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E. Gary Spitko
Santa Clara University School of Law

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**FROM QUEER TO PATERNITY: HOW PRIMARY GAY FATHERS
ARE CHANGING FATHERHOOD AND GAY IDENTITY**

E. GARY SPITKO*

I. INTRODUCTION

In February and March 2004, approximately 4,000 gay and lesbian couples were married in San Francisco City Hall.¹ San Francisco's "Winter of Love"²

* Associate Professor of Law, Santa Clara University School of Law. I am grateful to June Carbone, Brad Joondeph, Ron Krotoszynski, and Russell Powell for their helpful comments on an earlier draft of this Essay and to Kristen Fellner and Vivian Ware for their research support with respect to this Essay.

1. *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 465 (Cal. 2004). For background on the events leading up to and surrounding these marriages, *see id.* at 464-66; Lee Romney, *Defiant San Francisco Marries Dozens of Same-Sex Couples*, L.A. TIMES, Feb. 13, 2004, at A1; Harriet Chiang et al., *Mad Dash to S.F. City Hall to Say 'I Do': 2 Groups Trying to Halt Same-Sex Unions Must Wait Until Tuesday*, S. F. CHRON., Feb. 14, 2004, at A1; Karen Breslau & Brad Stone, *Outlaw Vows: A Brash Young Mayor Issues Marriage License to Same-Sex Couples and Opens a New Front in America's Culture Wars*, NEWSWEEK, Mar. 1, 2004, at 40 (recounting events of February 2004 relating to Mayor Gavin Newsom's order to the San Francisco city clerk to start issuing marriage licenses to same-sex couples and subsequent events relating to the same-sex marriages); Maura Dolan & Lee Romney, *High Court Halts Gay Marriages*, L.A. TIMES, Mar. 12, 2004, at A1; E.J. Graff, *An Outsider Steps In and Changes the Script*, L.A. TIMES, Mar. 14, 2004, at M1 (editorializing on how the same-sex marriages in San Francisco have triggered a cultural shift by making the same-sex marriage debate less abstract); Dean Murphy, *California Court Rules Gay Unions Have No Standing*, N.Y. TIMES, Aug. 13, 2004, at A1.

On August 12, 2004, the California Supreme Court held that these marriages were "void and of no legal effect from their inception." *Lockyer*, 95 P.3d at 464. Specifically, the court held that in the absence of a judicial determination that California statutes limiting marriage to the union of one man and one woman are unconstitutional, San Francisco "local executive officials lacked authority to issue marriage licenses to, solemnize marriages of, or register certificates of marriage for same-sex couples . . ." *Id.* The court emphasized that it did not have before it "the substantive question of the constitutional validity of California's statutory provisions limiting marriage to a union between a man and a women" and that its decision was "not intended, and should not be interpreted, to reflect any view on that issue." *Id.* Four lawsuits challenging the constitutionality of California's law limiting marriage so as to exclude same-sex couples have been consolidated and are pending in San Francisco Superior Court. *See* Mike McKee, *Next Gay Marriage Fight Could Move Fast*, THE RECORDER (San Francisco), Aug. 16, 2004, at 1 (describing the parties that filed the consolidated lawsuits). The lawsuits are consolidated under *City and County of San Francisco v. California*, No. 429-539 (S.F. Super. Ct.).

received world-wide press coverage.³ Of the countless thousands of photographs recording the marriages and related events of those days, two press photographs of the wedding of two men—Doug Okun and Eric Ethington—were among the more widely distributed around the nation and the world. The images showed Doug and Eric, two thirty-something gay men, respectively exchanging wedding vows and leaving San Francisco City Hall while each held in his arms one of their three-month-old twin daughters.⁴

Those images apparently struck a chord with the press. They appeared in numerous American newspapers and several foreign newspapers, and the photograph of Doug and Eric exchanging wedding vows appeared in Newsweek magazine.⁵ The images also apparently made a strong impression

2. The press began to use the phrase “Winter of Love” to describe the events of February 2004 shortly after same-sex couples began to marry in San Francisco. See, e.g., Debra J. Saunders, *Tactics Matter*, S. F. CHRON., Feb. 26, 2004, at A21 (referring to “San Francisco’s Winter of Love”); Shawn Hubler, *Rosie O’Donnell Brings Celebrity to S.F. Weddings*, L.A. TIMES, Feb. 27, 2004, at B1 (same); *Newsnight with Aaron Brown* (CNN Television Broadcast, Feb. 27, 2004) (“On now to gay marriage, today the California Supreme Court declined to stop what is becoming known as San Francisco’s Winter of Love”); Breslau & Stone, *supra* note 1, at 42 (referring to San Francisco’s “Winter of Love”). The phrase is a take-off of San Francisco’s “Summer of Love” of 1967. See Andrew Gumbel, *The Anti-Bohemian, Establishment Man Who Has Defied the White House on Gay Rights*, THE INDEPENDENT (London), Mar. 1, 2004, at 29 (“After the Summer of Love of 1967 . . . San Francisco is now experiencing its equally counter-cultural Winter of Love.”).

3. See, e.g., *Defiant San Francisco Officially Recognises Gay Marriages*, PAKISTAN PRESS INT’L INFO. SERVICES, Feb. 14, 2004, available at 2004 WL 66930165; Chris Ayres, *Mayor Lets California Gays Defy Wedding Ban*, THE TIMES (London), Feb. 14, 2004, at 4M; Lisa Leff, *Opponents of Gay Weddings in San Francisco Head to Court*, WINNIPEG FREE PRESS, Feb. 14, 2004, at A10; *Same-Sex Standoff: San Francisco Battles State Law*, TORONTO SUN, Feb. 20, 2004, at 58; *Arnie: Stop the Gay Weddings*, SUNDAY HERALD SUN (Melbourne, Austl.), Feb. 22, 2004, at 36; Andrew Gumbel, *San Francisco Told to Call a Halt to Its Gay Winter of Love*, THE INDEPENDENT (London), Mar. 13, 2004, at 36 (discussing reaction to California Supreme Court’s order halting civil same-sex marriage ceremonies). See also *supra* note 1 (citing stories giving background on the events leading up to and surrounding the same-sex marriages in San Francisco).

4. The sperm of Okun and Ethington and eggs from a single egg donor were used to conceive the girls. A gestational surrogate gave birth to the girls. Interview with Doug Okun in San Francisco, Cal. (Aug. 26, 2004).

5. See, e.g., Chiang et al., *supra* note 1 (photograph captioned “Holding their twin daughters Elizabeth and Sophia, Eric Ethington [sic] . . . and Doug Okun exchange marriage vows”); *Gays and Lesbians March Toward Marriage in San Francisco*, TORONTO STAR, Feb. 14, 2004, at A14 (photograph captioned “Eric Ethington, left, and partner Doug Okun, carrying twin daughters Sophia and Elizabeth respectively, leave San Francisco City Hall yesterday after obtaining their marriage license”); Jane Meredith Adams, *Suit to Stop Gay Marriages Delayed: Couples Flocking to San Francisco to Exchange Vows*, BOSTON GLOBE, Feb. 14, 2004, at A2 (photograph captioned “Eric Ethington (left), carrying daughter Sophia and a copy of his marriage license, left San Francisco City Hall yesterday with partner Doug Okun, carrying

on people throughout the world who saw them. Doug and Eric received cards, letters and e-mails from people across the United States and in several foreign nations who went to the trouble to find out how to reach them in order to send messages of congratulations.⁶ In San Francisco, I have witnessed on several occasions how, even months after the photographs appeared, Doug and Eric, who are friends of mine, are recognized by strangers as “the guys who got married while holding the babies.”

In this Symposium, I reflect upon how such images of gay fathers who raise children from the start as a gay couple are likely to impact the identity both of gay men and of fatherhood. I consider both the perceptions of the larger society as well as the self-images of gay men and their perceptions of fatherhood. For ease of reference, I will refer to such gay fathers who begin fathering while in a gay relationship as “primary gay fathers.”⁷ I contrast

Sophia’s twin sister, Elizabeth”); Jane Meredith Adams, *Suit to Stop Gay Marriages Delayed: Couples Flocking to San Francisco to Exchange Vows*, ORANGE COUNTY REGISTER, Feb. 14, 2004, at A1 (photograph captioned “Eric Ethington, left, and his partner, Doug Okun, both holding twin girls, leave San Francisco City Hall after receiving their marriage license Friday”); Jane Meredith Adams, *Suit to Stop Gay Marriages Delayed: Couples Flocking to San Francisco to Exchange Vows*, AKRON BEACON J., Feb. 14, 2004 (photograph captioned “Eric Ethington (left), carrying Sophia, and partner Doug Okun, carrying Sophia’s twin, Elizabeth, leave San Francisco City Hall after receiving a marriage license Friday”); Breslau & Stone, *supra* note 1, at 40-41 (photograph captioned “Eric Ethington [sic] and Doug Okun, with twin daughters Elizabeth and Sophia, say ‘I do’”); VANITY FAIR (Italian Edition), Mar. 4, 2004, at 24 (photograph captioned “Nella foto, due sposi: Eric Ethington e Doug Okun, con el loro gemelle, dopo il si in Municipio”). See also Jane Ganahl, *Love Stories: Doug and Eric: Zing Went the Strings*, S.F. CHRON., Mar. 14, 2004, at F1 (commenting that “by virtue of the sheer adorableness of their family and the presence of many photographers [at their wedding], [Okun and Ethington] became international symbols of gay parenting” and reporting that “[p]ublications from Newsweek to Italian Vanity Fair featured the mediagenic quartet”); *id.* (Okun recounting that “[w]e got a lot of press attention when we were at City Hall because of the babies, and ABC news ended up filming us. So later, when we were home, I told my parents, ‘Let’s turn on the news!’ It was the lead story, so our ceremony was on TV.”); *id.* (Ethington recounting that a relative telephoned from Provo, Utah and asked, “Do you guys want a copy of the Sunday paper here because you made the front page!”).

6. Interview with Doug Okun in San Francisco, Cal. (Aug. 26, 2004). See also Lisa Leff, *Gay Couples’ Refrain: ‘We Are Just a Family,’* ASSOCIATED PRESS, Feb. 28, 2004, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2004/02/28/state1319EST0047.DTL> (commenting that “after seeing their [Okun and Ethington’s wedding] picture, people from as far as Ireland sent congratulatory letters and e-mail”); Ganahl, *supra* note 5 (Ethington commenting, “It’s been great, in the wake of the wedding and the photo, to hear from younger gay men who see what we have and say, we want that, too!”); *Letters*, NEWSWEEK, 19-20, (Mar. 15, 2004) (letter of Alice Jones stating “[y]our photograph of Eric Ethington [sic], Doug Okun and their twin daughters says it all. These are the faces of a loving couple and loving parents. All they want are the same things that the rest of us take for granted.”).

7. I borrow this term from SUZANNE M. JOHNSON & ELIZABETH O’CONNOR, *THE GAY BABY BOOM: THE PSYCHOLOGY OF GAY PARENTHOOD* 100 (2002) (labeling as “primary gay

primary gay fathers with the first generation of gay fathers to come to American public consciousness—gay fathers of heterosexual marriages.⁸ I theorize that the circumstances surrounding the coming to public awareness of the latter class of gay fathers—typically divorce and custody litigation following the gay father’s coming out to his wife—helped to reinforce and perpetuate the identity of gay men as deceitful and untrustworthy, particularly in intimate relations, unable to commit to or enjoy a stable relationship, selfish, self-absorbed, and hyper-sexual. These circumstances, I argue, also helped to strengthen traditional masculine images of fatherhood by setting the gay father apart from what is considered the “ideal” father. I further theorize that, in contrast, the increased visibility of primary gay fathers, particularly in the context of the struggle for recognition of and protection for their intact families, is likely to help to break down these negative stereotypes and self-images of gay men.⁹ Moreover, I argue that this increased visibility also has the potential to weaken traditional gender roles associated with the fatherhood identity and to undermine the perception that gay men are unsuited for fatherhood.

II. GAY FATHERS OF HETEROSEXUAL MARRIAGES

The first generation of gay fathers to come to the consciousness of the American public fathered their children in a heterosexual marriage. Often, perhaps principally, they came to the attention of the legal system and society in the context of divorce, custody, and visitation proceedings after coming out to their wives.¹⁰ Such circumstances would tend to reinforce an existing

fathers” those fathers “who began their family after coming out”). *See also id.* at 103 (describing the group of parents at issue as “those parents who had begun their families within a gay or lesbian relationship”).

8. A prominent recent example of such a gay father coming to public consciousness is that of New Jersey Governor James McGreevey. Governor McGreevey was married to his second wife and was the father of two children when he announced at a press conference on August 12, 2004 that he was “a gay American.” He went on to announce that he had engaged in an extramarital affair with another man, and that he would resign as governor effective November 15, 2004. Mitch Lipka et al., *N.J. Governor Admits to Homosexual Affair, Announces Resignation*, PHILA. INQUIRER, Aug. 13, 2004, at A1.

9. *Cf.* Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 744, 783, 794 (1999) (arguing that “the stories of lesbian and gay parents can be used to highlight the false assumptions of the traditional narrative, and in this way they can serve as tools to overcome discrimination against lesbians and gays” and calling for the increased use of gay and lesbian narratives in popular culture, legal scholarship and courtroom advocacy).

10. *See, e.g.*, *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865 (Mo. Ct. App. 1982) (gay father appealing restricted visitation award with respect to the child of his heterosexual marriage); *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974) (dispute between a gay father and his ex-wife over

negative gay male identity as unfaithful and untrustworthy, unsuited for long-term intimacy, self-absorbed, and hyper-sexual. This identity existed and continues to exist not only in the heterosexual culture but also among gay men themselves.¹¹

First, this context would tend to promote an image of gay men as untrustworthy and unfaithful, particularly with respect to their intimate relationships.¹² Some of the public reaction to New Jersey Governor James

the father's visitation rights with respect to their three children born of the marriage); *Woodruff v. Woodruff*, 260 S.E.2d 775 (N.C. Ct. App. 1979) (visitation dispute between gay father and his ex-wife concerning their minor son); *Commonwealth ex rel. Bachman v. Bradley*, 91 A.2d 379 (Pa. Super. Ct. 1952) (visitation dispute between "bi-erotic" father and his ex-wife with respect to their two children); *Pascarella v. Pascarella*, 512 A.2d 715 (Pa. Super. Ct. 1986) (gay father seeking custody of his minor daughters from a heterosexual marriage).

11. See, e.g., Thomas W. Johnson & Michael S. Keren, *Creating and Maintaining Boundaries in Male Couples*, in *LESBIANS AND GAYS IN COUPLES AND FAMILIES: A HANDBOOK FOR THERAPISTS* 231, 235 (Joan Laird & Robert-Jay Green eds., 1996) (theorizing that men, including gay men, "internalize . . . common cultural assumptions [relating to an inability of men to "relate in a close, intimate, and nurturing manner"], most acutely on the intra-couple boundary of closeness and distance" and supporting this assertion by reference to "[c]omments made in our clinical and friendship context by gay men" such as "[g]ay relationships never last —men can't commit"); Jerry J. Bigner, *Working with Gay Fathers: Developmental, Postdivorce Parenting, and Therapeutic Issues*, in *LESBIANS AND GAYS IN COUPLES AND FAMILIES: A HANDBOOK FOR THERAPISTS* 374-75 (Joan Laird & Robert-Jay Green eds., 1996) (asserting that the gay subculture is singles-oriented and that "[t]his orientation tends to promote less emphasis on intimacy in relationships, few if any financial responsibilities for others, and a heavy focus on personal autonomy"); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 560 (1991) ("The stereotypes within the gay community are the same: gay men prefer sex without commitment, lesbians want emotional involvement.").

12. See, e.g., *In re R.E.W.*, 471 S.E.2d 6, 8 (Ga. Ct. App. 1996) (reversing juvenile court's denial of gay father's request for unsupervised visitation with his daughter, which was premised in part on juvenile court's finding that father could not be trusted to keep his promise to conceal his homosexuality from his child given that father had been discovered by mother with another man in the marital bedroom more than five years earlier); *North v. North*, 648 A.2d 1025, 1029 (Md. Ct. Spec. App. 1994) (reporting lower court's finding that gay father was "being very deceitful" given that he continued to have unprotected sex with his wife after he learned that he was HIV-positive); *Bachman*, 91 A.2d at 380-81 (finding that admittedly "bi-erotic" father's denial that he told his former wife of "his homosexual tendencies" was not credible). See also Bigner, *supra* note 11, at 371 (asserting that gay fathers of heterosexual marriage "juggl[e] two separate and conflicting personal identities and rely[] on deception to camouflage their homosexual orientation"); *id.* at 382 (characterizing gay fathers of heterosexual marriage as "having lived a life . . . that has been marked by deception and lack of authenticity"); Jenice M. Armstrong & Michael Hinkelman, *Outing Traumatizes Spouse*, PHILA. DAILY NEWS, Aug. 13, 2004, at 3 (woman who discovered during her marriage that her husband was gay commenting "[i]t's the deceit that is the most destructive").

With respect to the general stereotype that gay men are untrustworthy or unfaithful, see RICHARD A. POSNER, *SEX AND REASON* 300-01 (1992) (speaking of the stereotypical gay

McGreevey's recent public coming out¹³ illustrates this point well, even though his coming out was not in the context of divorce litigation.¹⁴ The facts of the cases themselves would tend to indicate that the gay father hid his sexuality from his wife at the time the two courted, married, and had children.¹⁵ The image is that of a gay man founding an intimate relationship on dishonesty with respect to the most fundamental aspects of himself and the relationship with his partner.¹⁶ One might also see the gay father's relationship with his child as infected by the same lies and dishonesty generally.¹⁷

lifestyle as being "pervaded . . . with furtiveness and concealment . . . and unreliability"); MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE '90S*, at 61 (1989) (listing as one of the "hallowed public myths of homosexuality" that homosexuals are unproductive and untrustworthy); Johnson & Keren, *supra* note 11, at 235 ("Mainstream cultural images of male couples depict relationships marked by betrayal, competition, vicious and 'bitchy' repartee, and sexual jealousy. There are few images of love, affection, commitment, and care."). See also William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703, 707 (1996) ("The never-ending masquerade of the closet made it impossible for the homosexual to have integrity, and yielded a self-fulfilling prophecy whereby homosexuals were persecuted, in part, because they were untrustworthy and susceptible to blackmail.").

13. See *supra* note 8.

14. See Editorial, *Jim McGreevey's Deceitful Exit*, N.Y. DAILY NEWS, Aug. 13, 2004, at 42 ("It was a dishonest performance - but perhaps an inevitable one, because by his own admission, the gov has been dishonest with himself through much of his life. Leopards and spots and all that."); Editorial, *McGreevey Falls Short of the Full Truth*, STAR LEDGER (Newark, N.J.), Aug. 13, 2004, at 26 (McGreevey "was dishonest with himself and those closest to him. And he was dishonest with New Jersey.").

15. See JANE DRUCKER, *FAMILIES OF VALUE: GAY AND LESBIAN PARENTS AND THEIR CHILDREN SPEAK OUT 77* (1998) (asserting that "[f]or men in particular, parenting children without a woman has not often seemed like a possibility, so many men marry despite knowing or suspecting that they are gay"); ROBERT L. BARRETT & BRYAN E. ROBINSON, *GAY FATHERS: ENCOURAGING THE HEARTS OF GAY DADS AND THEIR FAMILIES 49* (2000) ("The smoke screen myth holds that gay men use their marriages and children to conceal their true sexual orientation and to gain society's acceptance."); Gregory Berton Hare, *Gay Fathers' Perceptions of the Role of Fatherhood 27* (1993) (unpublished M.S.W. thesis, California State University - Long Beach) (on file at California State University - Long Beach) (reporting that 13.3% of the gay fathers of heterosexual marriage in the author's study stated that the hope that marriage would change their sexual orientation was a motivation for their having gotten married).

16. Recently, the "Down Low" lifestyle among African-American men who identify as straight but who have sex with men has been the focus of increased media attention. See J.L. KING, *ON THE DOWN LOW: A JOURNEY INTO THE LIVES OF "STRAIGHT" BLACK MEN WHO SLEEP WITH MEN* (2004); Lynn Norment, *The Low-Down on the Down-Low*, EBONY, Aug. 2004, at 34.

17. See ANDREW R. GOTTLIEB, *SONS TALK ABOUT THEIR GAY FATHERS: LIFE CURVES 136* (2003) (reporting the comments of sons of gay fathers of a heterosexual marriage indicating that the children felt anger and betrayal at father's homosexuality having been hidden from them); *id.* at xiv, 36 (commenting that a child may lose trust in his father if the father harbored the secret of his homosexuality for a long time); DRUCKER, *supra* note 15, at 117 ("If a child discovers the

Second, this context would tend to strengthen the existing perception of gay men as unable or unwilling to commit to a long-term intimate relationship and, relatedly, as prone to form unstable relationships that fail to endure.¹⁸ Knowing nothing else of the circumstances of the family's fracture, one would tend to surmise that the father's concealment of his sexuality as well as his decision to come out and perhaps also actively to explore his homosexuality has caused or at least contributed significantly to the break-up of the marriage.¹⁹ The public perception likely would be that the blame for the break-up of the relationship rests principally with the gay father, the choices he has made, and the actions he has taken.

Third, the public perception of the gay father's choices and actions would likely be that they are the selfish acts of a self-absorbed man.²⁰ The initial acts

parent's sexual orientation as an uncovered family secret, however, there will indeed be a sense of having been distrusted or betrayed.”).

18. See *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 866 (Mo. Ct. App. 1982) (“Since the divorce, the father admitted to sexual relations with one woman and with two men whom the father characterized as ‘lovers,’ one for a period of a year and another for a period of eight months.”); *In re J.S. & C.*, 324 A.2d 90, 95 (N.J. Super. Ct. Ch. Div. 1974) (noting in visitation dispute that “[s]ince his separation from plaintiff [his ex-wife], defendant [the gay father] has had several homosexual lovers”).

With respect to the general stereotype that gay men are unwilling or unable to commit to a long-term intimate relationship, see GERALD P. MALLON, *GAY MEN CHOOSING PARENTHOOD* 13 (2004) (speaking of the “myth” that “[g]ays do not have stable relationships”); Fajer, *supra* note 11, at 542 (“A corollary to gay people’s supposed obsession with sex is the belief that same-sex long-term relationships are impossible.”). See also POSNER, *supra* note 12, at 312 (asserting that “it would be misleading to suggest that homosexual marriages are likely to be as stable or rewarding as heterosexual marriages”).

19. See, e.g., *J.P. v. P.W.*, 772 S.W.2d 786, 787 (Mo. Ct. App. 1989) (mother left marital home after father, who had been having an affair with another man, told her of his homosexuality); *Woodruff v. Woodruff*, 260 S.E.2d 775, 776 (N.C. Ct. App. 1979) (gay father separated from wife and moved into an apartment with another man who had been visitor to their marital home and for whom gay father “experienced a feeling of love”); *Pascarella v. Pascarella*, 512 A.2d 715, 716 (Pa. Super. Ct. 1986) (noting that husband and wife separated when gay father “left the marital home to pursue a homosexual relationship with Anthony Capone”). See also *M.V.R. v. T.M.R.*, 454 N.Y.S.2d 779, 782 n.7 (N.Y. Sup. Ct. 1982) (wife alleging “that it was the husband’s homosexuality which ‘caused’ the marriage to fail”; opinion does not mention whether marriage involved children).

20. See, e.g., *North v. North*, 648 A.2d 1025, 1029-30 (Md. Ct. Spec. App. 1994) (reporting lower court’s remarks that gay father has “chosen to have his own lifestyle . . . the congregation be damned, his wife be damned, his children be damned”); ELLEN LEWIN, *LESBIAN MOTHERS: ACCOUNTS OF GENDER IN AMERICAN CULTURE* 16 (1993) (speaking of the “pervasive stereotypes of decadent, selfish, and above all nonprocreative behavior attributed to gay men”); Samuel A. Marcossou, *Romer and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their “First Line of Defense” in the Same-Sex Marriage Fight*, 24 J. CONTEMP. LAW 217, 246 (1998) (referring to the stereotype of “the hedonistic, present-oriented, promiscuous, and selfish homosexual”).

that would give rise to a perception of selfishness relate to the gay man's choices to enter into his relationship and eventual marriage with his wife while knowing that he is gay, perhaps to hide his homosexuality. His later decision to come out after his marriage and the birth of his child would reinforce the selfishness perception. The image is that of a man willing to break his wedding vows and fracture his family to pursue his own sexual interests. Indeed, it appears he is willing to risk emotional and psychological harm to his wife and his child to pursue those interests.²¹

This last point relates also to the fourth stereotype likely to be reinforced by the circumstances of a gay man involved in divorce and custody litigation after coming out to his wife: the idea that gay men are hyper-sexual.²² A likely

21. See, e.g., *J.L.P.(H.)*, 643 S.W.2d at 866, 869 (“The trial court’s findings [with respect to the gay father’s sexual and social activities and advocacy of a homosexual lifestyle] thus present a factual premise that the child’s physical or emotional welfare is threatened by the activities and conduct of the father”); *In re J.S. & C.*, 324 A.2d at 97 (commenting in reference to gay father who had exposed his children to his gay relationship and his advocacy on behalf of gay civil rights that “[w]e are dealing in the present case with a most sensitive issue which holds the possibility of inflicting severe mental anguish and detriment on three innocent children”); *id.* at 95 (noting with respect to a gay father who had accepted employment as Director of the National Gay Task Force at a relatively low salary that “[i]n the past [the gay father] has earned a substantial income which was utilized to help support the children [but h]e has now decided to forego this income in favor of the gay rights movement”); *Pulliam v. Smith*, 501 S.E.2d 898, 904 (N.C. 1998) (recounting evidence that “when [son] was told that defendant-father was involved in a homosexual relationship, [son] was emotionally distraught” and concluding that “[t]he trial court could reasonably find from this substantial evidence, as well as the other evidence . . . that [t]he activity of the [gay father] will likely create emotional difficulties for the two minor children”); *Pascarella*, 512 A.2d at 717 (reporting hearing court’s conclusion that “[i]t is inconceivable that [gay father’s daughters] could go into that environment, be exposed to [their father’s homosexual] relationship and not suffer some emotional disturbance, perhaps severe”). See also *Bigner*, *supra* note 11, at 376 (commenting “if one could cite a theme that consistently runs through the lay public’s notions about children of gay fathers, it is that these children are innocent victims by virtue of having a so-called deviant father”).

22. See, e.g., *J.L.P.(H.)*, 643 S.W.2d at 866 (recounting testimony of gay father that since his divorce he had had sex with one woman and with between twelve to fourteen men); *In re J.S. & C.*, 324 A.2d at 95 (noting that gay father “has had several homosexual lovers” since separating from his now ex-wife, that the father had taken his children to “a meeting hall for homosexuals, where one witness has testified he observed men, ‘fondling each other, necking and petting’” and that “pornographic periodicals with a homosexual orientation are available to the children at [the gay father’s] residence”); *Commonwealth ex rel. Bachman v. Bradley*, 91 A.2d 379, 381 (Pa. Super. Ct. 1952) (describing testimony that gay father sexually assaulted three persons, and relating other evidence “suggest[ing gay father’s] illicit relations with those of his own sex and affairs with the opposite sex[, and revealing] a decidedly erotic engrossment”).

With respect to the general stereotype that gay men are hyper-sexual, see MALLON, *supra* note 18, at 10 (speaking of “the larger cultural myth that men in general, and gay men in particular, are sexual predators, unable to control themselves sexually or apt to sexualize all situations”); BARRETT & ROBINSON, *supra* note 15, at 48 (“A pervasive myth about gay fathers

perception is that the gay father has fractured his family, abandoned his wife, and risked harm to his child all in order to satisfy his sexual desires.²³

The Supreme Court of Virginia's 1985 opinion in *Roe v. Roe*²⁴ exemplifies this imagery of a selfish and hyper-sexual gay father. In *Roe*, a gay father and his former wife were disputing custody with respect to their pre-teen daughter.²⁵ The mother had sought a change of custody after learning that the father was living with his male partner.²⁶ The court noted that "[t]he father openly admitted that he was living in an active homosexual relationship, sharing a bed and bedroom with a male friend in the same house with the child."²⁷ In holding that a parent in a gay relationship is *per se* unfit to be a custodian of his child, the Supreme Court of Virginia stated:

[W]e have no hesitancy in saying that the conditions under which this child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will

and homosexuals in general is that sex is all they think about and do."); Donald H.J. Hermann, *Legal Incorporation and Cinematic Reflections of Psychological Conceptions of Homosexuality*, 70 UMKC L. REV. 495, 521 (2002) (asserting that "[e]xplicit depiction of homosexuals as compulsive and predatory was common in American films with the decline of the Production Code, which previously had limited depiction of homosexuals to indirect portrayal"); *id.* at 516 ("With the identification of the homosexual as psychopath, the homosexual was sexualized; homosexuals were viewed as oversexed, uninhibited, compulsive and predatory."); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2161 (2003) ("Prevailing stereotypes about gay men (that they are hypersexual, promiscuous, indiscriminate) further emphasize the sexual aspects of their lives. The result is a tendency to hypersexualize gay men, to allow their sexuality to eclipse all else about them, even to see sexual motives or intentions where there are none.") (quoting JAMES D. WOODS & JAY H. LUCAS, *THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA* 65 (1993). See also George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 424, 435, 443 (2004) (asserting repeatedly that gay men tend to be promiscuous and arguing that "because the majority of gays who are male tend to be promiscuous, many gay marriages would be marriages of convenience entered into primarily for the tangible benefits" and "[f]urther, if same-sex marriages were valid, the high rate of promiscuity among gay men would in practice make it harder to take [adultery] laws seriously").

23. Cf. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 897-98 ("Children are the innocent victims who suffer the most from the choices their parents make to experiment for personal self-gratification with extramarital sexual relationships."); CAPITOL RESOURCE INSTITUTE, *Current Legislation*, at http://www.capitolresource.org/legislation_details.htm#A1967 (arguing against legislative extension of civil marriage rights to same-sex couples and commenting that "[a]dults should not put their sexual desires ahead of the needs of children" and "[s]ociety should not gamble with the lives of children by permitting gay marriage").

24. 324 S.E.2d 691 (Va. 1985).

25. *Id.* at 691.

26. *Id.* at 692.

27. *Id.*

inevitably afflict her relationships with her peers and with the community at large. The father's unfitness is manifested by his willingness to impose this burden upon her in exchange for his own gratification.²⁸

In the eyes of the court, the child is a victim of a type of sexual abuse perpetrated by her gay father. This image itself is consistent with the persistent cultural notion of the gay man as a sexual predator of children.²⁹

In sum, divorce and custody litigation involving a gay father who has come out to his wife would tend to reinforce the identity of gay men as unfaithful and untrustworthy, unable to commit to an intimate relationship, self-absorbed, and hyper-sexual. It is worth noting that divorce and custody litigation involving a lesbian mother who has come out to her husband would not tend to have a similar effect with respect to lesbian identity. The effect is specific to gay fathers and gay men.

28. *Id.* at 694. *But cf.* *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (answering in the negative the question of whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (holding that “[i]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest) (internal citation omitted).

29. *See, e.g.*, *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1243 (N.J. 1999) (Handler, J., concurring) (discussing “particularly pernicious stereotype about homosexuals . . . that a homosexual male is more likely than a heterosexual male to molest children”), *rev’d* 530 U.S. 640 (2000); *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 868 (Mo. Ct. App. 1982) (trial court characterized father’s behavior toward son, which was not sexual in nature, as “seductive in nature”); *id.* at 869 (labeling expert testimony with respect to child molestation as “suspect” since “[e]very trial judge, or for that matter, every appellate judge, knows that the molestation of minor boys by adult males is not as uncommon as the psychological experts’ testimony indicated,” concluding with no citation to evidence that “[i]t may be that numerically instances of molestation occur with more frequency between heterosexual males and female children, but given the statistical incidence of homosexuality . . . homosexual molestation is probably, on an absolute basis, more prevalent,” and commenting that “the father’s acknowledgement that he was living with an avowed homosexual certainly augurs for potential harm to the child that the trial court was perfectly competent to assess”); *In re J.S. & C.*, 324 A.2d 90, 96 (N.J. Sup. Ct. Ch. Div. 1974) (testimony of expert psychiatrist in visitation dispute involving gay father that “it is possible that these children upon reaching puberty would be subject to either overt or covert homosexual seduction which would detrimentally influence their sexual development”); *Bigner, supra* note 11, at 376-77 (“One of the most frequently cited reasons for denying custody or visitation rights to gay fathers is the notion that their same-sex children are likely to be molested sexually not only by the fathers but also by their lovers and gay friends.”); *Fajer, supra* note 11, at 541 (“The most vicious form of the sex-as-lifestyle assumption portrays gay people, particularly men, as child molesters.”); *Hare, supra* note 15 (reporting that 53.3% of the gay fathers of heterosexual marriage in the author’s study stated that society made it difficult for gay male couples to adopt children because of a belief that “gays will molest children”).

Certainly lesbian mothers who have come out to their husbands have suffered homophobic treatment by courts adjudicating their divorce and custody claims. Lesbian mothers risk that a court will perceive their lesbianism and even a committed same-sex relationship as deviant and as a negative for children.³⁰ And one could paint a lesbian mother who leaves her heterosexual marriage as sacrificing her husband's and child's interests to satisfy her own sexual desires.³¹ The image does not resonate, however, and it does not reinforce the existing stereotypes I have discussed above because the dominant cultural image of the homosexual as unfaithful, unable to commit, self-absorbed, and hyper-sexual is specific to gay men.

First, the dominant lesbian cultural identity is positively at odds with two of the images I have discussed above with respect to gay men. The popular cultural image is not of the lesbian unable to commit to a relationship, but of the lesbians who commit very early in their relationship.³² Moreover, the

30. See, e.g., *In re J.B.F. v. J.M.F.*, 730 So.2d 1190, 1195 (Ala. 1998) (holding that the trial court did not abuse its discretion in switching custody from mother to father based on two changed circumstances: (1) mother had "established an open lesbian relationship, which [she and her partner] explained to the child and which they demonstrate with affection in the presence of the child on a regular basis" and (2) "the father and stepmother have established a two-parent home environment where heterosexual marriage is presented as the moral and social norm"); *S v. S*, 608 S.W.2d 64 (Ky. Ct. App. 1980) (reversing trial court's denial of father's motion to change custody of child from mother to father and basing reversal on potentiality for future harm to child arising from mother's lesbian relationship); *Scott v. Scott*, 665 So.2d 760, 764, 766 (La. Ct. App. 1995) (finding that mother's "decision to live with the children and her lesbian lover in the same residence was a change of circumstances which materially affects the welfare of the minor children," commenting that where a gay parent openly resides with his or her partner "primary custody with the homosexual parent would rarely be held to be in the best interests of the child," and affirming trial court's change of primary custody from mother to father); *Chicoine v. Chicoine*, 479 N.W.2d 891, 893-94 (S.D. 1992) (reviewing trial court order granting lesbian mother supervised visitation with her children with restriction that "no unrelated female or homosexual male could be present during the children's visits" and criticizing the trial court because "[a]lthough it tried to protect the children through the visitation restrictions . . . these restrictions, especially considering the liberal visitation rights granted, are difficult, if not impossible, to enforce").

31. See, e.g., *In re J.B.F.*, 730 So.2d at 1196 ("While the evidence shows that the mother loves the child and has provided her with good care, it also shows that she has chosen to expose the child continuously to a lifestyle that is neither legal in this state, nor moral in the eyes of most of its citizens.") (internal quotations omitted); *Black v. Black*, No. 7, 1988 WL 22823, at *3 (Tenn. Ct. App. Mar. 10, 1988) ("We feel it is unacceptable to subject children to any course of conduct that might influence them to develop homosexual traits, and the facts of this case indicate that there is a strong possibility, because of the living arrangements of Mother and her lover, the children would be subjected to such influences.").

32. See, e.g., Fajer, *supra* note 11, at 559 ("Generally, lesbians are believed to be somewhat more likely to enter long-term relationships than gay men . . ."); Nora Villagran, *Girl-Meets-Girl Comedy Explores Commitment*, SAN JOSE MERCURY NEWS, Feb. 22, 2003, at 1 (lesbian film maker, whose film "pokes fun at lesbian and gay stereotypes, such as lesbians not being able to

lesbian identity is not hyper-sexual.³³ Rather, a dominant cultural image is of monogamous lesbians suffering from “lesbian bed death.”³⁴

Nor is there a dominant cultural image of the lesbian as unfaithful and untrustworthy or deceitful in her intimate relationships. The image of the gay man as unfaithful and untrustworthy in his intimate relationships is fed in large part by the images of the gay man as hyper-sexual and unable or unwilling to commit to an intimate relationship: The gay man, unable to control his sexual urges or commit, is therefore unable to remain faithful to his partner.³⁵ As noted above, however, the dominant lesbian identity is at odds with the notion of the lesbian as hyper-sexual or unable to commit. Thus, these last two

conceive of being in a relationship without living together” telling the joke: “What does a lesbian bring on a second date? . . . A U-Haul. What does a gay man bring on a second date? What second date?”).

33. See, e.g., Fajer, *supra* note 11, at 559 (“Indeed, within the gay community, the stereotype for lesbians is that they rarely engage in sex except in the context of a strongly emotional relationship.”); William E. Adams, Jr., *Whose Family Is It Anyway? The Continuing Struggle for Lesbian and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579, 592 n.105 (1996) (noting that amicus brief of the Rutherford Institute raising arguments against gay men and lesbians adopting children referred only to gay men when making arguments relating to sexual promiscuity); Sean M. Smith, ‘*Like Every Other Couple*’; *Do Committed Gays Have Better Sex Than Straight Couples?*, NEWSWEEK (web exclusive), Jun. 25, 2003, available at 2003 WL 75054393 (“Yes, gay men are having more sex than you are. But if it makes you feel any better, lesbians are probably not . . .”).

34. See, e.g., *Queer as Folk* (Showtime television broadcast, May 26, 2002) (Melanie and Lindsay attempt to stave off sexual dysfunction labeled “lesbian bed death”); Tim Goodman, *Showtime’s ‘The L Word’ Goes Boldly Where Other Series Have Only Flirted – To Love and Sex Among L.A. Lesbians*, S.F. CHRON., Jan. 16, 2004, at D1 (describing a story line on Showtime’s “The L Word” in which “Bette and Tina battle ‘lesbian bed death’”); Suzanne Iasenza, *The Big Lie – Lesbian Bed Death*, at http://www.pinklemonz.com/articles/bed_death.htm (last visited Sept. 27, 2004) (“As a sex researcher and sex therapist, I’m alarmed at how ubiquitous the lesbian bed death myth has become.”); Dani Cone, *Appropriate Lesbian Bed Death: If You Want the Hot Lesbian Fantasy, You’ve Got to Take the Messy Reality*, June 26, 2003, at <http://www.thestranger.com/2003-06-26/ex3.html> (commenting that “[a]ccording to Lesbian Bed Death theory, the reality of lesbian sex in lesbian relationships is that there isn’t that much of it” and noting that gay men “are saddled with the stigma of promiscuity—the other extreme”). See also Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169, 1181 (1996) (“Indeed, the problem many lesbians discuss is not unwanted sex but the opposite: ‘bed death,’ i.e., too little sex once the relationship is no longer novel.”); Susan J. Menahem, *CPR for Lesbian Bed Death*, at http://www.ipgcounseling.com/cpr_for_bed_death.html (last visited Sept. 27, 2004) (“Lesbian bed death is certainly a phenomenon that is alive and well among lesbian couples.”).

35. See POSNER, *supra* note 12, at 306 (“The male taste for variety in sexual partners makes the prospects for sexual fidelity worse in a homosexual than in a heterosexual marriage.”); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 625 (1999) (asserting that “[v]alidating gay marriage would encourage adultery [because s]exual fidelity is rare among gay men”).

images are not available to feed the image of the lesbian as unfaithful and untrustworthy. Moreover, the notion that lesbian sexuality is fluid, at least more fluid relative to male homosexuality,³⁶ would tend to undermine the image of the lesbian mother as deceitful. This notion allows for the conclusion that the lesbian mother was unaware of her homosexual orientation or feelings at the time she married her husband.³⁷

Finally, there is no dominant cultural image of the lesbian as self-absorbed. The cultural image of the gay man as self-absorbed is strongly related to the gay male identity (but not lesbian identity) of being narcissistic and preoccupied with physical beauty.³⁸ The currently popular television program *Queer Eye for the Straight Guy*, featuring five gay men obsessed with fashion, style, and physical beauty, showcases this gay male stereotype.³⁹

The identity of the gay man and gay father as self-absorbed, untrustworthy, unfaithful, unable to commit to a long-term intimate relationship, and hypersexual stands as an obstacle for the gay father asserting claims for custody and visitation rights with respect to his child. This obstacle stands distinct from and in addition to the disadvantage that any gay parent, whether lesbian or gay man, labors under because of his or her sexual orientation relative to a heterosexual parent in seeking to exercise such rights with respect to a child. Thus, this negative identity would handicap a gay father in a way that a lesbian mother would not be handicapped.

36. See POSNER, *supra* note 12, at 299-300 (listing experiences he believes might cause women to “turn away from sex with men and become practicing lesbians” and asserting that “lesbianism seems potentially more responsive to social control” as contrasted with male homosexuality); Laura S. Brown, *Lesbian Identities: Concepts and Issues*, in LESBIAN, GAY, BISEXUAL IDENTITIES OVER THE LIFESPAN 3, 4-18 (Antony R. D’Augelli & Charlotte J. Patterson eds., 1995); Mary Becker, *Women, Morality, and Sexual Orientation*, 8 U.C.L.A. WOMEN’S L. J. 165, 207-12 (arguing that some women have a fluid sexuality).

37. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 464-65 (1990) (commenting that in the 1970s, most lesbian mothers had become mothers in the context of a heterosexual marriage and citing to an account of these mothers that suggested that many of these women “were unaware of their Lesbian tendencies until after they married and had children”) (quoting PHYLLIS LYON & DEL MARTIN, LESBIAN/WOMAN 141 (1972)).

38. See POSNER, *supra* note 12, at 300-01 (speaking of the stereotypical gay lifestyle as being “pervaded . . . with a concern with externals (physical appearance, youth, dress) . . . and, of course, with narcissism”); *id.* at 295 (referring to the “position” that lesbianism is “a second-best choice by ‘mannish’ women who are unattractive to men”); Scott Burris, *Gay Marriage and Public Health*, 7 TEMP. POL. & CIV. RTS. L. REV. 417, 422 n.23, 424 (1998) (suggesting that “parenting may be one effective antidote to the worship of youth and beauty . . . in gay sexual ecology” but also noting that many gay men do not live in a culture of youth, beauty and desire).

39. See Stephen Pettitt, *A Queer Type of Stereotype*, EVENING STANDARD (London), July 20, 2004, available at <http://www.thisislondon.co.uk/> (*Queer Eye* “presents a non-existent universal archetype. It tells us that gay men . . . are unfailingly style-conscious.”).

A significant component of this obstacle faced by a gay man asserting custody and visitation rights is the dissociation of the gay father from the ideal of fatherhood. Relatedly, this negative gay identity also could reinforce masculine norms of fatherhood.⁴⁰ The calculus has several steps: First, the negative gay identity sets the gay father apart from positive norms of fatherhood. The idealized father is selfless, trustworthy, faithful, committed to his child (and her mother), and not overtly sexual. Thus, the gay identity is dissociated from fatherhood. This dissociation also exists not only in the dominant heterosexual culture but also among gay men: A part of the gay community has bought into the notion that fatherhood is not a gay thing.⁴¹

Second, the gay father, thus dissociated from the ideal of fatherhood, is associated with another dominant image of the gay man as effeminate.⁴² Thus, effeminacy also is associated with being “un-fatherly.” The converse of this association is the association of fatherhood with masculinity.⁴³ In this way, the

40. See *infra* notes 66-67 and accompanying text (discussing masculine norms of fatherhood).

41. See BARRETT & ROBINSON, *supra* note 15, at 6, 16 (describing how some gay activists once viewed gay fatherhood as a “sellout to heterosexism” and describing other negative attitudes of some gay people towards gay fathering); MALLON, *supra* note 18, at 57 (“As the gay men interviewed for this study moved toward fatherhood, they had to overcome the first barrier, which was their own internalized belief that gay men could not become parents.”); *id.* at 88-93 (several gay fathers discussing negative reactions of the gay community to their fathering, including the reaction that the gay fathers were trying to act straight); Bigner, *supra* note 11, at 374 (asserting that the father identity “may be unacceptable or inconsistent with the social standards within [the gay] subculture” and that some gay men meet a gay father’s disclosure that he is both a father and gay with “disapproval and even hostility”).

42. See BARRETT & ROBINSON, *supra* note 15, at 44 (“Traditionally, our society has perpetuated the stereotype that homosexual men are more feminine than heterosexual men”); POSNER, *supra* note 12, at 300-01 (commenting that a gay “life-style [is] believed [by men who are disgusted by gay men] to be pervaded with effeminacy, including physical weakness and cowardice . . . with concentration in a handful of unmanly occupations centered on fashion, entertainment, decoration, and culture—such occupations as the theater (above all the ballet) and the arts, hairdressing, interior decoration, women’s fashions, ladies’ shops, library work . . . with a bitchy, gossipy, histrionic, finicky, even hysterical manner”); Fajer, *supra* note 11, at 607-09 (commenting on the common assumption that gay men “exhibit stereotypical characteristics of the other gender” and citing to studies supporting that this stereotype does exist); Hermann, *supra* note 22, at 500 (characterizing the 1962 film *Advice and Consent* as “explicit in offering the viewer a depiction of a gay bar as a subterranean world of lisp and mincing deviates”); Donna Thompson-Schneider, *The Arc of History: Or, the Resurrection of Feminism’s Sameness/Difference Dichotomy in the Gay and Lesbian Marriage Debate*, 7 LAW & SEXUALITY 1, 29 (1997) (concluding that “[t]he ‘queer’ caricature which emerges from [the Defense of Marriage Act]’s legislative history [is] an affected, flamboyant, effeminate, promiscuous gay male”).

43. See BARRETT & ROBINSON, *supra* note 15, at 44 (“Just as femininity and male homosexuality have been connected, there has also been a tendency to link two other unrelated phenomena: masculinity and fatherhood.”).

gay identity I have described above reinforces masculine norms of fatherhood.⁴⁴

III. PRIMARY GAY FATHERS

As noted above, I have borrowed and use the term “primary gay fathers” to describe gay men who parent a child together from the birth of that child.⁴⁵ Primary gay fathering is, by itself, a powerful agent of change. These gay fathers integrate the reality that they are gay and live as gay men with their role as fathers from the inception of their fathering. Thus, they challenge the notion that being gay is contradictory to being a father, refuting the notion that “gay father” is an oxymoron.⁴⁶

Moreover, the context in which the primary gay father has come to the American consciousness militates in favor of destruction of the negative gay identity described *supra* in Part II. An important part of this context is the struggle by gay fathers to cement and achieve legal recognition for their intact relationship with one another and for the relationship they have with the child or children they are raising together. In particular, these primary gay fathers often have come to public consciousness in the context of efforts to secure second-parent adoptions⁴⁷ and to enter into same-sex civil marriage or civil unions.⁴⁸

44. Cf. Adeno Addis, “Hell Man, They Did Invent Us:” *The Mass Media, Law, and African Americans*, 41 BUFF. L. REV. 523, 526-27 (1993) (arguing that “the mainstream media produces and reproduces a largely negative image of African Americans . . . [which] is used to justify the continual exclusion of African Americans from the various social and political spheres of existence, and ultimately, to devalue their lives,” and exploring “how the majority produces the public identities of minorities and how by this very process the majority produces a largely virtuous identity for itself”).

45. See *supra* note 7.

46. See MALLON, *supra* note 18, at 1 (“The concepts of heterosexuality and parenthood are so inextricably intertwined in our culture that the suggestion of gay fatherhood appears alien, unnatural, even impossible.”); GOTTLIEB, *supra* note 17, at 3 (commenting and citing multiple sources for the proposition that “the seeming incongruity that has historically existed between parenthood and homosexuality, a contradiction in terms some might say, has been widely observed”); Bigner, *supra* note 11, at 373 (“To many people, even the label *gay father* represents a contradiction in terms. In societal interpretations, the *gay* label connotes an antifamily stereotype, while the *father* label connotes heterosexuality and a strong interest in sexual reproduction.”); Hare, *supra* note 15, at 1 (“To many people the concept of a gay father is a contradiction in terms.”). See also A.M. HOLMES, JACK 20-21 (1989) (fictional son wondering how his father could be gay given that “queers are not fathers”).

47. See, e.g., *In re Hart*, 806 A.2d 1179, 1182 (Del. Fam. Ct. 2001) (granting second-parent adoptions to gay male couple who had lived in a committed relationship for nearly 22 years); *In re M.M.D. & B.H.M.*, 662 A.2d 837, 840 (D.C. Ct. App. 1995) (granting second-parent adoption to a gay male couple “who have shared an intimate relationship for almost five years”); *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195, 1197 (Pa. 2002) (gay male domestic partners of

Thus, aside from the same-sex nature of their partnership, primary gay fathers raising their child together often come to public awareness as an archetypal heterosexual couple. The archetype is of two people committed to each other for life and committed to promoting the best interests of the children they are raising together.⁴⁹ Ironically, it is an archetype that a large proportion of heterosexual parents today do not fit.

This context of primary gay fathers fighting for legal recognition of and protection for their family is a favorable platform for the promotion of a positive identity for the gay father and, more generally, for the gay man. It stands in contradistinction to the context in which gay fathers of heterosexual marriage came to public consciousness—in divorce and custody litigation after coming out to their wives. While the latter context helped reinforce the gay

twenty years sought second-parent adoption by one partner of other partner's adopted children who were adopted during their partnership); Richard A. Marini, *Gay Couple Cherish Life with Their Adopted and Foster Children*, SAN ANTONIO EXPRESS-NEWS, Jul. 4, 2004, at 1K (profiling primary gay fathers who have gone through the adoption and then second-parent adoption process three times and are preparing to do so with respect to a fourth child).

A second parent adoption is an adoption in which a legal parent's non-marital partner is allowed to adopt the legal parent's child without the legal parent terminating her parental rights. NCLR PUBLICATIONS, *Second Parent Adoptions: A Snapshot of Current Law* (Aug. 2003), at <http://nclrights.org/publications/2ndparentadoptions.htm>. See also Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 17 n.2 (1999).

48. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003) ("As of . . . the date they filed their complaint . . . plaintiffs Gary Chalmers, thirty-five years old, and Richard Linnell, thirty-seven years old, had been in a committed relationship for thirteen years and lived with their eight year old daughter . . ."); 'We're a Family,' *Gay Couples Say*, AUGUSTA CHRON., Feb. 29, 2004, at A09 [hereinafter 'We're a Family'] (reporting story of primary gay fathers who entered into civil marriage in San Francisco in February 2004); Marini, *supra* note 47, at 5K (primary gay father stating that he and his partner "are fighting for the benefits and security that come from having our relationship legally recognized"); Charles Beggs, *Oregon Will Register 3,000 Gay-Marriage Licenses: Supporters, Foes Debate Meaning of Court Ruling*, COLUMBIAN (Vancouver, Wash.), July 10, 2004, at C2 (reporting comments of recently married primary gay father reacting to Oregon Court of Appeals action with respect to registration of same-sex marriage licenses).

49. See, e.g., *In re Hart*, 806 A.2d at 1181, 1190 (court speaking of gay male couple who had been in a committed relationship for nearly 22 years and who sought second-parent adoptions: "The testimony paints a compelling picture of two people who are dedicated to being good parents."); *In re M.M.D.*, 662 A.2d at 841 ("They [two gay fathers] have committed themselves to each other as a family to the extent legally possible, and they seek to raise Hillary together, *whether or not* their joint petition to adopt her is approved."); *id.* at 860 ("Bruce and Mark are living together in a committed personal relationship, as though married, and are jointly caring for Hillary as their child."). See also 'We're a Family,' *supra* note 48 (primary gay father, recently married in San Francisco to his partner of eight years, commenting "I'd be foolish not to get married with my girls. There are so many legal rights and responsibilities that come with it."); Marini, *supra* note 47 (referring to two primary gay fathers and their adopted and foster children as "[j]ust your typical, all-American, same-sex family").

male identity as untrustworthy, unable to commit to an intimate relationship, selfish, and hyper-sexual, this context for public awareness of the primary gay father will likely help to break down that identity while simultaneously helping to construct a more positive gay male identity. And while the context of gay fathers of heterosexual marriage tended to reinforce masculine norms of fatherhood, this context for awareness of the primary gay father will tend to break down those gender norms.

The primary gay father's great potential to impact gay identity stems principally from the intact status of his relationship with his co-parent and child. The intact feature of the primary gay father's family is made all the more salient today because the primary gay father is frequently in the public eye in the context of his efforts to protect and formalize his existing commitments. This context is in stark contrast with that of the gay father of a heterosexual marriage who is in the public eye due to the adjudication of matters pertaining to the fracture of his family. The primary gay father seeks to assume legal obligations and duties to his partner through same-sex civil marriage.⁵⁰ He seeks to assume legal obligations and duties through second-parent adoption of the child he has been raising and supporting although he has had no legal obligation to do so and, absent adoption, would have no legal obligation to continue to do.⁵¹ Thus, the primary gay father provides a powerful counter-example to the stereotype of the gay man as unable or unwilling to commit to a long-term intimate relationship.

Images of the primary gay father, and particularly the images relating to the primary gay father's efforts to strengthen his familial commitments and to assume legal obligations and duties to his partner and his child, also should tend to ameliorate the identity of the gay man as self-absorbed. In contrast with the context of the gay father of a heterosexual marriage who comes to public consciousness in the course of a custody or visitation battle, in these contexts, the primary gay father's family has not fractured. Consequently, the notion of the gay father sacrificing the interests of his spouse and child to selfishly pursue his own (sexual) interests is wholly inapposite. Moreover, efforts to become legally responsible for a child's support and well-being, in particular, are not easily categorized as self-absorbed.

One could argue, however, that the primary gay father is being selfish in depriving a child of a traditional set of heterosexual parents and in exposing the child to a homosexual lifestyle. The criticisms arising from such a point of

50. See *supra* note 48.

51. See, e.g., *In re M.M.D.*, 662 A.2d at 858 (pointing out in second-parent adoption case that "[a]lthough both Mark and Bruce currently provide support for Hillary, Mark's joining Bruce in the adoption petition would guarantee that they both continue to have an ongoing financial responsibility to her"). See also *supra* note 47.

view become relatively muted, and the images arising from such criticisms become outweighed by more positive images, given the context in which so many primary gay fathers come to be parents.

Most primary gay fathers become fathers through adoption rather than through biological fatherhood.⁵² Often they adopt children who might be classified as hard to place.⁵³ Suzanne Johnson and Elizabeth O'Connor report from their study of gay parents that primary gay fathers "faced less opposition from their own families about their plans to become parents than did [primary] lesbian [mother]s."⁵⁴ They theorize that perhaps this is because gay men were more likely to adopt to form their family as contrasted with lesbians who were more likely to bring a biological child into the world to form their family:

Most of the gay men chose to adopt a child, and family members may have seen this as a selfless act. It is difficult to argue that taking a child who has no family and giving that child a loving home is a selfish thing to do. On the

52. See DRUCKER, *supra* note 15, at 73 ("Although sperm donation is simple, affordable, and available to lesbians, egg donation (via surrogate mothering) is complex, expensive, and not widely available. Most gay men who are not fathers from heterosexual relationships therefore choose adoption or co-parenting with lesbian mothers as means by which to be fathers to children."); JOHNSON & O'CONNOR, *supra* note 7, at 109 (reporting that most of the primary gay fathers in their study became parents through adoption).

53. See, e.g., *In re Hart*, 806 A.2d at 1181-82 (granting second-parent adoptions to gay male couple with respect to two "children who were considered difficult to place [and] [a]s such . . . faced lives being shuffled around in the care of a state system, which while critically important for the care of children who can't even dream of a place to call home, frequently falls short of achieving the goal of permanency"); VALERIE LEHR, QUEER FAMILY VALUES: DEBUNKING THE MYTH OF THE NUCLEAR FAMILY 127 (1999) (asserting that because it is difficult to find an adoption agency or state agency that views gay men or lesbians as desirable adoptive parents, "when adoption or foster parenting [for a gay or lesbian person] is possible, the children most likely to be available to gays and lesbians are mixed-race children, disabled children, or older children of color from the United States, and adoptees from poor or war-torn countries around the world"); MALLON, *supra* note 18, at 48-49 (men who became fathers as openly gay men during the 1980s outside of the context of a heterosexual relationship commenting on why they chose to adopt hard to place children—"those babies that had been left at the hospital" and "exactly the kind of child most people didn't want"); BARRETT & ROBINSON, *supra* note 15, at 66 ("Gay men who are fortunate enough to become single adoptive fathers have limited choices of school-age boys who have mental or physical disabilities or who are members of a minority race, delinquent, or otherwise 'hard to place.'"); Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 197 (1995) ("Gay men, if legally not prohibited from adopting, certainly have a more difficult time than women becoming a parent through adoption. Children available to gays for adoption are often the 'less desirable' children who cannot be placed with middle-class, heterosexual, white couples."); Marini, *supra* note 47 (profiling primary gay fathers who are raising three adopted children and currently five foster children as "quietly, lovingly trying to save the lives of children who might otherwise be abandoned and forgotten").

54. JOHNSON & O'CONNOR, *supra* note 7, at 109.

other hand, a lesbian who elects to bring a child into the world may elicit more disapproval because others may see her decision as fulfilling her own needs, rather than a child's.⁵⁵

Even when primary gay fathers do become fathers through biological fatherhood—generally through surrogacy—they typically expend great effort and large sums of money to create a human life that is very much wanted and that otherwise would not exist.⁵⁶

It is particularly helpful to contrast the context of primary gay fathers seeking to obtain a second-parent adoption with the context of a gay father of a heterosexual marriage seeking to obtain custody of his child. In the typical case of the gay father of a heterosexual marriage seeking custody of his child, the alternative custody arrangement is that of a heterosexual household. This alternative provides a readily available means for those judges so inclined to “save” the child from exposure to the gay father’s “lifestyle.”⁵⁷ It also allows for the characterization of the gay father as selfish merely because he seeks to compete for custody with the heterosexual household.

Such salvation is not an option, however, in the second-parent adoption context. The child already is being parented and will continue to be parented by two gay men. The only issue is whether only one or both of them shall have legally enforceable and binding rights and obligations with respect to the child. Given that there is no readily available heterosexual alternative in the second-parent adoption context, such a context is less likely to give rise to the characterization of the gay father as selfish.

The recent efforts by primary gay fathers to secure adoption and marriage rights also provide a worthwhile point of comparison to efforts by gay men to challenge the constitutionality of laws prohibiting sodomy.⁵⁸ In 2003, in

55. *Id.* at 109-10.

56. See GROWING GENERATIONS, *For Intended Parents*, at <http://www.growinggenerations.com/parents> (last visited Nov. 14, 2004) (website of surrogacy and egg donation firm dedicated to serving the gay and lesbian community informing that its “[c]osts for surrogacy generally range between \$65,000.00 and \$100,000.00”); CENTER FOR SURROGATE PARENTING, INC., *Financial Aspects*, at <http://www.creatingfamilies.com/costpg.HTML> (last visited Nov. 14, 2004) (listing costs and fees relating to egg donation and gestational surrogacy).

57. See, e.g., Pulliam v. Smith, 501 S.E.2d 898, 904 (N.C. 1998) (affirming trial court’s modification of custody award that had given primary custody of divorced couple’s two children to father; modified award granted exclusive custody to mother in light of father’s gay relationship); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) (overturning trial court’s award of joint legal custody to mother and gay father, and entering decree vesting sole custody in mother in light of father’s “immoral and illicit” gay relationship). Awarding custody to the mother also allows the court to punish the father for his homosexuality and to compensate the mother for the injuries she has suffered in light of her gay husband’s deception and eventual coming out.

58. See Lawrence v. Texas, 539 U.S. 558 (2003) (two gay men challenging Texas sodomy statute under Federal Constitution); Bowers v. Hardwick, 478 U.S. 186 (1986) (gay man

Lawrence v. Texas, the Supreme Court held that Texas's statute criminalizing same-sex sodomy violated the Due Process Clause of the Fourteenth Amendment.⁵⁹ The *Lawrence* Court understood the connection between the conduct that Texas criminalized and the intimate emotional and more generally familial bonds that same-sex couples form.⁶⁰ But at another level, litigation challenging sodomy laws can be viewed as principally about the right to engage in certain sex acts.⁶¹ Thus, although the *Lawrence* decision was an immeasurable advancement for gay and lesbian civil rights,⁶² it might tend to reinforce the gay male identity as hyper-sexual.⁶³

The primary gay father's efforts to maintain and secure his relationship with his partner and his child are less readily categorized as being about sex and are more likely to be seen as being about family: Gay men need not marry one another to engage in gay sex. The primary gay father's efforts to adopt his

challenging Georgia sodomy statute under Federal Constitution); *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002) (gay men and lesbians challenging Arkansas sodomy statute under state constitution); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (gay man challenging Kentucky sodomy statute under state constitution); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997) (gay men and lesbians challenging Montana sodomy statute under state constitution); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (gay men and lesbians challenging Tennessee act prohibiting sodomy under state constitution).

59. *Lawrence*, 539 U.S. at 578.

60. *See id.* at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.").

61. *See Bowers*, 478 U.S. at 190 ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.").

62. *See, e.g.,* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1185 (2004) (arguing that *Lawrence* is helpful in several ways to supporters of same-sex marriage rights); Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1231 & n.378 (2004) (arguing that *Lawrence* has strengthened immensely the argument that sexual orientation classifications merit heightened scrutiny by dismantling the equal protection case law that relied upon *Bowers* in rejecting claims for such heightened scrutiny); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1949 (2004) (arguing "that the underlying theory and most important passages of *Lawrence* suggest ready (though not immediate) applicability of the holding to same-sex marriage, and to the entire public realm of how gays, lesbians, bisexuals, and the differently gendered are treated in housing, employment, adoption, and the like" but cautioning that "it would be a mistake to ignore the abundant language in the majority's opinion that might be taken to cut against such a reading").

63. *See* Andrew McLeod & Isaiah Crawford, *The Postmodern Family: An Examination of the Psychosocial and Legal Perspectives of Gay and Lesbian Parenting*, in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 218 (Gregory M. Herek ed., 1998) ("Highlighting sexual behavior as the central feature of an identity or relationship tends to overshadow other personal qualities, such as intimacy and love.").

functional child have nothing to do with sex. In general, then, images of the primary gay father, and particularly of his efforts to secure same-sex civil marriage and second-parent adoption rights, will tend toward loosening the association between the gay male and hyper-sexuality.⁶⁴

Finally, with respect to the gay identity, images of the primary gay father will tend to promote an honest gay male identity rather than one associated with deceit or untrustworthiness. The context of the gay father of a heterosexual marriage would seem likely to give rise to the perception that he has deceived his spouse about his sexual orientation.⁶⁵ In contrast, the primary gay father is by definition honest and open with his partner about his sexual orientation. Moreover, the context of the gay father of a heterosexual marriage holds an inherent dissonance for the child who learns that his father, who has been married to his mother, is gay. In contrast, at the time the child of primary gay parents begins to become aware of her parents' sexuality, that awareness is likely to be informed by her own observations of her parents' home life. I am not aware of any instance in which primary gay fathers deceived their child as to their sexual orientation. Further, when the primary gay fathers come to public consciousness in the context of efforts to secure legal recognition for their partnership or a second-parent adoption with respect to their child, the public should tend to see them as open and honest about their sexuality with the public as well.

The increased visibility of primary gay fathers also has the potential to weaken traditional gender roles associated with the fatherhood identity. These fatherhood stereotypes inform that the father's principal roles are as financial provider and disciplinarian.⁶⁶ These tasks are associated with "masculine"

64. *See id.* ("Lacking the validation of marriage, gay and lesbian relationships also may be more likely to be viewed in terms of a sexual freedom and individualism that preclude the kinship ties, responsibility, and affection normally associated with family.").

65. *See supra* notes 12-16 and accompanying text.

66. *See, e.g.,* LEHR, *supra* note 53, at 118-25 (theorizing as to how being the breadwinner and exerting power came to be central to the masculine identity within the family household); MALLON, *supra* note 18, at 23 ("Popular movies and television shows regularly depict fathers as awkward, clumsy, and uncomfortable in the role of nurturer. And while we see exceptions to this stereotype, by and large fathers focus on supporting the family financially and are available as adjunct nurturers to their young children."); *id.* at 85 (citing thirteen articles and commenting that "[i]n the mainstream literature on fathers . . . most are clearly defined in their role as breadwinner"); DRUCKER, *supra* note 15, at 34 ("We have been given, and long accepted, the archetype of one bread-winning father, one home-making mother, and two or three happy and well-behaved offspring all living comfortably in a well-appointed suburban home as the ideal, perhaps only real, American family constellation."); Nancy E. Dowd, *Women's, Men's and Children's Equalities: Some Reflections and Uncertainties*, 6 S. CAL. REV. L. & WOMEN'S STUD. 587, 596 (1996) (commenting that traditionally, "[t]o the extent men's role went beyond the economic, they were viewed either as disciplinarians or as connections to the public sphere").

traits of endurance, strength, sternness, and stoicism.⁶⁷ Conversely, the motherhood identity is that of nurturer, caretaker and homemaker.⁶⁸ These tasks are associated with “feminine” traits of empathy, compassion, gentleness, and tidiness.⁶⁹ If one buys into the fatherhood identity, the masculine father would seem by his nature less suited to the feminine tasks of nurturing, caretaking, and homemaking, and, appropriately, would have less to do with these feminine tasks.

The debate surrounding same-sex marriage suggests that a part of American society still buys into the fatherhood and motherhood identities, in at least a weaker form. One of the arguments often heard against gay marriage is that a child needs both a mother and a father, as opposed to simply two parents—be it two mothers or two fathers: A child needs both a mother-figure and a father-figure in order to develop to his maximum potential.⁷⁰ Implicit in this argument (indeed, sometimes explicit in the argument) is the assertion that fathers have certain traits that mothers cannot utilize or model as well as fathers can, and that mothers have certain traits that fathers cannot utilize or model as well as mothers can.

67. Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1976 (1995) [hereinafter *Patriarchy Is Such a Drag*].

68. See, e.g., JOHNSON AND O’CONNOR, *supra* note 7, at 149 (“Heterosexual parents tend to fall back on traditional gender roles once they have children, with the mother assuming the role of the primary nurturer and caretaker for the children. Even when both parents are employed and both desire a more equal parenting arrangement, heterosexual mothers still take on most of the responsibilities at home.”) (citing a study in A.R. HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989)); MALLON, *supra* note 18, at 23 (“Even after a few decades of feminism, child rearing is still the domain of women in U.S. society Mothers are the ones who make decisions about the child’s diet and nutrition, clothing, social activities, and even schooling.”); Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 842 (2002) (“Despite increasing public support for gender equality in social roles, most men and women still believe that fathers should be the primary breadwinners and that mothers should be the primary caretakers.”).

69. See *Patriarchy Is Such a Drag*, *supra* note 67, at 1976.

70. See, e.g., Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 755 (1998) (asserting that “the profound benefits of dual-gender parenting to model intergender relations and show children how to relate to persons of their own and the opposite gender are lost in same-sex unions”); Wardle, *supra* note 23, at 857 (“Among the most important reasons why heterosexual parenting is best for children is because there are gender-linked differences in child-rearing skills; men and women contribute different (gender-connected) strengths and attributes to their children’s development.”); Lynne Marie Kohm, *The Homosexual “Union”: Should Gay and Lesbian Partnerships Be Granted the Same Status as Marriage?*, 22 J. CONTEMP. L. 51, 61-62 (1996) (arguing that “legal recognition of same-sex marriages would weaken the nation’s social structure by diluting the meaning of marriage and family, and by promoting precarious families where there exists no father image or no mother image for a child”).

The success of primary gay fathers would tend to undermine this assertion. Simultaneously, the visibility and success of primary gay fathers would tend to weaken the stereotypes that ground the fatherhood identity (as well as those that ground the motherhood identity). The power of primary gay fathers to do so relates principally to the fact that families headed by primary gay fathers have never had any division of labor based on sex. The power of the image of primary gay fathers to alter the dominant fatherhood identity does not arise from the fact that two *gay* men are raising a baby. Rather, the power stems from the fact that two *men* are raising a baby.

In a household headed by two primary gay fathers, the sex of each father does not influence how the fathers divide parenting tasks between them. Because the fathers are both male, they cannot assign outside employment, child-rearing, or housekeeping duties on the basis of their sex. Moreover, they cannot assign roles of nurturing, disciplining, or mentoring on the basis of their sex.⁷¹ Therefore, it is understood that in a primary gay father household, whenever a parent performs a parenting task, it is necessarily the father who performs that task. Of particular importance, it is understood that the fathers have complete responsibility for nurturing and taking care of the child and maintaining the home. This should tend to weaken the traditional masculine fatherhood identity, especially to the extent that primary gay fathers are seen to raise healthy and happy children. This should tend to weaken the link between gender and certain parenting roles and would suggest that even among heterosexual couples sex need not influence how the parents divide or perform parenting roles.

There is some evidence that gay and lesbian couples are more likely than heterosexual couples to divide child caretaking and homemaking responsibilities equally.⁷² If true, that model would itself mitigate against a

71. See MALLON, *supra* note 18, at 76 (“Living outside the patriarchal norms set for men and women, same-gender couples have a unique opportunity to redefine their roles and responsibilities in the family according to their strengths and skills, rather than their gender.”); Bigner, *supra* note 11, at 379 (“In families formed by gays and lesbians, then, reliance on gender norms to determine who does what and how in child rearing is largely absent, despite the heavy cultural conditioning that shapes our basic ideas of parenting roles.”); Fajer, *supra* note 11, at 615 (asserting that “gay couples, operating without gender-based expectations of their proper roles during marriage, often create new rules for themselves based on sharing and equality rather than on gender stereotypes”).

72. See JOHNSON & O’CONNOR, *supra* note 7, at 150-58 (reviewing previous studies of other researchers concluding that lesbian parents maintain a more equal participation in parenting as contrasted with heterosexual couples, and reporting on their own study of gay and lesbian parents, concluding “there seems to be a real effort on the part of our participants to share the [housekeeping and child rearing] tasks equally, and half of them feel they do just that. In the remainder of families, the tasks are nearly equally divided, with one partner doing slightly more of the work associated with childcare and running a house Among these families, there was

rigid assignment of parenting tasks based on sex in that it teaches that parents can equally share these tasks. My main point, however, is not that households headed by primary gay fathers will divide their homemaking and child caretaking tasks more or less equally. It seems likely that many such households will decide that one father will work more outside the home and one father will have greater responsibilities within the home. The most important point is simply that the assignment of such roles is determined without regard to the sex of the parent.⁷³ This will tend to weaken gender-linked parenting norms.⁷⁴

Having divided child caretaking and homemaking duties without regard to sex, primary gay fathers also would seem more likely to perform those duties without limitations imposed by gender norms. One commentator has argued:

Homosexual couples as well as the families they form have the advantage of redefining and reinventing their own meanings for *family* and *parents* because they exist outside the traditionally defined family and parenting roles based on gender It is possible that gay fathers are freed to expand their interpretations of what it means to be a father far beyond the traditional meanings of fatherhood. This freedom to explore may allow gay fathers greater opportunities to incorporate the nurturant, expressive functions and behaviors traditionally assigned to mothers. By contrast, heterosexual fathers'

no rigid allocation of roles, as is typically found in heterosexual families."'). *See also id.* at 129-30 (reporting the comments of gay and lesbian parents in their study who "felt that children raised in a gay or lesbian home would be exposed to more equal parenting and hence develop less stereotypical ideas of how men and women should behave").

73. *See* JOHNSON & O'CONNOR, *supra* note 7, at 149 ("Among gay or lesbian couples, there is no automatic gender-related assumption that one partner will have most of the responsibility for running the household and taking care of the children.").

74. *See* Fajer, *supra* note 11, at 616 ("One of the biggest contributions gay people can make to society is to demonstrate the weakness of the bipolar model of gender and to attempt to rectify some of the harms it creates.").

Of course, some will continue to project gender-differentiating norms even onto a parental unit undifferentiated by gender. Thus, some will view the primary gay father who works principally outside the home as performing the father role, and will view the primary gay father who works principally inside the home child caretaking and homemaking as performing the mother role. And given that it is a *gay* man who is performing tasks traditionally associated with the motherhood identity, there is a certain danger that the primary gay father performing these tasks will for some strengthen the connection between the task and femininity. This would seem especially likely for those persons who most strongly equate gay with effeminate. That a primary gay father in the family also is performing the tasks traditionally associated with the masculine fatherhood identity should militate somewhat against this. On the whole, the fact that two fathers are seen as successfully raising a child from birth without any contribution from a mother should tend to weaken the gendered nature of both the fatherhood and motherhood identities.

tendency to identify with notions of traditional masculinity and gender polarity may constrain their parenting behaviors and styles.⁷⁵

In sum, the primary gay fathers' division and performance of child caretaking and homemaking responsibilities without regard to sex or gender norms would seem to be a powerful means by which to expand the fatherhood identity to include functions and qualities traditionally associated with the motherhood identity.⁷⁶ Thus, primary gay fathers help us move toward a gender-neutral parenthood identity.⁷⁷

Finally, the increased visibility of primary gay fathers is likely to alter more effectively how gay men view fatherhood within the gay identity, as contrasted with the visibility of gay fathers of a heterosexual marriage. As noted previously, many gay men view parenting as a heterosexual thing.⁷⁸ The gay father of a heterosexual marriage is as likely to reinforce this connection as to weaken it. When a gay man learns of another gay man who became a father while closeted and in the context of a heterosexual marriage, he easily can view the gay father as having been "playing straight": Becoming a father is something he did while running away from his homosexuality. Fathering was part of his heterosexual charade.

When primary gay fathers become fathers—within the context of their openly gay relationship—it is much more difficult to view the gay fathers as playing straight. Primary gay fathers, who from the beginning father wholly apart from an intimate heterosexual relationship or persona, thereby weaken

75. See Bigner, *supra* note 11, at 379.

76. See JOHNSON & O'CONNOR, *supra* note 7, at 130 (reporting comment of gay parent in their study of gay parents that "[w]e do less gender-specific role modeling. Our boys are able to express a greater range of feeling. They can be nurturing and physically affectionate."); *id.* (reporting comment of gay father in their study of gay parents that his son "will see males being nurturing and domestic"); *id.* (reporting comment of lesbian mother in their study of gay parents that "I think it is good for my son to see all kinds of projects and chores done by women. Everything from cleaning to mowing to car repair is done by his moms, and I think it is good that he doesn't have a certain gender assigned to certain types of chores."). See also Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 708 (2003) (arguing that even if research were to confirm that children raised by gay and lesbian parents differed with respect to gender role conformity as contrasted with children raised by heterosexual parents, such difference should not be equated with harm).

77. Because primary gay fathers so threaten to undermine societal gender norms and identities with respect to parenting, some social conservatives might find them even more objectionable as compared with gay fathers of heterosexual marriages, who at least tried for a time to parent in a traditional dual-gender union and whose children generally would continue to have both a mother and a father even after dissolution of that union. The increased visibility of primary gay fathers, therefore, might produce a cultural and political backlash greater than any that arose in the context of the coming to public consciousness of gay fathers of heterosexual marriage.

78. See *supra* note 41.

the connection between fatherhood and heterosexuality. They make it easier for gay people to view fatherhood as a gay thing.

Moreover, as set out previously, gay fathers of a heterosexual marriage tend to strengthen the gay identity as untrustworthy, unable to commit to an intimate relationship, selfish, and hyper-sexual—as most un-fatherly.⁷⁹ This identity reinforces the notion even among gay men that gay men should not be fathers. Conversely, primary gay fathers, also as set out previously, weaken this negative gay identity.⁸⁰ Thus, they lay the groundwork for other gay men to view fatherhood as consistent with gay identity. They make it easier for gay men to integrate the notion of fatherhood into their own gay identity and to consider the possibility that they might choose fatherhood within the context of a committed gay relationship.⁸¹

IV. CONCLUSION

Context matters. Gay men who become fathers in the context of an openly gay relationship have the potential to help gay men as well as the broader society redefine the gay identity. They also have the potential to influence greatly how gay men and the broader society construct the fatherhood identity.

A dominant stereotype of gay men is that they are hyper-sexual, self-absorbed, untrustworthy in their intimate relationships, and unwilling or unable to commit to a long-term intimate relationship. I have argued that the coming to public consciousness of gay fathers of heterosexual marriages, principally in the context of divorce litigation, reinforced this negative gay identity. I have argued further that, in so doing, this coming to public awareness also reinforced the traditional masculine images grounding the dominant fatherhood identity.

The present coming to public consciousness of a new generation of gay fathers—those who began parenting while in an openly gay relationship—has great potential to break down this negative gay identity and to lessen the gendered nature of the fatherhood identity. This potential is enhanced when these primary gay fathers come to the public's attention in the context of their efforts to secure legal recognition of and protections for their intact family, principally through same-sex civil marriage or civil union and through second-parent adoption. This increased public visibility of primary gay fathers also has great potential to lessen the disassociation of fatherhood from

79. *See supra* Section II.

80. *See supra* Section III.

81. *See, e.g.,* Ganahl, *supra* note 5 (primary gay father commenting that after his same-sex wedding and the surrounding publicity, including a widely-circulated photograph of him and his partner with their two children, he has heard from other gay men “who see what we have and say, we want that, too! I feel like we’re a role model for them, which is something we didn’t have.”).

homosexuality so that gay men might more easily integrate into their own gay identity the possibility of fatherhood within a committed gay relationship.