear family has been under siege in recent years.¹⁴ The basis for the criticism overlaps with, but is not identical to, the basis for criticizing the exclusivity of the family. The literature reflects both normative and descriptive reasons for attacking the dominance of the nuclear family. To some extent, the arguments are normative, asserting that the values promoted by the traditional ideology are, in various ways, wrong.

The most familiar critique focuses on the patriarchal nature of the nuclear family,¹⁵ even in this egalitarian age.¹⁶ In addition, there is the more descriptive argument that the traditional nuclear family has failed to live up to its promise, and that it is, like the proverbial parrot in the Monty Python skit, dead.¹⁷ This failure is evidenced by the

13. In writing this article, the law is drawn as it exists in a number of jurisdictions from both Canada, including the civil jurisdiction of Quebec, and the United States to illustrate the various issues and problems that arise.

14. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 15 (1995) (describing how state policies are implemented to halt any trends that diverge from the traditional nuclear family) [hereinafter FINEMAN, *THE NEUTERED MOTHER*].

15. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 14, at 27 (arguing that these arguments fail to consider the family as an institution but, rather, focus on gender).

16. For example, the traditional family does not encompass the lesbian family. See Polikoff, *This Child Does Have Two Mothers*, *supra* note 12, at 464.

17. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 14, at 155-56 (noting that the performance of the traditional nuclear family is a tarnished one).

prevalence of domestic violence and child abuse within traditional family units.¹⁸ A third basis for attacking the nuclear family is linked to the ideology of the family as exclusive. The concern is that by excluding non-traditional units, the nuclear family does not reflect the reality of many, if not most, people's lives.¹⁹ Furthermore, it masks and devalues other forms of family which are in fact quite functional and socially valuable.²⁰

In short, there is a large gap between the rhetoric and the reality of the exclusive family. If one accepts the importance of the channeling function in family law, the law is "channeling" in favor of a simplistic, impoverished vision of family. That vision fails to contemplate the needs and realities of many children by excluding many people who could or do contribute in various ways to their upbringing.²¹ In a society in which fewer children have two married heterosexual parents who can attend to their needs, and in which the state is contributing less supplementary support and resources, the rationale underlying the paradigm of the exclusive family appears to be especially weak. A premise of this Article is that in such a society, children will benefit if we encourage and facilitate the maintenance of connections with those in the community who may have special links with them.

B. The Exclusive Family as Handmaiden of the Nuclear Family

The arguments for and against the paradigm of the exclusive family, like those pertaining to the nuclear family, are both normative and descriptive. The normative argument in support of the exclusive family is that families work best, for both parents and children, when they are exclusive units because authority and responsibility are localized, readily identified, and efficient.²² One criticism of the exclusive family is that exclusivity is just a means for promoting and protecting

18. See FINEMAN, THE NEUTERED MOTHER, *supra* note 14, at 156 (describing how the family can be cast as potentially violent).

19. See FINEMAN, THE NEUTERED MOTHER, *supra* note 14, at 226-36 (arguing persuasively that principles of justice call for reconceptualization of the family).

20. See FINEMAN, THE NEUTERED MOTHER, *supra* note 14, at 226-36; see also STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1992) (contending that the nuclear family is based largely on myth and has not borne much relationship to real life).

21. See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 502 (1992) (citing Martha Fineman who emphasizes that families may include adult dependent children or elderly people who need care from other family members); see also FINEMAN, THE NEUTERED MOTHER, *supra* note 14, at 235 (noting how the child stands for all forms of dependency).

22. See Schneider, *supra* note 21, at 502 (explaining how these normative approaches describe ideals that gained substantial allegiance in Americans' lives).

the idealized nuclear family from outside disruption or interference.²³ As Carl Schneider effectively shows, family law demonstrates a preference for "channeling" people into nuclear families through a web of incentives and disincentives.²⁴

One incentive is the exclusivity of the unit.²⁵ Exclusivity is one of the "perks" of the nuclear family that "channels" people into that particular unit.²⁶ This criticism is not of exclusivity, rather it is about what sorts of groupings may benefit from the protection entailed by exclusivity. Other sorts of groupings do not generally receive the benefits of autonomy and control that are essential, to some extent, to the project of child rearing.²⁷ One of the reasons that lesbian mothers have been so concerned to exclude known donors from playing any parental role at all has been the fear that they are particularly vulnerable to donor interference as a non-traditional family.²⁸ It is worth noting that critics of the traditional nuclear family attack it as a norm that sets other sorts of families apart as inferior.²⁹ These critiques do not suggest that there is anything wrong with a two-parent heterosexual family.³⁰

This brings us to an important crossroad. If we disentangle the narrow idea of the exclusive nuclear family from the concept that there must be some autonomy and control within the family, we can

23. See Schneider, *supra* note 21, at 502 (explaining how such incentives as social currency and government support channel people into nuclear families).

24. Schneider, *supra* note 21, at 498.

25. Schneider, *supra* note 21, at 498.

26. Of course, the appeal of the nuclear family is much greater to those who actually hold the power within it. Despite the discourse of gender equality, the nuclear family continues to be a patriarchal institution with parents remaining in their gender traditional roles. See, e.g., MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 25 (1991) (discussing how the traditional model is now hidden behind the "best interests of the child" argument) [hereinafter FINEMAN, *THE ILLUSION OF EQUALITY*].

27. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 14, at 178. Fineman states:

[T]he prevailing presumption . . . is that the absence of a father creates a void, one that is appropriately filled by the state — by the bureaucrats who populate the many institutions, including legal ones, that deal with single mothers. Here, intervention and supervision are the norms, not privacy and the presumption of adequacy.

Id.

28. See APRIL MARTIN, *THE LESBIAN AND GAY PARENTING HANDBOOK: CREATING AND RAISING OUR FAMILIES* 86-87 (1993), cited in Fred A. Bernstein, *This Child Does Have Two Mothers . . . and a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 23-24 (1996) (noting that lesbian families use anonymous sperm donors in artificial insemination as protection from a future claim by the donor of parental rights over the child); see also Polikoff, *This Child Does Have Two Mothers*, *supra* note 12, at 459 (discussing a model of parenthood inclusive of non-traditional families, to which Bernstein replies).

29. See Bernstein, *supra* note 28, at 54 (suggesting that these critiques simply create their own model different from the traditional family model).

30. Bernstein, *supra* note 28, at 54.

rethink the essence of the family in ways that address the defects of the ideology of exclusivity while preserving self-determination and appropriate levels of authority within the core family units.³¹ Author Martha Fineman, for example, conceptualizes this core family unit sphere as restricted in scope, consisting of the dependent-caretaker relationship.³² Her vision would empower the core unit at the outset, and is consistent with a concept of the family that recognizes the benefits of more inclusive notions of family and connections with the community.³³

There are a number of examples of the way this might work and some indications exist that some judges are already finding informal ways of achieving Fineman's notion.³⁴ In one matter before a family court,³⁵ a grandmother applied to have a temporary custody order made permanent. A twelve year-old girl lived with her grandmother for most of her life. Her mother had a history of problems that rendered her parental role sporadic, and the child was doing well with the grandmother. Interestingly, the court declined to make the order permanent because it would have effectively severed the already strained relationship between the mother and daughter. Rather, the judge extended the temporary order and mandated counseling for the mother and daughter. The decision recognized that, while there was no question the daughter needed to remain with her grandmother, it was also important for the sake of the daughter to try to

31. The extent to which the family should be able to resist intervention from, and control by, the outside world is controversial. For example, it is one thing to say that a single mother with custody should have the ultimate authority to decide what school her child goes to or to allow the child to go on a particular school trip. It is another to say that violence within that unit should be tolerated.

32. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 14, at 234-35 (explaining that the dependent-caretaker relationship is not an egalitarian relationship, rather it is one that should be relatively insulated from state intervention and from others outside the dependent-caretaker relationship). Fineman's vision of the family unit is not the traditional nuclear family, although it could qualify.

33. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 14, at 234-35 (noting that the family unit could include, but is not limited to, the traditional nuclear family members). The family unit could also include an elderly parent cared for by an adult child, infants cared for by grandmothers, or someone terminally ill with AIDS being cared for by a partner. See also Martha A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995) (discussing "the schizophrenic nature of the interaction between social ideals and empirical observations concerning dependency") [hereinafter Fineman, *Masking Dependency*].

34. A key aspect of Fineman's model is that only the primary caretaker has legal authority. Fineman sees the egalitarian, authority-sharing model as one which is likely to mask continuing patriarchal patterns of authority within the family. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 14, at 22 (discussing the nature of the patriarchal ideology); FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 26, at 82 (citing the traditional doctrine that grants fathers "ownership" of their children).

35. Alan Lerner, of the University of Pennsylvania Law School, furnished this example used for illustrative purposes only.

salvage or establish a mother-daughter relationship.³⁶ In this way, the stability of the child-grandmother relationship (the core unit) was protected, but another important relationship was simultaneously encouraged.

The disengagement of the ideology of exclusivity from the nuclear family in the foregoing manner carries an additional benefit. Once non-traditional and traditional units are assured of a certain level of authority and autonomy, the incentive to resist the development or maintenance of supplementary relationships with others, such as non-custodial fathers,³⁷ or sperm donors in some cases, is likely to evaporate. This Article suggests that this is good in and of itself, as it would foster a multiplicity of relationships between children and people who, while not being parents in the full sense, can make positive contributions as members of the child's community.

C. New Reproductive Technologies: Another Challenge to the Ideology of Exclusivity

New Reproductive Technologies ("NRTs")³⁸ provide much of the fodder for current controversy over family and "family values." An important issue is the establishment of legal parentage or filiation when a child is created through the use of various reproductive technologies.³⁹ Within the current and traditional legal framework, establishing legal parentage is an exclusive,⁴⁰ as much as an inclusive, exercise. For example, the legal framework eliminates certain players from recognition as much as it identifies those with legal status as parents.⁴¹ Moreover, it usually writes the "losers" out of the family picture completely. Complex scenarios are already part of present reproductive reality: A and B as ovum and sperm donors, C as a gesta-

36. The grandmother in this case believed that it was important for her granddaughter to have a relationship with her mother. She was happy with this result because it maintained the status quo and, thereby, preserved the stability that she had provided for her granddaughter.

37. For example, a non-custodial father would be the biological father where the stepfather adopted the child.

38. See Wendy Dullea Bowie, Comment, *Multiplication and Division-New Math for the Courts: New Reproductive Technologies Create Potential Legal Time Bombs*, 95 DICK. L. REV. 135, 181 (1990) (stating that new reproductive technologies encompass the medical techniques of artificial insemination, in-vitro fertilization, gamete intra-fallopian transfers, and donated gametes and embryos).

39. See Bernstein, *supra* note 28, at 29 (noting that filiation is a prerequisite to visitation rights).

40. Exclusive refers to a "traditional family," such as one with a mother and a father.

41. See Bernstein, *supra* note 28, at 32 (noting that the court must actually declare the biological father by a court to have custodial rights to the child). While this might seem "forbidding," courts often recognize that "[p]arenthood is a bundle of rights, and courts are able to divide the bundle." *Id.* at 2.

tional surrogate, D as her husband, and E and F as the commissioning infertile couple who plan to raise the child. *Johnson v. Calvert*⁴² triggered an avalanche of academic response and criticism. Ultimately, the Supreme Court of California upheld the trial court's decision.⁴³ Popular response has been to either frame the issue in terms of whether the decision that Crispina Calvert was the legal mother was the "right" decision,⁴⁴ or focus on the case as a manifestation of the evils of NRTs, one of which is the tendency to undermine natural reproduction and the family.⁴⁵ These critiques miss the mark. In condemning NRTs as revolutionary and destructive of the "natural" family, these arguments fail to consider the increasingly recognized reality that the nuclear family paradigm is deeply flawed.⁴⁶

NRTs, whether we like them or not, are social phenomena that stretch our traditional notions about reproduction, child-bearing, child-rearing, and those who participate in this process.⁴⁷ NRTs are

42. 851 P.2d 776 (Cal. 1993) (holding that a husband and wife were the legal parents of a child born of a woman in whom the couple's fertilized egg were implanted, and not the surrogate birth mother). In *Calvert*, the Calverts wished to have a child. However, a hysterectomy left Mrs. Calvert with the capacity to produce eggs, yet incapable of carrying a child to birth. Thus, the married couple eventually entered a contract with Anna Johnson to carry the baby to term. Subsequently, the parties began to disagree over the failure of the surrogate to disclose her medical history and the surrogate's claim that the Calverts failed to provide adequate support. These arguments ultimately led to a lawsuit, with each side declaring parental rights. Following a hearing, the trial court determined that the Calverts were the child's genetic, biological, and natural parents. Therefore, the court effectively distinguished the gestational mother's right to the child. *Id.* at 778.

43. *Id.*

44. See, e.g., Jeffrey M. Place, *Gestational Surrogacy and the Meaning of "Mother"*: *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), 17 HARV. J.L. & PUB. POL'Y 907, 908 (1994) (stating that the California Supreme Court was asked to resolve the issue of whether the child's mother was the genetic or gestational mother); Sherrie L. Russell-Brown, *Parental Rights and Gestational Surrogacy: An Argument Against the Genetic Standard*, 23 COLUM. HUM. RTS. L. REV. 525, 549 (1992) (discussing suggestions on how to expand society's notions of family beyond that of the traditional heterosexual two-parent family).

45. Another important concern is the potential exploitation of the women who serve as surrogates or egg donors. For a strong critique of surrogacy, see MARTHA A. FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* 25 (1988) (noting that one argument against surrogacy is that it exploits both egg donors and surrogates).

46. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 14, at 27, 113, 150-57 (discussing the recent movement away from traditional family models). See generally COONTZ, *supra* note 20 (analyzing the transformation of the American family and the decline of the traditional nuclear family). In addition to being based on myth, the nuclear family paradigm has excluded many constructive family units from consideration as "family." For example, while a great deal of attention is paid to the rate of illegitimacy within the African-American community, little attention is paid to the support structures frequently provided by grandmothers and other members of the extended families and the community. See Sault, *supra* note 5, at 406 (referring to African-American families as "[t]he best documented example of child sharing").

47. See Janet L. Dolgin, *Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies*, 28 ARIZ. ST. L.J. 473, 475 (1996) (stating that reproductive technology brought a new challenge by questioning the biological, as well as the social, correlates of family relationships, and thus magnified earlier disruptions of changing familiar assumptions about the family); Andrea E. Stumpe, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*,

not alone in challenging these traditions. The focus on identifying the "real," or legal parents is analogous to legal parentage issues in the context of the roles of stepparents or natural fathers after adoption, or of birth mothers who want to retain some contact after giving up a child for adoption.⁴⁸ NRTs are part of current social developments that are challenging fundamental assumptions about the family.⁴⁹ Social change is already well under way, although the law has been slow in recognizing these changes. For this reason, this Article argues that NRTs are not revolutionary in terms of their effects on the family, but simply add to the mounting evidence in favor of a reconceived, and more inclusive legal notion of family.⁵⁰

This Article is not a defense of NRTs. There are many very good reasons to be concerned about the proliferation of NRTs, the best ones having to do with potential exploitation of reproduction and children.⁵¹ However, people concerned about NRTs are frequently the same people who believe that the nuclear family paradigm is threatened. In this sense, NRTs may be seen as one more nail in the coffin of the nuclear family myth as the central paradigm of the family in North America.

D. Toward An Inclusive Vision of Family

A more inclusive notion of family does not mean simply adding to the number of "parents" which law and society recognize. The challenge is to approach the task with a greater degree of imagination, so that different types and degrees of contribution and potential contribution may be fostered.⁵² It also means challenging the nuclear fam-

96 YALE L.J. 187, 187-88 (1986) (proposing a comprehensive legal matrix to accommodate shifting parental rights and obligations in this rapidly changing area of family law).

48. See Place, *supra* note 44, at 907 (discussing the case of Baby M. in which the birth mother fought for custody of her child even though she relinquished her parental rights in the surrogacy contract).

49. See Dolgin, *supra* note 47, at 475 (noting how NRTs questioned the biological and social correlates of family relationships and changed old familial assumptions about the family).

50. See Fineman, *Masking Dependency*, *supra* note 33, at 2181 (noting that another challenge to the nuclear family's exclusivity is society's continued adherence to an unrealistic and unrepresentative set of assumptions about the family which affects the way we perceive and attempt to solve persistent problems of poverty and social welfare).

51. See Dolgin, *supra* note 47, at 475-76 (arguing that courts' confusion over disputes arising out of NRTs ultimately leads to arbitrary decisions claiming that the best interests of the child are being served).

52. See Holmes, *supra* note 8, at 393. Holmes suggests a two-part test for identifying parent-like figures where a parent-like individual is:

(1) an individual who has (a) participated in the act or decision to create a family unit that included the child; or (b) executed a written acknowledgment of the child or had his or her name placed on the birth certificate of the child; or (c) executed an irrevocable written provision for the child's future *and*, (2) who has (a) lived with the child

ily as the superior and "normal" family paradigm. This Article is concerned with the paradigm of the exclusive family more than the nuclear family. As discussed above, it is possible to imagine a non-traditional family unit, such as a lesbian couple, which could be as exclusive of others as a traditional nuclear family. In the context of NRTs, however, there is frequently a traditional unit in the form of a married couple who wants a child. The issue that arises is whether there may be a role for the contributors, such as the woman who gives her baby up for adoption, the woman who contributes her ova, or the woman who gestates the child.⁵³

No discussion of the exclusive framework of the family is possible or complete without considering the views of author Katharine Bartlett.⁵⁴ After noting that an increasing number of children do not live in traditional nuclear families, Bartlett argues that children who live in non-traditional families often form attachments to adults outside the nuclear family, including stepparents, foster parents, and other caretakers.⁵⁵ Bartlett challenges the exclusive view of parenthood, and takes issue with the law's failure to recognize the relationships that form outside the exclusive family.⁵⁶

However, there are two issues with respect to which Bartlett and this Article diverge. First, Bartlett sees the nuclear family as "[a] fundamental premise of the law of exclusive parenthood . . ."⁵⁷ As discussed previously, some of the attributes of exclusivity, such as the designation of the parents as those persons with "unequivocal and

while assuming daily child-rearing responsibilities for a significant period of time; or (b) provided significant, regular support for and attempted to maintain consistent contact with the child when continued cohabitation with the child was prevented by the legal custodian.

Id. This is just an example of one possible way of identifying parent-like figures. This article does not suggest an adoption of rigid tests to determine whether certain people should be recognized as part of a child's life. Indeed, the contributions that this article refers to are very diverse both in their nature, as between an anonymous donor and a surrogate mother. For example, they could be recognized through including an annual photograph to regular contact where each satisfies different needs.

53. For the sake of this discussion, this article assumes that, as in the vast majority of cases, gestational surrogate mothers do not change their minds and claim the child. See *infra* Part III.A (discussing the expansion of the boundaries of the exclusive family in the field of surrogacy).

54. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984) (discussing the notion of parenthood as an exclusive status, and the law's recognition of only one set of parents for a child at any one time).

55. *Id.* at 881.

56. See *id.* (arguing that "[c]urrent law provides virtually no satisfactory means of accommodating such extra-parental attachments . . . because the presumption of exclusive parenthood requires that these relationships compete with others for legal recognition").

57. *Id.* at 879.

undivided authority over [children],”⁵⁸ are not necessarily or logically tied to the model of the nuclear family, although they have been traditionally. Such authority could, in principle, attach to non-traditional parents. Second, and more important, especially with respect to NRTs, Bartlett restricts her critique of the exclusive, nuclear family to those situations where the nuclear family has broken down.⁵⁹ The problem with this is that it does not address the limitations of the nuclear family, and it does not reflect the complex realities of families in the twentieth century. Continuing to see the nuclear family as the norm is to continue to hold it out as the model to which all families should aspire or conform.

While many aspects of the nuclear family work for non-nuclear families, the nuclear family norm is exclusive because it masks and devalues the myriad of family arrangements that do not conform. Once society separates the notion of an authoritative core of a family unit from the notion of the nuclear family, there is no reason not to recognize the contributions of non-nuclear families. Moreover, many of Bartlett’s arguments against exclusivity in the context of stepparents⁶⁰ and unwed fathers⁶¹ could also apply in the context of certain NRTs, where, depending on how one looks at the situation, there is a unit that looks very much like a traditional nuclear family. For example, although Mary Beth Whitehead was not recognized as a legal parent of Baby M., she obtained access rights.⁶²

The essential normative objection to the exclusivity paradigm is that it cuts too many players out of the picture and that it does not reflect the multiple roles and actors involved in a child’s life.⁶³ In focusing on the mother and father as a unit, a myriad of other players are written out of the script altogether. In the case of the single mother, for example, the superiority of the nuclear family model, combined with the exclusion of all but the members of the nuclear family, means that the key roles played by members of the extended

58. *Id.* at 882.

59. See Bartlett, *supra* note 54, at 880-82 (challenging the law’s adherence to the exclusive view of parenthood when the premise of the nuclear family fails).

60. See Bartlett, *supra* note 54, at 911-19 (describing how the law has cut out unwed fathers from a child’s life).

61. Bartlett, *supra* note 54, at 919-28.

62. See *In re Baby M.*, 537 A.2d 1227, 1263-64 (N.J. 1988) (remanding the visitation issue to the trial court); *In re Baby M.*, 542 A.2d 52, 53 (N.J. Super. Ct. Ch. Div. 1988) (explaining the court’s decision on visitation by stating that “[t]his is no longer a termination of parental rights or adoption case and it no longer matters how Melissa was conceived. She and her [surrogate] mother have the right to develop their own special relationship.”).

63. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 14, at 234-35 (noting that the family unit could include, but is not limited to, the traditional nuclear family members).

family, such as grandmothers and uncles, are legally invisible. Yet grandmothers and uncles can provide essential family functions.⁶⁴ For example, grandmothers provide a loving daycare environment, thereby performing a parental function.⁶⁵ Similarly, it is not uncommon for uncles to take on father-like parental roles.⁶⁶ Other legally invisible extended family members include, but are not limited to, stepparents, grandparents,⁶⁷ birth mothers, and unwed fathers.⁶⁸ Most recently, the list expanded to include surrogate mothers and sperm donors, such as gay males who donate to enable lesbian couples to have children.⁶⁹

Of course, it is necessary to identify "parents" or a "core unit"⁷⁰ in order to identify family members with support obligations, testamentary issues, and decision-making authority. However, this identification should not preclude the development of supplementary roles which could be legally recognized and which could generate significant links and support systems for children. The channeling function of law should encourage supplementary role development.⁷¹ It is unnecessary for our notion of "legal parent" to be a win-lose, winner-take-all proposition.⁷²

64. See Joan C. Bohl, *Autonomy vs. Grandparent Visitation: How Precedent Fell Prey to Sentiment* in *Herndon v. Tuney*, 62 MO. L. REV. 755, 776 (1997) (stating that the family unit includes grandparents); Alissa M. Wilson, *The Best Interests of Children in the Cultural Context of the Indian Child Welfare Act in In re S.S. and R.S.*, 28 LOY. U. CHI. L.J. 839, 841 (1997) (stating that grandparents, great-aunts or great-uncles, aunts or uncles, or cousins frequently raise children because of familial obligation to the extended family).

65. See Wilson, *supra* note 64, at 841 (discussing how Native American tribal members with child-rearing responsibilities direct their efforts not only towards their biological children, but also toward all tribal children).

66. Wilson, *supra* note 64, at 841.

67. The situation of grandparent-parent families, which cooperate to raise the children is very common and could have been discussed at length in this article. A subsequent version of this article includes some discussion of this growing family group. See generally Czapanski, *Grandparents, Parents and Grandchildren*, *supra* note 11, at 1319 (arguing for a legal recognition of co-parenthood rights exercisable by a parent and grandparent simultaneously in certain circumstances).

68. *Stanley v. Illinois*, 405 U.S. 645 (1972).

69. See *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994); *Leckie v. Voorhies*, 875 P.2d 521 (Or. Ct. App. 1994) (holding that the conduct of a sperm donor and the birth mother after the child's birth did not vitiate a waiver of the sperm donor's entitlement to assert parental rights).

70. See Czapanski, *Grandparents, Parents and Grandchildren*, *supra* note 11, at 1319 (discussing how a core unit might consist of a single parent, two parents, and/or a grandparent).

71. See Schneider, *supra* note 21, at 498-99 (discussing the "channeling function" of family law).

72. See Bernstein, *supra* note 28, at 24 (explaining a compelling account of the "all or nothing" effects of status as a legal parent).

II. THE EXCLUSIVE FAMILY: LAW, RHETORIC, AND REALITY

This part of the Article considers distinct areas of family law, which illustrate the tension between legal norms and changing social practices. Section A argues that the treatment of unmarried fathers and stepparent adoptions illustrate the tenacity of an exclusive and absolute nuclear family as a matter of family law even in circumstances where social practices have evolved to the point that the legal norms arguably serve a non-existent reality. The treatment of the excluded "ex-fathers" illustrates the need to recognize another sort of father or parent who has a role but is not the ultimate decision-maker or guardian. Section B suggests that joint custody provide a legal model for recognition of different parenting roles. The Article also argues that the problems with joint custody illustrate the need to explicitly recognize the difficulties inherent in dividing parenting "down the middle." This section suggests a preferable model of allocating the ultimate responsibility to one parent, while recognizing the importance of other players, such as non-custodial parents, stepparents, and grandparents, who may make different contributions. Section C suggests that open adoption is a social reality that the law has only recently begun to recognize and has expanded the horizons of the family beyond the boundaries of the nuclear family.

A. Unwed Fathers and Stepparent Adoptions

The history of the legal treatment of unwed fathers and of stepparent adoptions in the United States and in Canada, serves as a potent metaphor for the exclusive family. In particular, the aforementioned areas underline the legal imperative that a child has two parents and cannot have more than two. The "third" parent, typically the natural father, is excluded as a legal parent and from any entitlement to a present or future role in the child's life.⁷³ As Bernstein notes, genetic fathers often claim legal parentage not because they want the authority or status of full parents, but because they want the possibility of playing some role in the child's life.⁷⁴

73. Many jurisdictions provide for judicial discretion to permit access to fathers, but a review of the cases suggests that this is infrequently granted. See *Michael H. v. Gerald D.*, 491 U.S. 110, 135-36 (1989) (affirming the California Court of Appeals decision not to allow visitation by the natural father and stating that the CALIFORNIA CIV. CODE § 4601 provided that "a court [could], in its discretion, grant 'reasonable visiting rights . . . to any . . . person having an interest in the welfare of the child,'""); see also *Michael H. v. Gerald D.*, 236 Cal. Rptr. 810, 818-19 (Cal. Ct. App. 1987) (finding that the California statutory scheme precluded *Michael H.* from rebutting the presumption that a husband who was not sterile was the father of the child, because such rebuttal was dependent on the mother's cooperation and the rebuttal refutes the State's interest in upholding the integrity of the matrimonial family).

74. See Bernstein, *supra* note 28, at 30, 44-45 (stating the possibility that gay parents may be

The law, however, provides no half-way house, thus creating an incentive for some to claim recognition as legal parents. One is either a legal parent, or one is, in effect, a stranger.⁷⁵ This problem bears particular relevance to the situation with NRTs. As more people contribute to the creation of a human being, more people have claims analogous to those often made, for example, by absentee fathers. Absentee fathers have not established real relationships with the children they fathered, but who wish to retain at least the possibility of some contact with their children in the future. For this reason, it will be instructive to consider the treatment of unwed fathers and step-parent adoptions by the courts.

1. *United States Supreme Court Cases*

This section considers a few significant American cases that deal with the treatment of unwed fathers and stepparent adoptions. Although United States courts tend to frame the right to visitation in constitutional terms, these cases are nonetheless relevant to the Canadian context because they reveal the problems that result from an all-or-nothing approach. The line of cases beginning with *Stanley v. Illinois*⁷⁶ and ending with *Michael H. v. Gerald D.*,⁷⁷ inspired much commentary, much of which concerns reconciling apparent inconsistencies.⁷⁸

willing to innovate child-raising arrangements). This is also true in Canada. See, e.g., J.J.M. v. S.D.L. [1993] R.F.L.3d 400, 409 (N.S.S.C.A.D.) (discussing the case of a natural father who was not seeking to have custody of the child, but simply to maintain contact); *Re British Columbia Birth Registration No. 86-09-038808* [1990] R.F.L.3d 203 (B.C.S.C.) (noting that "the adoption is not seriously opposed and that the real issue is whether K. [the natural father] should have access to the child").

75. See J.J.M. v. S.D.L. [1993] R.F.L.3d 400, 409 (N.S.S.C.A.D.).

76. 405 U.S. 645 (1972) (finding that a state statute violated due process because the statute declared an unwed father unfit without a hearing). See, e.g., *Michael H.*, 491 U.S. at 121 (holding that California statute creating a presumption that a child born to a married woman living with her husband is the child of the marriage did not violate natural father's procedural due process rights or substantive due process rights); *Lehr v. Robertson*, 463 U.S. 248, 265 (1983) (holding that where the biological father had never established a substantial relationship with his child, the failure to give him notice of pending adoption proceedings did not deny the father due process or equal protection since he could have requested notice); *Caban v. Mohammed*, 441 U.S. 380, 389 (1979) (discussing a New York statute which gave the unwed mother, but not the unwed father, the right to withhold adoption consent and finding that a mother's relationship with the child could not be characterized as closer than the father's); *Quilloy v. Walcott*, 434 U.S. 246, 255 (1978) (refusing to extend constitutional protection to unwed fathers on the basis of biological paternity alone).

77. 491 U.S. 110 (1989).

78. See Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 654 (1993) [hereinafter Dolgin, *Just a Gene*].

a. Stanley v. Illinois

In *Stanley*, Peter Stanley lived with his children and their mother, Joan Stanley, on an intermittent basis for eighteen years.⁷⁹ When she died, an Illinois law, which presumed unwed fathers to be unfit, required the State to take the children as wards.⁸⁰ This law failed to provide a hearing to determine the father's parental fitness.⁸¹ The Court held that the statute deprived Stanley of his Constitutional rights of Due Process and Equal Protection.⁸² The Court emphasized, as Dolgin notes, the importance of Stanley's position as a biological and social father to his children.⁸³ What the Court did not resolve, however, was the independent legal significance of biological paternity. For the purposes of this Article, *Stanley's* significance lies merely in the fact that it was the first in this line of cases, as there was no issue of "choosing" one father over another.

b. Quilloin v. Walcott

The issue in *Quilloin v. Walcott*⁸⁴ was the constitutionality of a Georgia statute that accorded all unwed mothers, but only certain unwed fathers,⁸⁵ the right to veto the adoption of their children.⁸⁶ In *Quilloin*, the child's mother and father had never lived together.⁸⁷ Leon Quilloin had offered only irregular child support, although he had visited the child many times.⁸⁸ The mother had married Randall Walcott when the child was almost three years old, and Walcott, the child's stepfather, sought to adopt the child.⁸⁹ In this case, the Court upheld the statute, refusing to extend constitutional protection to unwed fathers on the basis of biological paternity alone.⁹⁰ The Court expressed concern with the absence of any substantial relationship

79. *Stanley v. Illinois*, 405 U.S. 645, 646 (1972).

80. *Id.*

81. *Id.* at 646-47.

82. *Id.* at 657-58.

83. See Dolgin, *Just a Gene*, *supra* note 78, at 650 (explaining how the father's role influenced the Court's decision).

84. 434 U.S. 246 (1978).

85. See *Quilloin v. Walcott*, 434 U.S. 246, 249 (1978) (summarizing Georgia law, which in part stated that an unwed father must obtain a court order legitimizing the child born out of wedlock).

86. *Id.*

87. *Id.* at 247.

88. *Id.* at 256.

89. *Id.* at 551.

90. *Quilloin*, 434 U.S. at 256.

between Quilloin and the child.⁹¹

This decision illustrates both the exclusive nature of legal parentage and the way that it is marshaled to serve the traditional nuclear family. As Dolgin astutely observes:

[T]he Court was at least equally concerned with the absence of a family unit including Quilloin, his child, and the child's mother, as it was with the absence of a social relationship between Quilloin and his child per se. The result of the adoption [by the child's stepfather] in this case, wrote the Court, is to give full recognition to a family unit already in existence, a result desired by all concerned, except the appellant. The Court's language about fathers who accept significant responsibility regarding the socialization of their children seemed to distinguish Quilloin from separated or divorced fathers who once had a relationship with their children's mothers, and who had once joined in a family unit with their children.⁹²

The assumption is that the success and integrity of the new family unit depends on the complete exclusion of other potential parents. Of course, the "flip-side" to this dilemma is that the stepparent, in the absence of legal adoption, is a legal stranger to the child. This status serves to some extent as an impetus for adoption. However, the consequences of the "all-or-nothing" framework that excludes one or the other parent may have tragic consequences for the child. As Bartlett notes:

[T]his legal failure may be particularly tragic if the stepfamily later dissolves.⁹³ A stepparent who has served as a father for several years may suddenly be nothing more, legally, than a stranger to the child. Alternatively, if the natural father's rights have been terminated in order to give parenting status to the stepparent, and if the dissolution of the stepfamily causes the stepfather to lose all interest in the child, the child may have a legal father who does not care for him and a natural father whom he cannot reach.⁹⁴

91. *Id.*

92. Dolgin, *Just a Gene*, *supra* note 78, at 654 (citing *Quilloin*, 434 U.S. at 255) (alteration in original).

93. See, e.g., *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994) (discussing a surrogacy situation in which the marriage of the contracting couple ended, causing the surrogate mother to claim legal parentage in the child). It appears that she had a change of heart with respect to her decision to give the child to the contracting couple because she feared that the child she had carried for the couple would not have a stable home, or worse, would not be wanted anymore. Divorce is more, not less, likely in subsequent marriages, with the presence of children from the earlier marriage as an added risk factor. Bartlett, *supra* note 54, at 918.

94. Bartlett, *supra* note 54, at 918.

c. Caban v. Mohammed

In *Caban v. Mohammed*,⁹⁵ a stepfather, Kazin Mohammed, petitioned the New York Surrogate Court for adoption of his wife's children who were born out of wedlock.⁹⁶ The New York statute at issue gave the unwed mother, but not the unwed father, the right to withhold adoption consent.⁹⁷ The Supreme Court overturned the lower court's grant of adoption based on intermediate scrutiny of the father's Equal Protection rights.⁹⁸ The Court ruled that the state's interest in "providing adoptive homes for its illegitimate children" did not outweigh the father's interest.⁹⁹ The Court also found that a mother's relationship with her children could not be generally characterized as closer than the father's relationship with the children.¹⁰⁰

Once again, the Court made its decision by the framework of exclusivity, but this time the legal stranger was the stepfather. This result, in general, is much less "exclusive" in practice, because the stepfather is likely to have, de facto, considerable involvement in the daily life of the child, while the natural father may have entitlements ranging from occasional access to joint custody. The child is less likely, accordingly, to be severed from a valuable or potentially valuable relationship. Nevertheless, the absence of any legal recognition of the stepparent illustrates the failure of the legal framework to recognize the complex realities of current familial arrangements that call for the creation of a greater variety of legal roles.¹⁰¹

Caban also illustrates the relationship between the framework of exclusivity and the nuclear family. As Dolgin argues, the thread that links this line of cases together is the "natural family." Dolgin argues,

[O]nce again, in *Caban* the Court in large part rested the unwed father's relation to his children and his claims to legal paternity on the father's relation to his children's mother — on the creation of a "natural family" — as much as on the father's relationship with

95. 441 U.S. 380 (1979).

96. *Caban v. Mohammed*, 441 U.S. 380, 384 (1979).

97. See N.Y. DOM. REL. LAW § 111 (McKinney 1977). The statute stipulated that consent for adoption shall be required of the adopted child; of the parents or surviving parent, whether adult or infant; of a child born in wedlock; of the mother, whether adult or infant; of a child born out of wedlock; and of any person or authorized agency having lawful custody of the adoptive child. *Id.*

98. *Caban*, 441 U.S. at 394.

99. *Id.* at 391.

100. *Id.* at 388-89.

101. A friend of mine is a stepmother of teenage children whose mother died. Her husband is frequently out of the country, and she has been repeatedly frustrated with difficulties arising over permission to go on school trips or to obtain a learner's driving permit, etc.

his children, per se.¹⁰²

The framework of exclusivity is, in effect, a protective wall which the law constructs around the unit that it considers as the superior and fundamental social unit: the nuclear (or natural) family. The essential function or attribute of exclusivity is the ability to control the unit and to resist influence from the outside, whether from the state or legal strangers. But, as I suggested above, and as I will discuss further below, some of these attributes of exclusivity, such as ultimate decision-making authority over schools or medical decisions, are not necessarily tied to the traditional nuclear family and could also be accorded to non-traditional family units.

d. Lehr v. Robertson

*Lehr v. Robertson*¹⁰³ is another example of an unwed father and step-father adoption case.¹⁰⁴ As an unwed father, Jonathan Lehr was not entitled to notice of an adoption proceeding enacted by his child's mother and her husband.¹⁰⁵ Lehr argued that the Court denied him Due Process and that the differential treatment in the statute denied him Equal Protection.¹⁰⁶ The Supreme Court rejected Lehr's claims.¹⁰⁷ Although the Court recognized an unwed father may deserve protection in some cases, a mere biological connection did not establish legal paternity.¹⁰⁸ Lehr's Equal Protection argument failed because he had not established a "substantial relationship" with his daughter, while the mother had established such a relationship with their daughter.¹⁰⁹

The simple understanding of this case is that constitutional protection of legal paternity requires a commitment to fatherhood evidenced by the establishment of a significant relationship with the child.¹¹⁰ Dolgin notes that the mother of his child hid the child from Lehr who "never ceased his efforts to locate" the mother and the child.¹¹¹ However, when Lehr located his child and her mother, the

102. Dolgin, *Just a Gene*, *supra* note 78, at 657.

103. 463 U.S. 248 (1983).

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

105. *Id.* at 264-65.

106. *Id.* at 248.

107. *Id.*

108. *Id.* at 261.

109. *Lehr v. Robertson*, 463 U.S. 248, 267 (1983).

110. See Dolgin, *Just a Gene*, *supra* note 78, at 662 (citing *Lehr v. Robertson*, 436 U.S. 248, 269 (1983) (White, J., dissenting) and noting that this is sometimes problematic as in *Lehr*).

111. Dolgin, *Just a Gene*, *supra* note 78, at 662.

child's mother threatened to have Lehr arrested if he attempted to make contact with his child.¹¹²

By way of comparison, the Canadian case *J.J.M. v. S.D.L.*¹¹³ dealt with a father appealing a decision that dispensed his right to consent to an adoption proceeding for his child.¹¹⁴ The court allowed the father's appeal, and the court dismissed both the application to dispense with consent, and the application for adoption.¹¹⁵ Judge Roscoe was sensitive to the fact that the mother did not cooperate with the father's access schedule, and that if the adoption was granted she and her husband would not allow the biological father access to the child.¹¹⁶ In addition, the judge specifically stated that the solid family unit created by the mother and her husband would continue to enhance the welfare of the child even if the adoption was not granted.¹¹⁷ Although in this case the judge did not give weight to the argument of the mother and her husband that the visits of the father would threaten their family unit, it is very obvious from the facts that the mother and her husband *did* feel threatened.¹¹⁸

These details further illustrate the consequences of the framework of exclusivity. The child's mother, in having to choose between the father as a legal parent or a legal stranger, naturally preferred legal recognition. The existence of joint custody presumptions (or "friendly parent" rules) in many jurisdictions may render the option even more stark.¹¹⁹ The mother can raise the child as she sees fit, without having to deal with what may be destructive interference and possible dissension over issues ranging from the choice of religion and schools, to medical treatment and disciplinary issues. Otherwise,

112. See Dolgin, *Just a Gene*, *supra* note 78, at 662; see also Woodhouse, *supra* note 5, at 1805-06 (observing *Lehr* to set up the framework of rights to children that "obscures actual fathering of them," and that *Lehr's* conduct prior to Jessica's birth as "a clear example of functional gestational fathering").

113. [1993] R.F.L.3d 400 (N.S.S.C.A.D.).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 402, 409.

118. See *J.J.M.*, [1993] R.F.L.3d at 408 (stating that, in fact, the custodial parent and his or her spouse articulate various reasons as to why adoption by the stepparent should be permitted by a court). Some of those reasons are: the child's surname is different from the rest of the family; if the custodial parent is the mother; the child needs some sort of symbolic process to prove that he really belongs to the new family; difficulties with succession; the presence of the non-custodial parent causes difficulties for the child or the new family unit. Citing Paula Baran Weiss, *The Misuse of Adoption by the Custodial Parent and Spouse*, 2 CANADIAN JOURNAL OF FAMILY LAW [CAN. J. FAM. L.] 141, 156 (1979), reprinted in CANADIAN CHILDREN'S LAW: CASES, NOTES AND MATERIALS 327, 329 (Nicholas Bala et al. eds., 1982)).

119. See, e.g., CAL. FAM. CODE § 3080 (West 1997) (stating that there is a presumption that joint custody is in the best interests of a minor child).

she can be one of two full legal parents sharing the parental role with her former spouse. The incentive is clear.

In the Canadian case of *Re British Columbia Birth Registration No. 86-09-038808*,¹²⁰ Judge Lamperson found that continued contact between the father and the child would be beneficial for the child.¹²¹ However, the mother and her husband wanted the father out of their lives. The child had been born following a casual relationship between the mother and father.¹²² The mother then married another man. After her marriage, she and her husband stopped the father's access to the child. The judge granted the adoption and reluctantly denied access to the father because he found such hostility towards the father on the part of the mother and her husband. He feared that continuing contact could be detrimental to the child.¹²³ Once again, it is clear that the mother and her husband did not want the father to disrupt the family unit that they had created. The judge's comments with respect to the mother and her husband's attitude were as follows:

[I]t is evident, however, that it is they who cannot cope with K. [the father] visiting the child. They find his visits disruptive to their relationship. Both of them admit to arguing with one another about K. and say that they find the situation to be very emotional. Although they have advanced reasons as to why K.'s visits to the child are detrimental, I find those to be mostly rationalizations designed to advance their case. The fact is that they want K. out of their lives once and for all and that this has nothing to do with the welfare of the child.¹²⁴

An alternative framework that provides a modified role for the father would bolster the mother's role as primary caretaker without threatening her position. In the absence of the "all or nothing framework" mothers would have less incentive to obliterate fathers from the picture entirely. This point is broadly relevant, not only to the case of unwed fathers/stepparent adoptions, but also to post-divorce custody issues and NRTs.

e. Michael H. v. Gerald D.

The final case in the unwed father line of Supreme Court decisions

120. [1990] R.F.L.3d 203 (B.C.S.C.).

121. *Re British Columbia Birth Registration No. 86-09-038808* [1990] R.F.L.3d 203 (B.C.S.C.).

122. *Id.*

123. *Id.*

124. *Id.* at 204.

is *Michael H v. Gerald D.*¹²⁵ Gerald D. and Carole D. were married in 1976.¹²⁶ In 1978, Carole became involved with a neighbor, Michael H. This relationship continued over the next few years, although Carole and Gerald remained married.¹²⁷ In 1981, Carole gave birth to Victoria, and her husband Gerald's name was listed on the birth certificate as father.¹²⁸ Shortly after the birth, however, Carole informed Michael that she suspected he was the father.¹²⁹ When Gerald moved to New York in late 1981, Carole stayed in California where she and Michael had blood tests taken of themselves and Victoria, which showed a 98.07% probability that Michael was the father.¹³⁰

Gerald always held Victoria out as his child, but following his move to New York, Carole and Victoria spent extended periods of time with Michael during which Michael held Victoria out as his child.¹³¹ There were periods of reconciliation with Gerald, and periods of months during which she and Victoria lived with Michael. Ultimately, in 1984, Carole reconciled with Gerald in New York. By this time, as Justice Scalia noted in his opinion for the Court, Victoria had "found herself within a variety of quasi-family units"¹³² for the first three years of her life. As Justice White noted in his dissent: "There is a personal and emotional relationship between Michael and Victoria, who grew up calling him 'Daddy.' Michael held Victoria out as his daughter and contributed to the child's financial support."¹³³

Michael H. filed a filiation action to establish his paternity and right to visitation.¹³⁴ It appears that his central concern was not to attain recognition as a full legal parent but simply to obtain visitation rights.¹³⁵ The only way to establish *prima facie* entitlement to visitation under California law was to establish paternity.¹³⁶ Thus, Michael H. was, in effect, forced to assert a claim larger than he really wanted.

125. 491 U.S. 110 (1989).

126. *Id.* at 113.

127. *Id.*

128. *Id.* at 114.

129. *Id.*

130. *Michael H.*, 491 U.S. at 114.

131. *Id.*

132. *Id.*

133. *See id.* at 159 (White, J., dissenting).

134. *See Michael H.*, 491 U.S. at 114; *see also* Vincent B. v. Joan R., 126 Cal. App. 3d 619 (Cal. Ct. App. 1981) (citing CAL. CIV. CODE § 4601 (West 1989) and illustrating that although California law provides that the court "may" grant visitation rights to "any person having an interest in the welfare of a child," case law indicates that pursuant to this section, absent legal paternity, visitation should be denied when it is against the wishes of the mother).

135. *Michael H.*, 491 U.S. at 119.

136. *See id.* at 117 (citing CAL. CIV. CODE § 4601 (West 1989)).

Interestingly, Justice Scalia noted that the "immediate benefit" sought by Michael H. was visitation, but went on to express some concern that "if Michael were successful in being declared the father, other rights would follow — most importantly, the right to be considered as the parent who should have custody."¹³⁷ His paternity action was denied on the basis of the California "marital presumption" statute.¹³⁸ In the eyes of the plurality, his visitation claim rested on his paternal status.¹³⁹

Michael H. and Victoria, through a guardian *ad litem*, appealed on the basis that the marital presumption violated their constitutional rights to due process and equal protection.¹⁴⁰ The Supreme Court, in a five to four decision, affirmed the lower court decisions upholding the marital presumption and the denial of visitation.¹⁴¹ Justice Scalia's plurality opinion is a ringing endorsement of both the vision of the traditional family as a "good" which the law properly protects, and

137. See *id.* at 118-19 (citing CAL. CIV. CODE § 4600) (West 1989) which describes custody as a status that:

[E]mbrace[s] the sum of parental rights with respect to the rearing of a child, including the child's care; the right to the child's services and earnings; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship.

Id. (alteration in original).

138. See *Michael H.*, 491 U.S. at 118 (concluding that the conditions qualifying the presumption were not satisfied by the facts); see also CAL. EVID. CODE § 621(a) (West Supp. 1989) (providing that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage"). The conditions to qualify for the presumption were held not to have been satisfied on the facts. *Michael H.*, 491 U.S. at 118.

139. See *Michael H. v. Gerald D.*, 236 Cal. Rptr. 810 (Cal. Ct. App. 1987) (denying Michael's motion for continued visitation pending the appeal under CAL. CIV. CODE § 4601 (West Supp. 1989)). The statute provided the following:

[R]easonable visitation rights [shall be awarded] to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child.

Id. The Plurality interpreted CAL. CIV. CODE § 621 as meaning that once a paternity claim failed, the claimant could not even claim the discretionary visitation rights as "any other person." See *Michael H.*, 491 U.S. at 133-34 (Stevens, J., concurring) (arguing that the decision constituted "an unnatural reading of the statute's plain language, but [was] also not consistent with the California courts' reading of the statute"); *Michael H.*, 491 U.S. at 148-51 (Brennan, J., dissenting) (discussing constitutional issues. Justice Brennan dismissed Justice Stevens' interpretation of California case law on § 4601 as "mere wishful thinking," and argued instead that the courts had been interpreting it in the same manner as the plurality. The statute removed not only the possibility of establishing parental status, but also the possibility of maintaining a relationship with the child which constituted a violation of Michael's and Victoria's due process rights.).

140. See *Michael H.*, 491 U.S. at 119. But see *Michael H.*, 491 U.S. at 133-34 (1989) (Stevens, J., concurring).

141. *Id.* at 121.

also, more implicitly, of the utility of the exclusiveness framework as a way to bolster and protect the traditional family. In holding that Michael H. did not have a constitutionally protected liberty interest in his relationship with Victoria, he rejected the argument that the earlier cases had established a liberty interest on the basis of "biological fatherhood plus an established parental relationship - factors that exist in the present case as well."¹⁴² The unwed father cases rested instead "upon the historic respect — indeed, sanctity would not be too strong a term — traditionally accorded to the relationships that develop within the unitary family."¹⁴³ As Dolgin notes:

[T]he plurality rejected the possibility, almost without exploration, that an unwed father and his biological child could form a "family unit" in the absence of an appropriate relationship between the unwed father and the child's mother. The opinion refused to include within "traditional," and thus protected, family units the "relationship established between a married woman, her lover, and their child."¹⁴⁴

The plurality opinion reveals its reliance on a very exclusive notion of family in its outright refusal to consider the possibility that Victoria might have two "fathers."¹⁴⁵ Indeed, Justice Scalia is rather dismissive on this point, stating that "California law, like nature itself, makes no provision for dual fatherhood,"¹⁴⁶ a comment which seems rather ironic given that the father whom the law identifies is not, in fact, the "natural" or biological father at all. The use of an exclusive notion of family as a protective shield for the traditional family was evident in the trial judge's determination that "the existence of two fathers as male authority figures will confuse the child and be counterproductive to her best interests."¹⁴⁷ Although the judge uses the "best interests of the child" language, the cited authority rested on the notion that allowing the biological father access to the child could have a destabilizing and disruptive influence on the legally-recognized

142. *Id.* at 123.

143. *Michael H.*, 491 U.S. at 123. The Plurality also rejected Victoria's claim (through her guardian *ad litem*) that she had a constitutionally protected right to maintain a relationship with her father. *Id.* Her due process claim failed on the same basis as *Michael H.*, that he had a constitutionally protected liberty interest in his relationship with Victoria. *Id.* at 130. The Court affirmed the validity of the state's choice to protect the marital family. Victoria's equal protection claim failed on related grounds. *Id.* at 131. The Plurality held that she was legitimate in the eyes of the law; was treated as other legitimate children; and was not, therefore, denied equal treatment. *Id.*

144. Dolgin, *Just a Gene*, *supra* note 78, at 667.

145. *Michael H.*, 491 U.S. at 121.

146. *Id.* at 135.

147. *Id.* at 118.

family unit.¹⁴⁸

The line of cases culminating in *Michael H.* all involved the question of whether the statutes at issue violated constitutionally protected rights. One could argue that these cases ought to be seen as authority for the view that the law should not embrace a broader notion of family and the roles various actors may play. All these cases held that certain statutory schemes did not violate a father's constitutional rights by replacing one parental role with another against the wishes of a biological father. Moreover, some cases, such as *Stanley* and *Quilloin*, did hold that fathers' constitutional rights had been violated. This restrictive reading of the cases might allow an argument that the law is receptive to a more inclusive and less traditional view of the family. Such a reading does not, however, take account of the almost fervored support for the traditional family that these cases reflect, and it is this aspect that renders them most relevant outside the United States.

The support of the traditional family is expressed most strongly in *Michael H.*, but is present in all the cases. The overriding concern in these cases is the desirability of creating or legally endorsing a "new" family unit, and of protecting it by excluding the old father, seen as a potentially destabilizing influence. Although the law in many jurisdictions has allowed access to "former" fathers, the provisions typically treat the father as any "other" person (meaning non-parent), and the burden is upon the claimant to convince the court to exercise its discretion by granting access.¹⁴⁹

Very few "ex-fathers" are successful in such claims.¹⁵⁰ By definition, a court claim indicates that the mother and the "new father" object to visitation. Usually, the courts are ready to accept the notion that the "ex-father" is somewhat of an interloper after the adoption and should not have access, a view that is consistent with the traditional view of adoption.¹⁵¹ The courts are very willing to see the "ex-father"

148. See *id.* at 135 (Stevens, J., concurring).

149. But see *Michael H.*, 491 U.S. at 134 (stating that § 621 of the California evidentiary statute created an absolute bar to the possibility that a person in Michael's position could prove that he is "another person having an interest in the welfare of the child" to whom "reasonable visitation rights" may be awarded under § 4601).

150. See generally Dolgin, *Just a Gene*, *supra* note 78, at 649-59 (discussing the development of the Supreme Court's attitude toward a biological father's relationship to his child). Dolgin believes that even in cases where the Court recognized comparable relationships of biological mothers and fathers to the child, the more significant factor was the child's relationship to the biological mother. *Id.*

151. See generally Danny R. Veilleux, Annotation, *Post Adoption Visitation by Natural Parent*, 78 A.L.R. 4th 278 (1991) (discussing post-adoption visitation rights).

as a threat to the stability of the new unit.¹⁵² However, this is out of step with the modern (or "post-modern") treatment of the typical family after divorce. In most of those cases, joint custody is frequently presumed and the argument of a mother that her ex-husband's visitation is disruptive to her new marriage is not likely to get her very far.¹⁵³ Of course, in the former cases, the first unit was not traditional in the sense that, as Dolgin correctly emphasizes,¹⁵⁴ the father did not have a marriage-like relationship with the mother.

When a marriage-like relationship existed, the judicial treatment (as cases like *Stanley* and *Caban* illustrate) is much more similar to that accorded to post-divorce families. This is also true in Canada, but to a lesser absolute extent. Judges in Canada do not necessarily equate adoption by a stepparent with absence of access for the father.¹⁵⁵ Several cases seem to recognize the interests of the father in maintaining his relationship with the child.¹⁵⁶ In *Adoption of Male Infant*,¹⁵⁷ Judge Seaton commented:

[I]n my view, the tie with a parent with access should not bar a child from being made a member of a new family through adoption, nor should a child being adopted by one of his parents and that parent's spouse be cut off from his other parent if that tie is useful to him. It would be wrong to have to choose between adoption and access where both might be in the best interests of the child, and the law does not force that choice on the court.¹⁵⁸

The cases pay attention to factors such as the relationship between the father and the child, the regularity of the exercise of access by the father, and the payment of maintenance.¹⁵⁹ These factors influence the courts in deciding whether adoption and access should be

152. Dolgin, *Just a Gene*, *supra* note 78, at 665-71.

153. Cf. Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767 (1997) (discussing the District of Columbia's presumption in favor of joint custody).

154. Dolgin, *Just a Gene*, *supra* note 78, at 654-55, 668, 670.

155. See cases cited *infra* note 156.

156. See, e.g., *D.(R.) v. S.(W.B.)* [1991] R.F.L.3d 1 (B.C.C.A.); *Re Adoption of Male Infant No. 78-08-022716*, No. CA004111 [1986] B.C.J. QUICK LAW 251 (B.C.C.A.); *Re British Columbia Birth Registration No. 86-09-038808* [1990] R.F.L.3d 203 (B.C.S.C.) (refusing to grant access to the father only because of the hostility of the mother and her husband); *W. v. C.* [1982] ONTARIO REPORTS.2d [O.R.2d] 730, 737 (Ont. Prov. Ct. Fam. Div.) (granting an application by the natural mother and her husband to dispense with the requirement that the natural father consent to adoption, but expressing hope and recommending that the proposed adoptive parents would permit a continuation of reasonable visitation by the natural father and his mother).

157. [1986] B.C.J. QUICK LAW 251.

158. *Adoption of Male Infant* [1986] B.C.J. Quick Law 251.

159. See cases cited *supra* note 156.

granted at all, in light of the best interests of the child.¹⁶⁰

In the context of stepparent adoptions, an obvious suggestion is that the "ex-father" should have a presumptive entitlement to access, rather than having to convince the court, as a legal stranger to the child, that he should be given access. Michael H. was apparently not seeking to usurp Gerald D.'s role as the primary father. He merely wanted to maintain contact and, in order to establish visitation rights, the legal framework required that he establish filiation.¹⁶¹ The possibility of a more moderate claim to access could deflate such situations. As things stood, Gerald and Carole had the choice between having Michael H. recognized as a full parent to the exclusion of Gerald D., or of resisting any entitlements at all. It is not terribly surprising that they chose the latter course. The all-or-nothing framework may force people to take stronger positions than they really want to take. Justice Scalia certainly saw the choice in stark terms:

[H]ere, to *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa. If Michael has a "freedom not to conform" (whatever that means), Gerald must equivalently have a "freedom to conform." One of them will pay a price for asserting that "freedom" — Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he [sic] and Victoria have established.¹⁶²

The possibility of certain access rights, which are disengaged from the status of recognition as the "parent(s)" in the full sense, could remove this impasse.¹⁶³ Herein lies an important analogy with issues arising in the context of adoption, surrogacy and other NRTs.

160. See, e.g., *C.(B.) v. T.(E.)* [1995] WESTERN WEEKLY REPORTS [W.W.R.] 560, 562, 564-65 (Sask. Q.B. Fam. Div.); *D.(R.) v. S.(W.B.)* [1991] R.F.L.3d at 3-4; *British Columbia Birth Registration Re British Columbia Birth Registration No. 86-09-03880* [1990] R.F.L.3d 203-04.

161. *But see* *W. v. C.* [1982] O.R.2d 730, 732 (describing a Canadian case in which the father was asked by the court why he thought it would be in the best interests of the child that his consent to the adoption not be dispensed with and made it abundantly clear that his exclusive concern was the maintenance of the very limited access he had exercised).

162. *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989). See Woodhouse, *supra* note 5, at 1857 (pointing out that from a child's perspective the matter would be presented differently). "The question would not be whether each of the daddies in *Michael H.* has the right to Victoria's company but whether two daddies are better than one." *Id.*

163. In principle, it might even be possible to create "suspended" access rights. For example, if the court was satisfied that access would not be in Victoria's best interests at a particular time, it might stipulate that the father could reapply later, or grant visitation to take effect at a particular future time.

2. Moving Away From the "All-or-Nothing" Father

Many children grow up in nontraditional families, and the families overlap.¹⁶⁴ Several legal structures are at odds with the new non-traditional family and continue to "channel" in favor of an obsolete model of the family. The child should be able to enjoy the benefits flowing from both the natural parents and the stepparent's affection.¹⁶⁵ In the words of one author, "family adoptions are really a perversion of the true purpose of adoption, which is to place children without parents or unwanted children in family units."¹⁶⁶ Children in reconstituted families frequently see themselves as having two fathers or mothers. Research repeatedly shows that the children who are most adjusted following divorce are those who maintain relationships with their natural parents.¹⁶⁷ Those relationships are not successive or exclusive; the subsequent family co-exists with the former.¹⁶⁸

Families are working out a multiplicity of relationships and roles for all the parent-figures and extended family members.¹⁶⁹ Our legal framework remains detached from reality, probably because the impetus for change, at least through caselaw, tends to come from the rare pathology of cases that are litigated. It is easy for courts to characterize cases where parents have not been married, as deviations from the norm of the nuclear family, and as the panacea for society's ills.¹⁷⁰ The link between these cases and the NRT cases lie in the fact that the players typically include a married couple and a third person who serves as a surrogate and/or a contributor of gametes. As discussed below, courts almost always prefer the nuclear family. Furthermore, as with the stepparent cases reviewed above, the notion that there might be some role, albeit a qualitatively different one, for left out "parents," is not even contemplated.

164. Kimberly P. Carr, Alison D. v. Virginia M.: *Neglecting the Best Interests of the Child in a Non-traditional Family*, 58 BROOK. L. REV. 1021, 1022 (1992).

165. Alastair Bissett-Johnson, *Stepparent Adoptions in English and Canadian Law in THE CHILD AND THE COURTS* 335, 350 (Ian F.G. Baxter & Mary A. Eberts eds., 1978), cited in J.J.M. v. S.D.L. [1993] R.F.L.3d 400, 408-09 (N.S.S.C.A.D.).

166. Weiss, *supra* note 118, cited in J.J.M. v. S.D.L. [1993] R.F.L.3d 400, 408 (N.S.S.C.A.D.).

167. See ELEANOR MACCOBY & ROBERT MNOOKIN, *THE DIVIDED CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 277 (1992) (finding that ongoing conflict between the parents is damaging to the child, so the benefit of frequent contact in a highly conflictual situation is potentially outweighed by the damaging effects of the conflict on the child); see also *Re British Columbia Birth Registration No. 86-09-038808* [1990] R.F.L.3d 203 (B.C.S.C.).

168. See generally Barbara L. Shapiro, *Non-Traditional Families in the Courts: The New Extended Family*, 11 J. AM. ACAD. MATRIM. LAW. 117, 118 (1993) (stating that the traditional concept of "family" has dramatically evolved over the past 25 years).

169. Shapiro, *supra* note 168, at 118.

170. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 111 (1989) (noting common law and statutes leaning toward maintaining the "marital family").

B. *The Post-Divorce Family and the Joint Custody Trend*

Joint custody may be seen as an arrangement at odds with traditional visions of the family because it appears to maintain parent-child relationships in the absence of a continuing viable nuclear family.¹⁷¹ Very often, joint custody is an arrangement that continues after both ex-spouses formed new relationships. Judges have not shown the concern about protecting the new unit in this context, and enthusiastically endorse joint custody.¹⁷² The feminist critique of this development is potent and fairly obvious. The discourse of equality has fueled the fathers' rights movements and served to reinforce patriarchal ideology by undermining the power which women have traditionally had with respect to children and custody.¹⁷³

There are two lessons that emerge from the rapid explosion in joint custody with respect to the exclusive framework of the family.¹⁷⁴ First, joint custody changed the landscape of custody and post-divorce parenting. At the very least, it provided a legal framework that recognizes and legitimizes non-exclusive parenting. Joint custody provides one model in which parenting is shared across units or households. Moreover, these units frequently contain new spouses, who also play roles which are implicitly recognized in the context of custody issues.¹⁷⁵

In many jurisdictions that explicitly recognize different forms of joint custody, the law recognizes that the parents may share in different ways. For example, joint physical custody may not involve equal amounts of time.¹⁷⁶ Joint legal custody may not involve more time

171. See Elizabeth Scott & Andre Dordeyn, *The Parent-Child Relationship and the Current Cycle of Family Law Reform: Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 483 (1984) (stating that the principle for resolving custody disputes may result in more joint custody arrangements, as the traditional family model becomes less generally the norm and more families engage in shared parenting).

172. A full critique of joint custody is beyond the scope of this article. See generally Alison Harvison Young, *Joint Custody as Norm: Solomon Revisited*, 32 OSGOODE HALL L.J. 785 (1994).

173. See FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 26, at 73. See, e.g., MARY ANN MASON, *THE EQUALITY TRAP* (1988) (arguing against joint custody as the preferred solution by legislatures); Carol Smart, *Power and the Politics of Child Custody*, in *CHILD CUSTODY AND THE POLITICS OF GENDER* 1, 8-10 (Carol Smart & Selma Sevenhuijsen eds., 1989) (noting how the fathers' rights movement relies on formal law's inequality to tie them closer to the interests of the child and concurrently usurping mothers' powers).

174. In 1991, 14% of court-determined divorce cases resulted in a joint custody settlement, up from 1% in 1986. See STATISTICS CANADA, *WOMEN IN CANADA: A STATISTICAL REPORT* 18 (3d ed. 1995).

175. For example, the relationship that a child has with a stepparent or stepsiblings may be factors that a court will consider if an issue arises about changing custody arrangements.

176. See *Hall-Duncan v. Duncan*, No. FA9501450815, 1998 WL 13876 (Conn. Super. Ct. Jan. 12, 1998) (discussing the plaintiffs Civil Custody of the triplets for 30% or 38% of the time); *Burke v. Burke*, 667 N.E. 2d 200 (N.Y. App. Div. 1997) (discussing respondent's custody of the child alternating weekends and every Wednesday after school until Thursday morning).

than the traditional "reasonable access." Because of the level of co-operation required to make it work, arrangements evolve along with the children's needs and activities. Joint custody is evidence that more inclusive models of the family are possible and probably be successful.¹⁷⁷

The second lesson which emerges from joint custody is cautionary in nature. The major problem with joint custody is that it weakens the position of the primary caretaker, usually the mother.¹⁷⁸ Although she is now expected to make her own way in the world economically, she risks losing her children if she accepts a job transfer.¹⁷⁹ Even though she may well have been the primary decision-maker during the marriage, post-divorce, she may be undermined in everything from discipline to bedtime to education to religion. It is hardly surprising that many women oppose joint custody for these reasons.¹⁸⁰

Arguably, joint custody has been a phenomenon that has caught on before it has been fully thought through. For instance, while its virtues of fostering children's relationships with their fathers have been widely extolled, little attention has been paid to the resolution of conflict between the ex-spouses. Few statutory schemes contemplate discord and provide for tie-breaking mechanisms. One example of a statute that does consider discord is the Manitoba, Canada, statute that provides that the primary caretaker will have the ultimate say in the case of disagreement.¹⁸¹

The CIVIL CODE OF QUEBEC, Canada, is another example. The Code specifically provides that parents can apply to the court for a determination of a matter concerning their child or children on which they are unable to agree.¹⁸² This provision is unusual because it

177. Scott & Dordeyn, *supra* note 171, at 472-75.

178. See Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 183-87 (1992) (discussing problems with joint custody).

179. There are cases which force mothers to choose. See, e.g., *Jones v. Jaworski* [1989] R.F.L.3d 385, 396-97 (Alta. Q.B.). The opinion expressed is that:

[I]f Jaworski [the mother] makes the decision to move to Ottawa it would be in the best interests of Christopher and Michael that their ordinary residence be transferred to their father's home. . . . If, as a result of this decision she elects to stay in Edmonton then I am of the view that there is no change of circumstances sufficient to vary the existing custody arrangements. I am aware that this may now be a virtually impossible choice for Jaworski but stranger things have happened before in people's lives.

Id.

180. Barbara Stark, *Divorce Law, Feminism, and Psychoanalysis: In Dreams Begin Responsibilities*, 38 UCLA L. REV. 1483, 1531 n.186 (1991).

181. Family Maintenance Act, R.S.M. ch. F-20 (1987) (Manitoba, Canada).

182. See CIVIL CODE OF QUEBEC [C.C.Q.] art. 604. Not surprisingly, there has been very little case law under this provision. Specific orders are, of course, made in the context of custody or access determinations, but it seems very rare that married parents litigate with respect to what school their child will attend. For examples of case law decided under article 604, see generally

applies to all parents, whether they are together or not.¹⁸³ It is also unusual because the drafters specifically contemplated the tie-breaking problem when they began revising the Code in the 1970s to conform to principles of spousal equality. Now, both parents retain "autorité parentale,"¹⁸⁴ which survives divorce and custody deprivations and can only be removed for cause.¹⁸⁵ This is the Quebec civil law equivalent, in effect, to legal joint custody. Previously, the issue never arose because, at law, the husband and father was the head of the family. His "autorité paternal" subsisted even if the wife obtained sole custody following divorce.¹⁸⁶

While it is clear that more cooperation and less conflict is better for the children involved, it is necessary to provide a realistic framework for the resolution of disputes that arise. It is not realistic for every disagreement to involve a trip to court. Rather, it makes much more sense to allocate a default decision-making power to one spouse or the other. The most satisfactory legal presumption would designate the primary caretaker as the default decision-maker. Allocating or re-allocating some essential power to women who are usually the primary caretakers¹⁸⁷ should result in two consequences. First, fathers will have some incentive to cooperate.¹⁸⁸ Second, mothers will feel

Droit de la famille - 2341 [1996] R.J.Q. 92 (C.S.) (difference of opinion between parents as to whether a psychological or psychosocial evaluation is in the best interest of their child); Droit de la famille - 2201 [1995] R.D.F. 417 (C.S.) (dispute between divorced parents regarding the religious education of their children).

183. C.C.Q. art. 604.

184. Parental authority.

185. See *G.C. v. T.V.F.* [1987] CANADA SUPREME COURT REPORTS [S.C.R.] 244 (Can). In a leading case that went to the Supreme Court of Canada, a father who was divorced from his wife, and estranged from his children prior to the death of the mother challenged a custody claim from the aunt and uncle with whom the children lived with since their mother became ill. The father initially won the custody suit but the children kept running away and returning to the aunt and uncle. The Court held that there was, no "cause" for depriving the father of his parental authority and right to custody, but because it was clearly, though not the father's fault, in the children's best interests to remain with their aunt and uncle, he was deprived of the "exercise" of his right to custody. The fact that he retained the "enjoyment" ("*jouissance*") of the right meant that the door was open for him to develop a relationship with his children in the future. It also meant that, in the event of the death of the aunt and uncle, custody would revert to him as the legally recognized father.

186. See QUEBEC CIVIL LAW: AN INTRODUCTION TO QUEBEC PRIVATE LAW 260 (J.E.C. Brierley et al. eds., 1993).

187. There are, of course, a number of problems with the primary caretaker presumption which have been discussed elsewhere. See MASON, *supra* note 173, at 35-36 (advocating a maternal presumption).

188. In most jurisdictions in North America, custody determinations are made either on the basis of joint custody presumptions or the best interests standard. Either way, this arguably has created an incentive for fathers to use the possibility of custody claims as bargaining chips. See FINEMAN, THE ILLUSION OF EQUALITY, *supra* note 26, at 79-94; see also MASON, *supra* note 173, at 83. One leading study, however, failed to find empirical evidence of claims for custody as bargaining strategies. See MACCOBY & MNOOKIN, *supra* note 167.

more secure, and thus more likely to actively encourage relationships to flourish without the fear that their own position will be undermined. In short, designating the primary caretaker as the default decision-maker might allow women to regain some of the losses suffered in the last twenty years as a result of the discourse and ideology of equality.¹⁸⁹ Joint custody arrangements could divide up parenting in any number of ways, subject to this default position.

Post-divorce family constellations are potentially strong models for more inclusive legal paradigms of the notion of family. Moreover, the "new right" and so-called "family values" notwithstanding, such alternative family formations have gained increasing acceptance, making it easier to displace the exclusive nuclear unit as the dominant norm. In turn, these developments may facilitate the acceptance of less traditional family relationships in other contexts, such as those involving NRTs and same-sex families.

C. Open Adoption

Open adoption¹⁹⁰ is another area that illustrates the disparity between law and practical reality. Many adoption arrangements have obvious relevance for surrogacy or even gamete donation. The paradigmatic relationship is one that answers a number of concerns about the notion of the "all-or-nothing" parent.¹⁹¹ There is generally no question that the adoptive parents are the decision-makers, though in some situations they might wish to consult the birth parent.¹⁹² For the birth parent, the central concern is to maintain contact so that he or she knows the whereabouts of his or her child. Frequently, adoptive parents send birthday cards and photographs of the child to birth parents.¹⁹³ The child can be raised not only knowing that she or he

189. See FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 26, at 29 (stating that "an equality view of marriage denies the reality of many women who assume, during and after the marriage, more than a partner's share in the conduct and burdens associated with household and child care"); see also MASON, *supra* note 173.

190. See Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1118 (1997) (stating that a new paradigm in adoption law is open adoption, which encompasses a range of possibilities such as open records and exchange of identifying information to birth parents or visiting the adoptive family after adoption); Annette Baron, Ruben Pamnor & Arthur D. Sorosky, *Open Adoption*, 21 SOC. WORK 97 (1976) (defining open adoption as one in which birth parents meet the adoptive parents and relinquish all legal, moral, and nurturing rights to the child, but retains the right to continuing contact and to knowledge of the child's whereabouts).

191. See Shapo, *supra* note 190, at 1195 (stating that once an adoption occurs, the parental rights of the biological parents are extinguished).

192. See Carol A. Gorenberg, *Fathers' Rights vs. Children's Best Interests: Establishing a Predictable Standard for California Adoption Disputes*, 31 FAM. L.Q. 169, 207 (1997) (discussing open adoption, where the adoptive family agrees to maintain contact with the child's biological family).

193. See *id.* at 207 (stating that "[o]pen adoptions include a wide range of options for one or

was adopted, but knowing that the birth parent(s) may be available to answer questions as well.¹⁹⁴ The adoptive parents have access to information about their child's medical history, as well as to other matters that become important as the child develops.¹⁹⁵

Perhaps not coincidentally, inclusive family ties develop when the position of the adoptive family is generally quite secure. As long as issues of consent and relinquishment are settled, and the adoption is formally constituted in accordance with the law, the position of the adoptive parents is clear: they are the legal decision-makers.¹⁹⁶ From this relatively strong position, the adoptive parents may feel comfortable including the birth mother or father in their lives. However, it is also important to recognize that this privilege goes both ways. The move to open adoption has been driven by the wish of birth mothers to play some role in the lives of their biological children.¹⁹⁷ Although some prospective adoptive parents may be reluctant, the scarcity of women willing to give up their babies for adoption has strengthened the birth mother's position in influencing the terms of the adoption agreement. Like many men who oppose stepparent adoptions, and like some surrogates who claim recognition as legal parents, these birth mothers are not seeking to replace the adoptive parents but are simply trying to establish a supplementary and complementary parental role.

two-way contact between the adoptive family and the birth parents, from simply sending annual pictures to the birth parents to regular visitation between the birth parents and the child").

194. See Shapo, *supra* note 190, at 1196 (discussing the adoptive child's ability to have access to his or her genetic history).

195. See Annette R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997 (1995) (discussing the phenomenon of open adoption and cautioning against defining the process of adoption as the creation of one family and the dissolution of another). The author sees adoption as:

[A] way of providing security for and meeting the developmental needs of a child by legally transferring ongoing parental responsibilities for that child from the birth parents to adoptive parents, and, in the process, creating a new kinship network that forever links the birth family and the adoptive family through the child who is shared by both.

Id. See also Cynthia E. Cordle, *Open Adoption: The Need for Legislative Action*, 2 VA. J. SOC. POL'Y & L. 275 (1995) (advocating no particular stance on open adoption but "seeks to explore and to clarify its legal status"); Laurie A. Ames, *Open Adoptions: Truth & Consequences*, 16 L. & PSYCHOL. REV. 137 (1992) (clarifying the positives and negatives of open adoption); Carol Amadio & Stuart L. Deutsh, *Allowing Adopted Children to 'Stay in Touch' with Blood Relatives*, 22 J. FAM. L. 59 (1983) (focusing on why open adoption is desirable and the current changes in law supporting it).

196. See generally Gorenberg, *supra* note 192, at 208 (reviewing legislative history).

197. See Carol Sanger, *Separating From Children*, 96 COLUM. L. REV. 325, 490 (1996) (stating that birth mothers have pressed for open adoptions in which the birth mother and the adoptive parents, and sometimes the birth mother and child, are no longer strangers to one another).

III. NRTs AND THE EXCLUSIVE FAMILY: PUSHING THE BOUNDARIES

Part III suggests that NRTs call for a more inclusive and diverse paradigm of the family in ways very analogous to those discussed in the preceding parts of this Article. NRTs, like the emerging realities of reconstituted families and open adoptions, are stretching the boundaries of the traditional notions of family, and are forcing us to consider a multitude of relationships. Many of the emerging solutions may serve as useful models or starting points in the context of NRTs.

This Article assumes that there are no disputes as to a child's designated primary caretaker or parent.¹⁹⁸ Most of the abundant literature written on this issue envisions "winners" and "losers."¹⁹⁹ Surrogacy issues, for example, have replaced the nature versus nurture debate with that of genetics versus gestation.²⁰⁰ The literature tends to reflect the dominant paradigm of the exclusive family: the child has no more than two parents, leaving the question of who gets cut out.

Unfortunately, the literature as a whole presents a skewed picture of the social reality. In the vast majority of NRT scenarios, no questions arise over biological parenthood or legal guardianship. Cases such as *In re Baby M.*²⁰¹ or *Johnson v. Calvert*²⁰² are rather pathological in this sense. The focus of attention on legal parentage, moreover, tends to deflect attention from the common problems that arise in such situations.²⁰³

198. This author's view is that surrogate contracts should not be specifically enforceable and that there should be a "cooling-off period" following the birth of the child (not preconception). During that time the gestational mother may decide not to relinquish the child. This would be very similar to provisions contained in many adoption statutes.

199. See generally Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 5-23 (1997) (discussing parental rights, the rights of third parties, and differing standards of determining custody).

200. See, e.g., Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497 (1996) (examining whether legal motherhood should be based on the preconception intentions of the two women who contribute a reproduction function, on genetic contributors, or on gestation); Russell-Brown, *supra* note 44, at 539. See generally Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995) (exploring racism and genetic ties with the law of surrogacy).

201. 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *rev'd*, 537 A.2d 1227 (N.J. 1988).

202. 851 P.2d 776 (Cal. 1993).

203. Although the subject of lesbian families could be discussed in a number of contexts, this article includes some discussion of it under sperm donation. See *infra* Part III.B.

A. Surrogacy²⁰⁴

Surrogacy is not a new concept.²⁰⁵ A number of feminist anthropologists have recently expressed considerable concern about the effects of certain NRTs, such as surrogacy and ovum donation, on kinship relationships.²⁰⁶ Kinship traditionally involved a convergence of "blood" or genetic ties to the gestational or nurturing role.²⁰⁷ In splitting these aspects of kinship, NRTs may threaten the essence of kinship.²⁰⁸ This "splitting" is not unique to NRTs. It is also true of adoption, (at least after birth), and of reconstituted families. Surrogacy is one of a number of modern family phenomena that challenges previously fundamental assumptions about the essence of family.²⁰⁹

The challenge of fundamental assumptions of family is evident in two respects. First, the traditional legal framework is challenged because there are more than two people involved²¹⁰ in creating a child.²¹¹ Second, it is clear that such surrogacy arrangements are increasing in frequency, and families are dealing with the initial presence of the third person in a variety of ways that are not present in the existing legal system.

Very few surrogacy arrangements end with the refusal of the gesta-

204. The term "surrogate" has been controversial. Currently, in medical circles, it is used to refer to a woman who carries a fetus for someone else and who contributes her own ovum to the project. In these circles, the woman who gestates a fetus created with the gametes of the intended parents is called "the gestational carrier," while the intended parents are generally simply referred to as the "parents." See SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGIES [SART] ANNUAL REPORTS. Many feminists have objected to the term "surrogate" on the basis that it suggests that she is not the "real" mother. In general usage, including legal writing, the term surrogate is generally understood as the woman who gestates the fetus, whether or not she contributes her own genetic material. See Erika Hessenthaler, *Gestational Surrogacy: Legal Implications of Reproductive Technology*, 21 N.C. CENT. L.J. 169, 169-70 (1995). I use the term in this sense.

205. See *Genesis* 16:2 (referencing that Abraham's wife, Sarah, recruited her maid, Hagar, to conceive a child with Abraham and carry it for her).

206. See HELENA RAGONE, *SURROGATE MOTHERHOOD — CONCEPTION IN THE HEART* 109-12 (1994) (stating that the introduction of assisted reproduction and surrogate parenting raises many new questions about kinship).

207. SARAH FRANKLIN, CELIA LURY, & JACKIE STACEY, *OFF-CENTRE: FEMINISM AND CULTURAL STUDIES* (1991); MARILYN STRATHERN, *REPRODUCING THE FUTURE: ESSAYS ON ANTHROPOLOGY, KINSHIP AND THE NEW REPRODUCTIVE TECHNOLOGIES* (1992).

208. See RAGONE, *supra* note 206, at 110 (discussing the separation of biological motherhood from social motherhood).

209. RAGONE, *supra* note 206, at 109-14.

210. See Shapo, *supra* note 190, at 1102 (stating that "a baby may have up to five people who could be designated as a parent at birth: two genetic parents, a gestational parent, and one or two people not biologically related to the resulting child who have orchestrated the others' contributions, intending to raise the child").

211. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989) (stating that "California law, like nature itself, makes no provision for dual fatherhood"). This comment might just as easily have been made about motherhood.

tional mother to hand over the child.²¹² The case law presents a rather limited view of the variety of relationships and attitudes involved in surrogacy arrangements. Increasingly, surrogacy means *gestational* surrogacy.²¹³ In gestational surrogacy an embryo is conceived *in-vitro*²¹⁴ using the intended parents' gametes and implanted in the womb of the gestational mother.²¹⁵ Typically, the gestational mother develops a close relationship with the intended parents, who attend ultrasound scans, doctor appointments, and other aspects of prenatal care. Often, the relationship between a gestational mother and the intended parents involves frequent contact, such as reported feelings of movement. Recent empirical evidence does suggest that while most surrogate mothers are involved with the pregnancies and excited at the prospect of new life, they do not waver from the view that the fetus is the child of the intended parents.²¹⁶

Psychological profiles indicate that surrogates tend to have narcissistic qualities and place a high value on the altruistic aspect of their contributions.²¹⁷ Carol Sanger cites an example of one program that deliberately changed its advertising copy from "Help an Infertile Couple" to "Give the Gift of Life."²¹⁸ This change garnered a much larger response from interested women.²¹⁹ Anecdotal reports²²⁰ suggest that severing the relationship with the intended parents after the birth can be very difficult for the surrogate mother²²¹ and that the

212. *But see In re Baby M*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *rev'd*, 537 A.2d 1227 (N.J. 1988) (discussing the refusal of a surrogate mother to return the child to the biological father and his wife).

213. *See generally* Scott B. Rae, *Parental Rights and the Definition of Motherhood in Surrogate Motherhood*, 3 S. CAL. REV. L. & WOMEN'S STUD. 219, 236 (1994) (distinguishing between egg donors and gestational mothers) [hereinafter Rae, *Parental Rights*].

214. *See id.* at 236.

215. *See generally* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993). Usually, the intended mother, though ovulating, is incapable of carrying a child, such as when she had a hysterectomy due to cervical cancer. Many in vitro fertilization (IVF) clinics require that the intended mother be physically unable to sustain a pregnancy in order to be eligible.

216. *See* RAGONE, *supra* note 206, at 38 (discussing surrogate mother's response to the question about "whose baby is it?" Surrogates typically respond that the baby belongs to the couple with whom she has contracted.).

217. *See* Andrea Mechanick Braverman et al., *Survey Results on the Current Practice of Ovum Donation*, 59 FERTILITY & STERILITY 1216 (1993). Of course, payment is also a factor. But as Carol Sanger argues, it is insufficient to explain why women do this, and in any event, some financial incentive is not inconsistent with an altruistic motive. *See* Sanger, *supra* note 197, at 461-62.

218. Sanger, *supra* note 197, at 462.

219. Sanger, *supra* note 197, at 461-62.

220. Interview with staff psychologist at a major fertility clinic (discussing programs with a psychiatrist) (Notes on file with author).

221. *See* RAGONE, *supra* note 206, at 44 (stating that "[m]any surrogates are quite content to receive yearly or semi-annual correspondence from their couple, but many other surrogates

amount of ongoing contact after the birth varies from family to family. Many families maintain a two-way contact, though it is not analogous to shared custody or even visitation *per se*. Rather, there is occasional contact, primarily between the adults, and the exchange of cards or photos.²²²

The paradigm of the exclusive nuclear family is at odds with this picture. The nuclear family seems to favor exclusion of the surrogate mother.²²³ The same paradigm that insists there can be only one father and one mother deems the continuing presence of an "extra" parent as awkward and threatening.²²⁴ However, like the stepfather or the "ex-father" who is legally eliminated by subsequent adoption, the connections and relationships between a surrogate and her child will nevertheless subsist at some level. They are not excluded *ab initio* by the "new" family, as the legal paradigm of the exclusive family would dictate.

The reality of surrogate parenting arrangements suggest that the surrogate does not assert or wish to assert an active or involved role in the child's life.²²⁵ Rather the surrogate defers to the intended parents and maintains minimal contact, which is likely to decrease over time.²²⁶ However, our legal paradigms should recognize the ongoing contributions to the family that a surrogate makes.²²⁷ The importance of the relationship between the surrogate mother and the intended parents is amply illustrated by the cases.

In *Johnson v. Calvert*,²²⁸ difficulties arose not because Anna Johnson, the surrogate, decided that she wanted to keep the child, but because

have no wish to 'terminate their relationships with their couple').

222. See RAGONE, *supra* note 206, at 44, 89 (describing the continuation of contact between surrogate mother and parents to exchange cards, photographs, and letters).

223. See generally RAGONE, *supra* note 206, at 43 (providing instructions from surrogacy programs "that once the child is born they should 'terminate' their relationship in order to allow the couple 'to get on with being parents' and to allow the surrogate to 'pick up the pieces of her life'").

224. See generally SCOTT B. RAE, *THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD* 77 (1994) (discussing the traditional parents as the two determined by biology. Recent reproductive technologies have made this determination more difficult to make.) [hereinafter RAE, ETHICS].

225. See Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2350 (1995) (stating that less than one percent of surrogates change their mind and make an effort to keep the child).

226. RAE, ETHICS, *supra* note 224, at 101.

227. See RAE, ETHICS, *supra* note 224, at 104-05 (stating that "[o]nce the legal parents have been identified in any surrogacy arrangement, then they both may exercise their rights to initiate and develop a relationship with the child, rear the child, and make decisions concerning the child's upbringing." The author subsequently argues that the fundamental rights of the surrogate mother to associate with her child are denied by the adoptive couple.).

228. 851 P.2d 776 (Cal. 1993).

her relationship with the Calverts, the adoptive parents, ended.²²⁹ As Justice Panelli observed in the summary of facts in the California Supreme Court:

[U]nfortunately, relations deteriorated between the two sides. Mark learned that Anna had not disclosed she had suffered several stillbirths and miscarriages. Anna felt Mark and Crispina did not do enough to obtain the required insurance policy. She also felt abandoned during an onset of premature labor in June.²³⁰

As a result of this breakdown, Anna wrote to the Calverts in July 1990, demanding that they pay her the balance of payments due or else "she would refuse to give up the child."²³¹ The Calverts responded shortly thereafter by seeking a declaration that they were the legal parents of the unborn child.²³² Anna filed a similar action.²³³ On these facts, the central dispute clearly did not arise over the question of who would raise the child, but rather arose as a matter, as Justice Panelli noted, of deteriorated relations.²³⁴

The same can be said with respect to the situation in *In re Marriage of Moschetta*.²³⁵ In *Moschetta*, the surrogate mother learned of the contracting couple's marital problems while she was in labor.²³⁶ The surrogate began to reconsider the surrogacy arrangement, and for two days refused to allow the father to see the baby.²³⁷ She subsequently agreed to allow the baby to be taken to the couple's home, after the

229. See Bernstein, *supra* note 28, at 29 (discussing *Jonhson v. Calvert*, 851 P.2d 776 (Cal. 1993)). Interestingly, more reputable surrogacy programs are increasingly cautious about the "matching" aspect on the basis that accepting unsuitable candidates or matching incompatible surrogates/couples is a recipe for problems. See Roberts, *supra* note 200, at 273 n.256, emphasizing that:

[W]e would not dream of telling pregnant people that when they give birth, the government will decide whether they can keep the child on the basis of whether a social worker thinks that the child looks like a good match for the particular parenting profile. . . . Yet social workers routinely make such determinations about poor Black mothers.

Id. at 273 n.256.

230. *Johnson v. Calvert*, 851 P. 2d at 776, 777-79 (Cal. 1993).

231. *Id.* at 778.

232. *Id.*

233. *Id.*

234. *Id.* at 777-79. This is not uncommon, and is one reason why IVF clinics tend to deploy considerable psychological resources in matching and counseling. In effect, as one psychologist told me, it is enlightened self-interest; experience is showing that the risk of problems and ultimately litigation can be greatly minimized by paying attention to the importance of the relationship between the surrogate mother and the intended parents.

235. 25 Cal. Rptr. 2d 1218 (Cal. Ct. App. 1994) (representing the issue of the enforceability of a traditional, as opposed to gestational, surrogacy contract).

236. *In re Marriage of Moschetta*, 25 Cal. Rptr. 2d 1218, 1223 (Cal. Ct. App. 1994).

237. *Id.*

couple told her they would stay together.²³⁸ However, the marriage deteriorated and the surrogate mother soon filed three petitions.²³⁹ The first was for legal separation; a second petition was to establish custody of the baby; and a third was to establish parental relationship.²⁴⁰ It was only after the marriage deteriorated that the surrogate mother joined the proceedings.²⁴¹

In both *Johnson* and *Moschetta*, the legal framework transformed (and arguably distorted) these problems into a question of rights over the child's custody. One effect of this approach is to mask the importance of the relationship between the surrogate mother and the intended parents. Once the parties framed the issue in terms of exclusive parenting rights, the inevitable inference is that the "other mother" (usually the gestational mother) disappears from view altogether.

A more inclusive vision of the family would retain a place for the woman who gestates a child.²⁴² This would not be a role of a third parent in the sense of one who is a primary caretaker/decision-maker, but would instead be someone who has played a vital part in the creation of the child, and who is likely to retain an interest (distant in most cases) in the family.²⁴³ It would also reflect the range in the amount or degree of contact there might be across different families. The message sent by the exclusive paradigm of the family is that this person should disappear as soon as the baby is born.²⁴⁴ The message sent by a more inclusive vision would recognize and value her contribution, as well as her (likely) interest in maintaining some contact with the family. Such a vision might also encourage the intended parents to acknowledge the need of the surrogate mother to feel that she is valued for her "gift of life."²⁴⁵ The parties should be encouraged to consider a prenatal agreement concerning post-natal ar-

238. *Id.*

239. *Id.*

240. *Id.* at 1223-24.

241. *In re Marriage of Moschetta*, 25 Cal. Rptr. 2d (Cal. Ct. App. 1994).

242. See generally RAE, ETHICS, *supra* note 224, at 109-11 (arguing that the termination of parental rights of a surrogate based on a contract is unconstitutional and that the emotional trauma on the surrogate mother is considerable). Therefore, surrogacy contracts that extinguish all contact after birth should be void. *Id.*

243. See Shapo, *supra* note 190, at 1195 (discussing the current legal system's inability to address parental claims on children born through artificial reproduction).

244. See Shapo, *supra* note 190, at 1195 (citing Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1002 (1995) (stating that once a child is legally adopted, the traditional family structure would extinguish the rights of the biological parents)).

245. It appears, however, that counseling in many centers is also performing this role.

rangements. This would allow parents to decide if, and when, to tell their children how they came into being.²⁴⁶

The issue of post-natal access is one that could be treated as a "matching" issue. For example, one could provide for the presumptive enforceability of agreements for whatever forms of ongoing contact the surrogate and the intended parents deem appropriate.²⁴⁷ These agreements could provide a means of expressly recognizing the roles that a surrogate mother may play. Finally, it is crucial to emphasize that a more inclusive paradigm would not presuppose any given degree or type of contact in any particular situation, but would rather facilitate the wide range of arrangements that one might expect to be as varied as human nature itself.

B. Gamete Donation

1. Lesbian Families and the Question of the Sperm Donor

The notion of the nuclear family does not extend to lesbian families.²⁴⁸ Lesbians are increasingly resorting to anonymous sperm donors.²⁴⁹ Although there may be a number of reasons for this,²⁵⁰ a prime reason is the concern that donation by a known donor opens the door to intervention by the donor, or, put another way, threatens

246. The author has some trouble with this, as the author's personal belief is that withholding this sort of information is a recipe for trouble at a later point. Nevertheless, the author believes that the parents who raise the child on a day-to-day basis are in the best position to decide how and when to address these issues. In the context of article 583 of the CIVIL CODE OF QUEBEC [C.C.Q.], it was held that it is the prerogative of the adoptive parents to reveal to their child that he or she was adopted before he or she can give a proper consent to an eventual meeting with the biological parents. See *Droit de la famille - 2427* [1996] R.J.Q. 1451 (C.Q.); *Droit de la famille - 657* [1989] R.J.Q. 1693 (C.Q.). See *infra* Part III.B.2 (discussing article 583 of the QUEBEC CIVIL CODE).

247. For example, an annual photograph.

248. Of course, the ideology of the exclusive family excludes some families from recognition as families in the first place. Legally speaking, lesbian families are seen as single-parent families and the status of the co-mother is tenuous at best. Such families are vulnerable to intrusion for the same reason that unwed fathers are vulnerable to the adoption of their children by stepfathers. That vulnerability lies in the absence of a traditional marriage or at least stable heterosexual relationship within which the child is produced. See Bernstein, *supra* note 28, at 24, 39.

249. Bernstein, *supra* note 28, at 20.

250. One of these may be "separatist," that is the wish to dissociate the raising of children from men. See Ann Nemesius, *The Family is Obsolete*, in *LESBIAN CONTRADICTION: A JOURNAL OF IRREVERENT FEMINISM* 6 (1994), cited in Bernstein, *supra* note 28, at 21:

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

Id.

the integrity of the lesbian core unit.²⁵¹

This concern appears to be justified. The case of *Thomas S. v. Robin Y.*²⁵² arose from the following facts. Robin Y. and Sandra R., lesbian partners, decided to have a child through donor insemination.²⁵³ Friends introduced them to Thomas S., an attorney, who agreed to become Robin Y.'s donor.²⁵⁴ Although he apparently agreed not to assert parental rights, the agreement was neither put in writing nor was a physician intermediary used, which would have invoked statutory protection against a subsequent assertion of paternal rights.²⁵⁵ Robin and Sandra wanted Thomas to be available to the child if and when she asked to meet her biological father.²⁵⁶ Contact was initiated when the child was three, and a relationship developed.²⁵⁷ Initially, it seems that everyone was very happy with this "inclusive" arrangement.²⁵⁸ However, when Thomas requested that the child spend part of her summer with him and his extended family, Robin and Sandra refused.²⁵⁹ Robin and Sandra testified that they felt that the child was being transformed into the child of a broken home with the implication that her family was incomplete.²⁶⁰ Thomas S. sued for visitation.²⁶¹ At trial, Judge Kaufman held that Thomas was not entitled to an order of filiation, a prerequisite to visitation.²⁶² The appeals court reversed the judgment in a three-to-five decision.²⁶³ The court of ap-

251. See Bernstein, *supra* note 28, at 21-22 (discussing the pros and cons of using anonymous sperm donors).

252. 599 N.Y.S.2d 377 (N.Y. Fam. Ct. 1993), *rev'd*, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994). In Canada there are no cases involving litigation between anonymous sperm donors and a lesbian couple. Rather, the cases dealt with maintenance or custody with respect to children conceived through artificial insemination after the relationship between the two mothers terminates. See, e.g., *Anderson v. Luoma* [1986] R.F.L.2d 127 (B.C.S.C.).

253. See *Thomas S. v. Robin Y.*, 599 N.Y.S.2d at 377, 378 (N.Y. Fam. Ct. 1993) (discussing the couples first child through artificial insemination and their desire to have a second child through the same means, but with a different sperm donor).

254. *Id.* at 378.

255. *Id.* See Bernstein, *supra* note 28, at 27-28 (discussing *Thomas S. v. Robin Y.*).

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

257. *Id.*

258. *Id.*

259. *Id.* at 379.

260. *Id.* at 379-80.

261. *Thomas S.*, 599 N.Y.S.2d at 379. See Bernstein, *supra* note 28, at 28 (discussing *Thomas S.*).

262. See *Thomas S. v. Robin Y.*, 599 N.Y.S.2d 377, 382 (N.Y. Fam. Ct. 1993); see also Michael H. v. Gerald D., 491 U.S. 110, 118-19 (1989) (noting that a number of rights, in addition to visitation, would follow from a declaration of paternity, such as the right to be considered as the parent who should have custody); Bernstein, *supra* note 28, at 23 (noting that lesbian families could be disrupted by sperm donors suing for parental rights).

263. See *Thomas S.*, 618 N.Y.S.2d at 356; see also Bernstein, *supra* note 28, at 35.

peals reasoned that Thomas' parental rights were terminated without following the procedures for termination of parental rights under New York's Social Services Law.²⁶⁴

The message sent by the court of appeals in *Thomas S.* is that any contact with the sperm donor carries a significant risk for a lesbian family. As in *Johnson v. Calvert*,²⁶⁵ where a breakdown in relations between Anna Johnson and the Calverts transformed into a polarized battle for legal parentage with very exclusionary results, the dispute for visitation in this case became a battle over the whole package of parental rights.²⁶⁶ The legal framework creates winners and losers, and fails to encourage the seeking of common ground. It is hardly surprising that lesbian families' response is to exclude the donors altogether.²⁶⁷ As Nancy Polikoff cautions, "[i]n the present system, known sperm donors who originally intend to remain unidentified and uninvolved can later change their minds and gain full parental rights."²⁶⁸ The present exclusionary framework creates and sustains an incentive to remove the third player, here the male sperm donor.

How might this be different? First, part of the problem lies in the close link between visitation and parental rights.²⁶⁹ If it were possible to dissociate the two, it might be possible to succeed in a claim for visitation without gaining full parental rights.²⁷⁰ Bernstein suggested that *Thomas S.* could have approached the issue differently, resulting in more favorable long term consequences. *Thomas* might have filed a conciliatory brief in which he recognized the autonomy interests of lesbian mothers — biological mothers and their partners — while advocating limited visitation for those donors who form relationships with their children at the mothers' invitation.²⁷¹ Instead, he chose a strategy that, by confirming the worst fears of lesbian mothers, will disadvantage all other gay men who hope to parent in cooperation

264. See N.Y. SOC. SERV. LAW § 384 (McKinney 1992 & Supp. 1998); N.Y. FAM. CT. ACT § 516 (McKinney 1983 & Supp. 1998) (mandating that a putative or unwed father must sign a waiver to relinquish rights).

265. 851 P.2d 776 (Cal. 1993).

266. See *Johnson v. Calvert*, 851 P.2d 776, 786-87 (Cal. 1993) (holding that a woman who enters into a surrogacy arrangement does not have parental rights).

267. See generally Bernstein, *supra* note 28, at 20-25 (discussing reasons some lesbians give for preferring to use anonymous sperm donors).

268. See Bernstein, *supra* note 28, at 25 (citing Nancy D. Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. REV. L. & SOC. CHANGE 907 (1986)).

269. See Bernstein, *supra* note 28, at 53-54 (noting distinctions in state visitation statutes).

270. This is possible for grandparents, and there is some variety from jurisdiction to jurisdiction on this point. See Bernstein, *supra* note 28, at 53-54.

271. Bernstein, *supra* note 28, at 30.

with lesbian mothers.²⁷²

Disassociating the notion of visitation from the core of parental authority would facilitate more inclusiveness of the biological father in circumstances like this. Parents like Robin and Sandra would not have to look over their shoulders in fear that someone else would be designated as a primary decision-maker for their child.²⁷³ The facts of the case do seem to suggest that the idea of contact was welcome.²⁷⁴ The "all or nothing" threat presented by the exclusive legal framework created an incentive both for Robin and Sandra to oppose the visitation and for Thomas to claim parental rights.²⁷⁵ Robin and Sandra's caution was very much vindicated by Thomas' subsequent claims.²⁷⁶

The analogies to stepparent adoptions, "ex-father" access, and potential issues in surrogacy cases are clear. The analogies point to an increasing need for a more inclusive middle ground.²⁷⁷ Here, as with surrogacy, it might not be advisable to have the visitation entitlement spring simply from the status of the arrangement. Rather, there should be certain triggers. For example, a prior agreement might be one factor that could trigger a presumption of access or non-access to the child.²⁷⁸

In summary, the risks which lesbian families (or heterosexual single mothers) face, encourage them to exclude the donors from playing any role whatsoever. This may mean that the child, and the family as a whole, must forego certain relationships that could be complementary to, and supportive of, the core unit. Strengthening the core unit against the risk of intrusion of parental rights by the donor, while facilitating a range of possible arrangements and relationships, should reduce the incentive to exclude these players.

272. Bernstein, *supra* note 28, at 30.

273. See generally Bernstein, *supra* note 28, at 22-23 (noting that lesbian mothers who have artificial insemination with known donors are "fearful of future interference by the biological father").

274. Bernstein, *supra* note 28, at 28.

275. Bernstein, *supra* note 28, at 31.

276. Bernstein, *supra* note 28, at 31.

277. See Bernstein, *supra* note 28, at 39 (noting that if children can adjust to having two fathers (stepfathers/adopted fathers) they can adjust to two mothers).

278. See Bernstein, *supra* note 28, at 33 (objecting on the basis that one cannot sustain a prior agreement like this without a consideration of the best interests of the child). On the other hand, this objection does not prevent the operation of *presumptions* (of access or non-access) that could be triggered by prenatal agreement and/or by subsequent contact. See *id.* at 33.

2. *Anonymous Sperm Donors*

The issues with anonymous sperm donors are somewhat different because a starting premise on all sides is that there will be no contact and no role played by the biological father at all.²⁷⁹ The extent to which this is actually true depends on the particular legal framework that varies from jurisdiction to jurisdiction, and may depend on the marital status of the mother.²⁸⁰ If the donor and the recipient were the only persons involved in this arrangement, one could assert unequivocally that the identity of the donor should never be revealed.²⁸¹ From an instrumental perspective, for example, there is some basis for concern that many potential donors would be deterred by the prospect of having their identities revealed.²⁸² However, the issue is more complicated because the child may want to meet the sperm donor. These issues are similar to those arising in the adoption context where children may wish to make contact with their biological parents.²⁸³

This Article argues that, here again, the rigor of the exclusive family paradigm should be relaxed. In a number of jurisdictions, the adoption issue has been addressed by means of a central registry of birth parents seeking children and vice-versa.²⁸⁴ Once a child reaches majority, he or she may register, and if the natural parent also registers, a meeting can be arranged.²⁸⁵ There have been a number of difficulties with such registers. If either the biological parent or the child does not register, questions arise about the appropriateness of the agency acting as an intermediary initiating contact.²⁸⁶

The province of British Columbia, Canada, solved this problem by

279. See Bernstein, *supra* note 28, at 20 (stating that "[a]lthough there is a man in the story, we never meet him, and he will never meet his child").

280. Bernstein, *supra* note 28, at 23.

281. This article assumes that there are and should be means by which non-identifying information, such as medical information or history, may be communicated.

282. See Peggy Orenstein, *Looking for a Donor to Call Dad*, N.Y. TIMES, June 18, 1995, at 28 (profiling a number of adults conceived by artificial insemination for whom it became very important to find and meet their biological fathers).

283. *Id.*

284. See, e.g., COLO. REV. STAT. § 25-2-113.5 (1997); IDAHO CODE § 16-1513 (1997); IND. ADMIN. CODE tit. 31, r. 14-20-2 (1998); CODE ME. R. § 9-304 (1997).

285. See CIVIL CODE OF QUEBEC [C.C.Q.], article 583 - formerly article 632 of An Act to Establish a New Civil Code and to Reform Family Law, S.Q. 1980, c. 39 - which permits an adopted person or the biological parent(s) to obtain information enabling one to find the other provided, he or she has previously consented thereto. Although article 583 does not refer to registers *per se*, it is in fact seen as the legal basis for their existence.

286. Having such an intermediary enter into contract with the person whose consent is required is simply part of the procedure established under former C.C.Q. article 632. Droit de la famille - 124 [1984] R.J.Q. 2030 (T.J.).

enacting new legislation that provides open adoption records unless children or parents file a "disclosure veto" or a "no-contact declaration."²⁸⁷ As for Quebec, Canada, courts have struggled with the interpretation of former article 583.²⁸⁸ A few cases have held that allowing a public agency to contact the biological parents of an adopted person of full age in order to try to ascertain their opinion on an eventual reunion would amount to giving those agencies permission to solicit the biological parents, contrary to article 583 which prohibits solicitation.²⁸⁹ In *Droit de la famille - 27*,²⁹⁰ Judge Sirois stated that the predecessor article 632 required the biological parents to give their consent *prior* to the exercise of the right of the adopted person to obtain information enabling her to find her parents.²⁹¹ On appeal, the court had to interpret the word "solicitation."²⁹² It concluded that authorizing the Social Services Center to find the applicant's biological parents and inform them that she wanted to meet them does not constitute solicitation within the meaning of the Code.²⁹³ The latter interpretation prevailed over the restrictive approach put forward by Judge Sirois in *Droit de la famille - 27*. Therefore, a prior consent is no longer required and this view should remain under article 583.²⁹⁴

Although that question appears to be resolved, the debate it generated is nonetheless very relevant for the purposes of this Article. Indeed, the interpretation of the word "solicitation," and the requirement of consent *before* the exercise of rights under article 583, reflects the more fundamental tension between the rights at stake in the adoption context. Those are the rights of the adopted person to

287. Adoption Regulation, B.C. Reg. 291 § 19 (1996) (British Columbia, Can.).

288. The full text of the article reads:

[I]f both father and mother have previously died, the brothers, sisters, and nephews and nieces in the first degree, of the deceased succeed to him, to the exclusion of the ascendants and the other collaterals. They succeed either in their own right, or by representation as provided in the second section of this chapter.

CIVIL CODE OF QUEBEC art. 583.

289. See generally Suzanne Pilon, *Les Retrouvailles en Matière D'Adoption (Art. 632 C.C.Q.)*, 45 REVUE DU BARREAU [R. du B.] 806 (1985) (discussing case law regarding article 632).

290. [1983] T.J. 2012.

291. *Droit de la famille - 27* [1984] C.A. 526, 527.

292. *Id.*

293. See *Droit de la famille - 27* [1984] C.A. 526 Court; see also *Droit de la famille - 124* [1984] T.J. 2012, which is to the same effect.

294. 1 QUEBEC, DEPARTMENT OF JUSTICE, COMMENTAIRES DU MINISTRE DE LA JUSTICE: LE CODE CIVIL DU QUÉBEC article 583 (1993) (explaining that the only innovation will be that the right provided for in C.C.Q. article 632 for an adopted person of majority is now extended to an adopted minor fourteen years of age or over, and to a minor under fourteen years of age within the limits of article 583). This change was brought about in order to achieve harmonization with the rules regarding consent to treatment. *Id.*

know his or her origins²⁹⁵ versus the right to privacy²⁹⁶ of the biological parents.²⁹⁷

Interestingly enough, few judgments explicitly mention these issues when confronted with situations such as those arising under the new article 583 of the CIVIL CODE OF QUEBEC. One such example is *Droit de la famille - 27*.²⁹⁸ In that case, Judge Sirois invoked the biological mother's right to privacy to justify his refusal to grant the applicant's (adoptee's) motion to obtain information leading to a meeting between her and her mother.²⁹⁹ The facts revealed that the biological mother had clearly and unequivocally declined meeting the child she had once given up for adoption, after being duly informed of applicant's wish to meet her.³⁰⁰

A similar result was reached by Judge Rivet in *Droit de la famille - 140*.³⁰¹ That case dealt with a motion to allow the examination of an adoption file (now article 582 of the CIVIL CODE OF QUEBEC) and to communicate with the biological parents.³⁰² The adopted child involved had leukemia and the best treatment for her was proven to be a bone marrow transplant. Judge Rivet said that the child's right to life prevails over confidentiality within the limits necessary to save the child's life: she expressly refused to allow the child or her biological parents to communicate in any way.³⁰³

It is safe to say that courts give the right to privacy a great deal of protection.³⁰⁴ This is consistent with the notion of exclusivity. At the same time, society places a high value on the idea of knowing our biological or genetic roots, which can be understood as an expression of exclusivity. Thus, there are conflicts in attaining exclusivity, which likely causes courts to struggle with their decisions regarding modern

295. This view brings more players into the family circle.

296. The right to privacy is entrenched in article 5 of the Charter of Human Rights and Freedoms, R.S.Q. ch. C-12 (Can.).

297. Biological parents prefer to keep "interlopers" out of the family circle.

298. 1984 T.J. 2073. After the Quebec Court of Appeal had established the correct parameters of interpretation of article 632, the case returned before Judge Sirois for a decision on the facts.

299. *Droit de la famille - 124* [1984] T.J. 2012-13.

300. *Id.*

301. [1984] T.J. 2049.

302. *Id.* at 2051.

303. *Id.* at 2051; see also *Droit de la famille - 1677* [1992] R.D.F. 590 (C.Q.), where Judge Grégoire granted a motion to consult the adoption file of a 38 year old woman suffering from diabetes, citing *Droit de la famille - 140* as authority for his decision. There, as well, it was mentioned that the applicant did not want to avail herself of article 632 and to know her biological parents.

304. *Droit de la famille - 1677* [1992] R.D.F. 590 (C.Q.).

family law issues. Had judges been more willing to depart from the rigor of the exclusive family paradigm, the problems with the interpretation of article 632 could probably have been avoided altogether. The broad interpretation of the word "solicitation," which eventually prevailed, is bound to achieve a better balance between the conflicting rights at stake. In a society where there exist different family arrangements and, in the era of new reproductive technologies, it becomes virtually impossible to ignore the various connections a child may have with different people. These factors require a relaxation of the rigor of the exclusive family paradigm.

Quebec has already taken a step in that direction with the creation of the register in the adoption context and the administrative procedure it presupposes. The procedure established under former article 632 and article 583 of the CIVIL CODE OF QUEBEC is clearly a voluntary one: neither the adopted person nor the biological parents have to apply to the court unless there is a conflict between the parties.³⁰⁵ It is sufficient for the interested party to place his or her request with the public agency. There is no problem if there is prior consent. However, absent such consent the public agency investigates and subsequently informs the applicant of the result of its investigation. In the case of a refusal of the party whose consent is required,³⁰⁶ the meeting between the adopted person and her biological parents does not take place.

Generally, courts do not interfere with the administrative process of the public agency, except under exigent circumstances, such as medical or humanitarian, which justify a rapid processing of the file.³⁰⁷ The absence of a positive result, in terms of finding a party or obtaining its consent, will not give rise to intervention of the court.³⁰⁸ This "obligation of means"³⁰⁹ is consistent with a fair balancing of the rights of the adopted person and those of the biological parents. The efficiency of the register, of course, largely depends on the available resources.³¹⁰

305. *Droit de la famille* - 216 [1985] T.J. 2033; *see* Pilon, *supra* note 298, at 808.

306. *See* cases, *supra* note 156 (holding that consent presupposes that the adopted person already knows she was adopted). The procedure under article 583 cannot be used for the purpose of revealing to an adopted person his or her status. *Id.*

307. *See* *Droit de la famille* - 216 [1985] T.J. 2033, 2035-36; *see also* Pilon, *supra* note 289, at 808.

308. *See* *Droit de la famille* - 1651 [1992] R.D.F. 478 (C.Q.); *Droit de la famille* - 1492 [1991] R.D.F. 550 (C.Q.); *Droit de la famille* - 1359 [1990] R.D.F. 589 (C.Q.); *Droit de la Famille* 807 [1990] R.J.Q. 1198 (C.Q.).

309. This is a civilian term denoting a duty to make reasonable efforts, as opposed to an "obligation of result" which denotes a duty to achieve a particular outcome.

310. *See* *Droit de la famille* - 1589 [1992] R.D.F. 294 (C.Q.) (explaining that in Quebec, a

Despite the problems alluded to above, the very existence of such a register in the adoption context, indicates that society is slowly moving away from the paradigm of the exclusive family. A register acknowledges that an adopted person of majority or minority, or his or her biological parents, may wish to have some contact in the future.³¹¹ Moreover, and this is a feature which should please fervent supporters of the traditional nuclear family, the mechanism created under article 583 does not in any way threaten the structure of the adoptive family. In fact, article 583 preserves the structure by requiring the consent of the adoptive parents in addition to that of the biological parents when the article 583 applicant is an adopted minor under fourteen years of age. The core family unit constituted by the adoptive family is preserved, while recognizing the potential role of the biological parents.

The register set up in article 583 could easily be adapted to include sperm donors. Indeed, the paradigm of the exclusive family "writes out" the anonymous sperm donor. In much the same way, the paradigm writes out the surrogate mother, birth mothers who put their children up for adoption, and "ex-fathers" whose children are adopted by stepfathers. In the context of anonymous sperm donors, this judicial practice probably reflects the expectations of the majority of the parties. Moreover, unless one is a true genetic essentialist, it is obvious that a sperm donor has invested much less than a surrogate (gestational or not) or an ovum donor. Nonetheless, we should not rule out the possibility of more inclusive arrangements. Article 583 of the CIVIL CODE OF QUEBEC proves that it is possible to envision a middle ground. It preserves the integrity of a child's (new) family, while at the same time allowing for the possibility of including other people in a child's life, including players who contributed to his or her birth.

3. *Ovum Donors*

The field of ovum donation is relatively new, especially in comparison to sperm donation, and has been escalating rapidly in the past few years.³¹² Unlike the other areas discussed, there is little case law thus far. One might imagine cases involving an unmarried recipient

considerable backlog due to scant resources has meant long waits for "matches."). It is interesting to note that, on one particular occasion, the court held that although certain constraints and delays are inevitable, they should not negate an applicant's right under former article 632. *Id.*

311. Such contact rendered possible by article 583 could take several forms, ranging from a single meeting to ongoing communication.

312. *See, e.g., Johnson v. Calvert*, 851 P.2d 776, 790-92 (Cal. 1993).

and a married known donor that could stretch the limits of the law, such as *Johnson v. Calvert*.³¹³ In some respects, the chances of such litigation are greater than in the sperm donor cases. The reason for this is that the donation process is much more onerous and intrusive for women who donate ovum, requiring drug treatment and physical intrusion which carry some long term risks.³¹⁴ In the case of the known donor, one might expect that some ongoing contact between the donor and the family might be seen as entirely natural since the donor's sacrifice is considerable.

The case for providing a more inclusive paradigm, which contemplates and facilitates a range of contact is similar to the cases outlined above.³¹⁵ If the core unit need not fear displacement by the donor, there is no reason to render the donor invisible as the exclusive family paradigm leads us to do. In the case of anonymous donors, one might also contemplate a registry system, such as the one outlined above.

IV. CONCLUSION

At the end of the twentieth century, the paradigm of the exclusive family has outlived its value. There are two aspects to the traditional notion. The first is that a child has two parents, and only two parents, and all parental authority resides within that parental unit. The second is that for most purposes, while that unit exists, everyone else is a legal stranger to the child. This Article has attempted to sketch out another model. While this model recognizes the central core of the parent-child unit for decision-making and related purposes, it expands the potential network of persons who may play supplementary and complementary roles with respect to the core unit. In other words, this model sees the family unit as closely connected to the community around it by explicitly recognizing the varied sorts of connections that might exist, and contributions that might be made, to the child's upbringing.

As this Article shows, the legal paradigm of exclusivity has meant that various actors, from "ex-fathers" replaced by stepfathers, to birth mothers or surrogate mothers, disappear from view. There are two problems with this. First, it is increasingly divergent from social practices, and second, it perpetuates the notion that the exclusive family is the one to which all society should aspire. This, of course, devalues

313. 851 P.2d 776 (Cal. 1993).

314. See *Johnson*, 851 P.2d at 778 (citing that surrogates may feel the uncomfortable side effects of labor).

315. The article does not suggest in any way that such contact should be compelled.

the myriad of other sorts of family arrangements that exist.

NRTs take their place among other emerging social practices with respect to which people are forging novel and creative relationships that stretch the boundaries of the traditional family beyond the absolute "one mother and one father" model. The law in this area seems to be the slowest institution to change. But at a time when fewer and fewer children live with two parents, when more and more children live in economically strained conditions, and when the state appears to be less and less likely to provide support, the "channeling function" of law could be deployed to encourage and support the creation and maintenance of more connections with those who may have special interests in a particular family or child, and a particular inclination to contribute.³¹⁶ Public discourse on child custody tends to lose sight of the forest through the trees: far more children suffer from poverty, neglect, and abandonment than suffer as a result of custody battles. The paradigm of the exclusive family presupposes the converse. From this perspective, social policy should be contemplating ways of encouraging more people to feel greater levels of responsibility for more children.³¹⁷

These new and diverse relations need not and should not threaten the integrity of the core unit, and in the absence of such threats, many families may choose to foster these connections. In a world in which too many children suffer from a scarcity of caring adults in their lives, the perpetuation of an ideology that reinforces this lack of involvement can only be described as perverse.

316. Sault, *supra* note 5, at 406. As one author correctly emphasizes, "[m]any of the problems that people face in the United States [and to some extent in Canada] today, are the consequences of cultural definitions that ignore the traditional kinship functions of sharing, cooperation, nurturing and mutual support, while asserting the values of biology, independence and control." *Id.*

317. See Sault, *supra* note 5, at 408 (stating another way of encouraging greater responsibility for the children that we should "accept children in terms of a shared framework for nurturance," as opposed to ownership and control). Once such a framework becomes accepted, "the legal system could [in turn] be used to devise solutions that accommodate a wider community, making it possible to satisfy more of the participants, and to create a stable and supportive network of kin commensurate with the needs of growing children." This alternative to exclusivity is what Sault refers to as "interdependence." *Id.* at 408.

