

Same-Sex Rights for Lesbian Mothers

Child Custody and Adoption

BY JENNIFER SCHULENBERG

L'auteure explore les conditions qui entourent l'adoption d'un enfant par les mères lesbiennes et leurs partenaires et examine l'évolution des lois de la famille, les conceptions de la famille, les peurs, les mythes associés à la maternité chez les lesbiennes.

Family life as an individual experience and as a social institution is in transition. In highly industrialized countries, such as Canada, families have been undergoing changes especially since the early 1970s. Some of these changes include increased birth rates to unmarried women, higher rates of divorce and remarriage, decreased fertility, and altered household composition (see Eichler). The predominant gender role pattern during the 1960s was that women would drop out of the labour market either upon marriage or upon giving birth to their first child. In contemporary times, the pattern is that women stay within the labour force throughout marriage and motherhood. This creates a new division of labour and necessitates a new perspective of the meaning of gender within couple relationships. For example, a heterosexual couple can think about having a child in the knowledge that society, in most cases, is fully supportive of their desire to be parents. This holds true except for "those couples whose sexuality is marked as deviant. [They] obtain little recognition of, or protection of their desire to become or remain parents" (Zicklin 56). The manner in which the term parental "fitness," "family," and "the best interests of the child" are conceptualized in the justice system greatly affects the outcome of custody cases involving a homosexual parent.

In Canada, judges have discretionary leeway in determining what the best interests of a child are in custody disputes. It can be argued that lesbian mothers are facing formidable obstacles. "A lesbian mother's likelihood for success is no more than 50 per cent compared to the standard maternal custody award of 90 per cent" (Causey and Duran-Aydintug 57). With approximately 250,000 lesbian parents in Canada this has a profound effect on the children of our nation (Epstein). Not all of the cases that appear before the courts are reported in legal journals. Child custody disputes in which the mother is a lesbian seldom appear in case law reports. As Arnup notes, it is commonly seen in cases with homosexuality or lesbianism being a factor "to seal the records ostensibly to protect the privacy of the individuals involved" (1995, 341). This

practice presents a problem as the cases that are reported and made accessible to judges and lawyers for their use in future cases are thereby given an importance beyond their individual significance.

Historical evolution of family law

Many of our laws, especially since the 1930s, relied on legal realism not in the sense of a philosophical theory, but as an attitude. It calls for an instrumental utilitarian use of law. Law is seen as a social tool. Legal realism attempts to create laws that are for the greatest good for the majority of people. Historically, family law has been the least amenable to legal realism and has been the most preoccupied with conscious creation of the symbolism of *normal* family life (Rosen).

Until the nineteenth century, English common law gave the father virtually unlimited rights to the custody of his minor, legitimate children. "Custody law considered children as pieces of property in which their father had a vested interest rather than as individuals whose welfare and interests were legitimate legal issues" (Arnup 1988, 246). In the middle of the nineteenth century, the process of industrialization created the separation of the home from the workplace. The roles of women and men became sharply differentiated. Men were expected to become the breadwinners of the family unit and the women were to be the wives and mothers.

The reduction in the autocratic powers of the father over his children was not so much a reflection of the improved status of women as a recognition of the social value of adequate mothering. (Arnup 1988, 246)

"The cult of motherhood" (Mason and Quirk 220) developed during this time. It focused on the superior moral and nurturing characteristics of women that naturally suited them for the rearing of children. In the twentieth century, power over who has the children shifted from individuals to legislation. In other

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words, "real power shifted to family court judges who had the authority to determine whether a mother *deserved* to have custody of her children" (Arnup 1989, 24). The problem arises in what is the criterion that judges a mother's worthiness to have her children? The problem "is not motherhood in isolation that is revered by the courts, but motherhood within a familial structure" (Arnup 1989, 25). Societal attitudes, prevalent norms, and how the family is defined influences the decision on whether the familial structure is appropriate for the granting of custody. This distinction can have disastrous consequences for lesbians seeking custody of their children.

Conceptions of the family

The definition of the family is ambiguous in the legal, social, and linguistic conceptualizations used. It is now recognized among researchers and policy makers that a monolithic definition¹ of the family is no longer adequate to reflect the complex reality that exists today. For example, if we define the nuclear family "as a working husband, housekeeping wife, and two children, and ask how many Americans actually still live in this type of family, that answer is seven per cent of the total United States population" (Ricketts and Achtenberg 83). According to the Vanier Institute, "we need a notion of family that accurately reflects the real experiences of individuals and the intimate relationships that they establish and attempt to sustain over time" (5). Narrow definitions, built on legally verifiable relationships (i.e. marriage), provide only a partial representation of the family. These descriptions tend to be judgmental by indicating that a family consists of a husband and a wife living in a neolocal residence, more commonly referred to as the nuclear family. This conjugal family has become *the family* which does not merely represent an ideal type but an overarching conceptualization where this ideal is feasible for the majority of the population. Within this given environment

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where the family is defined as an ideal type, "other family living arrangements are considered to be somehow deficient in familial content, or more radically, not familial at all" (Bould 133).

The variability of the treatment of the "the family" has implications in the area of family law. "It is the state, both the legislatures and the courts, and not individuals, which decides who is *in* and who is *out* of the *family*" (Findley 133). Notions of "fit parents," such as those deemed to provide a stable home environment, are grounded in societally-accepted definitions of the family. Yet, the

conventional notion of heterosexual marriage as the legal foundation and the building block of our social fabric is weakening. Statistics indicate that "50 per cent of first marriages and 60 per cent of second marriages are likely to end in divorce" (Cherlin 32; Martin *et al.* 38). Homosexuals are living a lifestyle that is in defiance of societal norms and values concerning sexuality and maternity (Arnup 1995, 341). They are not seen as participating in a family structure that is based upon a recognizable legal union, marriage, or a co-habitation for the purpose of procreation.

If a lesbian mother living with another woman is not part of the accepted definition of the family, the issue of child custody becomes that much more complex. Katherine Arnup stipulates that, "to judges, the lesbian feminist in particular seems to pose a double threat. She represents a refusal to abide by traditional sex roles, as well as a rejection of heterosexual nuclear family life" (Arnup 1995, 341). Her argument is collaborated by Rachel Epstein:

... A lesbian mother who is prepared to accept the traditional values of society in creating a stable facsimile of a nuclear family, may, in the future, be permitted to retain custody of her children. In so far as she represents a fundamental and ongoing challenge to the structures of heterosexuality and the nuclear family, however, the existence of the lesbian mother must be denied. (112)

David Rosen, however, suggests a more cultural definition of the family that would enable alternative family structures, such as the ones of lesbian mothers, to be recognized in family law. He states that the family is "a group of people united by certain convictions or common affiliation or as a collective body of persons who live in one house under one head or management" (37-38). If this form of a definition of a stable home environment became part of legal statute, the rights of the co-parent² would be recognized.

Methodology

The data for this article came from interviews conducted with seven lesbian mothers. The interviews occurred between May and July of 1998 and took place in private settings in Toronto, Kitchener, Hamilton, and Guelph.

The lesbian mother's ages ranged from 29 to approximately 55. Their children ranged in age from three to 26 years old. All of the respondents but one are the biological mothers of the children they are raising. The one respondent who was not the biological mother was the co-parent of a child biologically related to her partner that she had successfully legally adopted. Four of these women had adopted a child within their partnership. There are seven lesbian mothers that I interviewed. Of those seven, four of

them had children with their lesbian partners through artificial insemination with an unknown donor. The other three lesbian mothers conceived their children while involved in a previous heterosexual union (be that marriage or common-law) prior to identifying themselves as lesbians. All the lesbian mothers interviewed had only one child. Out of the seven women only two were single at the time of interviewing. Their professions ranged from a lawyer, psychologist, public health nurse, and employees of lesbian/gay associations. Overall, the lesbian mothers that were interviewed are only representative of a small segment of the lesbian mother population. They were primarily white, middle-class lesbian feminists that had completed post-secondary education or further.

The analysis that follows seeks to highlight any patterns and themes that arose out of the interviews conducted. These women spoke as feminists, as lesbians, and as mothers. The themes which emerged from the data involve the importance of the education of the judiciary in lesbian custody cases, the awareness that motherhood has political significance, redefinition of motherhood as an experience and an institution in society, and the re-creation of the term family to include the patterns of lesbian biological mothers and co-parents.

Findings, analysis, and discussion

The court treatment of lesbian mothers has been motivated by three dominant fears. Firstly, there is the myth that the child(ren) will become homosexual. The available research on the psychosexual development of children raised by lesbian mothers uniformly demonstrates that these children are as psychologically healthy as those that are raised by a heterosexual mother. Dr. Richard Green³ and the traditionalist, Dr. Benjamin Spock,⁴ agree. Indeed, "there is no evidence that homosexual parents are more apt to raise homosexual children. Most homosexuals are children of conventionally heterosexual parents" (Gross 520). Another concern is the fear of inappropriate gender socialization. The role of parents as models of gender-related behaviour was initially thought to be important in social learning theory. This theory's premise is that children are exposed to role models of both sexes from an early age through the media, siblings, peers, and parents which ensure proper gender identity development. Currently gender development is conceived as a process in which the child learns that he or she belongs to a category of male or female. Through exposure to cultural notions of what constitutes male and female behaviour and socialization with peers the child gradually develops a sense of gender identity and roles that are connected with that gender. Several studies that compared lesbian and heterosexual mothers and their children concluded, "that there is virtually no difference among the children with regard to gender identity, gender role behaviour, psychopathology or homosexual ori-

entation" (Epstein 110–111; see also Gottman; Green *et al.*; Kirkpatrick *et al.*; Patterson 1992a, 1992b). Studies have shown that, "lesbian couples are more flexible in social roles, more egalitarian and less oriented toward traditional gender divisions of labour than are heterosexual couples" (Brophy 490). And, finally, there is the fear that the children will suffer embarrassment and/or teasing by their peers and the community as a whole because of the social stigma attached to the sexual identity of the mother (see Arnup 1988; Epstein; Ferris; Findley; Hall; Kaufman and Dundas; Sanders). These concerns were not supported by research findings which suggest that, "being homosexual is clearly compatible with effective parenting and is not a major issue in parents' relationships with their children" (Harris and Turner 130). A summary of the findings of 30 studies of the children of lesbian and gay parents was published in the October 1992 issue of the journal *Child Development* that were unanimous in their findings that the children raised in homosexual households had developed normally (Sanders). Yet, despite the overwhelming research to the contrary, a 1996 survey of undergraduate students had disturbing conclusions. It found that the students rated a homosexual couple more likely to "create a dangerous environment for the child, be more emotionally unstable, and to be less likely to be awarded custody of the child than the heterosexual couples" (Crawford and Solliday 63).

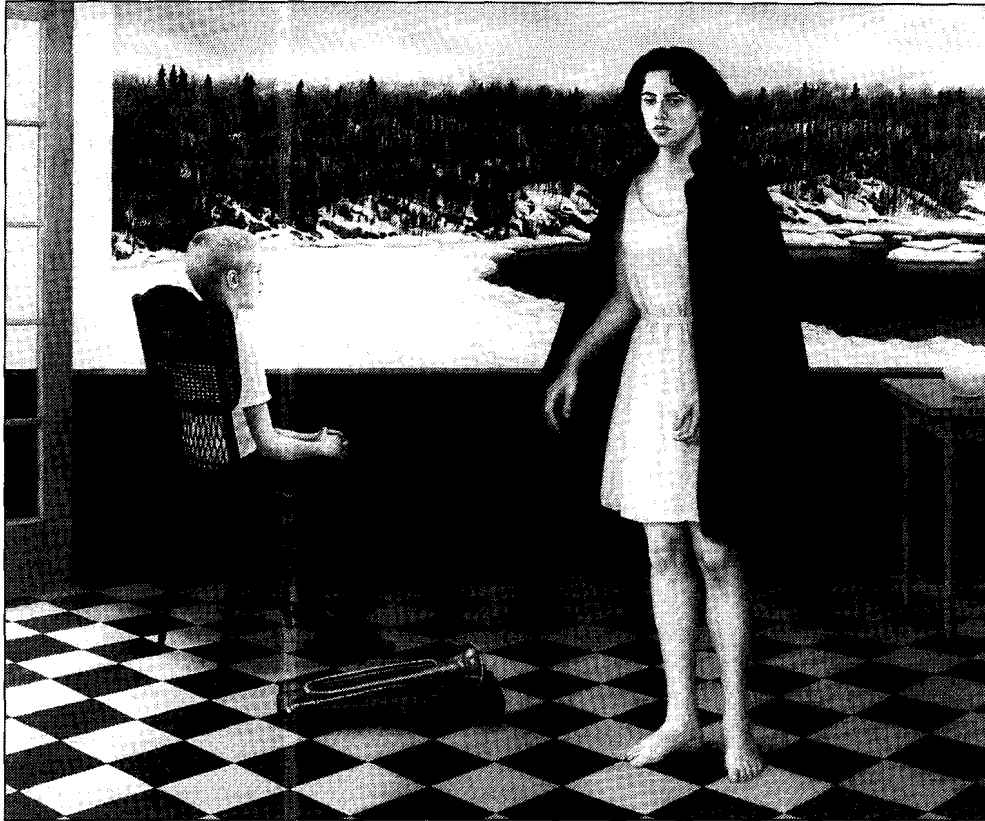
Laurie Pawlitza, a lawyer working with a law firm in Toronto clarifies many of the issues that lesbian mothers face today. Lawyers need to change their strategy when dealing with cases of child custody that involve a lesbian mother. "We have to educate the judiciary about the impact of *or the lack of impact* of homosexuality and child rearing." Pawlitza feels there are judges today that look at homosexuality *per se* as detrimental to the best interests of the child.

Some judges, particularly, I would think older judges, just have not a lot of sense of what ramifications there are if any ... they may still believe that homosexuality is something that is taught and that a gay or lesbian parent might try to influence the kid.

She warns that while claimants and lawyers must be careful not to offend any of the judges, they also want to ensure that judges are aware of the current research, and what the possible implications are of awarding custody to the lesbian mother, which are minimal.

As Katherine Arnup (1995) noted, many cases are sealed when an issue

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Valerie Palmer, "Open Water," oil on linen, approx. 46" x 50", 1992.
 Courtesy of Nancy Poole's Studio, Toronto, Ontario. Photo: Tom Moore

of homosexuality is involved. Laurie Pawlitza agrees but suggests there are a myriad of other situations that occur in these cases which make them difficult to research for other lawyers and academics. Many heterosexual couples that separate where one spouse is lesbian or gay settle all their disputes before trial. She indicates that this is not uncommon and occurs when the spouses are very good friends, but she is quick to add that if one spouse has a personal vendetta they can make life very miserable for their spouse in litigation. However, in the event they do, she confirms that it is definitely not uncommon to seal records so that statistics are hard to come by. Nevertheless, according to Pawlitza, 90 per cent of all family law cases are settled before trial and for many of them a court action is never started.

The voices of lesbian mothers

Brenda,⁵ a financial consultant points out that most women that she knows have had kids as "out" lesbians except for one.

She is the only one I know that has a father in the picture. Everyone that the child knows is aware that her mother is a lesbian, he knows that she is a lesbian, the lawyers know that she is a lesbian, but she would be hard pressed to go into court as a lesbian because she fears for the custody of her child.

Brenda reiterates that most people she knows are open about their sexual orientation as lesbians.

Rebecca, an accountant in her mid-40s, is an identified lesbian mother with a child from a previous heterosexual marriage. She comments that the women she knows that have a connection with the father of their children were in previous heterosexual relationships. Rebecca states that she, like the others, are careful:

... lots of written agreements and lots of documentation and a good relationship with [my] lawyer where [I am] constantly dealing with child rearing stuff, visitation stuff, how much time in the summer stuff and it is really onerous.

When asked whether Rebecca knew of any lesbian mothers that have suffered homophobic reactions from the father she was

quick to respond that it is always a threat whether it is spoken or not. "I don't know any lesbian who will boldly take the father, drag him into court because the father has that trump card ... yeah, but she's a dyke!" Rebecca expressed her desire for her partner to be legally recognized as a co-parent, however, the adoption and joint custody laws do not currently allow her any legal options.⁶

Sarah, a civil servant is the co-parent of a child that was born to her partner through artificial insemination by an unknown donor. When their son was two, they decided to pursue legal protections for them and their child. The first step was to secure joint custody. Sarah obtained this with relative ease. The next step was to pursue an adoption. Other members of the birth mother's family can challenge custody. Her partner gave birth to him so her partner's biological family had more legal claims to her son than she did because they had a biological connection that she did not. In order to erase that or supercede it they decided to go forward with the adoption where each parent is given the full bundle of parental rights physically and legally. In doing so, they ran into the problem that according to the *Child and Family Services Act of Ontario*, spouse was defined as someone of the opposite sex. They therefore did not qualify and in the interview with the Children's Aid Society they were turned down.⁷ At this stage, the only alternative that was open to Sarah and her partner was to go to court and challenge the piece of legislation that stipulated a spouse was of the opposite sex. They did so

with three other lesbian couples who had gone through the same process. Sarah explains,

... We decided that there is a certain strength in numbers and that if we all went together it would be much more difficult for a judge to consider this as such an isolated and one-off kind of incident. If you are sitting there before eight women and seven kids that it would be harder than if you are just dealing with one couple and one kid.

The eight women and seven kids sat through a day and a half of court. Expert testimony was provided on what kind of families lesbians form, their longevity, "what the impact is on children having two loving parents versus having one loving parent or parents who don't love them" (Sarah) and so forth. The judgment concluded that the definition of spouse should be changed and amended to reflect this diversity. This ruling allowed them to be examined on a per case basis as would occur with the adoption by a heterosexual married or common-law couple in Ontario.

The Honorable Judge James P. Nevins makes the following statement in his judgment of *Re K.*:

What is crucial to the children of lesbians and gay men, as to the children of heterosexual men and women, is loving, stable parenting. The opportunity for a lesbian or gay male parent to adopt a biologically unrelated child whom they parent provides a socially and legally recognized structure for an emotional relationship of great importance to the child. Such a structure recognizes the role and authority of the non-biological parent in both ordinary activities ... and in times of transition or crises such as illness, disability, or death. Such a structure also helps to ensure arrangements which fully recognize parenting relationships of importance to the child in the event of relationship breakdown and/or separation. Although many lesbian and gay male parents are able to make fair and orderly decisions about issues of child support and custody in the absence of a legal framework, the emotions associated with relationship breakdown can make this process difficult if not impossible for some. Where a child has been legally adopted by a non-biological parent, this structure may assist in clarifying the needs of the child and parental responsibilities. (16–17)

Thus, to legally sanction the agreement between the two people is to validate their partnership and establish their clear intent to parent together, and even upon the demise of their relationship to have access and a certain degree of influence and responsibility for the child. The laws across Canada need to be re-examined with this intent and purpose in mind. Unfortunately, the hetero-

sexual world of parent-teacher interviews, pediatrician visits, birthday parties, and permission slips rarely recognizes that these women are lesbians *and* mothers. Vanessa, a lesbian mother comments,

... the [lesbian] community as a whole would say without question that the lesbian mother community is facing an easier task to legitimize their duality in society. But even within the lesbian community we often feel like an invisible minority. We may not have to make surreptitious agreements and make wills that could be overturned anymore to get our custody and adoption orders but if we have been in a hetero relationship before and the natural father is not prepared to consent to an adoption then ultimately, in the end, if the lesbian relationship ends as a result of death or separation, the death of the bio-mum, for example, the non-bio mum could lose a custody dispute with the natural dad even after ten years of co-parenting the child.

Organizations such as PFLAG (Parents, Families, and Friends of Lesbians and Gays) help support lesbian mothers and their friends and family. Today, with more lesbian mothers choosing to have or adopt children there are many organizations and resources available to help support lesbian mothers and the children of lesbian and gay parents to cope with the institutionalized homophobia and the heterosexual assumption that is still prevalent in many institutions in Canada. As Laurie Pawlitzka states, "the bio-mum community, at least, insofar as ideal in adopting (*being fit to adopt*) [*is*] well on its way."

Conclusion

It is easy to see how a court might legitimately be concerned about how the larger community as a whole receives the children of lesbian mothers and co-parents. Violent crimes against homosexuals and the rejection of Bill C-167⁸ in the Ontario Legislature in 1994 are only two overt examples of how homophobia and stigmatization affect lesbians and gays despite the heterosexual public's growing acceptance of gay and lesbian unions.

The intent of this research was to determine if any barriers existed for lesbian mothers in obtaining custody of their children and/or adoption in Canadian society. Through an extensive review of the available literature and the research conducted within this study the importance of how terms such as "family," "spouse," "dependent," "parental fitness," and the "best interests of the child" are conceptualized in the justice system greatly affects the outcome of custody cases involving a homosexual parent. The majority of lesbians that have biological children from a previous heterosexual union are not *as* concerned as their peers were 5 to 15 years ago. As a result of the landmark decision in *Re: K. et al.* in Ontario that allows co-parents to adopt their partner's biological

children a process of change has begun. However, lesbian mothers still feel that their sexual orientation plays a role in determining the best interests of their children. Some still live in fear of losing custody of their children because of their lifestyle choices. As with lesbian mothers, current research does not indicate that there is a reason to believe that gay men are unfit parents as a result of their sexual orientation. According to Charlotte Patterson, the "protection of the best interests of children in lesbian and gay families increasingly demands that courts and legislative bodies acknowledge realities of life in nontraditional families" (1992b, 1037).

A great majority of the research conducted on lesbian motherhood centres around debunking the myths and stereotypes associated with lesbian and gay relationships and their lack of effect on parenting ability. One area for further research is the comparison of the commonalities and differences among lesbian families without the comparison to the heterosexual alternative. There appears to be an absence of longitudinal studies on children that were raised in lesbian families and the longevity of lesbian partnerships. Furthermore, there is a need for accurate documentation of alternative family structures that exist in Canada. The next Statistics Canada census needs to include questions that are mutually exclusive and exhaustive and which would allow for same-sex households, with or without children, to be accurately documented. Finally, research is needed that deals specifically with Canadian custody disputes of lesbian mothers from 1995 onwards. From the academic writings that have been published to date, it is not entirely clear whether the factors that judges claim are most important in determining custody have much to do with the final result. The interviews that were conducted in this research have indicated that there has been a considerable amount of progress in the redefinition of the family and lesbian mother's quest for custody within family law. In my opinion, this has not been clearly identified in the literature available. Through the education of the judiciary and further research that explores, supports, and reflects the structural changes within the institution of the family and the effect of judicial process on women, we will hopefully see a more even application of the law and court rulings. Further research, education, and law reform are mandatory, as homosexuality *per se* is not and should not be a barrier to child custody or adoption.

The author wishes to acknowledge the help and guidance of Dr. Belinda Leach and Dr. Nora Cebotarev.

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Toronto's "Society at the Turn of the Century: Continuities and Change" conference, April 14-15, 1999.

¹A monolithic bias or structure has an emphasis on uniformity of experience and universal structure and functions rather than on diversity of experiences, structure, and function.

²The term co-parent refers to the non-biological mother in a lesbian relationship.

³Dr. Richard Green is the best known authority on homosexuality and its effects on children. He has been quoted with approval by numerous judges in the United States and was extensively quoted in *Barkley v. Barkley*.

⁴Benjamin Spock's childrearing books are well-known and read in North America. It is particularly interesting that he takes this position, since he is generally considered to be "conservative in his views" (Gross 521).

⁵Names and identifying information have been changed to ensure the confidentiality assured to all participants.

⁶In Rebecca's case, there is a known father from a previous heterosexual relationship. For her lesbian partner to be able to legally adopt her child would require the birth father to completely abdicate any legal, physical responsibility for that child. Rebecca's ex-husband is not willing to do this, therefore her partner cannot be legally recognized as a co-parent.

⁷Interviews with the Children's Aid Society are standard practice in adoption cases. Questions include what your aspirations and goals are, what you do for a living, what kind of income you earn, what kind of home you live in etc. Sarah and her partner did not have to undergo a home visit as they were not applying for a strange baby adoption but a partner adoption where the child had resided with both parties since birth.

⁸Bill 167 "aimed to amend 56 provincial laws to equate same-sex couples with heterosexual couples. This was the first North American attempt to move from *ad hoc* changes to systematic reform" (Sanders 122-123). One of the Bill's intentions was to allow gay and lesbian people the legal right to adopt children. The Bill was defeated on second reading by nine votes in June 1994.

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KAREN V. LEE

I Wait My Turn

I wait my turn
with others that crave
to be impregnated
high tech infants

I wait my turn
the power of the needle
like piercing distress
into my body

I wait my turn
a child I crave
societal norms
flesh and conception

I wait my turn
cry no more
chains of the maternal womb
empty from constructed images

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