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## Defining Legal Parenthood: The Intersection of Gender and Sexual Identity in U.S. Child Custody Decisions, 2003-2009

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**DEFINING LEGAL PARENTHOOD: THE INTERSECTION OF GENDER AND  
SEXUAL IDENTITY IN U.S. CHILD CUSTODY DECISIONS, 2003-2009**

A Dissertation Presented

by

KRISTINA A. WATKINS

Submitted to the Graduate School of the  
University of Massachusetts Amherst in partial fulfillment  
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

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Sociology

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## DEDICATION

To my wife Deb, my mother Leeanne,  
and in memory of Grandpa

## ACKNOWLEDGMENTS

My advisor Joya Misra provided nothing but encouragement and support throughout graduate school. She took me under her wings during my first semester of grad school, and has guided me ever since. Joya has been invaluable to my intellectual and professional development, and I will be forever grateful.

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None of this would have been possible without the support and sacrifices of my family. My sister cheered me on for many years, and always made me laugh. My mother provided patient support during every step of the way, and I am incredibly grateful to her. My wife Deb always believed in me, even when I became stuck. She picked up extra slack, all while writing her own dissertation. I am grateful for her inspiration, patience, kindness, and love. I could not have done this without you.

## ABSTRACT

DEFINING LEGAL PARENTHOOD: THE INTERSECTION OF GENDER AND SEXUAL ORIENTATION IN U.S. CHILD CUSTODY DECISIONS, 2003-2009

SEPTEMBER 2011

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This dissertation examines the contested terrain of family through qualitative analysis of child custody decisions. Legal parenthood was historically based on the heteronormative family ideal of a legally married monogamous heterosexual couple and their biogenetically related children. In the context of diverse family forms of the twenty-first century, however, courts struggle to draw the boundary lines of legal parenthood. Although previous research has examined the role of parental gender or sexual identity on child custody decisions, my research fills an important gap, as I analyze variations in gender, sexual identity, and path to parenthood for heterosexual, gay, lesbian, and bisexual mothers and fathers. Using the universe of state-level child custody decisions from 2003 to 2009, I created a unique data set in which I matched court cases involving gay and lesbian parents to cases in the same court and time period that involved heterosexual parents, resulting in 254 court decisions. This research design enabled me to illuminate how courts construct families and parents in the context of variations in parental gender, sexual identity, and path to parenthood. In addition, qualitative textual analysis demonstrates how the courts struggled to conceptualize family forms outside of heterosexual marriage and biogenetically related children. Indeed, biogenetics continue

to remain central to legal constructions of parenthood. This research also reveals the continued legal regulation of family forms that deviate from the heteronormative ideal. Overall, this research elucidates larger questions about inequality, gender, sexuality, and family in the United States.

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# CHAPTER 1

## INTRODUCTION

This dissertation examines the contested terrain of family through qualitative analysis of child custody decisions. Legal parenthood was historically based on the heteronormative family ideal of a legally married monogamous heterosexual couple and their biogenetically related children (Bernstein 2001; Stacey 1996). Lowered marriage rates, increased cohabitation and non-marital childbearing, and the greater visibility of gay, lesbian, and bisexual parents, however, have transformed twenty-first century family life (Cherlin 2005). In the context of these diverse family forms, courts struggle to draw the boundary lines of legal parenthood. Therefore I ask: how do variations in gender, sexuality, and circumstances of family formation affect judicial constructions of parenthood and family in child custody decisions?

Previous research has examined the effect of parental gender *or* sexual identity on child custody. This dissertation examines how *both* parental gender and sexual identity affects judicial constructions of parenthood in child custody decisions. In addition, the diverse circumstances of family formation and dissolution result in varied legal relationships, and thereby warrant further analysis. For example, openly gay, lesbian and bisexual parents who have children outside of procreative heterosexual relationships are especially vulnerable, as few legal protections are available to them. Through analysis of gender, sexuality, and family formation as separate units of analysis, my research reveals the gendered and heteronormative ideals embedded in child custody decisions. Although some variation exists, overall I find that courts privilege women over men as parents,

especially mothers who uphold traditional norms for women. In addition, biogenetic parents and heterosexual parents are assumed to be better parents than non-biogenetic and gay and lesbian parents.

My research is unique because I analyzed heterosexual and homosexual parents, as well as both mothers and fathers. In addition, I categorized gay, lesbian, and bisexual parents according to whether their path to parenthood occurred in the context of a same-sex or opposite-sex relationship. I created a distinctive data set in which I matched court cases involving same-sex parents to cases in the same court and time period that involved heterosexual parents. This research design enabled me to illuminate how courts construct families and parents in the context of variations in parental gender, sexual identity, and path to parenthood.

### **A Note About Terminology**

Family law is premised upon the assumption that a married heterosexual couple engages in sexual intercourse in order to create a child, who is genetically linked to both father and mother, and gestationally linked to the mother. Family law and courts, however, use the term “biological” to describe children who are assumed to have both gestational and genetic connections to their mother and father. The modern reality of assisted reproductive technologies<sup>1</sup> (ARTs), however, has decoupled gestation from genetics.

Yet the law continues to support the assumption that genetic connections result from heterosexual reproduction between a woman and man, and result in a gestational

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<sup>1</sup> ARTs includes alternative insemination (AI), *in vitro* fertilization (IVF), egg or sperm donation, embryo transfer, surrogacy, or gestational carrying (for more explanation of the different types of reproductive technologies, see Agigian 2004, Appendix B).

connection between child and woman carrying child. Additionally, the underlying legal assumption is that children result from penile-vaginal intercourse between male and female. The law also assumes that the fertilization of sperm and egg occurs inside the woman's body, which then results in that same woman carrying that embryo to a full-term child. The law does not account for the viability of gametes outside of the act of heterosexual procreative sex.

Although not used by the courts, I use the term "biogenetic" (Bestard 2004) to describe the co-occurrence of gestational and genetic parenthood. I call "gestational" mothers those women who carry the child yet are not genetically linked to the child. Additionally "genetic" parents have shared genetic material with their children (Dolgin 2008).

### **Relevant Literature**

This research reveals the ways that the institutions of family and law are replete with assumptions about gender and sexuality. These assumptions are based upon the primacy of the heteronormative family model, which privileges a traditional sex/gender order based upon the heterosexual biogenetic mother as the parent accorded the most legitimacy. Therefore, all other parents, fathers, non-biogenetic parents, and non-heterosexual parents struggle to gain legal and social legitimacy as parents. Accordingly, I review the legal basis of family, the history of child custody, and the current child custody landscape in the United States.

Anthropologist David Schneider (1986) theorized that family was defined by nature and the law. Indeed the historical foundations of family law defined family

through biogenetic relationships to children (nature) and heterosexual marriage (law). Despite the increase in social parenthood, courts today still cling to those foundations. Beginning in the 1970s, the advent of ARTs began to shift presumptions that gestation and genetics were synonymous. Now gestational, genetic, and legal parent statuses are not always necessarily aligned (Lewin 1993; Stacey 1996; Sullivan 2004).

In the nineteenth century, states began to legally recognize non-biogenetic relationships through the statutory creation of adoption. Even if publicly stigmatized (Fisher 2003), adoption provided another way to have children outside of marriage (in most states) and outside of gestation or genetics. Since the Massachusetts legislature passed the first adoption statute in 1851, all states have legislatively enacted adoption statutes (Mezey 2009). Because these are statutory creations, however, adoptions continue to be governed by the details of each state's statutes. Therefore legal parent status today is determined through a) gestation, b) genetics, c) marriage and/or d) adoption. Because none of these options are universally available for lesbian mothers or gay fathers (and indeed, for some heterosexual parents), gay, lesbian, and bisexual parents are more likely to need the courts to determine parenthood status than heterosexual parents.

Increasingly, courts have recognized a fifth criterion as an essential part of legal parentage, the concept of intent. The "prebirth conduct and postbirth intentions" (Dowd 2001: 123) of the involved parties can help determine whether someone can be classified as a legal parent. Accounting for the intent of the parties, the courts can make clearer determinations regarding surrogacy and the planned families of same-sex parents. While the concept of parental intent has been acknowledged, the majority of courts do not

recognize the intent to parent as sufficient to establish legal parentage (Larson 2010; Miller 2011; Rosato 2006).

A legal formulation called “*de facto* parenthood” has developed as a way to grant a parent-like status to an adult with the intent to parent. A “*de facto* parent” has lived with the child and “has the consent of the legal parent” to form a relationship with and care for the child on a regular basis without “financial compensation” (*Janice M. v. Margaret K.* 2008 citing American Law Institute 2003). Therefore a *de facto* parent “has participated in the child’s life as a member of the child’s family” (*Janice M. v. Margaret K.* 2008 citing *E.N.O. v. L.M.M.* 1999), yet is clearly not a babysitter or a caretaker who is paid for childcare services. While some courts have recognized the theory of *de facto* parenthood, the vast majority of local and state courts do not recognize this theory as a legal basis for parenthood, especially because “consent of the legal parent” is often not a viable option when couples break up (Larson 2010). Indeed many lower-court judges determine that non-biogenetic or non-adoptive parents have “no standing” because they lack a biogenetic or adoptive connection to the child (Dalton 2001; Richman 2002). Therefore some claims to same-sex parenthood are dismissed early on in the legal process and are unlikely to be heard by a higher court.

Although previous research has examined the role of sexual orientation on custody decisions, these works focus on either lesbians or gay men, or combine them as a single group (Richman 2002; 2003; 2008; Connolly 1996; 1998; 2002a; 2002b; Dalton 1999; 2000; 2001). In addition, the majority of literature on same-sex families focuses on lesbian mothers rather than gay fathers (Erera 2002, with some notable exceptions like Berkowitz and Marsiglio 2007; Stacey 2004, 2005, 2006). Legal scholar Clifford Rosky

(2009) thoughtfully analyzed gender in the context of gay and lesbian custody decisions, however, his analysis only included gay fathers and lesbian mothers who left heterosexual relationships, rather than all same-sex parents. Additionally, Rosky did not compare gay, lesbian, and bisexual parents to heterosexual parents. By comparing custody decisions involving various gender and sexuality configurations, my research helps to fill this significant gap in the research.

### *Custody & Contestation*

#### *i. Tender Years Doctrine*

Prior to the mid-nineteenth century, fathers were automatically granted child custody, as the law regarded children as the property of men (Emery, Otto, and O'Donohue 2005). As birth rates decreased and children became less necessary as servants or farmhands, children began to take on an emotional, rather than financial, value (Mason 1994; Zelizer 1994). As men increasingly worked outside the home, mothers were exalted as a result of unique gestational and breastfeeding bonds with their newborns and young children. In this context, mothers were increasingly viewed as responsible for the moral education and nurturing of children (Hays 1996; Mason 1994). This ideology, called the cult of motherhood, was a distinctly white concept as most African-American mothers and children were still slaves or possessed few legal rights (Mason 1994). The increasing prominence of this ideology, however, created a shift in child custody decisions. Therefore in the latter half of the nineteenth century, the “tender years doctrine” emerged, recommending that courts award custody of all children of a tender age (under age 13), to their mothers.

The “tender years” doctrine was upheld as the standard for child custody until shifts in women’s employment patterns, family relations and gender relations began in the 1960s and 1970s. In the midst of these changing attitudes towards marriage, family, and women’s roles, state legislatures throughout the 1970s overturned fault-based divorce laws and passed statutes instituting no-fault divorce, which allowed women to leave unhappy marriages without their husbands’ consent (Adams 2006; Nakonezny, Shull, and Rodgers 1995). In the context of a growing cultural discourse on women’s equality, courts slowly attempted to make family law more gender neutral.

*ii. Primary Caretaker & Best Interests of the Child Doctrines*

The courts began to replace the “tender years” custody doctrine, a maternal preference for the custody of young children, with the “best interests of the child” custody standard (Artis 2004; Connolly 1996; Emery et al. 2005; Fox and Kelly 1995). The courts began to replace the “tender years” custody doctrine, a maternal preference for the custody of young children, with the less gendered “primary caretaker” doctrine, which awarded custody to the parent who performed the most caretaking duties. These duties included attending to the hygiene, nutrition, and the educational and extracurricular needs of the child. This doctrine, however, resulted in similar outcomes to the tender years doctrine, as mothers most often performed these tasks. As a result, the primary caretaker doctrine was incorporated into the newly devised “bests interests of the child standard” as one of several factors evaluated in custody decisions (Artis 2004; Connolly 1996; Emery et al. 2005; Fox and Kelly 1995; Gartner 2007).

The “best interests” doctrine, however, is vaguely defined, allowing judges the

opportunity to exercise broad discretion in their decision-making process, which can often lead to increased discrimination (Cooper and Cates 2006; Dalton 1999; Emery et al. 2005; Lin 1999; Reilly 1996). There is enormous variation in outcome depending on a variety of factors. As Judith Stacey reminds us: “U.S. family rights continue to splinter along lines of class, sexuality, and geography. U.S. family law is mainly state law and wildly inconsistent across state lines. Federal and state courts and legislatures wrestle, often incompatibly, to address the changing realities of American family life” (Stacey 2011: 106). As a result of this inconsistency and lack of uniformity between and within states, judges often incorporate their own beliefs about the heteronormative family ideal into their decisions.

As shifts toward gender-neutral family law began in the 1980s, state legislatures and family courts began to encourage coparenting through joint custody awards. Yet these doctrinal shifts still reflected inconsistent application of child custody standards. Indeed despite these doctrinal shifts in custody decision-making, research has shown that women and men are still not treated equally in the family courtroom. While fathers’ rights groups argue that the maternal preference essentially still exists, mothers’ rights groups and some feminists (Fineman 1988; Polikoff 1982) claim that judges have become partial to men in custody decisions, to the detriment of women (Adams 2006; Artis 1999; Artis 2004; Comerford 2006; Hacker 2005; Hemmens, Strom, and Schlegel 2000; Jacobs 1997; Smart and Sevenhuijsen 1989; Warshak 1996). Although joint physical custody has become more common in the past twenty years, the overwhelming majority of custody decisions award mothers custody. In addition, when mothers receive sole custody, some fathers decide not to appeal because of the unlikelihood of the courts

modifying initial custody orders. Overall, approximately 75% of children of divorced parents lived with their mother the majority of the time, while about 10% lived primarily with their fathers, another 10% of the children lived in joint physical custody arrangements, and 5% lived in split custody, where siblings are split up between parents, or in other arrangements (Emery et al. 2005). Indeed, mothers were awarded physical custody in 68 to 88% of cases, fathers did so in only 8 to 14% of cases, and joint physical custody was awarded in 2 to 6% of times (Fabricius et al. 2010). Other research indicated that the vast majority of children (85%) lived primarily with one parent but saw the other parent much less often.

These custody statistics, however, do not reveal the gendered and heteronormative constructions of parenthood evident in the judges' custody determinations. Indeed Artis (1999; 2004) found that judges often awarded custody to mothers based on beliefs in sex differences, such as assumptions that women possessed better nurturing skills than men, and created stronger bonds with children due to their ability to breastfeed. On the other hand, courts expected that fathers continue to provide economic support as the traditional gender role for men demands fulfillment of the breadwinner role (Ferreiro 1990; Maccoby 2005; Sullivan 1996).

Ideologies of appropriate mothering and fathering are also intertwined with deeply embedded assumptions about social class. As Twyla Hill (2001) stated: "laws tend to reflect the concerns of those with more power in the debate... [Therefore] class interests seems likely to have mediated the wording of laws" and judicial decisions. Indeed the courts often place disproportionate emphasis on the financial and occupational stability of the parents (Artis 2004; Crawford 1999). In addition, alimony and property

awards are often used as bargaining chips in custody feuds (Artis 2004). Court decisions reflect the larger society's "interdependency among multiple systems of domination," revealing the intersection of sexuality, race, gender, and class (Cohen 1997).

Gender also plays a role in judicial discussions of parental sexuality. Research suggests that mothers are treated very differently from fathers when extramarital affairs occurred. Judges extensively questioned mothers about their sexual behavior, whereas fathers were not subject to such scrutiny. Scholars suggest that a double standard exists in custody decisions, unfairly penalizing women for the same behavior performed by men (Bartlett 2000; Sack 1992; Weisberg 1995). Despite the potential for a double standard, courts have widely adopted a "no-harm" rule, which indicates that unless there is evidence that parental affairs caused harm to the children, extramarital affairs often cannot be submitted as evidence in custody and visitation cases (Wardle 2002)

Relationship dissolution and the ensuing custody decisions reveal the fault lines drawn by the courts in defining a parent. In fact, after divorce no longer involved "fault" or blame, child custody began to represent the new arena of contest within the emotional context of relationship dissolution (Adams 2006; Cahn and Carbone 2010). Although most couples negotiated the details of custody outside of court, the judicial custody decisions are vital to understanding "heretofore taken-for-granted gendered assumptions and expectations about parental roles and identities" (Hacker 2005). The vast majority (about 90%) of child custody cases are uncontested cases, in that the custody arrangements are decided out of court with legal assistance and perhaps mediation (Artis 1999; Mnookin and Kornhauser 1979). In contested cases, when the parents cannot agree, the judge must determine the custody arrangements. Despite the small percentage

of contested cases, the courts' interpretation of custody statutes influences uncontested cases (Artis 1999; Maccoby and Mnookin 1992; Mnookin and Kornhauser 1979).

The current family law system is arranged to parse out specific chunks of time to each parent (Moloney 2009). In my sample cases, courts often discussed the allocation of periods of time with the children (visitation) would be allocated in exchange for timely child support payments. While these periods of time take on high stakes in custody disputes, the quantity of time with children can never replace the quality of the relationships that need emotional and intimate connection in order to develop (Moloney 2009). One of the traditional ways that child support was enforced was for mothers to act as gatekeepers of access to the children (Fagan and Barnett 2003; Trinder 2008). If fathers did not pay child support, then they often could not maintain their visitation privileges. In high conflict cases, both the mother and the father frequently filed orders of contempt in court, both for lack of support payments, well as blocking access to visitation of children.

Despite changing cultural beliefs about men's abilities to parent, judges often incorporate cultural assumptions based on traditional gender roles into their custody decisions. While joint *legal* custody awards are becoming more common, courts still overwhelmingly award primary *physical* custody to mothers. Judges often assume that all women want custody of their children and all men do not want custody. Not all women want custody, however, as research indicated that about 82 percent of mothers want custody, compared to 32 percent of fathers (Mason 1999). Additionally research has indicated that fathers have decreased access to their children after divorce or relationship dissolution from the mother.

Certain factors, however, influence the likelihood that mothers *will not* and fathers will be awarded primary or joint *physical* custody of their children. These decisions are influenced by parents' variations in the sexual behavior, sexual identity, and fulfillment of gender roles, as well as the presence of mental health problems or issues of abuse.

For the most part, courts reinforce the heteronormative status quo with their custody decisions. This status quo reinforces the trend of the mother as primary or sole caretaker and father as an economic provider of child support and/or spousal support, with some visitation. This pattern is interrupted, however, when a parent or family's social class (Gordon 1988), race (Roberts 1991), or sexual behavior or identity (Richman 2009; Rosky 2009) deviates from normative family models.

### **Sample and Data**

This chapter is limited to the analysis of court decisions of heterosexual and lesbian mothers, however, my broader dissertation research focuses on both heterosexual and same-sex fathers and mothers. My research utilizes two complementary methods: qualitative textual analysis and quantitative content analysis of child custody judicial decisions using NVivo 8. My unit of analysis is judicial opinions in state courts regarding gay, lesbian, bisexual, and heterosexual parents in all 50 states and the District of Columbia from June 26, 2003 through the end of 2009. Since sodomy prohibition laws often were used as a justification to deny gays and lesbians custody of their children, it is appropriate to restrict my sample to those cases that were decided after the U.S. Supreme Court's *Lawrence v. Texas* invalidated all such laws in June 2003. In addition, my research focuses solely on state courts because family law falls under state

jurisdiction and is rarely addressed by federal courts unless rights guaranteed by the Constitution are vulnerable (Artis 1999).

I have included both bisexual fathers and mothers in my sample. For the most part, however, courts tend to categorize bisexuals as homosexuals. In the eyes of the law, only the categories of heterosexual and homosexual exist, reaffirming a binary system of sexual identity and behavior (Rosky 2009; Yoshino 2000). The law rarely recognizes a self-identified bisexual as homosexual unless s/he has engaged in sexual activity with someone of the same sex. The law also perpetuates a binary sex/gender system (Butler 1999; Cowan 2005). For this reason, my analysis excludes transgendered people. Although transgendered people often face similar issues of legal recognition, my first stage of research is limited to gay, lesbian, and bisexual people - people who are legally considered to be in unequivocal same-sex relationships. In the same-sex parent cases, only 3% (n=4) of cases discussed the bisexuality of parents<sup>2</sup>. The bisexual identity is subject to stigma from both heterosexual and gay and lesbian people. Therefore some people who engage in sexual behavior with both men and women may nonetheless adopt a sexual identity as gay or lesbian, as a way of conforming to the dichotomous sexual identity system.

Identification of the sample cases occurred in three stages. First, I conducted a thorough full-text search of all court cases available through the *Westlaw* database.<sup>3</sup> I supplemented my Westlaw searches with reading *Lesbian/Gay Law Notes*, a monthly publication of the LeGaL Foundation that reports on LGBT legal developments. I also

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<sup>2</sup> In addition, for the sake of brevity, I may use “lesbian” to mean “lesbian and bisexual” and “gay” to mean “gay and bisexual.”

<sup>3</sup> Westlaw is a comprehensive online legal research service in the United States. The subscription-based database service provides access to case law, statutes, administrative codes, and other public records at the state and federal levels. The majority of customers are attorneys, law students, and colleges and universities.

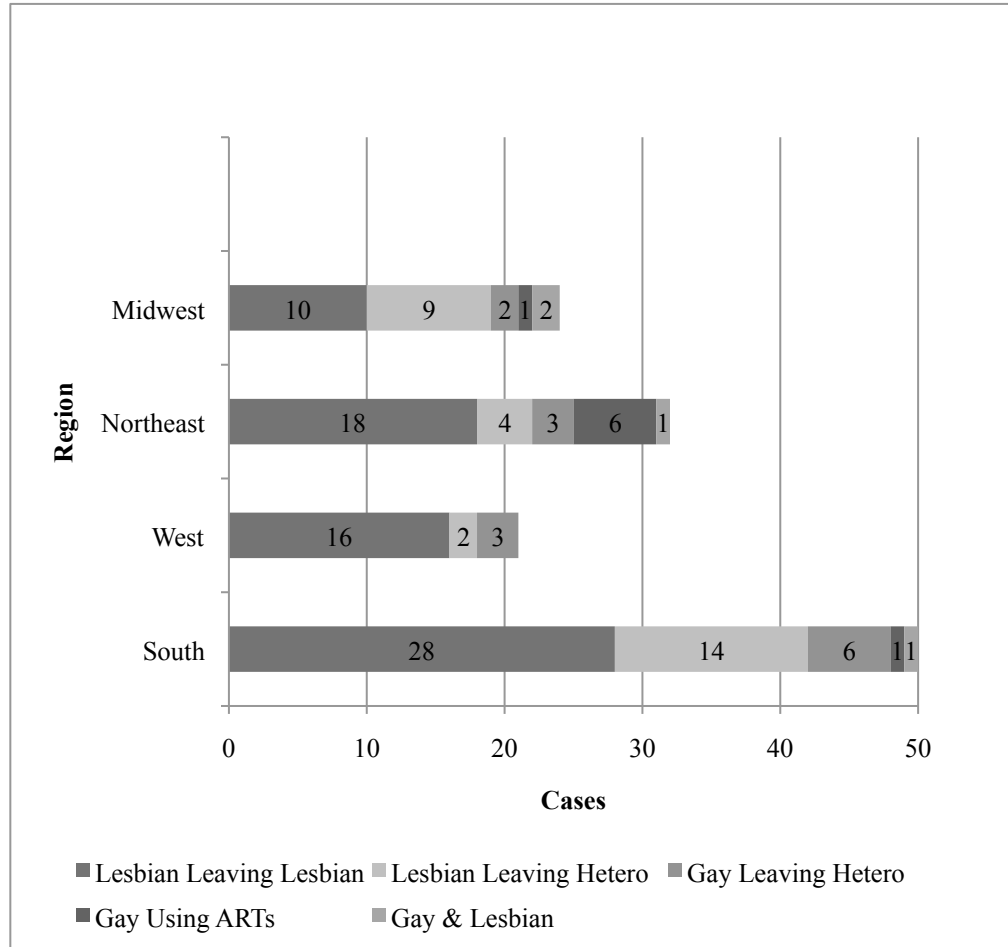
used any relevant cases that were referenced within a case. In Westlaw, I used the following search terms or their cognates for state-level courts: (1) “custody,” “visitation,” “parentage,” and “child support,” (2) “child,” or “parent,” and (3) “homosexual,” or “gay,” or “lesbian,” or “bisexual” or “same-sex.” The search resulted in almost 2,000 court cases. Many of these cases were quickly excluded as a result of the use of the proper name “Gay” or the fact that they were criminal cases that did not involve families. Second, I read all the cases generated from the above searches in order to determine their relevance to my criteria. The criteria I used for inclusion in my sample of gay, lesbian, and bisexual parent custody cases include those (a) heard by an appellate or trial court in one of the 50 states and D.C., (b) those about the custody, visitation, child support, or establishment of parentage of a child, and (c) in which at least one litigant self-identified<sup>4</sup> as gay, lesbian or bisexual at the time the court heard their case. I thoroughly examined all search results, and excluded those cases that did not meet these criteria. The remaining sample size is 101 lesbian mother cases, 22 gay father cases, and 4 that involve both gay fathers and lesbian mothers. The cases were heard in 37 states. Figure 1.1 indicates the general regional representation of the cases. Rather than include the distribution by each of the 37 states, I used the regions utilized by the U.S. Census Bureau (2011). Overall, 19% of my sample cases are from the Midwest; 25% are from the Northeast; 17% are from the West; and 39% are from the South. As shown in Figure 1.1, I have divided my sample according to gender, sexuality, and circumstances of family formation. Therefore, there are five groups: lesbian mothers leaving lesbian relationships, lesbian mothers leaving heterosexual relationships; gay fathers leaving

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<sup>4</sup> Even if a litigant does not self-identify as gay, lesbian, or bisexual, I included the case in my sample if the content of the decision includes a significant discussion of a litigant’s assumed non-heterosexual identity.

heterosexual relationships; gay fathers using ARTs; and cases that involve a gay father and a lesbian mother.

Figure 1.1. Regional Distribution of Cases



The third stage involved matching the gay, lesbian, and bisexual cases to similar heterosexual cases by state, time period, court venue, and judge(s). Each aspect of the matching process was prioritized for uniformity. In order to control for any interaction effects, I alternated the time period before or after the case to be matched. For example, a heterosexual case that occurred six to twelve months before the same-sex case was matched, followed by a heterosexual case that occurred six to twelve months after the

same-sex case, and so on. See Table 1.1 for a detailed description of my matching criteria. When the matching was complete, the final N was 254 cases. This method of matching cases is a common methodological tool (Songer and Sheehan 1993), and helps eradicate any potential bias in the selection of cases.

Table 1.1. Criteria for Matching Same-Sex Cases to Heterosexual Cases

	<b>Criterion</b>	<b>Description of Strategy</b>
1	State	
2	Court venue	
3	Time period	Alternated six months before, six months after (up to 12 months if necessary)
4	Types of parties involved	Parent vs. parent; parent vs. county social services
5	Judge(s)	Single judge decisions matched to single judge decisions. Multiple judge decisions matched by lead judge, followed by any additional judges. <i>Per curiam</i> cases (issued by the entire court) were matched to <i>per curiam</i> cases.
6	Topic	Custody, visitation, parentage, child support

This choice of method facilitates multiple comparisons, such as the comparison of the gender and/or sexuality of the litigants. Additionally, the multiple configurations of families that emerged can also be compared, such as cases involving: a heterosexual relationship or a same-sex one, a child born as a result of reproductive technology or not, and the existence of biogenetic ties. I carefully analyzed how the courts construct the parenting roles of the men and women in my sample. In addition, I examined how the courts view gay, lesbian, and bisexual parents in comparison to heterosexual mothers and fathers. This kind of comparative methodological design facilitated a full analysis of the intersections of both gender and sexuality. For example, a comparison of lesbian mothers with heterosexual mothers may illuminate normative expectations about mothers. On the

other hand, my analysis may also reveal how lesbian parents are viewed differently than gay male parents. My unique research design allows much flexibility in the possibilities for multiple kinds of analyses. The small number of cases, especially of gay and bisexual fathers, prohibited a full regional analysis.

Because reproductive technologies, adoptions, and legal fees require significant financial resources, the resulting sample of judicial decisions is often limited to those with socioeconomic privilege. Nonetheless, these decisions have far-reaching consequences for all parents, as the courts' legal interpretations influence the outcome of future cases through the use of legal precedent (Artis 1999; Maccoby and Mnookin 1992; Mnookin and Kornhauser 1979).

Because my sample consists of 81.7% appellate cases, it cannot be compared to the majority of custody decisions, which are settled out of court in trial court. Contested custody decisions, as mentioned above, constitute only about 10% of all custody decisions. My sample of mothers and fathers are unique because they chose to fight the initial custody decision. Appellate cases establish legal precedent, which other judges and lawyers consider in future cases. Although most trial court decisions are not "reported," some jurisdictions allow trial court decisions to be reported and therefore become part of the public record. In my sample, if I were to have excluded trial court decisions, I would have lost 18.3% of my cases, including 45.5% of gay father cases, 25% of gay father and lesbian mother cases, and 12.4% of lesbian mother cases. Since my sample has such few gay father cases, I chose to include any relevant trial court decisions that arose during my research.

## Analysis Strategy

Following the research of Wolcott (1994), I conducted a three-step analysis plan consisting of description, analysis, and interpretation. In addition, I utilized two complementary methods: qualitative textual analysis and content analysis of child custody judicial decisions. The content of the court decisions was sorted into various broad themes using the qualitative analysis program, NVivo 8. Then, more specific sub-themes and codes emerged around the broader themes, such as comparisons of discussions of “blood” ties between heterosexual and homosexual parents. In addition, I repeatedly read the cases in order to develop additional coding categories to supplement the ones already identified in my pilot study. I then analyzed the context surrounding those words, and began to interpret that context within larger narratives. Please see Table 1.2 for a list of codes used.

Table 1.2. List of Search Words and Their Cognates

<b>Categories</b>	<b>Search Words</b>
Legal Situation	Custody, parentage, visitation, support, adoption
Family & Children	Mother, father, parent, child, son, daughter, girl, boy, gender, wo/man
Marriage & Relationships	Marriage, ceremony, wedding, engagement, divorce, separation, husband, wife, spouse, partner, roommate, lover, girl/boyfriend
Biogenetics	Biology, genetic, reproductive, technology, nature, blood, birth
Sexuality	Sexual orientation/preference, lifestyle, heterosexual, homosexual, gay, lesbian, bisexual, queer, same-sex
Social Class & Status	Financial, economic, salary, job, money, home, career, property, ownership
Race & Ethnicity	White, European, American, Black, African, Caribbean, Latino, Hispanic, Asian, Native, Indian, indigenous
Kin & Relatives	Extended, relative, aunt, uncle, cousin, sister, brother, grandmother/father, niece, nephew, in-law

I employed a mixed methods approach in this dissertation. Qualitative textual analysis identified major themes. In the establishment of themes, ideologies and patterns of meaning also emerged. In addition, in order to exemplify these meanings, I extracted significant quotes from the court decisions. As Silverman states: “discourses of family life are applied in varying ways in a range of contexts, like courts of law” (Silverman 1993: 202). Therefore it is vital that judicial decisions be understood in the context in which they are produced, as they often reflect relations of power.

Through qualitative analysis of the text of court cases, I elucidate how the discourse of the judges constructs certain notions of parent and family. Not only is the judges’ choice of language significant, but what the judges have chosen to include or exclude in their decisions is also telling. For example, the litigants’ racial or ethnic identities were not identified in the court cases, yet an exclusion of a discussion of race suggests that the litigants are white. Although I included proxy codes for race in my research process, approximately 2% of all cases suggested a non-white racial background.

The judicial opinion is an important research tool, indeed, as a “social artifact” (Hamilton 2006: 40). Family policy and law is increasingly determined by how judges define families (Eichler 1997). Therefore it is vital to observe how courts actually describe and understand multiple kinds of familial relationships. In addition, my research focuses on judicial definitions of family, not on the specifics of the case outcome, indicating the compatibility of qualitative methods for this research.

In addition, content analysis of the 254 cases helped facilitate identification of patterns and themes. I also coded each case with the following categories: a) year of

case; b) state in which case was heard; c) whether the court heard multiple versions of the case; d) number of lesbian and/or gay parents involved; e) how the child was conceived: heterosexual intercourse, assisted reproductive technologies, adoption (domestic or international), foster care, etc.; f) sex of children; g) whether custody case resulted from heterosexual or homosexual relationship dissolution; and h) whether a legalized marriage, civil union, or domestic partnership was executed.

### **Dissertation Outline**

Chapters 2, 3, and 4 provide the comparative empirical analyses of this dissertation, for mothers, fathers, and gay and lesbian parents, respectively. Additionally I divided the gay, lesbian, and bisexual parent subsample cases into two different subsets depending on the circumstances of family formation. It is vital to distinguish the variations in paths to parenthood in my gay, lesbian, and bisexual parent subsample. The context of having children within a heterosexual or a same-sex relationship affects the way that courts construct parenthood because of variations in the presence of biogenetic ties and heterosexual marriage.

In Chapter 2, I analyze patterns of meaning and discourses that emerged in relation to mothering and women as parents. I compare heterosexual mother cases with lesbian mother cases. Additionally I divide the lesbian mother subsample into those mothers who were leaving same-sex or heterosexual relationships. I use Sharon Hays' (1996) ideology of intensive mothering to theoretically inform my discussion of mothers.

In Chapter 3, I examine gay, bisexual, and heterosexual fathers. In this chapter, I also include the four cases that involve gay, lesbian, and bisexual mothers and fathers. I

chose to incorporate those cases in the subsamples of gay and bisexual fathers because of the already small sample size of gay father cases. I utilize R.W. Connell's (1987) theoretical contributions of "hegemonic masculinity" to elucidate the importance of hegemonic fatherhood in understanding the ways that courts construct fathers and fatherhood.

In Chapter 4, I compare the gay father cases to the lesbian mother cases. I divide the subsample into two different groups – the heteronormative cases, in which families were formed in the context of heterosexual relationships, and the non-heteronormative cases, in which families were formed in the context of same-sex relationships. I examine the differences and similarities between all gay and lesbian parents. I also provide analysis comparing the heteronormative to the non-heteronormative cases.

In Chapter 5, I return to some of the key themes I presented in the preceding chapters. I revisit the heteronormative family model as the foundational basis of family law in the United States. I question the utility of holding on to a model that no longer reflects the current realities of twenty-first century American family life. In Chapter 5, I also discuss the limitations of my research, expose gaps in the current literature, and outline suggestions for future research.

## CHAPTER 2

### “FAILED TO PUT CHILDREN FIRST”: HOW COURTS REINFORCE NORMATIVE EXPECTATIONS OF MOTHERS

When Christopher<sup>5</sup> was 3 years old, his parents divorced in the state of Washington. His father received primary custody and his mother had liberal visitation. Because the mother’s new home was four hundred miles away, she did not use all of her allotted visitation, resulting in a court modification of less visitation time. When Christopher was five, both of his parents remarried. His stepmother started living with Christopher, and his mother began using all of her monthly visitation time. Five years later, Christopher’s father was suddenly killed in an accident. Following his father’s death, ten-year-old Christopher moved in with his biogenetic mother and her second husband. But the stepmother filed for custody and claimed that the mother was unfit (*In re Custody of Shields* 2006).

Christopher lived in Oregon for a year and a half, during which time he was elected class president and played football. After the stepmother’s petition for custody was granted, Christopher was forced to move back to his stepmother’s house. Although the mother filed two appeals, Christopher continued to live with his stepmother during the three and a half year appeals process.

According to family law, before standing can be established, the legal parent must be proven unfit or evidence provided which indicates that placement with the legal parent would cause “detriment” to the child (*Shields* 2006). Ultimately, the Washington Supreme Court ruled that the biogenetic mother was not unfit, and custody was

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<sup>5</sup> I use pseudonyms in all case descriptions.

transferred back to her. The court ruled, however, that the stepmother had standing and was granted visitation.

This Washington case between the child's stepmother and biogenetic mother yielded interesting findings when both litigating parents are heterosexual women. In a Florida case decided in the same year, however, a trial court and appellate court ruled that the non-biogenetic lesbian co-parent of two children did not have rights to visitation.

After fifteen years in a relationship, including agreeing to create two children together, and then co-parenting each child for five and three years respectively, this Florida lesbian couple broke up. The biogenetic mother refused to let her ex-partner see the children whom they chose to create together, saying that the non-biogenetic partner had no rights to the children (*Wakeman v. Dixon* 2006).

Compared to the Washington case, the Florida non-biogenetic lesbian co-parent played a much larger role in the decision for the couple to have a child, as well as in the day-to-day caretaking of the children. Both lesbian partners clearly had "procreative intent" to create a child (*Wakeman* 2006). Yet the Florida courts ruled that the non-biogenetic partner had no standing and was denied any visitation rights or access to the child.

While the circumstances of these two cases were different, the basic facts were similar. So why did these two decisions result in unequal outcomes? One possible explanation could be that Florida's courts are more conservative than Washington's but trends from my national sample suggest a more complicated picture. While I tracked custody outcomes, the discourses of parenthood embedded in the court decisions reveal much more complex understandings of parenthood, as well as the heteronormative and

gendered nature of the law. Indeed regardless of the national patchwork of state family laws, my research suggests that courts penalize lesbian mothers more frequently than heterosexual mothers in child custody decisions.

This chapter is limited to the analysis of court decisions of heterosexual and lesbian mothers. While the above case involved two lesbian mothers who had separated, I divided the lesbian subsample into two broad groups – lesbians who left heterosexual relationships and lesbians who left lesbian relationships. This distinction is significant because lesbians leaving lesbian relationships faced a different set of concerns within the courtroom than mothers who come out after having children in a heterosexual context.

In cases in which lesbian relationships dissolved, only lesbian mothers were involved, eliminating the possibility of a heterosexual parent. In these cases, custody was most often awarded to only one lesbian mother, and I illustrate how judges chose which lesbian parent received custody. I demonstrate how courts constructed the meanings of parenthood and family in both the discourses and outcomes of my sample custody decisions. Overall my analysis helps to explain how courts construct mothers, straight and lesbian, as deserving of custody.

### **Relevant Literature**

Despite increasing awareness of social parenthood, the law continues to define a parent through legal relationships. As discussed in Chapter 1, historically legal parent status was defined through biogenetic relationships to children and heterosexual marriage. Previously it was assumed that biology and genetics were one and the same. But with the advent of assisted reproductive technologies (ARTs), biology can be

separated from genetics. For instance when a woman donates her egg to a gestational carrier, she is the genetic mother while the gestational carrier is considered the gestational or birth mother. Indeed ARTs have divided motherhood into the gestational (“biological”), the genetic, and the social (Hammons 2008).

In addition, the statutory creation of adoption has allowed parents to have children outside of gestation or genetics, and outside of marriage (in most states). As legal creations, however, adoptions are subject to the limits of state statutes and case law. Therefore legal parent status today is determined by the presence of four factors: a) gestation, b) genetics, c) marriage, and/or d) adoption. Infrequently a fifth criterion, e) intent, has been recognized based on significant parental involvement.

Non-biogenetic lesbian parents do not fit into the binary system of biogenetically related parents – mother or father (Padavic and Butterfield 2011). Therefore, they are often unsure about their parental identity. Scholars have used the phrases “other (non-biological) mother” (Gabb 2005) and “modern other mother (MOM)” (Sullivan 2001) to describe these lesbian parents. Because cultural and institutional assumptions dictate that there can only be one mother, not all lesbian parents identify as mothers, and instead might identify as a “mather,” a hybrid identity of “mother” and “father” (Padavic and Butterfield 2011). Lesbian co-parents believed that rather than the lack of biogenetic ties, it was the lack of legal recognition that was the most problematic to the development of their parental identities (Padavic and Butterfield 2011).

Nonetheless, courts reflect the cultural assumptions about gender roles, and therefore categorized lesbian co-parents as mothers or as non-parents. Courts subscribe to what DiLapi calls a “hierarchy of motherhood”(DiLapi 1989). At the apex of this

hierarchy is “the appropriate mother,” who is a “heterosexual mother, of legal age, married in a traditional nuclear family, fertile, pregnant by intercourse with her husband, and wants to bear children” (DiLapi 1989: 110). Compulsory motherhood is indeed intertwined with compulsory heterosexuality (DiLapi 1989; Rich 1980).

Cultural expectations have helped forge distinct parenting roles as an extension of gender roles. Therefore parenting roles are not gender neutral, but are instead a reflection of a binary sex/gender system (Rubin 1993) – a male parent is therefore a father, and a female parent is a mother. As a result of this cultural logic, a mother is judged by how well she enacts a gendered role as a woman, including narrow prescriptions for femininity.

The characteristics necessary to be a woman, also understood as femininity, overlap with the expectations for motherhood – warmth, emotionality, kindness, selflessness, gentleness, and passivity. Indeed motherhood is integral to hegemonic femininity (Schippers 2007). In addition, heteronormative heterosexuality is a primary and defining component of hegemonic femininity. These culturally prescribed rules of femininity suggest that women make themselves look and act in certain ways, in order to attract the male gaze. Mothering is defined in relation to sexuality, but specifically heterosexuality. Therefore a non-heterosexual couple does not fit the script of proper female sexuality. In addition, a “lesbian mother” was considered an oxymoron, as those two concepts were assumed to never overlap (Thompson 2002). Hegemonic femininity, normative heterosexuality, and mothering are therefore mutually constitutive.

In the construction of proper parenting roles also comes a regulation and disciplining of the family and particular family members (Foucault 1995). The judicial

system frequently reinforces and reinscribes powerful cultural scripts of what parenting – understood as mothering and fathering – should be. The limited definitions of being a good woman are therefore translated into an often-restrictive set of assumptions about what qualities characterize a good mother. Sharon Hays’ ideology of “intensive mothering” (1996) is particularly useful in understanding how a “good mother” is constructed. Hays described intensive mothering as the primary ideology of mothering, which demands mothers’ dedication to her children through the dispensation of “tremendous amounts of time, energy and money” in all spheres of her life (Hays 1996: x). Social and cultural factors support an ideology of intensive mothering, which often leads to cultural blame of the mother who is unable to dedicate herself to her children (Hays 1996). Cultural expectations also dictate that mothers are the primary parent and that motherhood represents the ultimate fulfillment in a woman’s life (Meyers 2001). Indeed intensive mothering is an extension of the heteronormative family ideal of the woman’s role as caretaker and the man’s role as breadwinner.

Mothers are expected to show their children warmth, love, and affection, characteristics that are part of the emotion work necessary in families, and which is work most often performed by women (Carrington 1999; Hochschild 1983). On the other hand, economic provision is associated with the traditional gender role of breadwinning for men (Sullivan 1996), and by default, *not* appropriate as the primary role for women. Demographic shifts have led to increasing numbers of white and middle-class women entering the workplace, yet cultural definitions and ideologies of motherhood have not adjusted to these changing realities. Poor women and women of color, however, have

juggled work outside the home with mothering for centuries. Despite these realities, breadwinning is still not considered to be a part of the narrow definitions of mothering.

Intensive mothering is the norm for all mothers, both those who stay at home and those who perform paid work outside the home. Expectations for intensive mothering, however, do not change when work outside the home is added – instead, two sets of conflicting expectations coexist. Those mothers who work outside the home may be labeled “selfish” in the cultural war of determining who is the best mother (Thompson 2002). As long as mothers continue to uphold intensive mothering ideals, then employment and breadwinning can be added.

In their decisions, courts also focused on discussion of the non-normative sexual behavior and identity of the litigants. Although American society has become increasingly more tolerant of non-marital pleasure-based sex, the sexuality of parents is still assumed to be procreative in nature (D’Emilio and Freedman 1997; Katz 2007). Non-procreative sex outside of monogamous long-term cohabitating relationships, particularly for parents, is not socially acceptable. As Thompson discussed, “heterosexual mothers are excluded from the enactment of a non-procreative sexuality lest such activity be construed as immoral” (Thompson 2002: 6). Indeed, as the number of sexual partners increases during the post-relationship dissolution period, the stability of the family is assumed to weaken (Carpenter 2010; Okami et al. 1998). Because same-sex sexuality is inherently non-procreative, it is subject to many religious proscriptions and much cultural disapproval. This disfavor has inevitably been inscribed into the minds of legislators and judges, and therefore formalized in family law statutes and case law.

The courts still overwhelmingly uphold the normative child custody outcome of primary physical custody for biogenetic mothers. Certain factors, however, influence the likelihood that mothers will *not* be awarded primary or joint *physical* custody of their children. These decisions are influenced by mothers' variations in sexual behavior, sexual identity, and fulfillment of gender roles, as well as the presence of mental health problems, violence, or any kind of abuse.

Table 2.1. Subsample Descriptive Statistics: Mother Cases by Circumstance

	<b>Heterosexual</b>  (n=127)	<b>Lesbian Leaving Heterosexual</b>  (n=29)	<b>Lesbian Leaving Lesbian</b>  (n=72)	<b>Total</b>  (n=228)
Heterosexual Reproduction	125 (98%)	29 (100%)	4 (5%)	158 (69%)
ARTs (Assisted Reproductive Technologies)	2 (2%)	0	56 (78%)	58 (26%)
Adoption (Public or Private)	0	0	12 (17%)	12 (5%)

## Results

As indicated in Table 2.1, the subsample of all mothers consists of 228 child custody court cases. Heterosexual mother cases comprise 127 cases. As a result of biological realities, the path to children for heterosexual mothers in my sample was fairly straightforward, reflecting the heteronormative family model. Indeed 98% of heterosexual cases involved children created through heterosexual reproduction, while

two cases concerned surrogacy disputes. On the other hand, the lesbian mother cases were more complicated and merit a thorough discussion.

### *The Complexity of Lesbian Mother Cases*

The lesbian mother cases account for 101 cases. Of those cases, 29% of lesbian mothers make up those mothers leaving heterosexual relationships, and their path to parenthood was quite similar to the heterosexual mothers. The other 71% of lesbian mother cases involve lesbians leaving lesbian couples. As shown in Table 2.1, four cases of lesbians leaving lesbian relationships involved children who were created in heterosexual relationships but the litigation involved a lesbian couple's custody battle. The remainder of lesbian break-up cases included 55 (76%) cases where ARTs were used to create children, and 13 (18%) cases that involved adoption.

For lesbian dissolution cases, a diverse set of circumstances led them to court. Because marital relationships and gestational, genetic, and adoptive ties to the child are not universally available for lesbian mothers (and indeed, for some heterosexual mothers), lesbian parents leaving same-sex relationships are more likely than heterosexual mothers to need the courts to determine parenthood status. Indeed, judges acknowledged the complexity of these cases with thorough discussion of the circumstances that led to family creation.

These circumstances include diversity in two general factors for each involved parent: how the child was created and what kind of legal relationship exists with the child afterward. In addition, this configuration of circumstances can be different for each child that is brought into the family, as occasionally one method of creation and legal

relationship exists for one child and not the other. Within the lesbians leaving lesbian relationship cases, there were many different ways that mothers created families. The most common method consisted of one lesbian partner using ARTs to conceive a child, however, this situation often left the other lesbian partner with no gestational, genetic, or legal relationship to the child. Some lesbian mothers each decided to have a child using the same donor so that the children were genetic half-siblings. Other lesbian mothers used their partner's egg to create an embryo, creating a gestational mother and a genetic mother. A few lesbian mothers used sperm from their partner's male relatives in order to create a genetic link for the non-birthing partner.

Sometimes, the non-biogenetic co-mother adopted her partner's biogenetic child so that both partners had a legal relationship to the child. Because of the geographic legal patchwork regarding adoption laws, many states do not allow non-biological partners to adopt their partner's child unless the biological mother's legal rights were terminated first. Even when a second-parent or joint adoption was executed, some mothers tried to use the undefined nature of the law in various states to invalidate the adoption.

Clearly, the path of lesbian mothers to motherhood is quite diverse. Rather than focusing on the circumstances of each case, however, I center on the broad trends and patterns. The emergent discourses provide the overall trends, many of which cannot be classified into neat or binary categories. Therefore, even for cases in which the same custody outcome resulted, significant differences often surfaced in the language and discourse used by the courts.

### Sample Description

As discussed in Chapter 1, my sample cases are not representative of all child custody cases since most custody cases are decided out of court and are therefore not contested.<sup>6</sup> Precedent from the contested cases, however, plays a significant role in the outcomes of uncontested cases. Despite the narrow parameters of this sample, significant patterns and discourses emerged, highlighting the intersectional nature of both gender and sexuality in the arena of child custody.

Research suggests that approximately 80% of divorce cases (Artis 1999; Artis 2004; Mnookin and Kornhauser 1979; Johnston et al. 2005) are settled outside of court. Approximately 20% of child custody cases proceed to court (Jaffe, Lemon and Poisson 2003). During the court process, however, many cases settle, leaving approximately 4-10% of cases<sup>7</sup> (Johnston et al. 2005; Mnookin and Kornhauser 1979) that go to trial. This research, however, does not include custody battles for unmarried couples.

The remaining 4-10% of cases often involved serious conflict between the parents, which are often called “high-conflict custody cases” (Jaffe, Lemon and Poisson 2003). Because these cases are often so contentious, several researchers believe that domestic violence should be considered the norm in these cases, instead of exceptional (Johnston et al. 2005; Meier 2009). In addition, repeated allegations of abuse have become a defining characteristic of high-conflict cases (Johnston et al. 2005).

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<sup>6</sup> My sample mothers are unique because a) they are part of the 20% of custody cases that could not agree on a custody arrangement on their own or in mediation and b) 91% of the parties in these cases chose to fight the initial custody decision, which not all parents do (as only 9% of the mother cases were heard in trial courts).

<sup>7</sup> There is some disagreement about the percentage of contested cases. Mnookin & Kornhauser’s (1979) research suggests 80% of cases are settled outside of court, while Johnston et al. (2005) finds that 90% are settled outside of court. In addition, Johnston et al. (2005) found that 4-5% of cases go to trial, while Mnookin & Kornhauser (1979) stated that 10% go to trial. I primarily use Mnookin & Kornhauser’s sample because their research was based on a larger sample.

Table 2.2. Frequency of Circumstances for Mother Cases

	<b>Heterosexual</b>	<b>Lesbian Leaving Hetero</b>	<b>Lesbian Leaving Lesbian</b>
Marriage Ending in Divorce	66%	66%	1%
Criminal Activity and/or Violence	43%	14%	10%
Mental Health Issues	18%	17%	7%
Relatives trying to gain visitation or custody rights	17%	14%	6%
State Child Protective Services involved	16%	17%	6%
Substance Abuse	17%	10%	1%
Change in court venue or parental relocation	17%	10%	7%
Child Support	47%	38%	25%
Parent communication problems	20%	17%	6%

Although the mothers in my sample do not resemble the general population of custody disputes, there were still significant differences among heterosexual mothers, the lesbian mothers leaving heterosexual relationships, and the lesbian parents leaving lesbian relationships. Some of these differences involved the circumstances under which parents engaged in the legal system. As Table 2.2 demonstrates, the frequency of these circumstances often differed depending on the sexuality of the litigants. In my sample, 66% of heterosexual and lesbian mothers leaving heterosexual relationships had been married, and therefore divorced.<sup>8</sup> On the other hand, there was one (1%) lesbian leaving lesbian relationship case that ended in divorce as a result of a same-sex marriage performed in the same state as the divorce, and was therefore legally recognized.

Although these cases are not representative of all custody decisions, the differences between heterosexual cases and the lesbian cases become most apparent when comparing

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<sup>8</sup> According to the U.S. Census, 67% of families with children under age 18 were headed by married couples (Kreider & Elliott 2009). By chance, the rates in my sample are the same for heterosexual mothers and the lesbian mothers leaving heterosexual relationships.

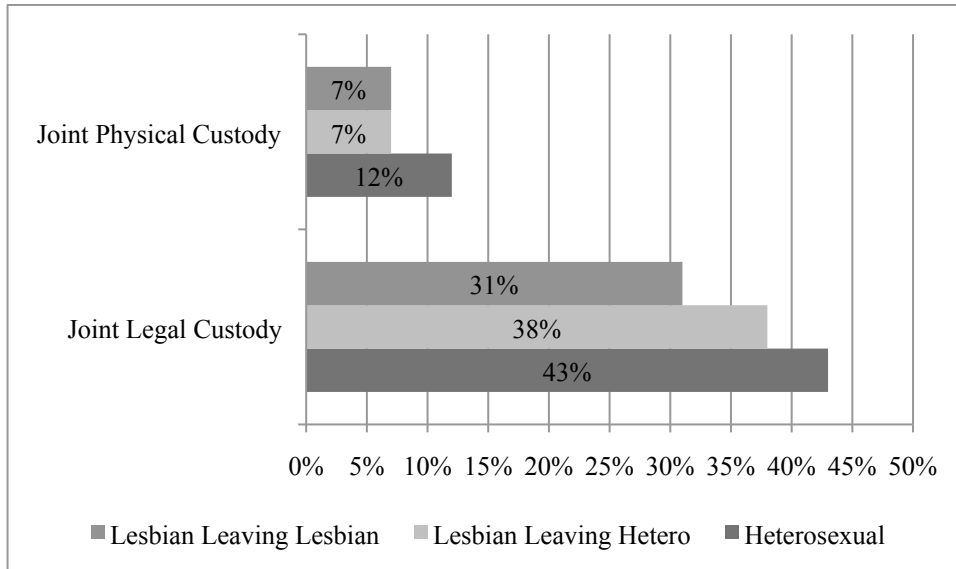
involvement in criminal activity and/or violence. For heterosexual cases, 43% were involved in criminal activity and/or violence, while those rates for lesbian mothers leaving heterosexual relationships and lesbians leaving lesbian were 14% and 10%, respectively. National data suggests that approximately 70-75% of cases handled after failed mediation involved domestic violence (Maccoby and Mnookin 1992). While this statistic is higher than the percentage for my sample's heterosexual mothers, some post-mediation cases settle before going to trial.

Sometimes those cases involving violence also involved behaviors on a spectrum ranging from parental communication problems to the more severe parental alienation syndrome (PAS). These behaviors range from not being able to communicate or cooperate effectively regarding parenting to deliberate attempts to block children's relationships with the other parent. There often was not a chance for significant parental communication problems and/or parental alienation unless both parties are recognized as a parent. Indeed, only 6% of cases involving lesbian parents leaving lesbian relationships involved parental communication problems, as seen in Table 2.2. On the other hand, 20% of all heterosexual cases and 17% of lesbian mothers leaving heterosexual relationships involved parental communication problems.

Nationally 11.9% of children lived with at least one parent who abused alcohol or illicit drugs (Substance Abuse and Mental Health Services Administration 2009). Rates of substance abuse for fathers are double that for mothers. Therefore households that include a father are more likely to experience substance abuse. In my sample, 17% of heterosexual cases involved substance abuse, which is significantly higher than the national average. In my lesbian subsample, only 10% of lesbian leaving heterosexual

cases and only 1% of lesbian leaving lesbian cases involved substance abuse.

Figure 2.1. Joint Physical and Legal Custody of Mother Cases

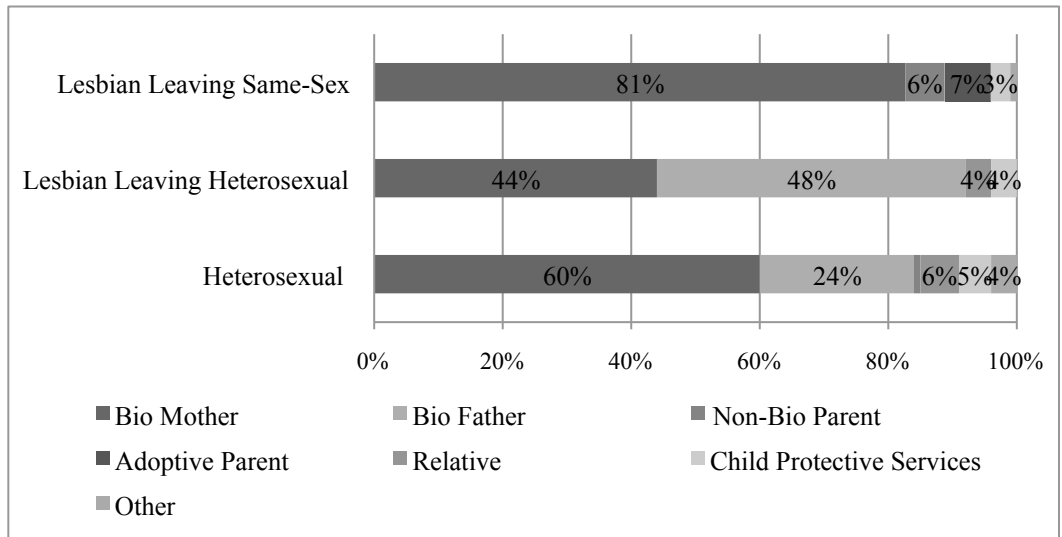


As indicated in Figure 2.1, joint physical custody was awarded to 12% of the heterosexual parents in my sample. On the other hand, only 7% of lesbian leaving heterosexual and lesbian leaving lesbian cases were awarded joint physical custody. Although joint legal custody has become increasingly common, it is often viewed as a legal formality that does not necessarily make parenting arrangements more equitable. Joint legal custody was awarded in 43% of the heterosexual cases, however, the rates were 38% and 31% for lesbian leaving heterosexual cases and lesbian leaving lesbian cases, respectively.

In the general population, more than 75% of custody cases result in primary custody for the mother (Emery et al. 2005). Simply put, mothers receive custody in the lion share of cases. For cases to be brought to the courts, and especially to the appellate

level, stakes tended to be higher, such as those cases involving violence, abuse, and mental health problems. So therefore it is not surprising that fewer mothers in my sample receive custody than in the American population.

Figure 2.2 Non-Joint Physical Custody Arrangements of Mother Cases



This statistic is significantly higher than that for heterosexual mothers, yet there was rarely more than one biogenetic parent involved in these cases. In addition, as shown in Table 2.2, the lesbian mothers leaving lesbian relationships cases were much less likely, at 10%, to involve issues of violence and abuse. For example, 43% of heterosexual mother cases involve abuse and violence, whereas only 14% of lesbian leaving heterosexual relationships cases involved violence or criminal activity. Overall, heterosexual mothers were still more likely to get custody even though their families were three times more likely to be involved in violence and abuse. In fact, the heterosexual mothers in my sample were much more likely to received primary physical custody (71%) if violence or criminal activity were absent from the cases than when those factors were present (46%).

As illustrated in Figure 2.2, in the lesbian leaving heterosexual cases, the fathers were twice as likely to receive primary physical custody as the fathers in the heterosexual cases. In addition, 96% of the non-joint lesbian leaving heterosexual relationship cases resulted in a biogenetic parent or relative receiving primary physical custody, while this statistic was 90% for the non-joint heterosexual cases. This trend, however, was different for the lesbians leaving lesbian relationship cases, where 81% of cases resulted in a biogenetic parent or relative receiving primary physical custody. Instead, in the lesbian break-up cases, adoptive and non-biogenetic parents were much more likely to receive primary physical custody than the other two sub-groups. In fact, 8% of adoptive lesbian mothers leaving lesbian relationships received primary physical custody, while there were 0 cases of adoptive parent involvement in the heterosexual and lesbian leaving heterosexual cases. A similar pattern was seen for non-biogenetic parents, who received primary physical custody 6% of the time in the lesbian leaving lesbian relationship cases, while this statistic was 1% for heterosexual cases, and 0 cases were observed for lesbian leaving heterosexual cases. Clearly significant differences exist among these three sample groups, and the context of legal parenthood is vital to understanding this profound variation.

### *Context of Legal Parenthood*

As discussed earlier, the courts determine the status of legal parents according to four criteria: a) gestation, b) genetics, c) marriage, and/or d) adoption. Gestational and genetic ties, however, represent the historical foundation of defining a *legal* parent. Indeed the default status of mothers is that they are biogenetically related to their

children, as women are the ones who give birth. Hospital and birth records confirm women's gestational and assumed genetic connections to children, whereas establishing paternity requires additional steps and can be disputed.

The courts took for granted the process through which heterosexual couples have children, and considered it "natural." In both the heterosexual cases and the cases involving lesbian mothers leaving heterosexual relationships cases, biogenetic relationships were assumed and therefore rarely mentioned in cases. In fact, only 22% (n=28) of the heterosexual mother cases and 17% (n=5) of the lesbian mothers leaving heterosexual relationship cases mentioned any derivative of the word "biology."<sup>9</sup> The absence of discussion of biogenetic ties supports the unwritten assumption that all heterosexual parents have biogenetic ties to their children.

The other historical foundation of determining legal parentage is legal marriage. The legal system continues to privilege married couples. For example, the paternity presumption automatically granted legal father status to any man married to the mother, even if his genetic connection to the child has not been verified. In both the heterosexual cases and the lesbian leaving heterosexual relationship cases, the courts commonly referred to the children of *married* parents by stating that "the parties have three minor children issue of the marriage" (*Campbell v. Campbell* 2003). Another way that the courts discussed a child born during a marriage by stating the date the couple married followed by the dates the children were born (*Quesinberry v. Quesinberry* 2009). Yet marital status was not a necessity, since the vast majority (98%) of heterosexual cases

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<sup>9</sup> Most often, these discussions involved questions of the father's paternity, rather than the absence of the mother's biological ties.

and all of the cases involving lesbians leaving heterosexual relationship involved two parents who were both biogenetically related to their children.

For both heterosexual cases and those involving lesbians leaving heterosexual relationships, many courts referred to children born outside of marriage as “out-of-wedlock” births. For example, the court stated, “mother and father are the unmarried biological parents of [child], who was born April 29, 2005” (*Clary v. Fisher* 2009). When children were born to unmarried parents, occasionally paternity had to be established. For example, “the couple lived together for a time, but, apparently, were never married. In December 2002, the child was legitimated by King” (*Moses v. King* 2007). Beyond the context of establishing paternity and describing whether the child was born within or outside marriage, there was no other discussion of the biogenetic relationship between mothers and children. Instead, the court decisions quickly shifted to the discussion of the mother’s parenting and sexuality.

Although adoption provides another option to establish legal parenthood, there is only one case that involves adoption in both subsamples of heterosexual cases and lesbian leaving heterosexual relationship cases. In this case, the child was adopted by the child’s “biological great-uncle,” who was also the biogenetic uncle of the child’s father (*Visitation of Cathy L.R.M.* 2005). The biogenetic grandmother requested visitation, but the court ruled that the adoptive parents had the right to deny her visitation. Although this case involved adoption, all parties were biogenetic relatives of the child, confirming the primacy of gestational and genetic ties.

Compared to the other two sub-groups, the lesbian partners who leave lesbian relationship cases were much more complex because gestational, genetic, marital, and/or

adoptive ties could not be assured. Above all else, the courts suggested that in order to be a legal parent, one must be a biogenetic parent. In most lesbian couples in my sample, however, usually only half of the couple has a biogenetic connection to the child, with the rare exception of using genetic material from the non-birthing mother or her male relative. Possessing only half of the biogenetic relationships of straight couples, lesbian parents in my sample therefore faced a doubly challenging relationship dissolution process. In addition, access to legal marriage recognition in most states was (and still is) also unavailable to lesbian couples, and courts labeled their children as “out of wedlock (*T.F. v. B.L.* 2004). Finally, both parents of same-sex couples cannot adopt children in most states, as well as the fact that these types of adoptions are often prohibitively expensive. Therefore lesbian couples who decide to parent begin with significant disadvantages, compared to their heterosexual peers.

The courts often described parents within a binary framework of “biological” versus “non-biological,” revealing the inadequacy of language to describe non-heteronormative family situations. Indeed, courts invoked biogenetic relationships, even if only to negate the presence of gestational or genetic ties. The uncertainty of the legal parent status of lesbian parents was evident in the fact that 90% (n=65) of lesbian break-up cases mentioned any derivative of the word “biology,” compared with 17% for lesbians leaving heterosexual relationship cases and 22% for heterosexual cases. In the lesbian leaving lesbian relationship cases, the courts discussed the “natural” or “biological” mother, and sometimes used ex-partner, “former domestic partner” (*Janice M. v. Margaret K.* 2008; *S.J.L.S. v. T.L.S.* 2008) or other relational language to describe the a “non-biological mother” (*Jones v. Jones* 2005), “non-biological parent” (*Heatzig v.*

*Maclean* 2008), “non-biological person” (*Brenda v. S.B.* 2006), “legal stranger,” (*C.M. v. C.H.* 2004) “third party,” “another female” (*H.M. v. E.T.* 2009), “non-parent,” (*Black v. Simms* 2009; *Egan v. Fridlund-Horne* 2009) or “person who is not a parent” (*Wakeman v. Dixon* 2006).

Table 2.3. Non-Joint Visitation Outcomes for Mother Cases

	<b>Heterosexual</b>	<b>Lesbian Leaving Hetero</b>	<b>Lesbian Leaving Lesbian</b>
Visitation with Biogenetic Mother	15%	52%	3%
Visitation with Biogenetic Father	53%	33%	-
Visitation with Non-Biogenetic Partner	1%	0	41%
Visitation with Adoptive Partner	0	0	9%
All Visitation Denied	1%	0	31%
Other	31%	11%	16%
Restricted Visitation	13%	24%	3%

Some courts recognized non-biogenetic mothers as a *de facto* parent, in the absence of biogenetic, marital, or adoptive ties. Recognition of *de facto* parent status, however, was rare. Additionally when non-biogenetic lesbian mothers filed for custody or visitation rights, some courts dismissed their case outright because they lacked “standing” to pursue a legal claim. Therefore in lesbian custody cases, the courts struggled to first figure out whether the other partner was even considered a legal parent. As indicated in Table 2.3, 29% of non-biogenetic lesbian mothers were denied all visitation or access to the child. After the legal parent status of the non-biogenetic parent was established, then the courts addressed the issues of custody, visitation, and child

support according to the best interests of the child doctrine. The biogenetic parent had an immediate legal standing in court, while most other adults, including non-biogenetic parents, who made claims on children were often considered “legal strangers” (*A.K. v. N.B.* 2008; *Pickelsimer v. Mullins* 2008; *Smith v. Gordon* 2009; *T.F. v. B.L.* 2004). For example, in 2008, the Alabama Court of Civil Appeals stated that the “*natural* mother’s former partner had no visitation rights with respect to the child” (emphasis mine) despite the fact that both women had planned for and raised the child for five years (*A.K. v. N.B.* 2008).

In a California case, the genetic mother donated her ova to her lesbian partner, the gestational mother, as a way for the couple to have children. The genetic mother, overlooking some of the wording, however, signed a donation consent form in the doctor’s office, which relinquished her rights to the child. Therefore when the couple separated after raising twins for five years, the gestational mother claimed that her ex-partner was a “legal stranger” who had only donated “genetic material” (*K.M. v. E.G.* 2005). But the court ruled that the genetic mother’s intention to create a child who “will be raised in their joint home, cannot waive her responsibility to support that child.” Although the genetic mother wanted to establish, not waive, her responsibility to the child through visitation, the court situated this case in terms of the financial obligation of parents, in order to exempt the state from financial assistance. In the end, the gestational mother was granted rights of visitation as the court decided that both the genetic mother and the gestational mother were legal parents.

## **Thematic Discussion**

While many smaller themes emerged in the research process, the expectations of intensive mothering continued to emerge as a central theme that courts revisited over and over again. This theme played out differently depending on sexual identity and the circumstances through which people became parents. As a result, I discuss intensive mothering for three different groups of my mothers subsample: heterosexual mothers, lesbian mothers leaving relationships with men to come out, and lesbian women leaving relationships with women.

### *I. Heterosexual Mothers: Expectations of Intensive Mothering*

As discussed in Chapter 1, courts rely on the best interests of the child standard in their child custody decisions. This standard often includes the primary caretaker doctrine, which purports that courts award physical custody to the parent who was most responsible for caretaking tasks. As a result of the prevalent cultural ideology of intensive mothering, however, the primary caretaker is the mother in the majority of custody cases. Therefore gendered parenting is already inscribed in law.

In my sample, courts often deferred to the cultural default of awarding primary physical custody to the mother. Indeed, courts often omitted discussion of a mother's parenting skills, reifying the heteronormative naturalness of motherhood. For example, in *Harris v. Harris* (2008), the mother and father both worked full time, yet the mother received primary physical custody of their children, while the father received visitation. The court never discussed the custody arrangement, but instead focused on the costs of childcare as part of the father's child support payments.

As evident in the above case *Harris*, the courts generally accommodated the needs of mothers to have paid employment outside of the home. In *Crowell v. Lasker* (2006), the court incorporated the primary caretaker doctrine into the custody decision-making process. Even though the genetic father was able to offer a house in an upscale neighborhood, and a two-parent home because he had remarried, the court awarded the mother custody “because she had cared for the child since birth” (*Crowell* 2006). Yet a court-appointed psychologist “expressed concern that Mother had allowed her apartment (that she shared with Nathaniel and a roommate) to become a mess.” The court ruled, however, that she was a “single mother trying to balance responsibilities of child-raising and a new career.” Clearly the court recognized the struggle inherent in the mother’s attempts to be both a caretaker and a financial provider for her children. In addition, the court did not deem that a messy home represented enough of a violation of intensive mothering to merit a change in custody.

In a New York case, the primary caretaker doctrine was upheld despite the fact that the stay-at-home mother planned to reenter the workforce. In *Stang v. Lange* (2007), the court acknowledged that “each party made contributions to the marriage... their partnership was fairly traditional with the husband as the breadwinner and the wife a stay-at-home mother.” A housekeeper and a nanny also assisted the mother with childcare and household maintenance. After the divorce, however, the wife expressed her desire to return to work. Because the mother had an MBA degree and had worked in the finance industry for fourteen years prior to their marriage, the court felt that her prospects for reemployment were quite good. Yet because the mother had been the primary caretaker, she was awarded primary physical custody of the children.

Although mothers continue to be valorized by the courts, the courts also paradoxically placed their parenting skills under increased scrutiny because of cultural expectations of “intensive mothering.” Yet the courts often rewarded mothers who conformed to the intensive mother model, such as a mother who had arranged a “complex set of activities” (*Daufel v. Daufel* 2008) for her children. Another mother’s dedication to their children was noted, as “she encouraged them to thrive, got them involved in playing musical instruments and helped them become educational standouts” (*W.S. v. B.S.* 2007).

The courts, however, often responded negatively if the judges perceived the mothers were overly involved with their children. In a Pennsylvania case, the court stated that the “mother appears to dote on the minor child” and “her involvement...when he is not in school is quite extensive” (*Brownlee v. Fenical-Brownlee* 2004). The mother discussed her disapproval of the father’s minimal level of involvement with the child, but the court stated: “it appears that Mother’s concerns are overblown.” Nonetheless, the courts upheld the decision to keep primary physical custody with the mother.

The majority of my heterosexual cases proceeded to the courts because of violations of gendered parenting. Most often, those violations consisted of violence, abuse, or mental health problems. The courts discussed a broad spectrum of violations to normative mothering. The courts overlooked some of these violations, and upheld the mother’s primary physical custody. In a Pennsylvania case, the biogenetic mother expected to receive sole physical custody because she was the primary caretaker. In this case, however, the primary caretaker doctrine was trumped by her violations of intensive

mothering, as a result of the child's injuries in her presence. After the court awarded a divorced couple joint physical custody, the mother appealed the decision. Because she had spent more time with the child than the father, the mother believed that she should be awarded sole physical custody, keeping in line with the primary caretaker doctrine. The court believed, however, that "there is reason from the record to be troubled over the child's safety in the mother's care" (*Johnson v. Lewis* 2005). While in the mother's care, the son had suffered from three serious injuries within the first fourteen months of his life, two of which resulted in broken bones. The father was not present during these injuries, and the mother had been the primary parent since the couple had separated when their child was six months old. In addition, because both the mother and father worked full-time, the primary caretaker doctrine was accorded less weight by the court because the child was in day care from the age of four months. Therefore, the court stated that she had not in fact spent more time with the child. Although the mother struggled with her parenting skills, it was telling that she assumed that she would receive primary physical custody. Therefore the courts rarely strayed from awarding primary physical custody to mothers, unless a fairly serious violation of intensive mothering occurred.

In general, parental alienation was much more common for heterosexual mother cases than for lesbian mother cases. Heterosexual mothers were often accused of interfering with the father's visitation, as well as compromising the relationship between the children and their father. Although much controversy still exists over the usage of PAS in family law cases, arguments for parental alienation syndrome emerged in 3% (n=4) of heterosexual mother cases. In an Illinois case, as part of a joint parenting agreement, the mother had been granted primary physical custody and the father

visitation. Within a year of the divorce proceedings, the father filed for sole custody because the mother had “engaged in a systematic effort to undermine the integrity of the relationship between [the father] and [the child].” The court believed that PAS included some of the mother’s behavior in this case, such as the “denial of visitation, denial of regular contact, withholding of information, [and] at least tacitly approving physical intimidation of [the father]” (*In re Marriage of Bates* 2003). The trial court found the mother’s testimony to be “largely invented, untruthful, manipulative, self-serving, and almost wholly [sic] absent of any recognition or responsibility for [her] actions and the damage that [her] actions have done to [the] child, and that child’s relationship with another and equal parent.” Therefore the court awarded sole custody to the father, with the mother’s visitation to be determined at a later date (*Bates* 2003).

In a Pennsylvania case, the court did not believe that a mother’s abuse of alcohol and parental alienation behaviors were sufficient violations of intensive mothering to grant additional visitation hours to the non-residential father. The court had documented the mother’s abuse of alcohol, as well as an arrest for driving under the influence (DUI). In addition, a court-appointed psychologist found that the mother interfered with the psychological evaluation process, including coaching her son to provide certain answers. In addition, the mother denied the father access to the child frequently, including prohibiting the child “from attending baseball games and practices when scheduled” (*Brownlee v. Fenical-Brownlee* 2004). Although the court ruled that the child’s “maturity, emotional and psychological well-being” would improve if the mother did not attack the father, the court found that no evidence was presented to increase the father’s

visitation time (*Brownlee v. Fenical-Brownlee* 2004). Therefore courts remained hesitant to not award mothers primary physical custody or to modify it once they had.

In about 13% (n=16) of heterosexual cases, the court issued restricted visitation orders. These parents were issued restricted visitation orders because of involvement with violence, criminal activity, and/or substance abuse. For example, in *Blackwell v. Humble* (2007), the mother was placed under supervised visitation because she had refused to return the children to the father, who had primary physical custody. In addition, the mother had allegedly made repeated remarks ridiculing her ex-husband and his parents, including allegedly coaching her children to accuse their paternal grandparents of physical abuse. In addition, both the mother and her new husband had severe mental health problems, which were not adequately treated. Overall, the father believed that the mother's "continued poisoning of the children" was causing emotional damage to their children. The mother was upset by these restrictions, which she argued were "draconian" and "usually reserved for mothers who have burned or scalded a child, broke[n] a child's limb, beaten a child, exposed a child to narcotics and dangerous [drugs], sexually abused the child or allowed a boyfriend to do so" (*Blackwell* 2007) Yet in same-sex parenting cases, restricted visitation can be issued solely for a parent's sexual behavior and/or identity.

Courts seem to be quite permissive in their tolerance of substance abuse problems by heterosexual parents, although substance abuse violated the norms of intensive mothering enough to merit court action. For example, in *McBrayer v. Smitherman-McBrayer* (2006), the father asked the court for primary custody as a result of several of the mother's parental problems. These problems included the mother's alcohol abuse,

her alleged failure to supervise children in school and at public events, as well as alleged verbal and physical abuse of the children. Although the court stated that it did not condone the mother's behavior, the father's request was denied and the mother's custody was upheld. The judges believed that "in the face of potentially losing custody of her children, and with the assistance of appropriate counseling, Mother will heed this serious warning" (*McBrayer* 2006). The court chose not to vilify the mother for her former lapses in parental responsibility, and instead chose to focus on the mother's assumed future improvement.

In *Sanborn v. Sanborn* (2004), the father was concerned about the mother's prescription drug abuse problem, in which she was found unconscious on two occasions. While the court admitted that there was "no direct evidence that Mother was abusing drugs during the year prior to the trial," the trial court noted that she had "tried to pass off a forged prescription" as recently as nine months before the trial. Because she had begun attending Narcotics Anonymous and had "made diligent efforts at rehabilitation" (*Sanborn* 2004), the court designated the mother as the primary residential parent. The court seemed willing to overlook the mother's intensive mothering violations because of the chance for rehabilitation.

In several cases, grandparents became involved in custody disputes because of concerns about the mothering skills of their daughters. In *Griner v. Griner* (2007), the biogenetic parents divorced and the court granted the father primary physical custody and the mother visitation. During the marriage, the mother "repeatedly made phone calls to the father or paternal grandmother in order to complain about the day to day problems dealing with the minor child" (*Griner* 2007). As a result of the mother's "fits of extreme

outrage and emotional outburst,” the mother’s psychologist believed that she was not fit to have primary custody.

After three years of this custody arrangement, the child’s paternal grandparents claimed that both the mother and father were unfit and sought custody and/or visitation. The grandparents claimed that the mother’s psychological issues raised at the initial divorce proceeding rendered her unfit. Because those circumstances existed before the initial custody order, however, the court ruled that those facts did not qualify as a change in circumstances necessary to modify custody. In addition, the grandparents maintained that the mother had not paid child support and that the mother was “believed to be cohabitating with a member of the opposite sex and works out of town several nights a week” (*Griner* 2007). The court dismissed both of those claims, however, because child support was not required in the original order, and cohabitation did not render the mother unfit.

The grandparents then claimed that the father was unfit because his new wife “engage[d] in harsh discipline towards the minor child,” and that the child was “suffering from emotional problems due to her treatment” (*Griner* 2007). In addition, the father’s new wife was “known to have an abusive past towards her prior stepchild.” Because there were no claims of “illegal activity or abusive behavior,” however, the court stated that the “allegations were not sufficient to state a claim of father’s unfitness” (*Griner*). In the final judgment, the court denied any custody rights to the grandparents and upheld the original custody order. In this case, both mothers can be viewed as violating the norms of intensive mothering. These violations, however, were not sufficient to switch custody from the biogenetic parents to the biogenetic grandparents.

Although a component of being a good mother is procreative heterosexual sexuality, the courts did not consider heterosexual cohabitation to be a severe enough violation of intensive mothering. The courts rarely expressed concern about children's exposure to their parents' sexual behavior, however, more severe violations of normative sexuality and intensive mothering merited a change from the status quo of physical custody for mothers. In a Virginia case, a mother began an affair with another man while her husband was on military duty in Iraq. After the father's return from Iraq, the mother informed him about her affair and the couple reconciled. Following the reconciliation, the mother denied "resuming sexual relations" with the other man (*Polemeni v. Polemeni* 2007). The trial court and the appellate court, however, believed the mother was lying because the other man's car "was seen at her residence late into the night." The court concluded, that although the wife and the other man had "den[ied] further copulation... their denials do not ring true." The court stated that her affair had "doomed the marriage" as she exhibited "faithless behavior." Because the mother had violated the norms of intensive mothering and appropriate femininity, the court awarded full physical custody to the father and visitation to the mother, as well as denying all spousal support to the mother (*Polemeni* 2007).

## *II. Lesbian Mothers Leaving Heterosexual Relationships: Expectations of Intensive Mothering*

The courts tend to overlook the missteps of heterosexual mothers more than they do for lesbian mothers. By their very existence, lesbian mothers violated norms of intensive mothering, as a lesbian's non-normative sexual identity and behavior was

antithetical to the procreative heterosexuality of mothers. Indeed, courts expressed cultural fears about lesbians as inappropriate parents who violated the norms of proper gender and sexuality expression, which would therefore affected children's development.

In a case involving a lesbian mother leaving a heterosexual marriage, the court stated that the "mother failed to put her children first" because she "chooses to reside in Oregon" with her partner while her children live with the father in Virginia (*Sirney v. Sirney* 2007). Although the court briefly acknowledged that the "father's hostility towards the mother" had hindered her ability to maintain contact with the children, overall the court felt that she "demonstrated a lack of willingness to maintain a close and continuing relationship with her children" (*Sirney*). Therefore the mother violated the norms of intensive mothering because she did not fully dedicate herself to her children, both in the location of her residence, as well as her intermittent contact with her children. The Virginia court ruled that the "limited contact mother has had with the children over the past several years has had a detrimental impact on the children" (*Sirney*). The court awarded primary custody to the father and issued an order of restricted visitation on the mother. This order prohibited "overnight stays by a person to whom [the mother] is not married with whom she is she is involved in a romantic, sexual relationship while the children are visiting." Clearly the court ruled that non-heterosexual cohabitation warranted an order of restricted visitation.

Courts relied on normative standards of mothering in their criticisms of mothers. For example, a Mississippi court believed that a lesbian mother was "lacking in some aspects of her character" (*Davidson v. Coit* 2005). The court claimed that the lesbian

parent's mother had "grave concerns about [her daughter's] motherly instincts." By including this comment in the case, the court reinforced assumptions about the naturalness of a "maternal instinct." In addition, the court claimed that the mother "lets others watch her children more than she does" and that her employment interfered with the time she spends with them. For heterosexual mothers, however, mothers' employment outside the home was viewed as a necessary component of post-separation mothering.

The *Davidson* court was also concerned with the mother's "change of partners" because the mother had dated three women in the eight years since the divorce. The court claimed that the number of partners, not the sex of the partners, was problematic because "it would be just as wrong for three different female or male partners" (*Davidson v. Coit* 2005). A Mississippi court ruled that the exposure to the mother's "alternative lifestyle" was "detrimental to the children's well-being" (*Davidson* 2005). Therefore the court conveyed the belief that exposure to this "lifestyle" would result in assumed negative consequences for the children.

Courts frequently displayed concern about women's sexual agency, and reinforced the sexual double standard. Mothers who were sexually active were sometimes perceived to be promiscuous unless the mother was involved in a heteronormative monogamous procreative marital sexual relationship. The courts struggled with how to conceptualize families outside of the reference point of marriage, monogamy and sexual permissiveness for women. In *Berry v. Berry* (2005), the court ruled that custody should be changed to the father because of the mother's "homosexuality and multiple partners." The trial court based its decision in part on the

mother's "openly promiscuous lifestyle" which "would have an adverse effect on the child in the future" (*Berry* 2005). In *Moses v. King* (2006), the court changed custody from the mother to the father because "it has to do with the fact that you [the mother] are in what I view as a meretricious relationship in front of your child" (*Moses* 2006). Meretricious is a word used to describe a prostitute, a seemingly excessive description of a monogamous same-sex partner.

The sexual behavior and identity of mothers also created custody cases initiated by extended kin who disapproved of this behavior. In this Indiana case, Collin was born out of wedlock and his father has not been involved in the child's life. Collin's mother lived with her parents for six years after his birth. When he was nine months old, the mother had to return to work full-time, and the grandparents became the child's primary caretakers for the next five years. When Collin was five, the mother began dating a woman named Karen. After the grandparents found out about this relationship, the grandmother told the mother "homosexuality is a sin, that she was putting herself and [Collin] in danger, and that mother risked losing her job." Within several months, the mother and the child moved into the mother's own house, and Karen quit her job to become the caretaker of Collin. Soon afterwards, the grandmother had a stroke, and told her daughter that "her homosexuality was the cause of [her] stroke" (*In re Visitation of C.L.H.* 2009).

In addition, the grandparents asked the mother not to visit with Karen, but the mother explained that she "was a member of her family and should be included in family get-togethers." The mother and her partner attempted to maintain contact with the grandparents for several months, however, the grandparents made their disapproval of

Karen clear. In particular, the grandparents “seem[ed] to be very offended by the active role [the] mother has afforded [Karen] in the caregiving of [Collin]” (*C.L.H.* 2009). As Padavic and Butterfield (2011) discussed, the idea of more than one mother was unfathomable to the grandparents.

But on Christmas Eve, the grandparents showed up at mother’s door, demanding to see Collin who was asleep. An argument resulted and the grandfather expressed “concern for [Collin’s] safety with [Karen].” Grandfather told mother that she was a “low...human being” and that she “was never to set foot on their property ever again.” The grandfather then warned the mother that “if anything were to ever happen to [Collin] he’d make sure [mother] was taken care of” and the mother reported feeling physically threatened (*C.L.H.* 2009).

After this incident, the mother stopped communicating with her parents. Three months later, the grandparents filed for visitation rights; they had standing because the child was born to unmarried parents.<sup>10</sup> The appellate court, however, ruled that the “grandparents did not have clean hands” because they had “created unnecessary conflict and stress within the family...which created an unhealthy environment for [Collin]” (*C.L.H.* 2009). Because the mother was deemed a fit parent, the court ruled that it could not require visitation against the wishes of a fit parent.

Although this outcome was positive, a year and half of legal struggle resulted because of the grandparents’ “unwillingness to accept [their daughter’s] relationship with Karen” (*C.L.H.* 2009). The appellate court also noted that the mother and Karen were married in California during the trial. In addition, the court noted that Collin referred to

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<sup>10</sup> In the 1980s, many state legislatures, including Indiana, passed grandparent visitation statutes, which granted standing to grandparents of children who were born “out of wedlock” or children of divorced parents (McMullen 2009).

his mother as “Mommy” and Karen as “Mom,” thereby acknowledging the existence of two mothers.

A 2009 Alabama case provided an interesting analysis of both substance abuse and grandparent visitation and custody. In February 2006, the biogenetic mother of two children confessed that she was addicted to alcohol. She admitted herself to rehab and the maternal grandparents began to care for the children. Three months into the mother’s rehab treatment, the grandparents claimed that the mother “was attempting to give custody of the children to an individual that she had met during rehabilitative treatment” (*M.B. v. S.B* 2009). While the case excluded additional details, it was unlikely that the mother would have given custody of her children to an unknown person. This “individual” was likely a friend or possibly a lesbian girlfriend or partner. The courts attempted to make it sound as if the mother was irresponsible in her choice of guardians. In this case, however, the courts rarely discussed the mother’s sexual behavior or identity. By avoiding the topic, the courts were able to pretend that sexual behavior or identity was not a factor in the custody decision. In attempting to not draw attention to the mother’s sexuality, however, its absence becomes quite noticeable.

Within eight months, the mother had “‘graduated’ from her rehabilitative treatment” and continued to seek visitation with her children. Because the grandparents did not approve of the children having overnight visitation while the mother’s lesbian partner was present, the grandparents began to deny the mother’s visitation rights. As a result, the mother filed a petition to change custody. The trial court found that the mother was “capable of being a strong and good parent,” and that “a change in custody from the maternal grandparents to the mother would materially promote the welfare of the

children” (*M.B. v. S.B.* 2009). In addition, the mother had provided random drug testing reports as evidence that she had been “clean” since February 2006.

The only reason that the custody had been changed in the first place was because of the mother’s substance abuse. The mother’s rehabilitation treatment had ended and she had been clean for over a year, which qualified as a “material and substantial change in circumstances” necessary to change custody back to the biogenetic parent (*M.B. v. S.B.* 2009). In the heterosexual cases, substance abuse alone was not reason enough to deny a biogenetic mother’s custody. The appellate court overruled the trial court’s decision, however, and ruled that the “visitation disputes” between the grandparents and the mother were not sufficient to change the custody back to the mother.

This decision suggests that anti-gay sentiment may be playing out behind the scenes. The appellate court only mentioned the mother’s sexuality in relation to the grandparents’ decision to deny visitation. Therefore, the court appeared to take no sides on the issue of the mother’s sexuality. The court provided a footnote that stated that the grandparents reported “that the younger child reported having witnessed the mother engaged in ‘inappropriate’ contact with another woman; the record further reflects that the children may have witnessed the mother engaged in ‘inappropriate’ behavior with her current lesbian partner.” Instead the court ruled that nothing would “outweigh the potential harm of uprooting the children from the only stable home that they have ever known.” The children lived with their mother, however, for over two years prior to her rehabilitation. In addition, the U.S. Supreme Court has repeatedly recognized “the interests of parents in the care, custody and control of their children” (*Troxel v. Granville* 2000). The constitutionally afforded rights of parents, however, do not exist for

grandparents (Henderson 2005). By awarding the grandparents custody, the court established its disapproval of non-normative sexual identity and behavior in a more veiled manner.

### *III. Lesbian Mothers Leaving Lesbian Relationships: Expectations of Intensive Mothering*

Lesbian mothers often faced significant barriers in trying to uphold the norms of intensive mothering. The courts focused increased scrutiny on lesbian mothers based on the assumption that their non-normative sexual identities conflicted with their gender roles and hence their roles as good mothers. Therefore lesbian mothers were disadvantaged in the eyes of the court, particularly non-biogenetic lesbian mothers, who the courts often did not even consider to be parents at all. Indeed, the non-biogenetic mother's status as a parent was frequently questioned. In addition, the courts struggled with the language used to describe these couples, such as "lesbian partners who lived together" (*K.M. v. E.G.* 2005) or two women who "began living together as intimates" (*In re Parentage of L.B.* 2005). In addition, the non-biogenetic mother was not the primary caregiver in the vast majority of cases. Therefore the "other" mother often had two strikes against her.

Intensive mothering cannot be performed fully by both parents in lesbian couples. When there were two mothers and one was the breadwinner, the court essentially viewed the mother who was the economic provider like a default father (*A.H. v. M.P.* 2007; *Elisa B. v. Superior Court* 2005; *Londergan v. Carillo* 2009). In a Massachusetts case, for example, both parties were legally married and had both cross-adopted the other partner's biogenetic children. As a result of these adoptions, biogenetic ties were of secondary

concern to the court. Instead, the court ruled according to the primary caretaker doctrine. Although joint legal custody was awarded, sole physical custody was granted to the mother who had performed most of the caretaking prior to the divorce and “had been the stay-at-home mother” (*Londergan v. Carillo* 2009). Although the court acknowledged that “she too had taken care of the children,” Melissa had “assumed the role as breadwinner” through her demanding schedule as a surgeon, and was therefore only awarded visitation.

The rest of the discussion was focused on the division of financial assets, such as weekly payments of \$200 for rehabilitative alimony and \$1,250 for child support to the stay-at-home mother. Clearly this upper class family was able to afford multiple second-parent adoptions and attorney fees, as well as only one partner in the paid workforce. While this couple chose to participate in a legal same-sex marriage, that privilege only perpetuated class and race inequalities. This decision recreated similar dynamics to heterosexual divorces where the male breadwinner receives visitation and the caretaker mother receives sole physical custody. Although the court recognized the “stay-at-home mother” for her caretaking labor through the child support award, the court also rewarded normative gender roles, both before and after the divorce. The closer that a family becomes in legal status to heteronormative family ideal, the more that courts tended to rely on traditional gender norms, which only continues to shore up the ideal.

In some cases, in those states where second-parent or joint adoption were available, the courts penalized those parents who did not take advantage of adoption as a method of legal protection. In *A.H. v. M.P.* (2007), the Supreme Judicial Court (SJC) of Massachusetts made a distinction between what it called “caretaking functions” and

“parenting functions” in the establishment of *de facto* parenthood. Citing the American Law Institute Principles, the court ruled that parenting functions were “tasks that serve the needs of the child or the child’s residential family” and that caretaking functions were those “parenting functions that focuses on ‘tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others” (*A.H.* 2009). The court stated that their decision was not meant to “disparage or discount the role of breadwinners in providing for a child’s welfare,” but instead rewarded the parent who fostered the distinct “parent-child bond” of a caretaker. Even though the non-biogenetic co-parent was the primary financial provider for the family and fulfilled “parenting functions,” the court ruled that she did not interact with the child enough to fulfill “caretaking functions” and was therefore not granted “*de facto*” parent status and denied any parenting rights.

#### Exceptions Regarding Child Support

After lesbian couples break up, not all non-biogenetic mothers attempted to gain custody rights. Instead, some non-biogenetic lesbian parents tried to shirk their financial responsibilities as a parent, causing the biogenetic parent to sue for child support. For example, a lesbian couple chose to have children at the same time using the same sperm donor. Emily gave birth to twins, while Elisa gave birth to one child. Elisa breastfed all three children, and claimed tax deductions for three children. Yet when the couple dissolved their relationship, Elisa tried to deny that she was the parent of the twins. Because Elisa had been the financial provider in their household, Emily was forced to receive public assistance in order to survive financially with the twins. The Supreme

Court of California stated that “we perceive no reason why both parents of a child cannot be women” (*Elisa B. v. Superior Court* Cal. 2005). This statement suggested acceptance of this lesbian couple in its recognition of both mothers. But the underlying motivations of the court were revealed later in the case. The court wrote: “the child was deprived of the right to have a traditional father to take care of the financial needs of this child. [Elisa] chose to step in those shoes and assume the role and responsibility of the ‘other’ parent. This should be her responsibility and not the responsibility of the taxpayer” (*Elisa B.* 2005). While this case outcome supported the notion that lesbian parents should be equally responsible for the children they chose to create, the court also reinforced the heteronormative family ideal. In viewing this family as equal to the traditional family, the court also recreated the gendered division of labor as a way to ensure that the state was not financially responsible for these children.

In a similar case in Delaware (*Chambers v. Chambers* 2005), the non-biogenetic mother was the “breadwinner and primary provider” for the biogenetic mother and their son. When the couple split up, the non-biogenetic mother maintained frequent and consistent visitation with their son. When the biogenetic mother, however, issued a claim for child support, the non-biogenetic mother claimed that she was not a parent. She stated “we all know what a parent is” and asserted that only biogenetic ties to a child or adoption creates a parent. The Delaware Court disagreed however, and declared that she was a “*de facto*” parent and was “essential in shaping the child’s daily routine including meeting his psychological, physical, moral and developmental needs.” In this case, the Delaware court explicitly acknowledged, that “regardless of which party was the primary caregiver,” the non-biogenetic mother “interacted with the child on a daily basis” for the

first two years of the child's life (*Chambers* 2005). In this case daily interaction with the child constituted caretaking, yet in other states (such as Massachusetts), similar interaction did not result in equitable custody rights.

### **Conclusion**

The courts are responsible for incorporating the best interests of the child in all of their custody decisions. This doctrine, however, is not described clearly, which can result in wide variability in how this standard is applied. This variability is particularly evident when different populations of mothers enter into custody battles. In this chapter, the courts' differential treatment of mothers was evident.

Based on the work of DiLapi (1989) and Rubin (1993), I found that custody decisions for mothers often operated according to a hierarchy. If biogenetic relationships existed for all parties, the courts then addressed whether the expectations of intensive mothering had been violated. In the lesbian mothers leaving straight relationships, for example, non-normative sexual identity and behavior represented the most significant violation of intensive mothering. For heterosexual mothers, however, intensive mothering violations tended to involve issues of violence, abuse, and mental health. If a biogenetic relationship only existed for one party, however, then the court needed to establish whether the non-biogenetic parent had standing to pursue a custody claim. If standing was established for the parent without any biogenetic ties, then the courts discussed intensive mothering norms, and which parent was the primary caretaker. Courts rarely discussed the sexual behavior and identity of lesbian leaving lesbian relationship cases, but instead focused on the presence of gestational, genetic, marital, or

adoptive ties, followed by violations of intensive mothering norms. Courts reflected cultural assumptions about gender roles, and therefore categorized lesbian co-parents as mothers or as non-parents.

As discussed earlier, courts establish legal parent status by the presence of four-five factors: a) gestation, b) genetics, c) marriage, and/or d) adoption, and occasionally e) intent. Primarily, however, legal motherhood is defined through gestation and genetics. Although all women who want to give birth are limited by the physical realities of gestation and genetics, lesbian parents face multiple layers of additional restrictions and discrimination. Government and insurance regulations dictate that only those who cannot conceive after heterosexual intercourse are eligible for insurance coverage of ARTs (Anderson 2009). Therefore lesbians who want to give birth but do not engage in heterosexual intercourse must have access to financial resources. In addition, legal parent status is defined by an inconsistent set of legislative and judicial laws that vary by state, county, municipality, court, and/or judge. Therefore the geographic and legal patchwork of inequality in adoption, marriage, and parenting laws represents another significant barrier to the creation of a lesbian parent-headed family. Overall, lesbians who want to parent face significant restrictions based on variations in social class, geography, and legal and political realities.

This profound inequality signifies how the legal system is structured to reward the family configurations that conform to the heteronormative family ideal. Indeed, heterosexual custody disputes do not necessitate court intervention, except in cases of serious conflict between the parents, substance abuse, violence, or mental health problems. Judicial intervention should remain a last resort for families, however, lesbian

mothers are often forced to enter the court system in an attempt to seek equitable parenting rights.

This chapter exemplified the penalties faced by lesbian mothers. Indeed lesbians leaving heterosexual relationships were much less likely to receive primary physical custody than the heterosexual mothers, despite the heterosexual parents' higher incidence rates of violence, abuse, criminality, and mental health problems. As long as a heterosexual genetic father is an alternative, the default pattern of primary physical custody awards for biogenetic mothers is interrupted as a result of their non-normative sexual identity.

Lesbians leaving lesbian relationships come to the legal table with less access to the four defining components of legal parenthood. In most states, the law does not allow lesbian parents in lesbian relationships to have legal parenting protections, therefore, the question of standing was discussed in 75% (n=54) of lesbian leaving lesbian relationship cases. Yet only 42% of lesbian leaving lesbian relationships were granted standing or *de facto* parenthood status. Because of that, vulnerability and lack of legal protection become woven into the daily realities of lesbian parent families during the relationship, but especially if dissolution occurs. In lesbian leaving lesbian relationship cases, however, neither parent is a heterosexual parent. Having no heterosexual parent alternative results in the de-emphasis on non-normative sexual behavior or identity.

The courts' decisions make the hierarchy of motherhood distinctly visible. Courts judged violations of normative motherhood harshly. The courts however were significantly more permissive in overlooking those violations for heterosexual mothers than for mothers who engaged in non-normative sexual behavior. Through both the

discourses and the outcomes of these custody decisions, the context of legal relationships and the expectations for intensive mothering become central to determining whether mothers are deserving of custody. In order to understand the complexity of judicial constructions of parenthood, however, it is now vital to turn to the fathers in my sample.

## CHAPTER 3

### THE HETEROSEXUALITY OF HEGEMONIC FATHERHOOD

Mitchell's parents divorced when he was six years old; his mother was awarded primary physical custody and his father was granted visitation. For several years, his father had struggled with significant mental health problems, which had required hospitalization and outpatient therapy. After the father's several incidents of intoxication and rage in front of Mitchell, the mother requested that visitation be changed to supervised visitation. The father had forcibly removed Mitchell from his mother's home several times, and had removed Mitchell's loose tooth with a pair of scissors. Mitchell had also told a counselor that he was scared of his father. One incident "devastated" the child so severely that when he was six, he reverted to bedwetting.

A court-appointed guardian for the child recommended that the father have supervised visitation because she was concerned for Mitchell's safety. Although the father appealed, the Court of Appeals of Indiana (*J.M. v. N.M.* 2006) upheld the restricted visitation order, requiring the father to meet Mitchell at a counseling center, supervised by professional counselors. The court added that the father had refused to complete a psychological evaluation, including a substance abuse assessment. The court ruled that "unsupervised parenting time would significantly impair [Mitchell's] emotional development" (*J.M. v. N.M.* 2006).

Decided the following year, the Virginia Court of Appeals issued a divorce to a couple after seventeen years of marriage and three biogenetic children. The primary reason for the divorce was because the father realized that he was gay. The parents were granted joint legal custody, while the mother was given primary physical custody and the

father was issued an order of restricted visitation because of his homosexuality. The father was prohibited “from exposing the children to his homosexual lifestyle” and from expressing affection with “third parties in the presence of the children” (*A.O.V. v. J.R.V.* 2007). In addition, the father was not allowed to have “any companion with whom he has a romantic relationship stay overnight.” The latter restriction meant that when the children visited, the father’s partner was forced to sleep at a friend’s house instead of the home they shared. The court added that there was no need to “bar the father’s companion from the children’s presence” entirely (*A.O.V.* 2007).

Yet the Court of Appeals of Virginia discussed the testimony of the mother and family friends describing him as an “involved parent” and a “loving father” who had a “good relationship with the children” (*A.O.V. v. J.R.V.* 2007). The court also noted that during the children’s visits, the father arranged for vacations or worked from home and took the children to many outdoor and cultural activities. The father appealed and stated that there was no evidence of harm to the children. The court countered that evidence of “adverse effects” on the children was not necessary to uphold the restricted visitation order.

Both of these cases resulted in the fathers being subject to restricted visitation orders, however, the reasoning was quite different. Although one could argue that different states, courts, and judges resulted in different outcomes, my research shows that these diverse outcomes often result from the differential treatment of heterosexual and gay, lesbian, and bisexual parents. Indeed, my research of child custody decisions revealed that the courts subject gay fathers to increased scrutiny when compared to heterosexual fathers. While violence, mental health problems, and substance abuse

tended to be common reasons for litigation in the heterosexual cases, gay fathers often faced legal barriers because of their non-normative sexuality.

This chapter is limited to the analysis of court decisions of heterosexual and gay fathers. While the above case involved a heterosexual marriage ending because the father came out, I divided the gay father subsample into two broad groups – gay fathers who left heterosexual relationships and gay fathers who used assisted reproductive technologies (ARTs) to create children. This distinction is significant because gay fathers using ARTs face a different set of concerns within the courtroom than fathers who come out after having children in a heterosexual context. Through analysis of both outcomes and discourses, I demonstrate how courts constructed straight, bisexual and gay fathers as deserving of custody or visitation.

### **Relevant Literature**

In this chapter, I explore parenting for heterosexual and gay men. As discussed in previous chapters, the courts establish legal parentage by adherence to four criteria: a) gestation, b) genetics<sup>11</sup>, c) marriage, and/or d) adoption. Additionally occasionally a fifth criterion, e) intent, has been recognized. While there are technically five criteria, legal parentage is still primarily defined through heterosexual marriage and biogenetic relationships to children.

Family law in the United States has long honored the “marital presumption” of paternity, which assumed the paternity of the husband if his wife had a child while they were married (Rothstein et al. 2005; Stacey 2006). Although marriage has historically

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<sup>11</sup> For mothers, biology and genetics can be separated from one other. For men, however, biology and genetics for men appear to be indistinguishable, as one cannot tell whether a father had procreative sex or donated sperm in the creation of the child.

served as a crucial legal marker for fatherhood, “marriage, put simply, is now an inadequate securer of paternity” (Collier 1995: 205). Because increasing numbers of children are born to unmarried parents, the courts have been forced to confront “illegitimate” or “out-of-wedlock” births. Courts have responded in a variety of ways, the most common being the institutionalization of genetic testing to establish paternity.

In addition to marriage, Euro-American conceptions of family rest on the assumption of a biogenetic connection between parents and children, resulting from heterosexual reproduction (Hargreaves 2006; Hayden 1995). Expectations of biogenetic ties are even more pervasive for fathers, as paternity is one of the central ways that fatherhood is defined, both culturally and legally (Bridgeman, Lind and Keating 2008). Because men’s genetic connections to children can never be fully known, legal parentage for men is particularly fraught with contestation and uncertainty. Through widespread DNA testing that can provide 99.9999 percent accuracy of paternity, both voluntary and involuntary legal paternity determinations are “creating a purely biological definition of fatherhood” (Dowd 2000: 120).

Indeed, legal fatherhood is primarily established through biogenetic connection and/or marriage. Heterosexuality is also central to this type of narrowly defined fatherhood. Although the links between masculinity and fathering have been under-theorized, the concept of hegemonic masculinity<sup>12</sup> (Connell 1987) is especially useful in understanding fatherhood. Hegemonic masculinity can be understood as an ideal type of masculinity, and include the features of heterosexuality, domination, aggressiveness, stoicism, and control (Cheng 1999; Connell 1987).

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<sup>12</sup> See Schrock & Schwalbe (2009) for a discussion of the limitations of hegemonic masculinity as a theoretical concept.

Multiple masculinities exist concurrently in modern U.S. society; hegemonic masculinity is the valorized ideal, which few men are actually able to attain, but many men help to support (Cheng 1999). Hegemonic masculinity helps to maintain patriarchal privilege, as it is constructed in relation to femininities and subordinated masculinities (Connell 1987). Hegemonic fatherhood is therefore a part of hegemonic masculinity; this fatherhood form is based on heterosexual marriage with biologically related children created through procreative reproduction.

Also central to hegemonic fatherhood is being the economic provider to the family through a stable successful professional career in the public sphere. But a narrow focus on economic provision does not facilitate alternative kinds of fathering (Whitehead 2010; Orloff and Monson 2002). As economic realities have changed in the last four decades, the father as family provider can no longer be guaranteed for all families. In response, discussions of an “involved” or “new” father have emerged, which emphasized a father who may be a provider, but who also was emotionally involved with his family and participated in childcare (Krivickas 2010; LaRossa 1988; Rotundo 1985; Wall and Arnold 2007). Despite increased cultural supports for the involved “new father,” the practice of fatherhood does not necessarily reflect those changes as fathers continue to be defined by their ability to act as a financial provider to the family (Coltrane and Galt 2000). In addition, some of the roles of hegemonic masculinity – such as being economically successful and able to provide for a family, or being heterosexual and virile – coincide with notions of what it is to be a good father. But as legal scholar Nancy Dowd stated, “men’s socialization continues to emphasize qualities in conflict with good fathering” (Dowd 2000: 11). Necessary qualities for parenting, such as being emotive

and nurturing are often excluded from hegemonic masculinity. Therefore fatherhood is most often defined by biogenetic contribution to the child and as well as the ability to fulfill the breadwinner role (Ferreiro 1990; Maccoby 2005; Sullivan 1996).

Another component of hegemonic masculinity is the “capacity to exert control or to resist being controlled” (Schrock and Schwalbe 2009: 280). For some men, this capacity leads to violent expressions of that control, perpetrated as physical and sexual violence against others. While men’s strength and capacity for violence may be viewed as part of the role as father, courts view physical and sexual abuse as problematic – a hyper-masculinity run amuck, creating a dangerous situation for children. Indeed, courts express fear and judgment when fathers’ sexuality becomes non-normative. This could come in the form of – watching pornography, child or adult sexual abuse, or same-sex sexual behavior or gay identity. However, while porn focused on adults may be viewed as part-and-parcel of men’s sexuality – child sexual abuse and child porn may be viewed as more problematic. Child sexual abuse is also often associated with the belief that same-sex child sexual abuse will lead to the development of same-sex attraction and a gay identity (McGuffey 2008).

Same-sex sexual behavior and gay identity are particularly challenging to hegemonic masculinity. Since hegemonic masculinity is defined as being heterosexual, engaging in same-sex sexual behavior may call men’s very masculinity into question. Since gay men are assumed not to be masculine and assumed not to engage in heterosexual procreative sex, gay men are also not conceived as fathers (Berkowitz and Marsiglio 2007). In addition, the centrality of marriage and biogenetically related children to legal father status is particularly problematic for gay and bisexual fathers,

since neither of these components is guaranteed for both partners. Therefore gay fathers challenge hegemonic fatherhood on multiple fronts.

At the same time, engaging in same-sex sexual behavior remains so stigmatized that courts may view gay fathers as spreaders of sexual disease. Another stereotype that judges have used is that gay fathers and their partners are child molesters, particularly of their own sons and daughters (Andersen 2005). In particular, gay fathers face stereotypes that they are hypersexual and cannot control their sexual urges. These stereotypes serve to obscure all other parts of gay fathers' lives by defining them solely by their sexuality (Spitko 2005). Research has indicated that judges are influenced by these stereotypes in their decision-making process, resulting in increased discrimination for gay fathers (Emery et al. 2005; Lin 1999; Reilly 1996).

As Rosky (2009) and Pascoe (2007) discuss, homophobia plays out in different ways for gay men than for lesbians. As a result of lesbians' status as women, lesbian sexuality operates differently in comparison to the presumptively unbridled sexuality of all men. In particular, assumptions about gender identity are often conflated with assumptions about sexual identity. By not investigating these differences, we are missing the complex dimensions of a "gendered homophobia" evident in court decisions.

## **Results**

As shown in Table 1, the subsample of all fathers is composed of 153 child custody decisions, consisting of 127 heterosexual father cases. As a result of the marital presumption, the married heterosexual men in my sample became fathers in a fairly direct way, with the exception of two surrogacy cases. Because of men's physical limitations,

however, unmarried heterosexual men faced significantly more uncertainty in their path to fatherhood. Nonetheless, 98% of the heterosexual cases involved children created through heterosexual reproduction. On the other hand, the gay father cases are inherently complex and warrant a detailed analysis.

Table 3.1. Subsample Descriptive Statistics: Father Cases by Circumstance

	<b>Heterosexual Fathers</b>	<b>Gay Fathers Leaving Heterosexual Relationships</b>	<b>Gay Fathers Using ARTs</b>	<b>Total</b>
	<b>(n=127)</b>	<b>(n=15)</b>	<b>(n=11)</b>	<b>(n=153)</b>
Heterosexual Reproduction	125 (98%)	14 (93%)	0	139 (69%)
ARTs (Assisted Reproductive Technologies)	2 (2%)	0	11 (100%)	13 (25%)
Adoption (Public or Private)	0	1 (7%)	0	1 (6%)

*The Complexity of Gay Father Using ART Cases*

The gay father subsample accounts for 26 cases. Of these cases, 58 percent (n=15) of gay fathers make up those fathers leaving heterosexual relationships. Although gay fathers leaving heterosexual relationships had a rather uncomplicated path to parenthood, Table 3.1 illustrates that this subsample involved one adoption, as well as one case that involved a heterosexual marriage to a bisexual mother. The other 42 percent (n=11) of gay father cases were more complex, and differed from the subsample of lesbian mothers using ARTs and engaged in custody disputes. Of the 11 cases, only

one involved a custody dispute between two gay fathers. The other 10 cases consisted of three cases involving custody disputes between gay fathers and lesbian mothers, and seven cases involving the establishment of legal parentage rights for gay fathers involved in surrogacy agreements. In three of those seven surrogacy cases, the gay fathers engaged in custody battles with surrogate mothers who had changed their minds and wanted to keep the children they had birthed. In the remaining four cases, the gay fathers were in litigation with the state Department of Public Health to compel the state to honor their surrogacy contracts and therefore recognize their parentage. In the latter four cases, the surrogate mothers wanted to surrender legal rights to the children, however, the state objected to issuing prebirth orders or birth certificates to two fathers and no mother.

In the gay father using ARTs cases, the fathers utilized a variety of methods in order to have children. Gestational surrogacy was the most common method, reaffirming the significance of biogenetic ties. Similar to lesbian two-parent families, the complex circumstances of parenthood led to a multiplicity of outcomes for each gay father, such as how the child was created and the post-birth legal relationship between the child and each parent. The issues at stake included the following: which parties contributed genetic material; whether the egg donor was anonymous or related; whether the carrier was related or not; whether a genetic test was required to establish paternity; the number of children born; the states of residence for the gay male couple and the surrogate; the state in which the child is born; and the marital status of the gay male couple. The most common method consisted of both men contributing sperm and using the same anonymous egg donor. The two embryos were then implanted into a gestational carrier, who was usually contracted for her services. The end result was usually that one child

was born, but this meant that some fathers were unaware of the genetic father's identity, unless the court mandated genetic testing. Some courts awarded legal parent status to both men solely on the basis of the surrogacy contract. Other courts mandated genetic testing, which resulted in one of the gay fathers lacking a genetic link to the child. In a few cases, only one partner donated sperm, which rendered a genetic test unnecessary.

In four of the eleven cases, twins were born. Two twin sets were born from one man's sperm and an anonymous donor egg, while the other two twin sets were born from each man's sperm and donor eggs. The latter group of twins were then genetic half-siblings because the same egg donor was used. A few cases involved men who had enlisted female family members to assist in the surrogacy process. For example, an HIV-positive single gay man entered into a surrogacy agreement with his niece, which established her as the gestational carrier of his child. In one case, a gay male partner contracted with his sister to be a gestational carrier of an embryo formed by his partner's sperm and an anonymously donated egg. This latter scenario created a genetic link for the non-donating partner. In another case, two embryos were implanted in the surrogate – one using an egg from father A's sister and father B's sperm, and one with an egg from father B's niece and father A's sperm. Although only one child was born, both gay fathers had a genetic relationship to the child. Overall, not only are the paths to gay fatherhood amazingly diverse, but the complexity of legal parent recognition makes fatherhood doubly challenging.

### Sample Description

As discussed in the previous two chapters, my sample cases do not represent all custody decisions since most child custody decisions are not contested and decided privately or in mediation. Preliminary findings suggest that heterosexual parents engaged in appellate court proceedings for a limited number of reasons. These reasons included allegations of physical and sexual abuse of family members, criminal activities, parental communication problems, inter-state relocations, attempts by relatives to gain access to children, substance abuse, and mental health difficulties. On the other hand, gay fathers rarely had similarly elaborate histories, and instead ended up in court because of issues around their sexual behavior and identity. Some of the differences that emerged between heterosexual and gay fathers involved the circumstances that led parents to initiate legal action, as Table 3.2 demonstrates.

Table 3.2. Frequency of Circumstances for Father Cases

	<b>Heterosexual Fathers</b>	<b>Gay Fathers Leaving Heterosexual Relationships</b>	<b>Gay Fathers Using ARTs</b>
	<b>(n=127)</b>	<b>(n=15)</b>	<b>(n=11)</b>
Marriage ending in divorce	66%	93%	0
Criminal activity and/or violence	43%	27%	0
Mental health issues	18%	13%	0
Relatives/others trying to gain visitation or custody rights	17%	7%	27%
State Child Protective Services involved	16%	0	0
Substance abuse	17%	13%	0
Change in court venue or parental relocation	17%	10%	7%
Child support	47%	60%	0
Parent communication problems	20%	27%	9%

As indicated in Table 3.2, approximately 66% of heterosexual cases involved a marriage ending in divorce, while 93% of the gay fathers leaving heterosexual relationships involved divorce. This higher rate of marriage helps to explain why higher rates of child support existed for gay fathers leaving heterosexual relationships (60%) than for heterosexual fathers (47%). In addition, as a result of parental relocation or change in court venue, 17% of heterosexual parents initiated litigation, a rate 70-240% higher than it was for the two groups of gay fathers, respectively.

In addition, involvement in criminal activity and violence for heterosexual cases was 43%, while it was sixty percent less (27%) for gay fathers leaving heterosexual relationships, and there were zero observations for gay fathers using ARTs. The presence of mental health problems or substance abuse in the cases suggested similar patterns, with 18% and 17% of the heterosexual cases indicating that one or both parents suffered from mental health problems or substance abuse, respectively. Zero cases were observed in either category for gay fathers using ARTs. On the other hand 13% (n=2) of the gay fathers leaving heterosexual relationships cases involved mental health problems or substance abuse problems. In those two cases, both involved the mental health issues of the mothers, which resulted in the fathers receiving custody.

The involvement of relatives or “third parties” trying to gain custody rights was evident in 17% of heterosexual cases and in 7% of the gay fathers leaving heterosexual relationships. For the gay fathers using ARTs, 27% (n=3) of the cases involved the surrogate mother’s attempt to renege on her commitment to relinquish rights to the child. In addition, the involvement of state child protection agencies occurred in 16% of the heterosexual cases, and in zero cases of the gay father groups.

Sometimes the courts reasoned that parental communication problems were so severe that custody should be changed. These communication problems ranged from lack of cooperation regarding parenting to intentional efforts to impede children's relationships with the other parent. Unless both parties were legally recognized as a parent, however, parental communication problems were unlikely to be a problem, as this occurred in only 9% of gay fathers leaving ARTs cases, as seen in Table 3.2. On the other hand, 20% of all heterosexual cases and 27% of gay fathers leaving heterosexual relationships involved parental communication problems. In the gay fathers leaving heterosexual relationships cases, some courts focused their legal reasoning on parental communication problems as a way to conceal their deep-seated discomfort with gay fathers.

Table 3.3. Gay Fathers Using ARTs by Outcome

	Case	Birth Type	Parties	Outcome
				<b><i>Full Legal Recognition for All Involved Fathers</i></b>
1	<i>P.G.M. v. J.M.A.</i>	Gestational Surrogacy	Single Genetic Father vs. Gestational Carrier/Father's Niece	Genetic Father Sole Custody; Gestational Carrier/Biogenetic Niece Denied Custody
2	<i>Prashad v. Copeland</i>	Traditional Surrogacy	Genetic Father and Non-Genetic Father vs. Surrogate/ Biogenetic Mother	Genetic Father and Non-Genetic Father Primary Custody; Biogenetic Mother Secondary Custody
3	<i>Cunningham v. Tardiff</i>	Gestational Surrogacy	Two Possibly Genetic Fathers (twins) vs. Dept. of Public Health	Birth Certificate Issued for Both Fathers
4	<i>Cassidy v. Williams</i>	Gestational Surrogacy	Two Possibly Genetic Fathers (twins) vs. Dept. of Public Health	Birth Certificate Issued for Both Fathers
5	<i>Griffiths v. Taylor</i>	Gestational Surrogacy	Genetic Father and Non-Genetic Father vs. Dept. of Public Health	Birth Certificate Issued for Both Fathers
				<b><i>Genetic Fathers Favored</i></b>
6	<i>Oleski v. Hynes</i>	Gestational Surrogacy	Genetic Father and Non-Genetic Father vs. Dept. of Public Health	Birth Certificate Issued to Genetic Father Only; Non-Genetic Father Needs to Execute an Adoption
7	<i>Davis v. Kania</i>	Gestational Surrogacy	Genetic Father vs. Legal <sup>a</sup> Father	Joint Legal Custody; Genetic Father Primary Physical Custody; Legal <sup>a</sup> Father Visitation
				<b><i>Gestational Mother Privileged</i></b>
8	<i>A.G.R. v. D.R.H. &amp; S.H.</i>	Gestational Surrogacy	Genetic Father and Non-Genetic Father vs. Gestational Carrier/ Non-Genetic Father's Sister	Gestational Carrier/Non-Genetic Father's Sister Primary Custody; Genetic Father Visitation; Non-Genetic Father Denied Visitation

<sup>a</sup> Father was not an adoptive parent, however, the court referred to him as a legal parent because his name had been on the birth certificate and a California court had issued a judgment of paternity prior to the child's birth.

The fathers using ARTs cases are complex and multi-layered. In order to simplify matters, I divided the subsample into two groups; Table 3.3 illustrates the cases that involve gay fathers and Table 3.4 demonstrates the cases that involve gay fathers and lesbian mothers. Table 3.3 includes one custody case between two gay fathers and seven cases involving the establishment of legal parentage rights for gay fathers involved in surrogacy agreements. Although based on broad generalizations, I have sorted the table by most positive outcome to least positive outcome. In Table 3.3, *P.G.M. v. J.M.A.* (Row 1) involved an HIV-positive single gay man who was granted sole custody after his gestational carrier/niece sued for custody. In a surrogacy case, *Prashad v. Copeland* (Row 2), the genetic and non-genetic gay fathers were both granted primary custody, while the biogenetic mother/traditional surrogate was granted secondary custody. In Rows 3 through 5, the court granted birth certificates for both the genetic and non-genetic father, also upholding the desires of the gestational carrier to relinquish parenting rights. In *Oleski v. Hynes* (Row 6), the court only issued a birth certificate to the genetic father, forcing the non-genetic gay father to adopt the child he planned with his partner. In my sample, there was only one case that involved a custody battle between two fathers (*Davis v. Kania*, Row 7). The court rewarded primary custody to the genetic father, and visitation to the legal, but non-genetic father, clearly reinforcing the primacy of biogenetic ties. In a surrogacy case, (*A.G.R. v. D.R.H. & S.H.*, Row 8) the sister of the non-genetic father acted as a gestational surrogate and was granted primary custody. At the same time, the genetic father was granted visitation, while the non-genetic father, also the surrogate's brother, was denied visitation. Excluding Row 7 as a child custody case,

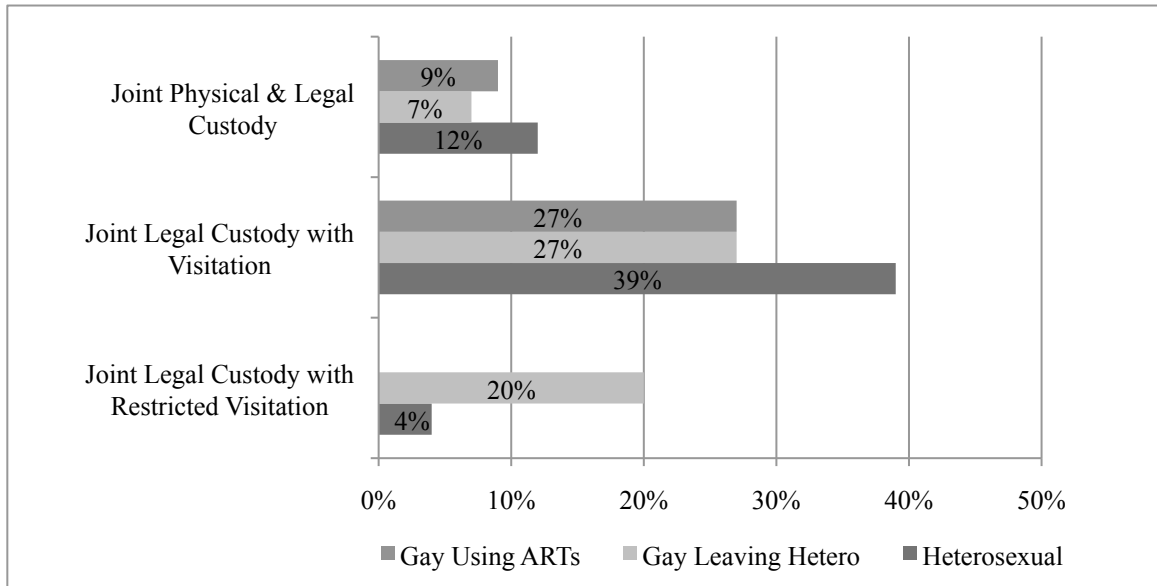
the courts upheld the majority of surrogate agreements (71%, 5 of 7) in favor of all gay fathers involved.

Table 3.4. Gay Father and Lesbian Mother Co-Parenting Cases

<b>Case</b>	<b>Birth Type</b>	<b>Parties</b>	<b>Outcome</b>
			<b><i>Lesbian &amp; Gay Father Co-Parenting</i></b>
<i>Barnett v. Clemmer</i>	AI with Lesbian	Genetic Father vs. Lesbian Bio Mother	Joint Legal and Physical Custody
			<b><i>Biogenetic Lesbian Mother Privileged</i></b>
<i>Browne v. D'Alleva</i>	AI with Lesbian	Genetic Father vs. Lesbian Bio Mother	Joint Legal Custody; Lesbian Bio Mother Primary Physical Custody; Genetic Father Visitation
<i>In re Mullen</i>	AI with Lesbian	Genetic Father and Lesbian Bio Mother vs. Lesbian Non-Bio Mother	Lesbian Bio Mother Primary Physical Custody; Genetic Father Visitation; Lesbian Non-Bio Mother Denied Visitation

Table 3.4 demonstrates the three cases that involved gay fathers and lesbian mothers. This table is sorted from most to least amount of paternal involvement. In *Barnett v. Clemmer*, the lesbian mother and gay father split parenting equally with each other and their respective same-sex partners. Although they had some disagreements, the court ruled that they could communicate effectively enough to maintain joint legal and physical custody for both parties. In *Browne v. D'Alleva*, verbal miscommunication between the gay genetic father and the lesbian biogenetic mother led to litigation. The court ruled that because the gay father had filed a paternity determination and his name was on the birth certificate that the genetic father was awarded joint legal custody and visitation. Although he had signed a donor agreement form relinquishing his rights, the gay sperm donor became involved in the case, *In re Mullen*, in order to help the biogenetic mother deny the non-biogenetic mother parental rights.

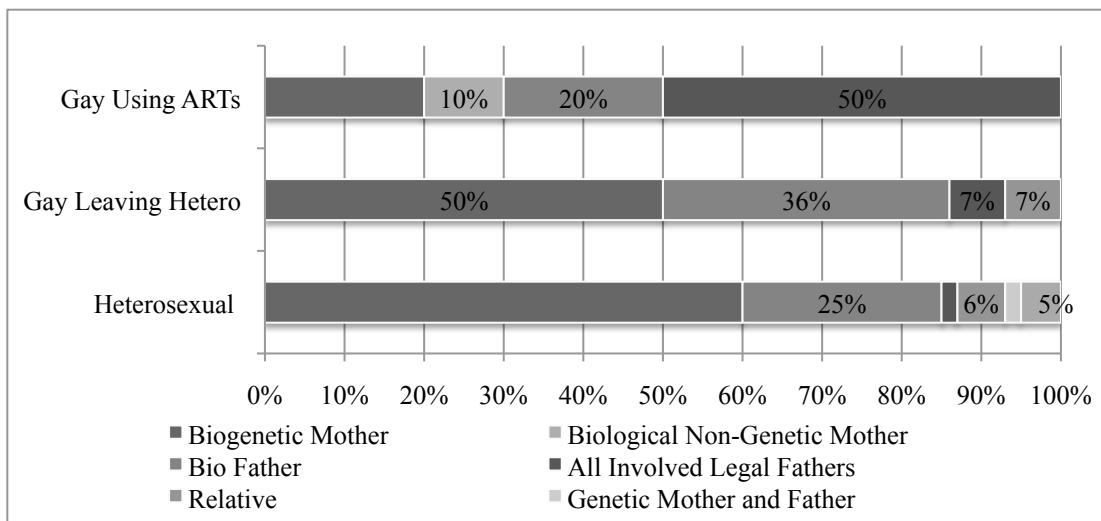
Figure 3.1. Joint Physical and Legal Custody of Father Cases



The varied circumstances under which gay fathers came to parenthood resulted in similarly diverse custody outcomes. As indicated in Figure 3.1, joint physical custody was awarded to 12% of the heterosexual parents in my sample. On the other hand, only 7% of gay fathers leaving heterosexual relationships and 9% of gay fathers using ARTs were awarded joint physical custody. Although joint legal custody has become increasingly common, it is often viewed as a legal formality that does not necessarily make parenting arrangements more equitable. Because of variations in restriction visitation orders, I divided joint legal custody into two separate categories, with traditional visitation and with restricted visitation. Joint legal custody with visitation was awarded in 39% of the heterosexual cases, however, the rate was 27% for the two groups of gay fathers. Therefore heterosexual fathers were forty-five percent more likely to receive joint legal custody with visitation than the gay fathers. In addition, the rates of joint legal custody with restricted visitation also revealed important differences.

Although zero cases were observed for gay fathers using ARTs, joint legal custody with restricted visitation was awarded 4% of the time for heterosexual fathers and 20% of the time for gay fathers leaving heterosexual relationships. This difference means that gay fathers leaving heterosexual relationships were five times more likely to receive a restricted visitation order with joint legal custody than heterosexual fathers.

Figure 3.2. Non-Joint Physical Custody Arrangements of Father Cases



Despite significant structural changes of widespread employment of women and cultural changes encouraging men’s involvement in childrearing, the courts today still overwhelmingly award women custody of children. My sample, however, was not as representative as the general population. Therefore it was to be expected that heterosexual fathers received custody more often than they do in the general population. As shown in Figure 3.2, a diverse set of outcomes existed for physical custody awards that were not joint custody. Indeed, 24% (n=27) of heterosexual biogenetic fathers were awarded primary custody. On the other hand, 36% (n=5) of biogenetic gay fathers

leaving heterosexual relationships received primary physical custody. In cases involving gay fathers using ARTs, 20% of biogenetic fathers received primary physical custody. The finding that heterosexual fathers received primary custody less frequently than gay fathers leaving heterosexual relationships may seem surprising. The sample size differential between heterosexual fathers (n=127) and gay father leaving heterosexual relationships (n=15), however, partially accounts for this finding. In addition, it is important to look at the alternative parent, usually the biogenetic mother, in these five cases. The circumstances were as follows: one father had been issued a restricted visitation order that was later reversed (*Hedberg v. Detthow*); the mother in another case was bisexual and did not have relatives nearby (*Archer v. Archer*); the mother repeatedly blocked the children from maintaining a relationship with their father (*Turco v. Turco*); the mother exposed the children to abuse (*Strome and Strome*); and the father had been the child's primary caretaker since birth (*T.D. v. T.A.J.*). In addition, I created the category, "all legal fathers involved," in order to have a more comprehensive label that would include legal fathers who entered surrogacy contracts, as well as one non-biogenetic legal (in the heterosexual cases) and one adoptive father (in the gay leaving heterosexual relationship cases). In the gay fathers using ARTs cases, the courts granted legal recognition to all involved fathers 50% of the time, thereby upholding the surrogacy agreements.

### Context of Legal Parenthood

Although hospital and medical records confirm women's biogenetic connections to their children, the process to establish paternity is more complicated. State and local

public health departments administer birth certificates, which represent legal documents. In cases that deviate from the heteronormative procreative married couple, such as cases involving same-sex couples and surrogacy, the names on the birth certificate can represent important indicators of parentage. Surrogacy laws vary widely from state to state, resulting in some intended parents to “venue-shop” for a surrogate-friendly state (Spar 2006). For example, in *Hodas v. Morin* (2004), a married heterosexual couple living in Connecticut used a gestational carrier from New York, but the child was to be born in a Massachusetts hospital. The Massachusetts Supreme Judicial Court ultimately ruled that both the husband and wife, as the genetic parents, could be listed as parents on the birth certificate.

The courts often assumed the naturalness of the process by which heterosexual couples have children. For gay fathers leaving heterosexual relationships, zero cases mentioned any derivative of the words “biology,” “genetics” or “paternity.” Since 93% of the gay father leaving heterosexual relationship cases involved marriage, as indicated in Table 2, the lack of discussion of biogenetics is not surprising, as the marital presumption supersedes discussions of biogenetics. Biogenetic ties lose significance as a marker of parenthood when children were born during the marriage.

In contrast, 28% (n=35) of the heterosexual cases mentioned the words “biology,” “genetics,” or “paternity.” Of those thirty-five cases, 74 percent of the parents were not married at the time of the children’s births, while 17 percent were married but the judges were referring to other cases, 6 percent involved the mothers’ post-divorce boyfriends, and 3 percent involved a mother’s marital affair that resulted in children. This finding exemplifies the power of the marital presumption in eliminating the necessity to confirm

the genetic connection of the father to the child through paternity testing. Therefore, biogenetic ties essentially become irrelevant for fathers married to the mothers. If the children are born during the marriage, the presumption of genetic relatedness between fathers and children is powerful and eradicates the necessity to confirm relatedness through genetic testing.

In the third subsample group, gay men using ARTs, 91% (n=10) of cases mentioned the words “biology,” “genetics” or “paternity.” Indeed, the uncertainty of the legal parent status of gay fathers was evident in this stark comparison among gay men using ARTs and the two previous subsamples of fathers. The frequent discussion of biogenetics in these cases reflects not only the physical impossibility of men birthing children, but also reflects the lack of federally recognized marriage rights for same-sex couples.

In heterosexual cases and gay fathers leaving heterosexual relationship cases, the language was fairly uncomplicated. Those couples who were married had children “as issue” of the marriage. While in unmarried heterosexual relationships, one case described the mother and her “paramour” who had “two children out of wedlock (*W.S. v. B.S.* 2007). In the gay fathers leaving heterosexual relationship cases, the courts used the terms: “current paramour,” “companion,” “lovers” (*A.O.V. v. J.R.V.* 2007); “father’s gay lover(s)” (*Hogue v. Hogue* 2004); “lives in a relationship with another man” (*Richard v. Richard* 2009); “same-sex partner” (*Antoine v. Lannom* 2006; *Turco v. Turco* 2009). Yet the dearth of appropriate language to describe gay father couples also became evident in the courts’ descriptions. Phrases such as “legal” (*A.G.R. v. D.R.H. & S.H.* 2009), “genetic,” (*A.G.R.*), “biological” (*Prashad v. Copeland* 2009), and “natural” (*Oleski v.*

*Hynes* 2008) father described the partner whose sperm fertilized the egg. The father who had no genetic link was called the “intended father” (*A.G.R.*), the “adopting parent” (*Oleski*), he who is “intended to be that of a full parent to the children” (*Oleski*), and the “father’s homosexual partner” (*Prashad*). Sometimes the courts used language that described the relationship between the two men, instead of a relationship to the children. For example, Connecticut courts described a “homosexual couple who have been together for over twenty-one years” (*Cassidy v. Williams* 2008) and “two homosexual men, registered domestic partners in the State of New York” (*Griffiths v. Taylor* 2008). The limits of language to describe gay fathers prompted one judge to state: “the English language does not provide us with a fully satisfactory label to place upon him... ‘Parent,’ which is gender-neutral, seems to be the only term that fits” (*Oleski v. Hynes* 2008). In this case, however, the judge concluded that “he,” the non-biogenetic father, was not a legal parent, as I discuss in the next section.

## **Thematic Discussion**

### *I. Heterosexual Fathers: Expectations of Hegemonic Fatherhood*

Two defining components of American fatherhood are biogenetic connection and breadwinning. In the process of establishing legal parentage, however, the courts must first determine which parties have a biogenetic and/or legal relationship with the child. Men’s ability to create genetic offspring also represents a central tenet of hegemonic fatherhood. Therefore paternity decisions cut to the heart of hegemonic fatherhood. The paternity cases in my sample arose because the mothers were not married at the time of

the children's births. In addition, the fathers had agreed to have their names placed on the birth certificates, which signified a legal acknowledgement of fatherhood.

In *King v. Lusk* (2006), for example, two children were born to Teresa while she had been in a ten-year relationship with Rob, who was listed on the birth certificate as the genetic father to both sons. When the children were ages two and four, Rob filed a legitimation proceeding for both children, and primary custody was awarded to Teresa with visitation to Rob. Teresa had since married Nick and ten months after Rob's legitimation, Nick filed a petition with the court and claimed that the younger child was his biological son. Although Teresa and Nick later divorced, a paternity test determined that Nick was the genetic father of the younger child. The appeals court, however, ruled that Rob's involvement in both children's lives was sufficient to declare him the legal father. The Georgia court described Rob's involvement with the children, "including activities, birthdays, and holidays, had established a paternal and family relationship with both boys, and had made all his child support payments" (*King v. Lusk* 2006). On the other hand, Nick had not paid child support and had had little contact with his son since the paternity test eighteen months earlier. Although social fathering seemed to prevail in this case, Rob believed that he was the genetic father of both children and had had no knowledge of the sexual relationship between Nick and Teresa. Presumed biogenetic relationships were still a defining component of defining parenthood, even if those relationships turned out to be false. In addition, the best interests of the child were maintained by granting legal parent status to a father who consistently provided child support, and therefore fulfilled his role as a breadwinner.

In a similar case in Kentucky, Maya gave birth to Lauren while dating Jacob, however, their relationship ended a few months later. Although the court had ordered a paternity test, Jacob voluntarily signed the paternity order without being tested, and his name was placed on the birth certificate. Two years later, Jacob found out that he was not the biological father, even though he had been awarded primary physical custody of Lauren. Maya then filed to have the genetic father, Mark, listed as one of the parties, but the court prohibited that action because Mark had never filed to “assert his rights” as the genetic father, and therefore was not an “aggrieved party.” In addition, Maya filed the paperwork past the statutory time limit to submit evidence of the paternity test. The court noted that Jacob “considers himself the child’s father” and “has physically, emotionally, and financially supported [Lauren] from her birth to present day” (*J.B. v. M.S.* 2008). The court applauded Jacob because he did not “try to escape responsibility for the child” (*J.B. v. M.S.* 2008). In paternity cases, mothers were often portrayed as deceptive because they had “failed to disclose” to the men signing the paternity orders that they might not be the genetic fathers. Overall, while the courts increasingly recognized a non-genetic fatherhood, the courts commended the men for not walking away from the father-child relationships they had built under the assumption that they were genetic fathers.

As discussed in Chapter 2, mothers were the default parent in the heterosexual subsample cases. As a result, fathers often did not receive primary custody unless the mother violated norms of intensive mothering. In about 13% (n=16) of heterosexual cases, the court issued restricted visitation orders. These parents were issued restricted visitation orders because of involvement with violence, criminal activity, and/or substance abuse. For example, in *Hoback v. Hoback* (2008), a married couple’s initial

divorce order granted primary residential custody to the father and visitation to the mother. Within a year of their divorce, the father noticed odd behavior from their six year-old daughter. The father then learned that their daughter had alleged told a psychologist of sexual abuse she suffered during her visits with her mother, from two different men in the mother's family. The father filed a court motion to discontinue the mother's visits. The mother cross-filed and requested that primary residential custody be switched to her because the father was not cooperating with their co-parenting plan. In the trial, the psychologist stated that the child was in "severe danger" as she testified about the daughter's graphic descriptions of the ongoing abuse. The psychologist did not believe that the child had been coached into making these allegations. In addition, the psychologist believed that the mother was aware of the abuse, but failed to intervene, which clearly violated the norms of an intensive mother responsible for protecting her children. As a result, the trial court issued a restriction mandating that one, but not both, of the men in the mother's family was prohibited from being in the child's presence. Instead of granting the father's request to halt visitation with the mother, the court switched primary physical custody to the mother because the "father's desire to control mother...has overwhelmed his good sense on raising this child" (*Hoback* 2008). The court claimed that the father's "desire to control the mother," a component of hegemonic masculinity, was the reason that they switched primary residential custody from the father to the mother. Yet it was an uncontrolled hegemonic masculinity that led the male members of the mother's family to sexually abuse her daughter. The father appealed the custody reversal and the appellate court ultimately ruled that the trial court failed to adequately address all of the evidence presented of the abuse. The appellate court then

reinstated the father's primary residential custody with visitation for the mother. Clearly the allegations of sexual abuse confirmed by a licensed psychologist were not given sufficient weight by the trial court. Yet when the partners of gay fathers were accused of sexual abuse, however, little evidence was often presented and visitation was restricted or denied indefinitely.

The presence of violence or abusive men in the mother's lives emerged as a frequent theme in court cases. In an Ohio case, *Posey v. Posey* (2006), the court granted primary custody to the father, voiding the former shared custody plan, after the father learned about the mother's abusive boyfriend. The court chastised the mother because she had not "chose[n] to remove...her abusive boyfriend, thereby favoring her boyfriend over her children" (*Posey* 2006). In both *Hoback* and *Posey*, the mother disregarded the norms of intensive mothering, thereby enabling the fathers to receive primary custody.

For heterosexual fathers, strength and aggressiveness are indicators of a developed masculine self, however, when that strength crosses the line of acceptability into violence, the courts were ambivalent about that violence. Often incidents were reframed in order to direct blame towards mothers for their violations of intensive mothering. In *Cunningham v. Cunningham* (2004), the wife had provided inconsistent testimonies about the presence of domestic violence in the marriage. In one testimony the mother asserted that the husband had hurt one of their children in a domestic incident, however, in a later deposition, she claimed that the father had never hurt the children. The husband denied all allegations of domestic violence. After weighing the "credibility, sincerity, and character of the witnesses," the Missouri court granted the father primary physical custody with visitation to the mother. In *J.P. v. K.S.* (2005), while the court was

troubled about the father's history of domestic violence, the court was also concerned with the mother's "unilateral decision-making." Because the father had attended counseling for domestic violence, the court "expects that [the father] has learned the skills necessary to refrain from any violence in the future" and the court upheld frequent visitation for the father (*J.P.* 2005). In both cases, the courts judged the character and conduct of mothers, thus enabling the fathers to have more time with the children.

As a result of the unrepresentative sample, many of these high-conflict cases reveal back and forth power plays between the mother and father, and the court ultimately must decide who "wins." In other instances of violations to intensive mothering, however, fathers struggled to modify custody decisions, or even to increase visitation amounts. A father's request for an extra 24 hours of visitation every two weeks was denied, despite the mother's DUI charge (*Brownlee v. Brownlee-Fenical* 2004). In an Ohio case, the father had been awarded temporary custody of their three children during the mother's 60-day jail sentence for her DUI conviction (*Bates-Brown v. Brown* 2007). Because of the mother's alcohol abuse and his two older sons' stated preference to live with him, the father filed for permanent legal and physical custody. The court terminated the shared parenting plan, however, because the parents were unable to communicate with each other. Ultimately the court awarded physical and legal custody of the three sons to the mother. Mothers often continued to function as the "default parent" (Townsend 2002: 112), and courts reflected this preference.

In some cases, fatherhood began to represent the number of days or weeks of visitation fathers had been awarded. Sometimes these battles over parent-child contact time revealed deeper issues, such as the allegation that one parent hindered the children's

relationships with the other parent. For example, in *In re Marriage of West* (2004), the mother filed a request for increased child support and decreased parenting time for the father. The mother claimed that the father had not used all of his visitation time. But the father maintained that he was not able to use all of time because the mother had impeded his efforts to coordinate time with the children. The court sided with the mother, reducing the father's parenting time by 14 nights (15% total) and increasing his child support. Indeed, at times, parental communication problems were so severe that the courts were forced to pick one parent to have custody – the one who would be most likely to encourage contact with the other parent.

In some cases, tension arose between the father and the mother when the mother's new boyfriend or husband became very involved in the children's lives. In *W.S. v. B.S.* (2007), Bernadette and Walter, the biogenetic parents of two children, divorced nine years earlier, resulting in sole custody for the mother and visitation rights for the father. After her boyfriend, Aaron, and Bernadette violated the divorce order by relocating outside a fifty-mile radius, Walter filed a petition for custody of the children.

The court expressed concern that Aaron repeatedly referred to the children as "his own children" and that the children called him "Dad" or "Daddy" sometimes, despite his admission that Walter was "100 percent the biological father." Despite referring to Aaron as "volatile" and feeling threatened by him, Bernadette acknowledged that he "has been 'more of a father' to the children than [Walter] ever was" (*W.S. v. B.S.* 2007).

Aaron stated that for eight years, he had "provided food, clothing, shelter, vacation, camp, karate, chorus, instruments...probably another five hundred things, and if that is not what a nurturer and someone who cares for children does..." (*W.S. v. B.S.*

2007). Aaron invoked the image of a “nurturer” to describe himself as a non-biogenetic parent. Yet the genetic father made timely child support payments, and used all of his allotted visitation time. The court disapproved of this idea of competing fathers, especially since Aaron “had acknowledged that [Walter’s] rights are superior to his” (*W.S.* 2007).

The court was particularly concerned that the children’s stated desire to live with their mother was “the result of pressure put on them by the mother and [Aaron].” Therefore the court awarded custody to Walter, the biogenetic father, because the court was convinced that the biogenetic father would be more likely than the mother to “put the children’s interests first” and “would foster an ongoing relationship between the mother and the girls” (*W.S. v. B.S.* 2007). The issue of primary concern to courts was to ensure that at least one man was providing financial support, whether it was the biogenetic father or the mother’s new husband. If the biogenetic father paid child support and was involved in the children’s lives consistently, the courts were less likely to dismiss this investment when a secondary father figure became part of the equation.

The courts viewed breadwinning as an assumed part of fatherhood. When economic provision interfered with attentive fathering, however, the courts disapproved. For example, in *Brownlee v. Fenical-Brownlee* (2004), the father was self-employed and made ceramics from home. On many weekends, the father must travel to art shows in order to sell his work, but claimed that the mother was not flexible in adjusting his visitation schedule. The court noted that “when [the father] is distracted by his employment, he appears detached and the minor child feels he is less important to Father than a particular bowl or jar that Father happens to be working on at the time” (*Brownlee*

2004). The court also commented that the mother believed that the father was “inattentive when the minor child is at Father’s house” (*Brownlee* 2004). While the court acknowledges the importance of employment, the pursuit of employment was expected not to interfere with a man’s fathering. Normative careers for men often suggest work outside the home in the public sphere, forcing fathers who work from home to ensure that they continue to serve as a proper breadwinner at the same time providing sufficient attention and caretaking to the children. The father’s career as an artist demanded skills like creativity and patience, qualities that contradict the core of hegemonic masculinity and fatherhood. Clearly this father struggled to balance work and caretaking, and the father may have lacked the patience necessary for fathering.

In *Stang v. Lange* (2007), the court commended the father because he “helped care for the children...more typically than found in a traditional marriage.” Yet the judge also acknowledged that their marriage was “fairly traditional with the husband as the breadwinner and the wife a stay-at-home mother.” The mother was granted primary physical custody of the children, while the husband had frequent visitation. The court noted that “the husband enjoys substantial access to the children,” which “decreas[ed] some of the wife’s expenditures for the children’s benefit” (*Stang* 2007). The framework for interpreting father’s visitation was often through the lens of financial benefits. Indeed, fatherhood at times was reduced to the size of the child support payments.

In some cases, however, fathers did not follow through on their child support payments. The courts interpreted child support arrears as severe violation of hegemonic fatherhood. For example, in *Croak v. Bergeron* (2006), the father filed for a reduced child support payment because of his unemployment. The judge stated that the father

“carefully orchestrated his periods of unemployment to coincide with court appearances so that he [could] report that he [was] unemployed at that point in time and thereby evade the payment of guidelines support.” Although in this case, the court ruled that the father had failed to show a change in circumstances, since in the previous 3-year period, he had received almost \$500,000 in “income and assets” as a result of multiple inheritances, while the mother and his two children “struggled to meet their living expenses on” \$150 per week (*Croak* 2006). The courts repeatedly attempted to ensure that a legal father was identified, followed by adequate financial support to the mother and children, thereby ensuring that the family would not need governmental assistance.

Sometimes the exchange relationship between financial support and child visitation become very explicit. In *Bank v. White* (2006), Peter lived with and later married Linda, the biogenetic mother of two children from a previous marriage. Several years later, as part of the divorce action, Linda filed for “pendente lite maintenance,” an order for the higher income spouse, usually the husband, to financially support the lower income spouse, usually the wife, while the divorce was pending. Peter immediately requested visitation with the children, but the New York court was not impressed that he only filed for visitation in response to Linda’s support order. The court never mentioned the biogenetic father, but noted that Peter had “served as a ‘father figure’ in [the children’s] lives” for eight years. But the court stated that he had “failed to demonstrate that he...undertook any effort to maintain a relationship with the subject children” since he moved to California three years earlier. Because Peter did not maintain regular contact with the children, the court determined that Peter lacked standing and was therefore denied all rights to visitation.

In cases involving relocation, a different set of issues emerged because the court was forced to choose whose request for custody should be honored. In *Adamson v. Dodge* (2006) the father moved from New York to Wisconsin in order to be near his children. When his ex-wife informed him that she was not moving to Wisconsin, the father quit a job he had just started two weeks earlier in order to move back to New York in order to be closer to his children. Three years later, the mother violated the court order and moved to Wisconsin in order to pursue a new relationship and look for employment. The father filed an order of contempt against the mother. But the Supreme Court of Vermont denied the father's contempt order and refused to make the mother move back from Wisconsin. Despite multiple moves and disruptions to his career trajectory (and potential breadwinning capacity), the father made timely child support payments and saw his children regularly. Although the father made repeated efforts to be an involved father, the court believed that the father had initiated litigation out of anger, not because he wanted more contact with his children. In the end, the court established a new parent-child contact order, reflecting the geographic distance between the parents.

Although many courts still favor mothers in their joint physical custody decisions, there is increasing support of respecting the "joint" nature of these post-divorce families. In a groundbreaking case, the Supreme Judicial Court of Massachusetts ruled in *Mason v. Coleman* (2006) that the mother could not move her children 100 miles away from the father because it would be violating their joint custody arrangement. During the marriage, the court noted: "each parent took the part of a 'primary caretaker' to the children" (*Mason* 2006). It was rare for courts to mention the mother and father as "primary caretakers." The joint arrangement enabled each parent to have equal parenting

time with his or her children. The court ruled that the best interests of the children, which was to have frequent contact with both parents, was more important than a parent's right to move. In addition, the move would have disrupted the children's lives by removing them from a school district where they had developed a support system. This educational stability was particularly important as one of the children had "learning problems" (*Mason* 2006).

In some cases, the gendered component of parenthood surfaced. Through encouraging the sports involvement of their sons, fathers were able to help shore up hegemonic masculinity in themselves and their sons (*McGuffey* 2008). Indeed the courts frequently validated the separate and unique contributions that mothers and fathers make according to traditional gender roles. In *A.J. v. D.M.*, after the father's release from prison for drug possession, the father made efforts to see his son more frequently and they have "grown closer with one another" (*A.J. v. D.M.* 2006). The father assisted his son with his schoolwork, as well as "helping him to get back into shape for football after he suffered a broken leg" (*A.J. v. D.M.* 2006). In another case, when he visited his father, one son said that "they do 'guy stuff,' including watching sports and playing basketball" (*J.P. v. K.S.* 2005). In a third case, the father had coached his ten-year-old son's baseball team. But the father believed that the mother was trying to "phase him out of a relationship" with his son through her attempts to block the son's attendance at the practices and games (*Brownlee v. Fenical-Brownlee* 2004). Some judges emphasized the role of fathers in socializing their children into hegemonic masculinity through the promotion of toughness, athleticism, and heterosexuality. Indeed some judges subscribe

to the theory that children need a parent of the same sex in order to receive proper gender role socialization (Powell and Downey 1997).

For heterosexual fathers, a virile sexuality is usually an expectation of fatherhood, except when it crosses the line of acceptability. For example, in *Petty v. Petty* (2005), the father viewed internet sites “exhibiting material of a sexual nature and had placed a personal advertisement on an internet site in an apparent effort to attract sexual partners.” The Court of Appeals of Tennessee ruled that the father’s “penchant for pornography” merited supervised visitation of his children at his parents’ house. In addition, the mother was granted sole authority of all decision-making for the children’s lives and the father was excluded.

The father confessed that he had violated a temporary order by visiting his girlfriend on the weekends when his children were visiting. While the details of the order were not provided, it was likely that the divorce order had prohibited the father from exposing his children to a non-marital sexual relationship. But the father claimed that “exposure to his girlfriend and her children was a positive thing, because the children got along great and it felt like a ‘large family’” (*Butterman v. Butterman* 2009). The court agreed with the father and deemed that his girlfriend and her family “was a positive factor” (*Butterman* 2009). Since the father was “technically in contempt” for violating the order, the court fined him one dollar as a slap on the wrist, but then immediately dismissed the contempt finding.

Because the mother was mentally ill and had been subject to repeated involuntary commitments, the mother was granted telephone visitation and supervised visitation for one summer week. In conclusion, the trial court acknowledged that “while husband’s

circumstances were ‘not ideal,’” the mother’s condition left the trial judge with “no choice.” Overall, despite the father’s “technical” violation, contact with his girlfriend and her family was found to be beneficial, rather than detrimental.

## *II. Gay Fathers Leaving Heterosexual Relationships: Expectations of Hegemonic Fatherhood*

Fathers already face barriers to custody because of their gender status as men, who are not considered to be primary parents. My research indicates that gay fathers, therefore, confronted an additional layer of resistance due to their stigmatized sexual identities. In my sample, this trend was particularly evident when gay fathers left a heterosexual marriage.<sup>13</sup> In the context of a heterosexual divorce, the courts often deemed the ex-wife a more appropriate custodial parent because of her normative gender (a woman and therefore a mother) and sexual identity (most often heterosexual) statuses. As fathers struggled to negotiate custody arrangements, gay fathers were also met with additional discrimination and restrictions because of their deviant sexual behavior and identity.

For the courts, gay fathers violated multiple tenets of hegemonic fatherhood. Hegemonic fatherhood is based on a foundation of heterosexuality and procreative sexuality, both of which gay men violate through non-heterosexual and non-normative sexual identity and behavior. In addition gay men’s non-procreative sexual identity and behavior was by definition anti-family. By their very existence, gay fathers represented an oxymoron and a threat to the assumed stability of the family unit. Such violations

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<sup>13</sup> As shown in Table 2, the majority (93%) of the gay fathers leaving heterosexual relationships in my sample were married.

merited increased scrutiny from the courts. Fathers engaged in family life were assumed to be heterosexual, while men engaged in sexual behavior with other men were assumed not to be fathers. Indeed, courts feared that gay fathers disturbed the norms of proper gender and sexuality expression. Children's development could therefore be affected by exposure to inappropriate sexual identity and behavior.

Many courts considered same-sex sexual behavior and gay sexual identity to be incompatible with parenthood. Therefore some courts attempted to limit exposure to gay people and gay sexual behavior through restricted visitation for gay fathers. Restricted visitation ranged from the prohibition of overnight guests, as well as limiting exposure to all other homosexuals and their "chosen lifestyle" (*A.O.V. v. J.R.V.* 2007; *Hogue v. Hogue* 2004; *McGriff v. McGriff* 2004). In gay father cases in which they were leaving a heterosexual relationship (n=15), restricted visitation was required in 47% (n=7<sup>14</sup>) of the cases, and in one of those seven cases, custody was terminated completely. In comparison, 13% of heterosexual cases resulted in restricted visitation orders. The gay fathers were almost four times more likely to be issued a restricted visitation order than the parents in the heterosexual cases.

In the late 2000s, however, the courts have expressed increasing tolerance towards gay fathers as compared to the 1980s and 1990s. This change was evident by the fact that the highest courts overturned 3 of the 7 restricted visitation orders. In the remaining cases of gay fathers leaving heterosexual relationships, restricted visitation was not ordered and a variety of outcomes resulted. The outcomes consisted of the following: grandmother was granted rights over gay father (n=1); father was granted custody because of emotionally unstable mother (n=3); father was granted custody

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<sup>14</sup> Please see Chapter 4 for more details on the stereotype of gay fathers as child molesters.

because he had more relatives nearby (n=1); and father was granted some degree of joint custody (n=3). Overall, 53% (n=8) of the gay fathers leaving heterosexual relationship sample were either denied visitation or were subject to a restricted visitation order.

While this statistic was likely higher than it would have been in the 1980s and 1990s<sup>15</sup>, the finding suggested that the majority of gay fathers faced significant barriers in their attempts to be parents to their biogenetic children.

Restricted visitation was one way in which courts handled fears of sexual abuse of children by gay fathers and their partners. For example, in *Soteriou v. Soteriou* (2005), an incident at work prompted a nineteen-year-old man to file charges of sexual abuse against the father's partner. The police dropped all of the charges and the case was closed. Yet the Connecticut court ruled that the gay father's daughter and son could not "be left unsupervised with the defendant's current cohabitant unless the cohabitant undergoes an evaluation by [a doctor] to determine whether he poses a risk to the children." Although the partner was never charged with any crime, the allegations of adult sexual abuse led to the assumption that the father's gay male partner would be likely to engage in the abuse of his partner's 5 and 3 year-old children.

In an Ohio case, *Antoine v. Lannom* (2006), the father's six-year-old son made accusations that his father's partner had sexually abused him. Indeed, this was a serious charge, however, nothing was ever reported to the police. In addition, a psychologist was never consulted, and the court failed to order psychologist evaluations of the parents, the gay father's partner, and the children, as the father had requested. Considering the young age of the child and the hostility between the parties, a psychological evaluation would

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<sup>15</sup> Legal scholar Cliff Rosky (2009) examined the custody decisions of gay and lesbian parents in the 1980s and 1990s, and while he did not track the exact statistics for restricted visitation orders, his research suggests that these restrictions occurred more frequently then, and importantly, were less likely to be overturned on appeal.

have helped to reveal if the child had been coached to make those allegations. Instead, the court terminated all of the father's parental rights. In the context of allegations of sexual abuse, the courts in the heterosexual subsample cases often noted psychological testing, police reports, investigation by the child welfare department, or other interventions. In the gay father leaving heterosexual relationship cases, however, the courts often assumed the worst from the beginning, rather than calling for a systematic investigation.

As Rosky (2009) noted, not only is the threat of sexual abuse present in these custody decisions, but the fears of gay men as carriers of disease was a common theme in my sample. In particular, the association of gay men with HIV/AIDS was still evident (*Turco v. Turco* 2009), although less so in the twenty-first century than it was in the 1980s and 1990s (see Rosky 2009). In one Arizona decision, the ex-wife “‘created a scene,’ including calling [the gay and HIV-negative father] an ‘AIDS infested faggot’ in the middle of the auditorium” at their son's school (*Turco v. Turco* 2009). The outcome, however, resulted in the court ruling in favor of the father because the mother was determined to be mentally unstable.

Indeed, the association between sexual risk and gay men emerged several times. In a Virginia case, the ex-wife demanded more compensation for spousal support as a result of evidence that the father had had affairs prior to the divorce. The mother claimed that the father was “risking the health of the mother by clandestinely engaging in several affairs...while the parties still engaged in regular sexual relations” (*A.O.V. v. J.R.V.* 2007). Having already issued a restricted visitation order, the court denied the mother's request for increased spousal support. In a Connecticut case, the court stated that the

mother was “devastated” when she found out that her husband “was engaged in extramarital homosexual activities and ‘spreading disease’” (*Soteriou v. Soteriou* 2005). Despite this claim, there was no evidence that the father had any sexually transmitted diseases (*Soteriou*).

Gay men’s sexual attraction, identity, and behavior fundamentally contradict hegemonic fatherhood. Because of this tension, gay men were considered to be outlaws of the family and the community. Therefore one of the ways that some semblance of “normal” could be maintained was through subduing any aspects of one’s sexual identity. Courts repeatedly expressed concern about children’s exposure to the “homosexual lifestyle.” For example, a Virginia court applauded the father for being “discreet in the presence of the children about his romantic relationship” (*A.O.V. v. J.R.V.* 2007). In another case, *Hogue v. Hogue* (2004), the father was found in contempt of court because he had violated a court order by telling his child that he was gay. The order specified that the father was forbidden “from taking the child around or otherwise exposing the child to his gay lover(s) and/or his gay lifestyle” (*Hogue* 2004). This violation resulted in the father spending two days in jail. The child’s therapist was concerned that this information had been revealed to the son. In fact, the court stated that the therapist believed it was “somewhat detrimental,” but not enough to limit future time with father (*Hogue v. Hogue* 2004). The restraining order was eventually overturned on appeal because it did “not describe the prohibited acts in reasonable detail,” not because it was discriminatory (*Hogue* 2004). Overall, the courts commended gay fathers for being disingenuous and staying in the closet.

In *McGriff v. McGriff* (2004), the court accused the father of refusing to

communicate with the mother, except for communication through their attorneys. This lack of communication was “clearly detrimental to the girls and makes joint custody completely unworkable.” The court then issued a restricted visitation order that prohibited his male partner from being present during the children’s visits, including a six-week summer visit. This custody outcome did not seem to align with the logic presented by the court. In the 4-1 decision, the dissenting judge expressed concern by stating that the court “reached for reasons to help [the mother] succeed in her claim when the primary reason stated in her petition to modify custody, homosexuality, is not a legally permissible consideration” (*McGriff* 2004).

Some courts revealed more awareness of “alternative lifestyle homes” (*T.D. v. T.A.J.* 2006), as well as increasing acceptance of gay men as fathers. In a Delaware case, the mother and father shared joint legal custody, and the father had primary physical custody because “he has been raising this child since birth as the primary residential parent” (*T.D. v. T.A.J.* 2006). The court recounted the mother’s “concerns regarding the father’s chosen lifestyle.” The court ruled, however, that “unless it has a negative impact on the minor child,” this was not an issue that “will be taken into consideration by the Court” (*T.D.* 2006).

There are other indications that outcomes for gay fathers have improved since the 1980s and 1990s. For example, in *Strome and Strome*, the judge awarded primary physical custody to the gay father, despite numerous appeals. In addition, the judge discussed the father’s parenting, which in other cases was not addressed because sexuality was the overriding factor. Although the court acknowledged the “father’s past inadequacies as a parent,” the “father’s parenting in the 10 months before the hearing was

exemplary.” The court discussed how the “children thrived in their home.” The court used the word “their” to describe the house where the gay father, his partner and children lived, signifying a shift from previous decades in the language used to acknowledge the shared life of gay parents and their partners.

In this case, however, the mother had originally had custody following the divorce. When the father and the paternal grandmother learned that the mother had exposed children to “sexual and other abuse,” the father filed for temporary custody and moved himself and the children into his mother’s house. For a couple years, although he lived in the same home, the father was not highly involved in the children’s lives, and the grandmother was the primary caretaker. After he had met his current partner, however, he began playing an active role in the children’s lives. Soon, the father decided to move himself and the children into the partner’s house. The grandmother objected because she believed that there were “circumstances detrimental to the children.” The trial court agreed and awarded custody to her. During one of the many appeals, the Oregon Supreme Court ruled in another case on the rights of “third party” parents. The case was therefore remanded in light of the recent decision. The appellate court ruled that the grandmother had “not overcome the statutory presumption that favors legal parents in custody disputes” and therefore, custody was returned to the father again.

The court discussed the results of the home study, where it was found that contrary to the grandmother’s claims, the “father did in fact set boundaries with the children.” In addition, the father’s flexible work schedule allowed him to “participate actively in all aspects of [the children’s] lives.” The court mentioned that the children’s teachers testified that the children were “bright, articulate, and well-behaved.”

This sentiment was not one often heard in gay father cases from other decades. Yet in a similar case, the maternal grandmother and the mother's second husband prevailed in her custody battle with the gay father after the biogenetic mother died of cancer. Unlike the Oregon court, this Indiana court did not recognize the "natural parent presumption" for the gay father and instead awarded full custody to the children's maternal grandmother and stepfather. In this case, the court was concerned that the father had not investigated the immigration status of his same-sex partner (*In re Guardianship of A.N.B.* 2007). The court also commented that the father's partner was nineteen years old, however, the age of the other parties was never mentioned. Despite much legal precedent that financial inequalities between parents cannot be used against them, the court ruled that the grandmother's and stepfather's salaries were double the salaries of the genetic father and his same-sex partner. Clearly, this gay father violated several tenets of hegemonic fatherhood through his non-normative sexuality, perceptions that he could not adequately provide financially for his children, and by his choice of a partner who violated normative class and race expectations. In addition the courts often focused attention on other negative factors in order to veil anti-gay prejudice.

### *III. Gay Fathers Using ARTs: Expectations of Hegemonic Fatherhood*

Gay fathers using ARTs face considerable obstacles in their desire to have children. The small size of my subsample reflects this reality. Gay men struggle to have children initially, followed by great effort to create a legal relationship for the fathers involved. Therefore non-biogenetic fathers face extraordinary difficulties to gain recognition as legal parents. In the subsample cases of gay fathers using ARTs, there is

little discussion of fathering because there are so many barriers just to become fathers in the first place.

In contrast to the lesbian leaving lesbian relationship subsample, there was only one gay father custody case involving two gay fathers who separated. In *Davis. v. Kania* (2003), a gay male couple, Alexander and Nathan, decided to use a surrogate to carry their child. The sperm from each man and eggs from the same anonymous donor were used to create the embryos, which were implanted into the gestational carrier. Before the child's birth, both men petitioned a California court to establish a "paternal relationship" with the child. After the child's birth, it was determined that Alexander was the genetic father. The California court issued a paternity judgment, ruling that Alexander was the "genetic and legal parent," and Nathan was the "legal parent" of the child. When the child was almost two years old, the family moved to Connecticut, but the relationship ended a year later.

Nathan then filed a motion to prevent Alexander from taking the child to Greece for three months. This court visit prompted both men to enter into an agreement, in which Alexander would have sole custody and Nathan would have visitation every other weekend. Alexander then filed a motion asserting that Nathan was not a "parent" because his "claim of paternity lacks any basis under Connecticut law" (*Davis v. Kania* 2003). The Connecticut court disagreed and noted that Nathan had not attempted to adopt the child because he had assumed that the California paternity judgment was equivalent. In addition, the court noted that Nathan had "provided emotional and financial support" to the child, and had believed he was a legal parent. Therefore the court ruled that Nathan could assert his parental rights in Connecticut and was therefore

recognized as a legal parent. As a result, both men were granted joint legal custody, however, Alexander was granted primary physical custody while Nathan received visitation. While this outcome was considered a success due to Nathan's recognition as a legal parent, the award of primary physical custody to the genetic father exemplified the privileging of genetic ties in defining fatherhood.

In the three cases that involved lesbian mothers and gay fathers, the issue of custody also emerged. In *Browne v. D'Alleva* (2007), Rebecca and Denise had decided they wanted to have a child, and Rebecca's friend, Andy, agreed to be the sperm donor. Andy signed the sperm donor consent form two years before the child's birth, which stated "I give up all rights and claims to such a child." After Rebecca gave birth to the child, however, Andy had signed a paternity acknowledgement form, and his name was placed on the birth certificate as the father. Three months after the child's birth, Andy refused to sign the documents necessary to allow Denise to adopt the child. One month after Andy's refusal, Rebecca and Denise participated in a civil union in Connecticut.

Although Andy lived in Europe with his partner Sebastian, Andy claimed that Rebecca had told him that he would be a "legal guardian" to the child. Rebecca asserted that she had informed Andy, however, that Denise would adopt the child and that he and Sebastian "would have a role as secondary or 'fun parents'" (*Browne v. D'Alleva* 2007). None of these claims, however, were put in writing or in a legal agreement. Andy requested joint legal custody and visitation, but the court needed to determine if he had standing. The court described Andy as "not the 'legal father' of the minor child, but only the 'genetic' or biological father" (*Browne* 2007). The court ultimately ruled that the sperm donor did have standing to seek joint legal custody and visitation primarily

because of the plaintiff's acknowledgement of paternity (through his name on the birth certificate), as well as "the preconception intent of the parties."

In three of the surrogacy cases, the surrogate mothers fought for custody. In a custody case involving a gay male couple, Jeremy and Adam, and a surrogate heterosexual married woman, Diana. Both men donated sperm that was used to artificially inseminate Diana. After giving birth, Diana fought for custody. Although a paternity test was never performed, Adam's name was placed on the birth certificate. After a court-ordered paternity test revealed that Jeremy was the genetic father, the North Carolina Court of Appeals ruled that Adam had a right to intervene in the custody battle because Adam "has been a full-time parent to [the child] since her birth and has assumed all responsibilities of being a parent to her...for almost two years" (*Prashad v. Copeland* 2009). Adam and Jeremy were awarded "primary legal and physical custody" of the child, while Diana was granted "secondary legal and physical custody" (*Prashad* 2009).

Laws and statutes regarding surrogacy agreements are quite disjointed throughout the country, with few states having statutes that address the specifics of surrogacy (Markens 2007). A 2009 New Jersey case, the judge argued that "surrogacy contracts are made before the mother knows the strength of her bond with the child" and granted the gestational surrogate, who was also one of the men's sister, legal status as the "mother" (*A.G.R. v. D.R.H. & S.H.* 2009). This outcome reaffirms the primacy of gender and of the defining component of parenting as motherhood.

The other surrogacy decisions in my subsample involved a claim for parentage against the state. In four Connecticut decisions, the Department of Public Health refused to grant birth certificates to gay fathers who had entered into gestational surrogacy

agreements. The department's argument centered around several points, including placing "inaccurate information" on birth certificates and that the fathers have not "naturally conceived nor adopted these children" which state law requires "to be considered a parent (*Cunningham v. Tardiff* 2008). In addition, the department objected to naming any parent on the birth certificate without genetic testing. Once genetic testing had been completed, the department agreed to place the "genetic parent" on the birth certificate, but not the "intended parent" (*Cunningham* 2008). Therefore, these gay fathers sued the Department of Public Health in order to mandate legal recognition of the genetic and non-genetic fathers.

In one case, the court was particularly troubled by the premise of the case. The judge was concerned because the genetic father's partner was "neither linked to the child by genetics nor by his being in a legally-recognized relationship with [the genetic father]" (*Oleski v. Hynes* 2008). The non-genetic father was denied parentage recognition on the child's birth certificate, and the judge couched his reasoning in terms of the best interests of the children. The judge expressed discomfort that custody would be transferred not only to the genetic father, but "to an individual not related to [the twins] except by his untested declaration that he intends to parent them" (*Oleski* 2008). The resulting decision required the partner to file an adoption of the child after the birth. Clearly the *Oleski* court refused to recognize intent as a valid way to establish parentage.

Three months after the *Oleski* decision, the Connecticut court ruled on *Cunningham v. Tardiff* (2008), which resulted in a very different outcome. The gestational surrogate was implanted with two embryos, each fertilized by respective male partner's sperm and the eggs of an anonymous donor. Because twins were born, "it is

unknown as to which plaintiff fathered which baby” (*Cunningham* 2008). *Cunningham* was decided four days after the Connecticut Supreme Court had issued its decision (*Kerrigan v. Commissioner of Public Health* 2008) legalizing same-sex marriage in the state of Connecticut. Although same-sex marriages in the state did not begin until one month later, the effects of the *Kerrigan* decision were clearly apparent. Citing the *Kerrigan* decision, the *Cunningham* judge ruled that “the plaintiffs’ marriage is a legally recognized marriage the same as a legally recognized marriage for a heterosexual couple in Connecticut.”

Because the couple had been “married at the time of the transfer of the fertilized embryos into the surrogate,” the couple was entitled to “parental rights as biological and/or genetic parents” (*Cunningham* 2008). In addition, the court stated: “any children born as a result of these procedures acquire in all respects the status of a legitimate child.” This legitimacy allowed the parents to place both of their names on both children’s birth certificates (*Cunningham* 2008).

### **Conclusion**

As discussed earlier, courts establish legal parent status by the presence of five factors: a) gestation, b) genetics, c) marriage, and/or d) adoption, and occasionally e) intent. As a result of the limitations in confirming men’s biogenetic ties to children, fatherhood was often determined through marriage and genetic paternity testing. In the context of gay fathers having children outside of procreative sex, medical and legal contracts help determine legal fatherhood.

My findings reinforce the limited notions of hegemonic fatherhood, which views a father as a financial contributor or provider, and not as a parent who is intimately involved in children's lives. The courts' constructions of fatherhood were quite narrow, centrally based on genetics and breadwinning. My findings also reveal the embedded nature of heterosexuality throughout all conceptions of fatherhood.

Additionally the sample cases suggested that the default parent was still the mother. If the mother violated the norms of intensive mothering, however, then fathers had a chance to have equal or primary custody. In addition, fathering was frequently defined in relation to mothering, rather than on its own terms.

In the gay father cases, courts focused less attention on the parenting of the fathers and more on the sexuality and biogenetic relationships to the children they had created. Indeed as a Connecticut judge declared: "in this era of evolving reproductive technology and intent based parenthood, our laws must acknowledge these realities and not simply cling to genetic connections" (*Griffiths v. Taylor* 2008). Despite these changes, however, gay fathers leaving heterosexual relationships were still subject to significant levels of discrimination and bias. In my sample cases, the precedent of the *Lawrence* decision forced courts to veil their discomfort and bias in more clever ways, such as expressing concern about community disapproval, financial inequity, and exposure to unmarried sexuality.

The ideologies of hegemonic masculinity and hegemonic fatherhood are firmly embedded in the legal system and the larger society. When different group of men become fathers, the assumptions of hegemonic fatherhood are revealed in the discourses of custody decisions.

Once biogenetic relationships are confirmed for all litigants, the courts then addressed how well the parents conformed to the norms of hegemonic fatherhood and intensive mothering. The courts were significantly more accommodating to heterosexual fathers than they were to gay fathers. The context of how legal relationships are determined is clearly an important puzzle piece in understanding how difficult it is for gay men to become *legal* fathers. In light of these barriers, it was not surprising that my sample size was limited, however, the findings still suggest multiple layers of inequality exist among different groups of fathers. In addition, for gay men to become parents through surrogacy, they must have access to significant financial resources and have the means to seek out the appropriate legal and medical resources.

The legal system is configured in order to validate families that conform to the heteronormative family ideal. Because the law is not written in order to accommodate the diverse circumstances and needs of people with non-normative sexual identities, however, gay and lesbian parents are forced to enter litigation in order for judges to provide the boundaries and legal protections that gay and lesbian couples seek. A more in-depth discussion of gay and lesbian parent cases is where I now turn.

## CHAPTER 4

### SAME-SEX PARENTHOOD? THE INCREASING IMPORTANCE OF GENDER

After two daughters and seven years of marriage, Robert and Janelle divorced. Three years later, Janelle claimed that Robert's "intimate relationship with a person of the same sex" merited a change in custody from their shared parenting arrangement (*McGriff v. McGriff* 2004). Janelle also requested that the father "be required to seek professional assistance in dealing with his homosexuality" (*McGriff* 2004). In addition, the court stated that the mother does not object to "any specific behavior or conduct" of the father's, but instead the court said that she believed that his "living openly as a homosexual needed to be appropriately explained to the children" (*McGriff* 2004). Robert had begun living "openly as a homosexual" when he began a relationship with another man three years after their divorce. Adopting a gay and lesbian identity challenged heteronormative understandings of family. The premise of sexual behavior inherent in relationships, however, transformed deviant sexual identity into something much more sinister – deviant sexual behavior. This sexual behavior in the presence of children represented the final crossing of the line of unacceptability. Revoking joint custody, the Supreme Court of Idaho awarded Janelle primary physical custody and Robert a traditional visitation schedule of two weekends per month. But Robert was also issued a restricted visitation order banning him from "residing in the same house with his male partner during [children's] visits" (*McGriff* 2004).

Less than three months later, the Alabama Court of Appeals issued a modified custody order for twelve-year old Jasmine. When they divorced eight years earlier, the mother, Heather, was granted primary residential custody and the father, Doug, was

awarded visitation. Three years later, Heather moved Jasmine over an hour away in order to live with her same-sex partner, Meredith. While Jasmine's grades and extracurricular involvement remained the same after the move, the father claimed that the Jasmine lived in "an emotionally unstable environment because the mother lived with someone with whom she was romantically involved but to whom she was not married" (*L.A.M. v. B.M.* 2004).

Despite the fact that the mother admitted to having "sexual relations with [Meredith] while the child was in the home," the court did not restrict her visitation (*L.A.M. v. B.M.* 2004). By switching primary custody to Doug, the court certainly conveyed their disapproval of Heather's relationship with Meredith. The court chose, however, not to issue a restricted visitation order, prohibiting Meredith's presence in front of the children. Yet the *McGriff* court banned the presence of the father's partner and ruled that the "male partner should not be involved in the family relationship" (*McGriff* 2004).

Why did the outcomes of these cases differ? While both courts exhibited concern about the presence of gay and lesbian parents, the courts subjected gay fathers to more severe scrutiny than lesbian mothers. While both gay and lesbian parents pollute the heteronormative family ideal, courts perceived gay fathers as more threatening to the sanctity of the ideal.

This chapter is limited to the analysis of court decisions of gay, lesbian, and bisexual parents. While the above cases involved parents who had left heterosexual relationships, I divided the subsample into two broad groups – gay and lesbian parents who left heterosexual relationships and gay and lesbian parents who had children outside

of heterosexual relationships. Gay and lesbian parents leaving heterosexual relationships faced a different set of concerns than parents in same-sex relationships who choose to create children using ARTs and adoption.

### **Relevant Literature**

This chapter seeks to explore how courts construct gay and lesbian parents in judicial custody decisions. Accordingly, I review how child custody issues are handled for same-sex families, and cultural beliefs about gays and lesbians embedded in the judicial decisions.

A key milestone for same-sex families, and the modern gay and lesbian rights movement more broadly, was the U.S. Supreme Court decision, *Lawrence v. Texas* (2003). This decision struck down all state sodomy laws, which had criminalized certain sexual activities that were considered “crimes against nature,” such as oral and anal sex. While these acts could include heterosexual sexual activity, in reality, these laws were primarily enforced against those engaged in same-sex sexual behavior, and were often called “homosexual conduct” laws. Leading gay rights organizations celebrated the decision, while conservative groups criticized the “activist judges” for overstepping their bounds (Klarman 2005). Many courts had previously used the criminalization of sodomy as a legal justification for the denial of gay and lesbian rights, especially in family and parenting cases (National Gay and Lesbian Task Force 2011).

In the last decades, gay, lesbian, and bisexual families have become a central topic in the national political dialogue (Rimmerman and Wilcox 2007). Indeed, assisted reproductive technologies and the “gayby boom” (as some commentators have called it)

(Dunne 2000; Lewin 1993) have enabled openly gay and lesbian people to become parents outside of the realm of heterosexual intercourse (Lewin 1993; Stacey 1996; Sullivan 2004).

Despite the “gayby boom” and the *Lawrence* decision, same-sex parents have few legal protections guaranteed to them in most states. As discussed in previous chapters, courts define legal parent status by the presence of five factors: a) gestation, b) genetics, c) marriage, and/or d) adoption, and occasionally e) intent. Courts still privilege the historical foundations of heterosexual marriage and biogenetic relationships to children as central to defining a legal parent. Since one or both of these criteria are not present for most parents in same-sex relationships, legal parent status is often not granted to more than one parent of gay and lesbian families. The legal mechanisms of “second-parent” and “joint” adoptions enable two parents in a same-sex relationship to adopt the child, however, only seventeen states and the District of Columbia have statewide judicial precedent or legislative statute legalizing either of these adoptions (Human Rights Campaign 2011). In addition, only six states and Washington D.C. currently offer access to same-sex marriage.

Even where such adoptions are available, some parents lack knowledge of their availability and/or face other bureaucratic and financial barriers, making these adoptions less common. Therefore when the parents in same-sex families break up, different outcomes result, ranging from no visitation for the non-legal parent to joint physical custody for both parents. Although some non-biogenetic gay and lesbian parents may be granted parental rights as a “*de facto*” parenthood, such requests are frequently denied because the non-biogenetic parent lacks standing.

Although custody laws and judicial precedents vary from state to state, and even from judge to judge, all courts adhere to the “best interests of the child” standard, which dictates that custody should be based solely on children’s needs (Artis 2004; Connolly 1996; Emery, Otto, and O’Donohue 2005). But the family law system grants significant latitude to judges in their decision-making process, which often increases discrimination against sexuality minority parents (Cooper and Cates 2006; Dalton 1999; Emery et al. 2005; Lin 1999; Reilly 1996).

This discrimination stems from widespread negative cultural beliefs about gay and lesbian people. Although the American Psychological Association (APA) declassified homosexuality as a mental disorder in 1973, stigma about homosexuality still pervades our culture, ranging from discrimination to fear of gay and lesbian people exhibited in national policies like “Don’t Ask, Don’t Tell.” Judges have invoked common cultural fears in their decisions, such that children will suffer from various negative effects, including that they will grow up to be homosexual and that they will not develop proper gender roles or gender identities (Falk 1989; Gold, Perrin, Futterman and Friedman 1994; Rosky 2009).

Twentieth century representations of homosexuality – that it is both a “contagious condition,” (Watney 1997) and that it centers around seduction, especially of children still figure prominently in the societal imagination (Crooks and Baur 2008; Kent 2010; Knauer 2000; Watney 1997). This “contagion/seduction model of homosexuality” (Watney 1997: 23) is linked to another stereotype that judges have invoked – that lesbians and gay men are child molesters and/or that they will sexually abuse their own sons and daughters (Andersen 2005; Herek 2002; Jenkins 2004;).

This longstanding cultural belief is particularly problematic for gay men who are often stereotyped as hypersexual and unable to control their sexual urges. These stereotypes reinforce essentialist beliefs that gay men are solely defined by their sexual behavior (Spitko 2005). Regardless of the fact that evidence has disproven these child molester myths (Cahill and Jones 2002; National Gay and Lesbian Task Force 2006, 2011; Rosky 2009), the safety of children continues to be a concern in same-sex parenting court cases (Andersen 2005; Herek 2002).

Yet, importantly, gender differences exist in people's beliefs in anti-gay stereotypes. In a 1999 study, almost 20% of heterosexual men surveyed believed that at least half of gay men "molest or abuse children," while only 8.5% believed this about lesbians. Heterosexual women believed these same stereotypes about half as often as heterosexual men (Herek 2002: 51). Since the majority of judges are heterosexual men, the potential importance of these stereotypes should not be discounted.

As Rosky (2009) and Pascoe (2007) discuss, homophobia plays out in different ways for gay men than for lesbians. In particular, assumptions about gender identity are often conflated with assumptions about sexual identity. By not investigating these differences, we are missing the complex dimensions of a "gendered homophobia" evident in court decisions. Research must move beyond the assumption that all same-sex couples are perceived and treated similarly. Instead, gender-based stereotypes operate differently for gay fathers than for lesbian mothers. Gay fathers pose significantly more threat than lesbian mothers in the perceived healthy development of children's appropriate gender roles (Rosky 2009). Therefore, this chapter focuses on this intersection of homophobia in court decisions and not just heteronormative, but also gendered, constructions of

parenthood.

## **Results**

### *Sample Description*

This subsample consists of 127 cases, as Table 4.1 indicates. These cases consist of 101 (80%) lesbian mother cases, 22 (17%) gay father cases, and 4 (3%) that involved both gay fathers and lesbian mothers. In addition, as shown in Table 4.1, approximately 14% of the gay and lesbian subsample cases involved a same-sex civil union, domestic partnership, or marriage, however, only 3% of all cases involved a legal relationship that was recognized by the state in which the litigation occurred.

Table 4.1. Descriptive Statistics for Gay Fathers and Lesbian Mothers

		<b>Gay Fathers</b>	<b>Lesbian Mothers</b>	<b>Gay Fathers &amp; Lesbian Mothers</b>	<b>TOTAL</b>
Total Subsample		22 (17%)	101 (80%)	4 (3%)	127
<b>Cases by Origin of Child</b>					
Child Resulted from Heterosexual Reproduction		13	33	1	47 (37%)
Child Resulted from Assisted Reproductive Technologies (ART)		8	56	3	67 (53%)
Child Resulted from Public or Private Adoption		1	12	0	13 (10%)
<b>Cases by Type of Relationship Recognition</b>					
Marriage	MA	1 <sup>a</sup>	1	0	2
	CA	1 <sup>b</sup>	1	0	2
	OR	0	1	0	1
	Canada	1 <sup>a</sup>	2	0	3
Civil Union	VT	0	4 <sup>c</sup>	0	4
	CT	0	0	1	1
	NJ	1 <sup>b</sup>	0	0	1
Domestic Partnership	CA	1	3	0	4
	NY	1	1 <sup>c</sup>	0	2
Dom. Partner Affidavit	FL	0	1	0	1

<sup>a</sup>This gay male couple was married in both Canada and Massachusetts.

<sup>b</sup> This gay male couple was married in California and had a civil union in New Jersey.

<sup>c</sup> This lesbian couple had a civil union in Vermont, as well as a domestic partnership in New York.

While there were similarities between all lesbian mother and gay father cases, there were also important differences depending on the circumstances. As shown in Table 4.2, I organized the subsample cases according to two broad categories of circumstances: (a) heteronormative relationships, involving a heterosexual relationship ending in which one party came out as gay or lesbian (34%); (b) non-heteronormative relationships, in which a lesbian relationship ended (57%), gay father(s) used surrogacy (6%), and cases in which there was a lesbian mother and a gay father (3%).

Table 4.2. Heteronormative and Non-Heteronormative Subsamples

	<b>CIRCUMSTANCE</b>	<b>%</b>		
<b>HETERONORMATIVE</b>	Left heterosexual relationship & one party comes out	men	11% (n=14)	34% (n=43)
		women	23% (n=29)	
<b>NON-HETERONORMATIVE</b>	Lesbian couple split	men	1% (n=1)	58% (n=73)
		women	57% (n=72)	
	Gay father(s) used surrogacy		5% (n=7)	
	Lesbian mother and gay father		3% (n=4)	

In section I, I discuss the similarities and gendered differences among the heteronormative cases. In section II, I shift focus to the similarities and gendered differences among the non-heteronormative subsample cases.

## **Thematic Discussion**

### *I. Heteronormative Relationships*

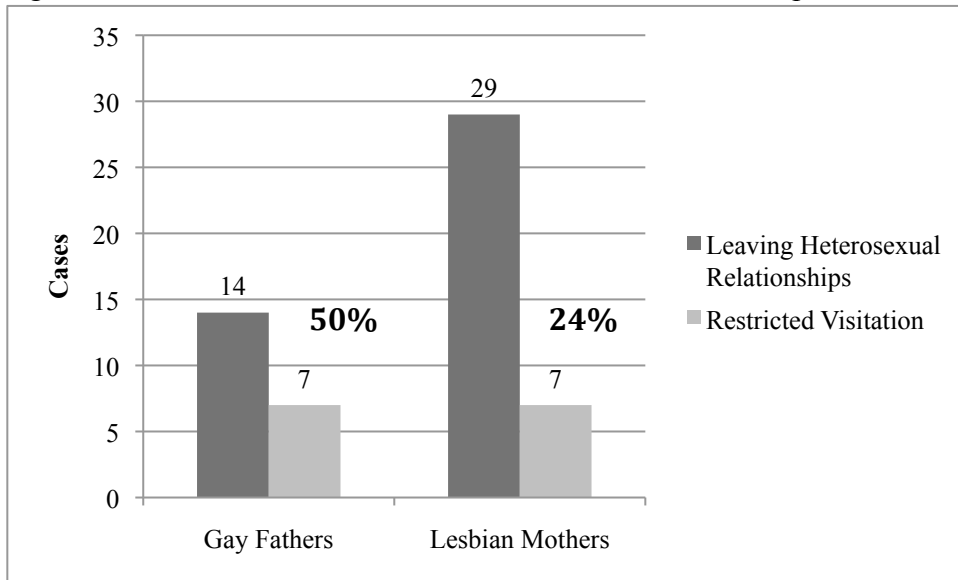
In their assessment of the best interests of the child, some judges believed that parental homosexuality represented a violation of public morality. As expressions of this moral disapproval, courts repeatedly denied custody to and restricted the visitation of gay, lesbian, and bisexual parents. Restricted visitation ranged from the prohibition of overnight guests, as well as limiting exposure to all other gay men and lesbians and their “lifestyle” (*A.O.V. v. J.R.V.* 2007; *Antoine v. Lannon* 2006; *Cook v. Cook* 2007; *Damron v. Damron* 2003; *Hedberg v. Detthow* 2005; *Hogue v. Hogue* 2004; *McGriff v. McGriff* 2004; *Mongerson v. Mongerson* 2009; *Sirney v. Sirney* 2007; *Soteriou v. Soteriou* 2005). Indeed, overall comparisons indicated that gay and lesbian parents leaving heterosexual relationships were more than twice as likely to receive restricted visitation orders than heterosexual parents, with 13% (16 of 127) for heterosexual parents and 33% (14 of 43) for gay and lesbian parents combined.

The question of whether homosexuality is a choice has been a subject of great debate, as it is often associated with religious conservatives and negative attitudes towards gay rights. Some courts expressed regret that the ideal heterosexual family was ruined by a father’s decision to come out. A Connecticut judge wrote: A Connecticut judge wrote that the father had failed to consider “the impact of [his lifestyle] choices on [his wife] and the children” (*Soteriou v. Soteriou*, Ct., 2005). The judge also noted that the “the [father] appears to have little understanding over his role in the demise of this family” (*Soteriou* 2005). The court suggested that gay fathers should feel shame for their “choices.” Indeed, several courts accused the fathers of abandoning their wives and children to “pursue [a] gay lifestyle” (*Hogue v. Hogue*, Tenn. 2004).

A family court judge in Delaware echoed the same language in describing the “father’s chosen lifestyle” (*T.D. v. T.A.J.* 2006). Because many proponents of gay rights have argued that sexual orientation is something over which people have no control (Herek 2002), the judge’s words “chosen life style” could be perceived as being anti-gay. Queer theorists, however, have argued that social and legal protections should be provided regardless of whether same-sex desire is a choice or an uncontrollable biological directive (Whisman 1996).

While courts sometimes discussed gay fathers as having a choice in their sexual identity, this same discussion was not raised in the cases of lesbian parents. In both gay father and lesbian mother cases, the term “lifestyle” was raised frequently, in about 45% of lesbian mother cases, and 50% of gay father cases. But in none of the lesbian mother cases was the term “chosen lifestyle” or the idea of a “choice” discussed. Courts used the term “lesbian lifestyle” (*Clark v. Boals* 2007; *Davidson v. Coit* 2005; *D.M.S. v. S.S.P.* 2007) frequently, but the courts did not reprimand lesbian mothers for tearing apart the family in the ways that gay fathers were scolded. Gay sexual identity and behavior, especially as embodied in *openly* gay fathers, represent a greater threat to the heteronormative family ideal than lesbian identity and behavior. The threat of gay men to society, to hegemonic father, and to hegemonic masculinity is acutely felt as a constant undercurrent in most of these court decisions. Indeed male sexuality overall is perceived to be excessive and uncontrollable, whereas female sexuality is perceived to be minimal or non-existent, and certainly not threatening.

Figure 4.1. Restricted Visitation for Heteronormative Subsample



Courts used restricted visitation as a way to express moral disapproval of gay fathers and lesbian mothers. In comparing the lesbian and gay parents who left heterosexual relationships, the courts issued restricted visitation orders more frequently for gay fathers than for lesbian mothers, as shown in Figure 4.1. In gay father cases in which they were leaving a heterosexual relationship (n=14), restricted visitation was required in 50% (n=7) of the cases, and in one of those seven cases, custody was terminated completely. An additional case resulted in the court granting the maternal grandmother and stepfather parental rights instead of the gay biogenetic father. Therefore, a restriction visitation or a custody denial was issued in 57% (n=8) of the gay fathers leaving heterosexual relationship cases.

On the other hand, only 24% (n=7) of the lesbian mothers leaving heterosexual relationship cases involved a form of restricted visitation. Therefore gay fathers were issued restricted visitation orders twice as frequently as lesbian mothers. Of those seven

restricted visitation orders, 28% (n=2) were overturned; for gay fathers, 43% (n=3) were overturned. The small sample sizes prevent a full comparative analysis, however, even after excluding the overturned orders, 36% of gay father cases were subject to restricted visitation or no visitation, whereas 17% of lesbian mother cases were subject to restricted visitation or no visitation. This outcome exemplifies not just the centrality of motherhood, but also the decreased threat represented by lesbian sexuality. This outcome additionally reflects the intersection of both fathering *and* gay identity and behavior.

Although the U.S. Supreme Court invalidated all sodomy prohibition laws in *Lawrence v. Texas* in 2003, courts still seemed to associate illegal sexual behavior with gays and lesbians. Courts expressed awareness that custody could no longer be denied simply because gay and lesbian identity was presumed to result in same-sex sexual behavior. For example, in 2004, the Idaho Supreme Court recognized the significance of the *Lawrence* decision, and acknowledged how the decision informed child custody proceedings, so that “sexual orientation, in and of itself, cannot be a basis for awarding or removing custody” (*McGriff v. McGriff*, Id., 2004). Despite this recognition, however, the court agreed to modify the shared parenting plan because of the mother’s claim that the father “has failed to deal with his homosexuality in a responsible and emotionally stable manner.” The father had “revealed his sexual orientation” to his ten-year-old daughter despite the mother’s previous requests that she be present when this occurred. Agreeing with the mother, the court chastised the father for his behavior.

In addition, the court-appointed psychologist found that the mother and father were ““good parents who have cared well for the children...[and] have shown positive nurturing”” (*McGriff* 2004). Although the psychologist recommended not modifying the

shared custody arrangement agreement, the court did so anyway. Therefore the court issued a restricted visitation order to the divorced father prohibiting his partner from “residing in the same house” during the children’s visits (*McGriff* 2004). Implicit in denying the partner the ability to sleep in their jointly purchased home was that these men could become engaged in legal sexual activity while the children were visiting. Similarly, a Virginia court ruled that the gay biogenetic father was only entitled to restricted visitation because of “an illicit relationship to which minor children are exposed cannot be condoned” (*A.O.V. v. J.R.V.* 2007). Although this ruling forbade overnight visits with the father’s partner, the *A.O.V.* court issued this decision four years after *Lawrence*, suggesting that courts found easy ways to circumvent the significance of the *Lawrence* decision in their custody decisions.

As discussed in previous chapters, courts used other strategies to deny claims of discrimination based on sexual identity. Some courts were particularly concerned about community disapproval of gay and lesbian parents and their children. In *Kimberly R.* (2005), the judge was concerned about the children living in “an environment for which [the daughter] can be ridiculed at school from all her friends” (*Kimberly R. v. Superior Court* 2005). An Idaho court justified the gay father’s restricted visitation order because of the “conservative culture and morays (sic) in which the children live” (*McGriff v. McGriff* 2004). A Virginia court incorporated “societal views of homosexuality” in its decision (*A.O.V. v. J.R.V.* 2007). The court also acknowledged the state’s “traditional concern over exposing children to extra-marital relationships” (*A.O.V.* 2007).

Courts justified their decisions through discussion of the state’s and the community’s disapproval of non-marital relationships. For instance, in *Sirney v. Sirney*

(2007), another circuit of the Virginia Appeals Court upheld the trial court's restricted visitation order, which stated that there will be "no overnight stays by a person to whom [mother] is not married with whom she is involved in a romantic, sexual relationship while the children are visiting" (*Sirney* 2007). The court rejected the "mother's claims that she was discriminated against" because the restricted visitation order applied to both "male and female overnight guests" and was therefore "gender neutral" (*Sirney* 2007). In addition, the court claimed that the mother did not "keep paramount the children's comfort level" when they were around her same-sex partner or gay and lesbian friends. Ensuring the constant comfort of children, however, is not necessarily part of the definition of "parental fitness" or "the best interests of the child." Therefore joint legal custody was revoked and the father was issued sole custody of the children and the mother was granted restricted visitation.

In *Davidson v. Coit*, the court claimed that the mother's "sexual preference" was not the issue, but a change in custody was necessary because her two daughters were "exposed to their mother's sexual behavior" (*Davidson v. Coit* 2005). The court was particularly concerned that the lesbian mother's "alternative lifestyle... would raise everybody's eyebrows" (*Davidson v. Coit* 2005). In addition, much of the Davidson decision was based on trial court testimony from a "qualified expert in the area of adolescent, child and family therapy" (*Davidson* 2005). The appellate court neglected to mention, however, that the state Board of Licensed Clinical Social Worker had revoked his license a year earlier for unethical behavior, including complaints of coaching children (Leonard 2005; Website 2010). The expert quoted the oldest (nine-year-old) daughter: "there are naked women on the t.v. kissing each other and lying next to each

other like this' and then she demonstrated by acting affectionate kissing and then she said, 'yuk'" (*Davidson 2005*). The expert stated that the oldest daughter "is noticing and paying to the fact that her mother is sharing a bed with another woman" and this is "not going to be particularly good for [the daughters] mentally" (*Davidson 2005*). Although it was unclear whether the children were coached, the assumption was that exposure to this desire was inherently problematic for her "two impressionable girls." In conclusion, the court ruled that the best interests of the child demanded a shift in custody to the father (*Davidson 2005*).

In several cases, the courts expressed assumptions about normative gender roles and parenting. For instance, as a result of assumptions that children need a parent of each sex in order to acquire proper gender roles, the development of children's proper gender roles is a concern for all judges. For example, in *Page v. Page*, the court noted that "there was competent, credible evidence...that, as a collateral result of [the mother's] relationship with [her partner], including [her partner's] conduct, both [boys] have experienced personality development disorders that are neither slight nor inconsequential." Stereotypes about lesbians suggest that they do not know how to interact with men, the court is concerned that the mother's girlfriend "has not developed the social skills necessary to enable her to effectively interact with young men of this age [fifteen and thirteen years of age]" (*Page v. Page 2008*).

The courts often seemed preoccupied with the constant specter of same-sex sexual behavior occurring between gay and lesbian parents and their partners. In *Gould v. Dickens* (2004), the father was granted a child protective order based upon allegations that his son witnessed his mother and her lesbian partner "engage in a sexual act" (*Gould*

2004). The trial court issued restricted visitation stating that the lesbian partner could not occupy the same bedroom as the mother while the children were visiting. The trial court inferred that the partner and mother sleeping in the same bedroom “would endanger the child’s physical health or impair his emotional development” (*Gould* 2004). The appeals court, however, overturned this ruling stating that there was no evidence of such endangerment.

One of the common ways that courts issued restricted visitation orders was through evidence of “actual or potential harm to the children.” Historically courts have warned of the harm done to children as a result of exposure to gay and lesbian parents, as well as their partners and friends. Evidence was not necessary, however, for many courts to assume that children’s exposure to gay and lesbian people was in and of itself problematic. Indeed a North Dakota trial court was fearful that a lesbian mother’s “open homosexual relationship may endanger the children’s emotional health and impair the children’s emotional development” (*Damron v. Damron* 2003). Although the “presumption of harm” doctrine has become less popular with the courts over time, the doctrine often still functioned as the default logic that must be disproven.

In *Cook v. Cook* (2007), the original divorce order awarded a shared custody plan, alternating every two weeks with the mother, Celia, and father, Paul. Part of this order, however, included “a provision referred to as the ‘[Sherry] clause,’ which provided: Neither parent shall allow [Sherry] to be associated with the minor children and thereby allowing her to live or visit in the home” (*Cook* 2007). A year later, Paul requested a change in custody and “motion for contempt” against Celia for violating the Sherry clause. The court found Celia in contempt of court and issued a six-month contempt

sentence on two occasions for “exposing the children to her lesbian relationship” (*Cook* 2007). In addition, Paul was awarded primary physical custody, and Celia was limited to restricted visitation based on the Sherry clause. Because Sherry lived in an adjacent trailer when the children were visiting, the court found Celia had “attempted to deceive the court” and had exhibited a “pattern of misconduct” that merited two years supervised probation (*Cook* 2007).

While some lesbian mothers and gay fathers faced similar sentiments in the courts, the threat of sexual abuse was much more salient for gay fathers than lesbian mothers. Multiple courts expressed serious concern about the safety of the children in the context of gay fathers and their partners. Although Rosky (2009) discussed the trend for gay fathers to be suspected of abusing their own sons, there was no correlation in my sample between the sex of the children and whether a gay father receives restricted visitation. Of the seven cases of restricted visitation, five involved at least one son, one involved daughters, and in one the sex of the children is not specified. Of the remaining cases in which the fathers did not receive restricted visitation, all seven cases involved male children. This finding suggests that not all gay fathers with sons were considered suspect. Despite the prevalence of the stereotype that gay fathers or their partners were child molesters (Rosky 2009), my sample does not indicate a correlation between the sex of the child and allegations of abuse or restricted visitation orders.

While not always explicit, sometimes courts issued restricted visitation orders based on underlying fears of sexual abuse, even if there were no allegations of abuse. For example, a Virginia court prohibited a gay father’s partner from staying overnight when the children visited. In addition, the father was ordered not to leave “the children in his

companion's care" (*A.O.V.* 2007). Direct allegations of child sexual abuse were evident in 14% (n=2) of the gay fathers leaving heterosexual relationships cases.

For example, in *Soteriou v. Soteriou* (2005), the mother hired a private investigator to follow her ex-husband and his male partner. In addition, the ex-wife claimed that her ex-husband was "spreading disease" although there was no evidence that the father had any STDs. The court claimed that three issues led to their decision to grant mother residential custody: 1) "pornographic images" found on the internet of father and male partner; 2) allegations of sexual abuse made by nineteen-year-old man against father's partner, all charges of which were dropped by the police and the case was closed; and 3) father did not provide sufficient background about cohabitating partner to mother. In the end, the court ruled that the gay father's children cannot "be left unsupervised with the defendant's current cohabitant unless the cohabitant undergoes an evaluation by [a doctor] to determine whether he poses a risk to the children." Although the partner was never charged with any crime, the allegations of adult sexual abuse lead to the assumption that the father's gay male partner would be likely to engage in the abuse of his partner's 5- and 3-year-old children. In addition, heterosexual cases do not require the provision of background information about the divorced parent's new partner.

In *Antoine v. Lannom*, the bisexual father's six-year-old son accused the father's partner of sexual abuse. A clinical psychologist testified that he could not be sure that abuse had occurred. While the charges were not to be taken lightly, the court chose not to investigate further and terminated the father's parental rights unilaterally (*Antoine* 2006).

Although child abuse allegations were present in 14% of gay father cases, allegations of child sexual abuse by a lesbian mother was discussed in only 3% (n=1) of lesbians leaving heterosexual relationships cases. The outcomes for the gay father cases, however, were quite different than the one lesbian mother case. The courts in both gay father cases issued restricted visitation orders, without sufficient investigation into whether the allegations of abuse were founded. On the other hand, in *Gould v. Dickens* (2004), the heterosexual father and lesbian mother both accused each other of sexually abusing their son. After their examination of the allegations, the court-appointed clinical psychologist and the county family services investigator concluded that the allegations were unfounded.

Additionally, child sexual abuse was discussed in another lesbian mother case, however, the allegations were made against the father. The county department of family services found evidence of physical and psychological abuse of family members, as well as sexual abuse of the daughter. The trial court judge initiated dependency proceedings for the children to enter the foster care system instead of granting custody to the lesbian mother. The judge told the social worker that she was “discriminating against the children when you don’t consider what is in their best interest” (*Kimberly R. v. Superior Court* 2005). The social worker, however, replied “[b]eing a homosexual is not illegal...I feel it’s more detrimental [Nina] sleeping in her father’s bed than living with her mother who is a lesbian” (*Kimberly R.* 2005). The appellate court ruled however that the trial judge provided no evidence that living with their mother and her partner would have a “detrimental effect on the children’s lives” (*Kimberly R.* 2005). Therefore full custody was granted to the lesbian mother who cohabitated with her same-sex partner.

In lesbian mother cases, allegations of sexual abuse were subject to thorough investigation, however, in gay father cases, assumptions of sexual abuse or the likelihood of future abuse were assumed by default.

## *II. Biogenetic Ties in Non-Heteronormative Relationships*

Sixty-six percent of the gay and lesbian parent sample was composed of non-heteronormative relationships. The vast majority of the non-heteronormative sample was composed of lesbian mothers leaving heterosexual relationships. Additionally, 71% of all lesbian mother cases resulted from same-sex relationships ending, not from leaving heterosexual relationships. On the other hand, 13% (1 of 8) of the gay father cases resulted from a same-sex relationship ending. In addition, 32% of all the gay father cases resulted from two men entering into surrogacy contracts and seeking legal parentage for both of them. These findings suggest that gay and bisexual men face more barriers to parenthood than lesbians or bisexual women. Gay men who want to father face what Judith Stacey (2006) called “a biological procreative disadvantage,” which also results in less visibility for gay fathers. Not only are men<sup>16</sup> physically unable to birth a child<sup>17</sup>, there is also additional discrimination in the adoption process and the law, making it less likely for fathers’ cases to make it to court in the first place. Therefore for some gay men with financial resources, surrogacy is often the most viable path to fatherhood.

In cases involving heterosexual separation, the judges often expressed concerns about the sexual identity and behavior of the gay or lesbian parent. Part of the reason that

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<sup>16</sup> In this case, “men” refers to cisgender people, who are born as anatomic and genetic males, and excludes trans men.

<sup>17</sup> Although women must obtain sperm from male friends, sperm banks or heterosexual intercourse, women no longer need the contributions of men after embryo formation. On the other hand, gay men who want to have a biological connection to the child must find a willing surrogate mother (Segal-Engelchin, Erera, and Cwikel 2005).

judges often objected to the non-normative sexual identities of these parents was because in most cases, biogenetically-related heterosexual parent alternatives, either the other parent or related kin, were available. In the case of same-sex couples breaking up, custody with either parent will lead to the same end result – gay and lesbian parents raising the children.

Gay fathers and lesbian mothers both face diverse paths to parenthood. While it is significantly easier for lesbian mothers to have children, both gay and lesbian parents face legal, medical, and financial barriers. Recognizing the legal weight accorded to biogenetic ties, both gay and lesbian parents frequently attempted to create biological and/or genetic ties with at least one, if not both partners in the couple. In *K.M. v. E.G.* (2005), one partner, the gestational mother, carried the ova of her lesbian partner, the genetic mother. In 62% (5 of 8) of the gay father cases that involved surrogacy agreements, both gay fathers donated sperm so that one embryo from each father was implanted into the surrogate mother. In three of those eight cases, the gay fathers used a female genetic relative to assist in the process in some way as a genetically related egg donor or as a biogenetically related gestational carrier. Clearly gay and lesbian parents were subject to the same mores and pressures that value gestational and genetic relationships as key signifiers of family. This reality was also reflected in the fact that only 10% of the gay and lesbian sample cases emerged as a result of adopted children, as indicated in Table 4.1.

As family law historically defined parenthood through biogenetics, the courts still conferred biogenetic ties significant power to define legal parenthood. For example, when lesbian couples ended their relationship and only one parent had a biological

relationship to the children, the courts consistently valued the biogenetic relationship and granted sole custody to the biogenetic mother. Non-biogenetic lesbian mothers, who played a central role in parenting, were denied custody or visitation rights in 58% of cases because they “lacked standing” without a biogenetic or other legal connection to the child (*A.K. v. N.B.* 2008; *Smith v. Gordon* 2009; *T.F. v. B.L.* 2004). For example, in 2008, the Alabama Court of Civil Appeals stated that the “natural mother’s former partner had no visitation rights with respect to the child” despite the fact that both women had planned for and raised the child for five years (*A.K. v. N.B.* 2008). The primacy of biogenetic ties was still evident in these decisions.

A 2008 Kentucky court ruled that the non-biological lesbian mother was not a *de facto* parent, even though she had signed a “verified petition alleging she was the de facto custodian of the child” (*Pickelsimer v. Mullins*, Ky., 2008). In addition, both the biological mother and co-mother “participated in raising and caring” for their son equally even after the couple separated. “The child was on a heart monitor so it was not uncommon for [the co-mother] to awaken at night and care for him. At the same time, [the bio mother] would care for [Wendell] when [the co-mother] was at work. As [Wendell] grew, he began to refer to [the bio mother] as ‘mommy’ and to [the co-mother] as ‘momma’” (*Pickelsimer* 2008). Yet the Kentucky Court of Appeals ruled that the lesbian co-parent had no legal standing to pursue a claim. While recognizing the labor necessary for intensive mothering, the court ultimately ruled that only one intensive mother, the biological one, was a legal parent.

As known sperm donors for lesbian couples, men often became litigants when lesbians broke up. The role of donor men was sometimes elevated beyond just biological

connection as a result of the men's financial contributions. In two cases involving heterosexual known sperm donors, (*Jacob v. Shultz-Jacob* 2007) and (*Mintz v. Zoernig* 2008) the sperm donor was granted visitation for his biogenetic ties and limited financial contributions. For example, in *Jacob v. Shultz-Jacob* (2007), a lesbian couple approached a male friend to be a sperm donor for their children. The heterosexual donor was involved in the lives of the two children since their births. When the lesbian couple separated, the biogenetic mother filed for child support from the non-biogenetic mother. The judge ruled that the sperm donor should also be included as a party responsible for child support. After the donor contributed more than \$13,000 over a four-year period, the court ruled that these financial contributions "demonstrate parental involvement far beyond the merely biological" (*Jacob* 2007). The judge therefore granted visitation to the non-biogenetic mother and the sperm donor, while also issuing two child support orders. In these instances, while the sperm donors were not granted the legal status of *de facto* parent, they still were regarded as a parent due to their biogenetic connection to the child, as well as their financial contributions. Therefore tenets of hegemonic fatherhood, the breadwinner role and a biogenetic tie to children, were both rewarded by the court as central to the creation of legal parentage.

Clearly the recognition of three people with parental rights represented a huge shift in the traditional legal definitions of parenthood, and this case was likely the first of its kind (Leonard 2007). On the one hand, this case signified a thorough awareness of the complexities of modern family life, particularly for non-heteronormative families. Moving beyond the narrow definitions of statutory law, the judge revealed a more fluid understanding to defining legal parents. On the other hand, this flexible approach to

defining parents was based upon two bedrock components of hegemonic fatherhood: economic provision and biogenetic paternity. In addition, many other cases in my sample involved a non-biogenetic mother who provided much more time than the *Jacob* sperm donor and more than a few thousand dollars a year, and they were denied any rights of visitation.

Because the legal recognition of three parents remained an unlikely outcome, an infrequent but increasingly popular legal strategy among lesbian biogenetic mothers involved teaming up with the sperm donor after the lesbian parents' relationship ends. If the courts recognized two parents, then it would be very unlikely the court would recognize a third. Indeed, an Ohio court determined that gay sperm donor was the legal father and "had the option of entering into a shared parenting agreement...or petition the court for an allocation of rights and responsibilities" (*In re Mullen* 2009). The non-biogenetic lesbian mother, however, who had helped raise the child, was denied any visitation rights. Although the sperm donor played only an occasional role in the child's life, the donor's biological ties signaled conformance to hegemonic fatherhood.

Reaffirming the significance of biological ties and because of significant barriers to adoption, some gay men become parents via gestational surrogacy, where two different embryos are often implanted in the surrogate using sperm from each of the gay men and anonymous egg donors. Laws and statutes regarding surrogacy agreements are quite disjointed throughout the country. In the majority of cases (6 of 8, 75%) in my subsample, however, surrogacy agreements are upheld in favor of gay fathers. A 2009 New Jersey case, the judge argued that "surrogacy contracts are made before the mother knows the strength of her bond with the child" (*A.G.R. v. D.R.H. & S.H.* 2009). The

presumed uniqueness of the mother-child bond reflected essentialist understandings of motherhood. In addition, the judge placed the ideals of intensive mothering on a pedestal, applauding the subordination of parental needs and intentions to the needs of the child. In addition, the non-biological father's sister served as the gestational carrier, representing the significance of biological ties in defining family. The gestational surrogate was ultimately granted legal status as mother (*A.G.R. v. D.R.H. & S.H.* 2009). This outcome reaffirms the primacy of gender and of the defining component of parenting as motherhood.

In lesbian break-up cases, the courts continue to be focused on gendered and heteronormative parenting. For example, the cultural pressures to mother became visible in the content of the decisions. Recounting testimony from the trial, the *T.F.* court described how “the defendant... ‘went along’ with having a baby because she got ‘tired of the arguments’ and ‘didn’t want to take [the plaintiff’s] dream away’” (*T.F.* 2004). This “dream” is based on broad cultural forces that encourage most women, including lesbians, to see motherhood as central to a woman’s identity (Murphy 2001). Motherhood is one of the essential characteristics of womanhood, and as Ellen Lewin suggests, the normative status of a presumably heterosexual mother can become the primary status for lesbian mothers, overriding their previous status as a sexual minority (Lewin 1993; Sullivan 2001). The end result of the *T.F.* case was that the non-biological mother was not required to pay child support despite her integral role in planning for a child because the Supreme Judicial Court of Massachusetts did not recognize her as a legal parent.

In some cases, the gendered norms of parenting were evident, as the courts tried to reconcile the financial provider role with the lesbian parents' roles as mothers. In *A.H. v. M.P.* (2007), the Supreme Judicial Court (SJC) of Massachusetts awarded custody to the biological mother who was deemed the primary caretaker. Even though the non-biological co-parent was the primary financial provider for the family, she did not develop "the parent-child bond [that] grows from the myriad hands-on activities of an adult in tending to a child's needs" (*A.H.* 2007). The non-biological mother was therefore not granted "*de facto*" parent status and denied any parenting rights.

While there was only one gay father custody case, this case rewarded the biological father full residential custody. Because the two fathers had filed for legal parentage in California prior to the child's birth, the non-biological father was legal recognized as a parent. Nonetheless the outcome validated biological ties as a central defining component of hegemonic fatherhood.

### **Conclusion**

Judicial discourse reveals important insights into understanding power and inequality in the family, which have real consequences for American families. Although the law has long played a role in regulating the family (Foucault 1995), this study helps to elucidate how that regulation occurs for same-sex families.

By analyzing gay fathers and lesbian together as a single unit of analysis, the complexities of how gender and sexual identity interact are obscured. Indeed, this research helps to reveal how the court system is embedded with gendered norms about parenthood and family. In particular, lesbian mothers faced gendered assumptions that

reinforced heteronormativity. Overall, lesbian parents were more often awarded custody rights because their normative status as mothers and caregivers trumped their non-normative sexual identity.

On the other hand, gay fathers were often subject to suspicion and disgust about their sexual behavior and the people they associated with (other gay men). Courts helped to conceal all other parts of gay fathers' lives by defining them solely by their sexuality, whereas the sexual behavior of lesbians is often rendered invisible (Spitko 2005). In addition, the courts viewed fathers who acted as caregivers as transgressive (Kessler 2005) because they violated gender norms, and were then doubly penalized by their non-normative sexual identity. Gay fathers represent deviation from traditional morality, as well as stirring up fears about oversexed gay men as perpetrators of sexual and child abuse. Therefore courts often deny equal custody, and issue restricted visitation for gay fathers, much more frequently than for lesbian mothers.

As much mainstream GLBT political activism seems to be centered on achieving equal access to marriage, one cannot help but notice an absence of similar movements for family and parenting rights (except for the work of a few legal advocacy organizations). Although some queer theorists and feminists may consider same-sex marriage as "homonormative" assimilation, marriage and other couple-based relationship recognitions are increasingly acknowledged by courts to ensure equitable child custody arrangements. A 2010 New York decision (*Debra H. v. Janice R.*, NY, 2010) indicated that even though a non-biological lesbian mother did not adopt her partner's biological child (as her partner prohibited her from doing so), she was awarded parenting rights

based on the fact that the couple had had a Vermont civil union.<sup>18</sup> In effect, marriage or marriage-like relationships have begun to serve as proxies for updated family law statutes and equal access to joint and second-parent adoptions.

While the courts have slowly become more open to redefining families, many courts still cling to traditional gender roles with men as breadwinners and women as caregivers. In addition, courts clearly reward conforming to heteronormative ideals of biological and marital relationships. Finally anti-gay stereotypes and homophobia are still entrenched in the judicial system.

Gay fathers and lesbian mothers need to be analyzed distinctly because gender and sexual identity and behavior interact in the ways we define parents and families in the United States today. Courts continue to be faced with increasingly more diverse family configurations, consisting of multiple parents, partners, children, and extended kin. Therefore structural changes in the legislative and judicial branches will be necessary to reflect these complex realities of family life. Clearly the court is not just an arena that makes case law, but has consequences for the construction of family, sexuality and gender.

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<sup>18</sup> Fourteen percent of my sample cases involved a same-sex civil union, domestic partnership, or marriage. See Table 4.1 for more details.

## CHAPTER 5

### CHILD CUSTODY IN A POST-*LAWRENCE* WORLD

This dissertation began as a way to explore how parental sexuality and gender played a role in judicial constructions of parenthood. Previous research documented the discrimination faced by gay, lesbian, and bisexual parents in the context of custody disputes (Connolly 2002; Dalton 1999; Richman 2008; Rosky 2009). My research, however, is unique because I conducted a comparison to an empirically-created matched sample of heterosexual parents.

In addition to sexuality and gender, the characteristics of family formation emerged as an additional variable that is central to understanding gay and lesbian parents. Gay and lesbian parents who had children within the context of heterosexual relationships face quite different realities than gay and lesbian parents who created children outside of heterosexual intercourse. The path to parenthood is a vital distinction as it helps inform legal parenthood status. As discussed in previous chapters, legal parent status today is determined through a) gestation, b) genetics, c) marriage, and/or d) adoption. In addition, there is an infrequently used criterion of e) parental intent.

The first four options are not available to lesbian mothers or gay fathers (and indeed, for some heterosexual parents) who want to have children outside heterosexual relationships. Therefore gay and lesbian parents are more likely to need the courts to determine parenthood status than heterosexual parents. Even for those parents who have “come out” after heterosexual relationships, the heterosexual parent often initiates litigation in order to wrest custody away from a non-heterosexual parent.

Just as parental heterosexuality was assumed in custody decisions, courts assumed

that the act of heterosexual reproduction was the path to parenthood for all parents. While 98% of my matched heterosexual sample cases involved heterosexual intercourse, only 37% of gay and lesbian parent cases did. Though not surprising, this difference is significant because the law is primarily constructed to accommodate the heteronormative family ideal of a legally married monogamous heterosexual couple who engaged in heterosexual intercourse in order to have children biogenetically related to both members of the couple. This privileged ideal is not an option for same-sex couples who want children outside of a heterosexual relationship (with the exception of those few couples who use opposite sex relatives as gamete donors).

Faced with additional barriers in having children, gay, lesbian, and bisexual parents have remarkably diverse family formation patterns in comparison to heterosexual parents. Therefore my research fills a crucial gap in the literature in that I analyze various intersections of difference in parents, along the lines of gender, sexuality, and path to family formation.

### **Theoretical Threads**

Gayle Rubin's (1993) hierarchy of sexual value is a particularly useful lens for understanding the broad themes of this dissertation. This sexual hierarchy privileges married privileges married, monogamous, reproductive heterosexual sexuality as "normal" and judges unmarried, non-procreative, homosexuality sexuality as "abnormal" (Rubin 1993). Discourses about sexuality also represent discourses about family. Therefore, the heteronormative family ideal conforms to the multiple dichotomies in this hierarchy. Two biogenetically related parents who had heterosexual intercourse in the

context of a legal heterosexual marriage fall on the “normal” side of this dichotomy and the rest fall on the side of “abnormal.”

In the context of my sample, the gay, lesbian, and bisexual parent cases all fall on the “abnormal” side. Indeed biogenetic parents are assumed to be better parents, as are mothers who uphold the norms of intensive mothering and hegemonic femininity. Courts also commended fathers who abided by the norms of hegemonic fatherhood. In most cases, this praise, however, was not translated to primary or joint custody for fathers, unless the mothers violated intensive mothering. In addition, heterosexual parents represent the assumed default for a good parent. The courts consistently reward parents who conform to the heteronormative family ideal, by providing more leeway for mothers, biogenetic parents, and heterosexual parents.

In addition, legal motherhood is defined differently than legal fatherhood, yet those criteria align with the heteronormative family ideal. For example, legal motherhood is essentially defined through biological and genetic relationships with the children. After those criteria are established, then the politics of intensive mothering are invoked. Legal fatherhood, on the hand, is primarily defined through marriage, and the marital presumption, which presumes a legal relationship between a child and any the mother’s husband. If marital ties are not present, then the courts resort to proving a genetic tie to the children to define legal fatherhood. This genetic tie is an essential component of hegemonic fatherhood. Indeed gender and sexuality both matter in the constructions of legal parenthood.

While Rubin’s theory of sexual hierarchy can be a useful way to make sense of these patterns, the complexities of legal parenthood in custody decisions cannot always

be reduced to binary categories. As the previous chapters show, courts have diverse views about family and parenthood, which are often contradictory. Courts continue to exhibit shifts in the monolithic understand of *the* family. Yet significant discrimination persists for non-heteronormative family forms.

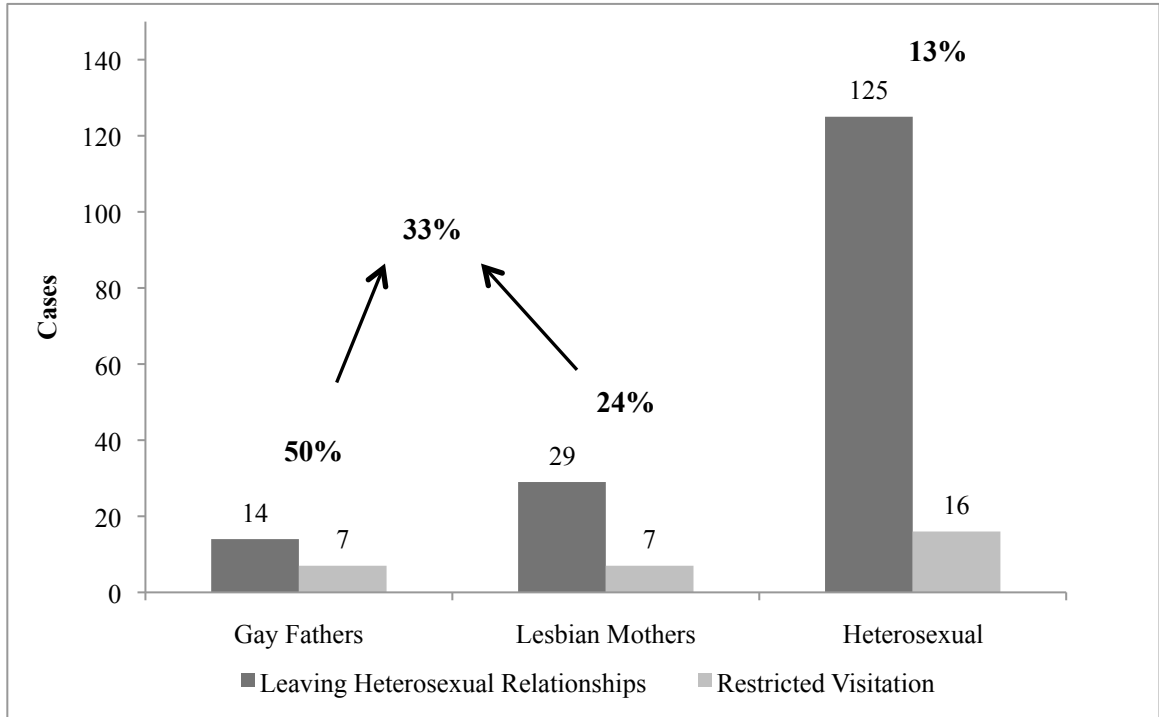
### **Gay Fathers and Lesbian Mothers**

Certainly a limitation of this study is the small sample size of gay father cases. Gay men who want to become fathers face enormous cultural and institutional barriers to become parents in the first place. Gay men face cultural narratives that they are oversexed, promiscuous, and likely to molest children. In addition, gay fathers violate hegemonic fatherhood and therefore cannot properly socialize their children into appropriately distinct (and heterosexual) gender and sex roles. Gay men who are thinking about fatherhood may opt out of fathering due to additional institutional hurdles and layers of discrimination at all phases in their paths to parenthood. Yet those gay men who choose to father using surrogacy must have significant financial resources to do so. Indeed, we can see how class and race become inseparable from gender (Roberts 1993; Spelman 1988), as there is a “simultaneous existence of oppression and privilege” (Williams 2004).

Cultural and institutional supports for men as primary caretakers are few and far between in the U.S. today, as this is a violation of hegemonic masculinity and fatherhood. When non-normative sexuality is thrown into the mix of fathers as primary caretakers, the heteronormative family ideal is also sent into disarray. These additional barriers at multiple levels of the family formation and dissolution process provide some insight into

the limited options for gay men who want to father and why my sample of gay fathers is so small.

Figure 5.1. Restricted Visitation for all Parents Leaving Heterosexual Relationships



Courts consistently subjected gay fathers to more scrutiny than lesbian mothers. As indicated in previous chapters and shown in Figure 5.1, gay fathers leaving heterosexual relationships were subject to restricted visitation orders twice as frequently as lesbian mothers. Comparing lesbian mother and gay father cases together to heterosexual parent cases, one can see that 13% of heterosexual parent cases were subject to restricted visitation, yet 33% of gay father and lesbian mother cases were. Yet the establishment of legal parenthood status is something that gay fathers and lesbian mothers share. For example, 58% of lesbian leaving lesbian relationship cases did not recognize the non-biogenetic lesbian mother as a parent, and she was therefore denied visitation or any legal rights to the child.

This dissertation has shown the courts' reliance on the heteronormative family ideal as the referent for family and parenthood. Indeed, heterosexuality is so privileged as the norm that it becomes virtually invisible in the law, and society more generally (Moran 2004). Instead, to have sexuality suggests a comparison to the norm – the “other” – not an examination of the norm itself. Therefore the assumption of heterosexuality as the default exemplifies how the law is replete with heteronormativity.

This research has examined the similarities and differences of how courts examine variations in parental gender, sexuality, and family formation. Overall, heterosexual parents are assumed to be better parents than parents with non-normative sexual identities. Mothers and biogenetic parents are also overwhelmingly favored as better parents than fathers and non-biogenetic parents. Heterosexual fathers were subject to increased scrutiny as compared to heterosexual mothers. Similarly, gay fathers were issued orders of restricted visitation twice as often as lesbian mothers. The previous chapters presented evidence for general patterns, while also providing evidence of complexity and nuance. Indeed judicial discretion leaves much significant decision-making power in the hands of individual judges and courts.

### **Limitations and Future Research**

The U.S. Supreme Court's decision *Lawrence v. Texas* (2003) changed the landscape of the twenty-first century gay, lesbian, and bisexual rights movement. While other researchers have focused on pre-*Lawrence* decisions, I aim to use the pre-*Lawrence* and post-*Lawrence* eras as distinct analytical time periods ripe for comparison, if enough cases emerge among the same states, for example. In pre-*Lawrence* custody decisions,

courts acknowledged the denial of custody to gay or lesbian parents as a result of their illegal sexual behavior. In the post-*Lawrence* era, this type of outright discrimination was not tolerated. Therefore discriminatory decision-making must be concealed by other reasoning or intentions.

In my own future work I intend to explore the relationship between the outcomes I have observed and the passage of anti-discrimination ordinances, state-level DOMA and super DOMA legislation, and family and parenting case law and legislation. I envision a map that can explicate the relationship between geography and outcome by using a larger sample that includes cases after 2009, as well as cases prior to June 2003. By being able to determine the degree of alignment between these outcomes and state law, perhaps important predictive patterns can be observed. In conclusion, this dissertation begins the task of comparison to the heteronormative family ideal as the reference point to which courts compare all families.

Although this dissertation is limited to the exploration of heterosexual, gay, lesbian, and bisexual parents, investigation of transgender parents merits a separate analysis. Transgender parents importantly complicate the intersection of sex, gender, and sexuality, in ways that interrogate the courts' reliance on traditional notions of family. The issue of child custody merits significant attention as it affects all families (and potential parents) and most importantly, future generations of children.

Perhaps additional research could utilize variant methods, including interviews with judges and parents, as well as participant observation and ethnographic methods. Previous researchers in this area have already used these methods, however, not with a matched heterosexual sample for comparative analysis. By adding an analysis of

heterosexual cases, this research made a unique contribution to the literature on socio-legal studies, family, and gender and sexuality.

Using a larger sample of cases, future research can elucidate any regional or state-level differences. This research aimed to illuminate the discrimination faced by lesbian, gay, and bisexual parents, while also noting how all parents, opposite-sex and same-sex are affected by the mismatch between the heteronormative family ideal and the realities of today's diverse family configurations.

Future research on sexual minorities will benefit from keeping gender distinctions at the forefront. Because gays and lesbians are not perceived or treated similarly in society, it is essential that we analytically separate the gay, lesbian, and bisexual people by gender.

### **Final Thoughts**

Previous scholars have shown that gay, lesbian, and bisexual parents face significant discrimination in the courtroom when determining their legal parent status. By comparing gay, lesbian, and bisexual parent cases to heterosexual parents, my research makes a vital contribution by analyzing the significant comparative outcomes of these multiple types of parents, with variations not only in their gender and sexuality, but also to their type of family formation.

My comparative research makes a unique contribution to the literature on family, gender and sexuality, and socio-legal studies. By disentangling the various ways that legal parenthood is constructed, for example, I explicate how biology and genetics are not synonymous. In addition, I make clear that legal motherhood is constructed and

determined differently than legal fatherhood, so that gay fathers and lesbian mothers should not always be lumped into one analytical group.

This research helps disentangle sexuality from gender at the same time that it reveals the mutually constitutive nature of gender and sexuality. The courts reinforce traditional power relations by forcing families to conform to the heteronormative family ideal. On the other hand, there are indications that a small but increasing number of courts have begun to incorporate the diversity of family forms into their definitions of legal parenthood. Overall, this dissertation shows that the family is a site of contested terrain, particularly for families with diverse gender, sexuality, and family formation configurations.

## APPENDIX

### CASE NAMES AND CITATIONS

1. *In re Mullen*, 924 N.E.2d 448 (2009).
2. *A.G.R. v. D.R.H. & S.H.*, Superior Court of N.J., Hudson County (2009).
3. *Jocelyn II v. Vanesha P.*, 890 N.Y.S.2d 179, (2009).
4. *In re M.K.S.-V.*, 301 S.W.3d 460 (2009).
5. *Prashad v. Copeland*, 685 S.E.2d 199 (2009).
6. *In re L.F.A.*, 353 Mont. 220 (2009).
7. *Kulstad v. Maniaci*, 352 Mont. 513 (2009).
8. *Barker v. Chandler*, 2009 WL 2986105 (2009).
9. *Boseman v. Jarrell*, 681 S.E.2d 374 (2009).
10. *Damon v. York*, 54 Va.App. 544 (2009).
11. *M.B. v. S.B.*, 41 So.3d 79 (2009).
12. *Londergan v. Carrillo*, 74 Mass. App. Ct. 1126 (2009).
13. *Shineovich v. Kemp*, 229 Or. App. 670 (2009).
14. *Charisma R. v. Kristina S.*, 175 Cal.App.4th 361 (2009).
15. *White v. White*, 293 S.W.3d 1 (2009).
16. *In re Visitation of C.L.H.*, 908 N.E.2d 320 (2009).
17. *Mongerson v. Mongerson*, 678 S.E.2d 891 (2009)
18. *Richard v. Richard*, 20 So.3d 1061 (2009).
19. *Black v. Simms*, 12 So.3d 1140 (2009).
20. *H.M. v. E.T.*, 881 N.Y.S.2d 113 (2009).
21. *Embry v. Ryan*, 11 So.3d 408 (2009).
22. *In re S.J.L.*, 2009 WL 1160492 (2009)
23. *Turco v. Turco*, 2009 WL 1098094 (2009).
24. *Egan v. Fridlund-Horne*, 211 P.3d 1213 (2009).

25. *Debra H. v. Janice R.*, 877 N.Y.S.2d 259 (2009).
26. *Tilley v. Kilgore*, 2009 WL 485063 (2009).
27. *Giancaspro v. Congleton*, 2009 WL 416301 (2009).
28. *Morris v. Hawk*, 180 Ohio App.3d 837 (2009).
29. *Smith v. Gordon*, 968 A.2d 1 (2009).
30. *Palazzolo v. Mire*, 10 So.3d 748 (2009).
31. *Cunningham v. Tardiff*, 2008 WL 4779641 (2008).
32. *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (2008).
33. *In re Smith*, 262 S.W.3d 463 (2008).
34. *Heatzig v. MacLean*, 664 S.E.2d 347 (2008).
35. *Mintz v. Zoernig*, 145 N.M. 362 (2008).
36. *Barnett v. Clemmer*, 2008 WL 2780290 (2008).
37. *Oleski v. Hynes*, 2008 WL 2930518 (2008).
38. *Cassidy v. Williams*, 2008 WL 2930591 (2008).
39. *Page v. Page*, 2008 WL 2469176 (2008).
40. *Griffiths v. Taylor*, 2008 WL 2745130 (2008).
41. *In re J.D.F.*, 2008 WL 2350253 (2008).
42. *Stadter v. Siperko*, 52 Va. App. 81 (2008).
43. *In re Guardianship of A.N.B.*, 887 N.E.2d 1032 (2008).
44. *A.K. v. N.B.*, 2008 WL 2154098 (2008).
45. *Janice M. v. Margaret K.*, 404 Md. 661 (2008).
46. *Mason v. Dwinnell*, 660 S.E.2d 58 (2008).
47. *Pickelsimer v. Mullins*, 2008 Ky. App. LEXIS 95 (2008).
48. *Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (2008).
49. *Sirney v. Sirney*, 2007 WL 4525274 (2007).
50. *Cook v. Cook*, 970 So.2d 960 (2007).
51. *P.G.M. v. J.M.A.*, 2007 WL 4304448 (2007).

52. *Browne v. D'Alleva*, 2007 WL 4636692 (2007).
53. *Massey-Holt v. Holt*, 255 S.W.3d 603 (2007).
54. *D.M.S. v. S.S.P.*, 2007 WL 2894264 (2007).
55. *Paskiewicz v. Paskiewicz*, 967 So.2d 277 (2007).
56. *Smith v. Jones*, 69 Mass.App.Ct. 400 (2007).
57. *In re Yesenia G.*, 2007 WL 1559942 (2007).
58. *Dexter v. Dexter*, 2007 WL 1532084 (2007).
59. *Clark v. Boals*, 2007 WL 1395339 (2007).
60. *Soohoo v. Johnson*, 731 N.W.2d 815 (2007).
61. *Jacob v. Schultz-Jacob*, 923 A.2d 473 (2007).
62. *Holmes v. Holmes*, 98 Ark.App. 341 (2007).
63. *A.O.V. v. J.R.V.*, 2007 WL 581871 (2007).
64. *Jones v. Barlow*, 154 P.3d 808 (2007).
65. *Swinford v. Humbert*, 2007 WL 494997 (2007).
66. *Archer v. Archer*, 2007 WL 268548 (2007).
67. *Goodson v. Castellanos*, 214 S.W.3d 741 (2007).
68. *A.H. v. M.P.*, 447 Mass. 828 (2006).
69. *Miller-Jenkins v. Miller-Jenkins*, 49 Va.App. 88 (2006).
70. *In re H.C.S.*, 219 S.W.3d 33 (2006).
71. *Hobbs v. Van Stavern*, 249 S.W.3d 1 (2006).
72. *Moses v. King*, 637 S.E.2d 97 (2006).
73. *Frazier v. Penraat*, 822 N.Y.S.2d 21 (2006).
74. *Behrens v. Rimland*, 822 N.Y.S.2d 285 (2006).
75. *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441 (2006).
76. *L.M.S. v. C.M.G.*, 2006 WL 5668820 (2006).
77. *B.F. v. T.D.*, 194 S.W.3d 310 (2006).
78. *D.E. v. R.D.B.*, 929 So.2d 1164 (2006).

79. *Antoine v. Lannon*, 2006 WL 1305091 (2006).
80. *Isch v. Isch*, 2006 WL 1230270 (2006).
81. *Therese B. v. Dunbar*, 2006 WL 1075093 (2006).
82. *Smith v. Smith*, 893 A.2d 934 (2006).
83. *T.D. v. T.A.J.*, 2006 WL 4041946 (2006).
84. *Brenda S. v. S.B.*, 2006 WL 301105 (2006).
85. *Annette F. v. Sharon S.*, 2006 WL 269952 (2006).
86. *Wakeman v. Dixon*, 2006 WL 162748 (2006).
87. *In re Guardianship of Sophia S.*, 2005 WL 3471671 (2005).
88. *King v. S.B.*, 837 N.E.2d 965 (2005).
89. *Soteriou v. Soteriou*, 2005 WL 3471472 (2005).
90. *Sheridan v. Sheridan*, 2005 WL 3008911 (2005).
91. *In re Parentage of L.B.*, 155 Wash.2d 679 (2005).
92. *Jones v. Jones*, 884 A.2d 915 (2005).
93. *Strome and Strome*, 201 Or.App. 625 (2005).
94. *Valore v. Bronicki*, 77 Pa. D. & C.4th 259 (2005).
95. *Weiss ex rel. Weiss v. Crites*, 169 S.W.3d 888 (2005).
96. *K.M. v. E.G.*, 37 Cal.4th 130 (2005).
97. *Elisa B. v. Superior Court*, 37 Cal.4th 108 (2005).
98. *Kristine H. v. Lisa R.*, 37 Cal.4th 156 (2005).
99. *Hanley v. Poh*, 73 Pa. D. & C.4th 14 (2005).
100. *A.G. v. D.W.*, 2005 WL 1432744 (2005).
101. *In re Clifford K.*, 217 W.Va. 625 (2005).
102. *Hedberg v. Detthow*, 1789 Md.Ct.Sp.App. (2005).
103. *Berry v. Berry*, 2005 WL 1277847 (2005).
104. *S.S. v. E.S.*, 2005 WL 3560720 (2005).
105. *T.B. v. L.R.M.*, 874 A.2d 34 (2005).

106. *Connor v. Velinda C.*, 356 Ill.App.3d 315 (2005).
107. *Kimberly R. v. Superior Court*, 2005 WL 419351 (2005).
108. *Mariga v. Flint*, 822 N.E.2d 620 (2005)
109. *Davidson v. Coit*, 899 So.2d 904 (2005).
110. *Chambers v. Chambers*, 2005 WL 645220 (2005).
111. *Kaye v. Kaye*, 2005 WL 41558 (2005).
112. *In re E.C.*, 271 Ga.App. 133 (2004)
113. *L.A.M. v. B.M.*, 906 So.2d 942 (2004).
114. *Davis v. Davis*, 2004 WL 2806433 (2004).
115. *McGriff v. McGriff*, 140 Idaho 642 (2004).
116. *Bishop v. Bishop*, 2004 WL 2004686 (2004).
117. *T.F. v. B.L.*, 442 Mass. 522 (2004).
118. *Gould v. Dickens*, 143 S.W.3d 639 (2004).
119. *In re E.L.M.C.*, 100 P.3d 546 (2004).
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121. *C.E.W. v. D.E.W.*, 845 A.2d 1146 (2004).
122. *Hogue v. Hogue*, 147 S.W.3d 245 (2004).
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125. *Damron v. Damron*, 670 N.W.2d 871 (2003).
126. *In re Adoption of A.W.*, 343 Ill.App.3d 396 (2003).
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