

Lesbian (M)Otherhood: Creating an Alternative Model for Settling Child Custody Disputes

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“Lesbian mother. In earlier times the characterization itself would have seemed an oxymoron. Lesbianism being the essence of deviance and motherhood the sublime and sacred reason for every woman’s existence.”

—Margaret Randall¹

“[T]o acknowledge that a lesbian can be a mother and a mother a lesbian, contrary to popular stereotypes; to question the dictating by powerful men as to how women . . . shall use their bodies . . . is to challenge deeply embedded phobias and prejudices.”

—Adrienne Rich²

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1. MARGARET RANDALL, NARRATIVE OF POWER: ESSAYS FOR AN ENDANGERED CENTURY 91 (2004).

I. INTRODUCTION

Lesbian motherhood presents numerous challenges to the American legal system for which its courts are not equipped. Nancy Polikoff, a leading gay and lesbian family law scholar, explains that “[i]f the relationship between two women ends and they cannot agree on matters of custody and visitation, [the] family will find itself in a court system ill-prepared to recognize its existence and to formulate rules to resolve its disputes.”³

Three cases that illustrate these challenges recently stood before the California Supreme Court: *Kristine H. v. Lisa R., Elisa B. v. Superior Court*, and *K.M. v. E.G.*⁴ *Kristine H.* concerned two female, registered domestic partners who chose to have a baby via artificial insemination.⁵ They dissolved their partnership two years later, and the birth mother sought to deny custody rights to her former partner.⁶ In *Elisa B.*, the lesbian partners each gave birth to children via artificial insemination, and they jointly decided that Elisa would provide financial support by working outside the home while the other would care for the children.⁷ Upon the termination of their relationship, Elisa refused to continue that support, forcing her former partner to require public assistance.⁸ The county government then filed suit against Elisa in order to force child support obligations upon her.⁹ *K.M.* comprises a lesbian couple in which K.M. gave her eggs to E.G. in order to achieve in vitro fertilization and give birth to the child that they both desired.¹⁰ Five years later, the women dissolved their domestic partnership, and K.M. filed suit to gain parental rights over the child, which E.G. had denied her.¹¹

Although their fact patterns differ, each case grapples with the same central issue: what legal rights and responsibilities do lesbians have for the children they once chose to raise with a former partner? The California Supreme Court recognized the nonbiological partner (or, in *K.M.*, the nonpregnant partner) as a legal parent in each case by relying

2. ADRIENNE RICH, ON LIES, SECRETS, AND SILENCE 197 (1979).

3. 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, 463 (1990).

4. 117 P.3d 690 (Cal. 2005); 117 P.3d 660 (Cal. 2005); 117 P.3d 673 (Cal. 2005).

5. *See* 117 P.3d at 692.

6. *See id.*

7. *See* 117 P.3d at 663.

8. *See id.* at 663-64.

9. *See id.* at 664.

10. *K.M. v. E.G.*, 117 P.3d 673, 675-76 (Cal. 2005).

11. *See id.* at 675-77.

upon California's comprehensive domestic partnership and second-parent adoption statutes.¹² However, in states that lack such legislation, courts vary widely as to whether or not they will even hear a legal claim from a nonbiological or nonadoptive ("nonlegal") lesbian partner, much less grant that partner any parental rights.

When faced with a child custody battle between lesbian partners, courts must first decide whether the nonlegal partner has standing to even challenge a child custody arrangement.¹³ Out of the dozen or so jurisdictions that have encountered such cases, some have refused to hear these claims at all.¹⁴ However, a growing minority of courts have granted standing to the nonlegal partner under the doctrines of *in loco parentis*, *de facto parent*, and *psychological parent*.¹⁵

12. See *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005); *Elisa B.*, 117 P.3d 660; *K.M.*, 117 P.3d 673.

13. See Ruthann Robson, *Making Mothers: Lesbian Legal Theory and the Judicial Construction of Lesbian Mothers*, 22 WOMEN'S RTS. L. REP. 15, 20 (Fall/Winter 2000); see also *Alison D. v. Virginia M.* 572 N.E.2d 27, 28 (N.Y. 1991); *Carvin v. Britain*, 122 P.3d 161, 176 (Wash. 2005).

14. See, e.g., *B.F. v. T.D.*, No. 2004-CA-000083-ME, 2005 Ky. App. LEXIS 95, at *1, *19-20 (Ky. Ct. App. Apr. 15, 2005) (holding that a lesbian partner who is neither the biological nor adoptive mother to the child does not have standing to pursue custody because, by failing to prove that the biological mother is unfit or has waived custody, she does not satisfy the statutory definition of *de facto custodian*).

15. Robson, *supra* note 13, at 22-23. In *Kellogg v. Kellogg*, the court addresses the issue of standing for a person who assumes parental responsibilities without engaging in a formal adoption. 646 A.2d 1246 (Pa. Super. Ct. 1994). The Superior Court of Pennsylvania, for example, relied upon the notion of *in loco parentis* to hold that "[s]tanding will be found where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent." *S.A. v. C.G.R.*, 856 A.2d 1248, 1250 (Pa. Super Ct. 2004). The Supreme Court of Washington granted standing to a lesbian nonlegal parent under the doctrine of "*de facto parent*," which recognizes the parental interests of an individual as long as she proves the existence of a parent-like relationship and that the relationship was formed with the consent and encouragement of the legal parent. *Carvin v. Britain*, 122 P.3d 161, 167-68 n.7 (Wash. 2005). A triggering factor, like the legal parent's denial of visitation, must also occur before the state will recognize a third party as a *de facto parent*. See *id.* at 165 (quoting *Carvin v. Britain*, 89 P.3d 271, 278 (Wash. App. 2004)). The third and final means for granting standing arises under the concept of *psychological parenting*, which is the method the Supreme Court of West Virginia employed to resolve a child custody dispute between lesbian partners. The court defined the most important components of a *psychological parent* as

the formation of a significant relationship between a child and an adult . . . a substantial temporal duration of the relationship; the adult's assumption of caretaking duties for and provision of emotional and financial support to the child; and, most importantly, the fostering and encouragement of, and consent to, such relationship by the child's legal parent or guardian.

Tina B. v. Paul S., 619 S.E.2d 138, 156 (W. Va. 2005). Jurisdictions interchangeably and inconsistently apply these three related yet distinct terms. Detailed explanation of the acute differences among the concepts reaches beyond the scope of this Article. For clarification on this issue, see *Carvin*, 122 P.3d at 167-68 n.7.

Permitting the nonlegal mother to bring child custody claims into the courtroom does not guarantee that her rights as a parent are weighed equally against those of her former partner. Despite the recent surge of lesbian motherhood, popularly referred to as the “gayby boom,”¹⁶ courts have not understood lesbian motherhood adequately, thereby failing to provide suitable remedies to sparring partners and their children. The legal doctrines upon which courts rely when deciding child custody battles derive from models of heterosexual marriage and reflect patriarchal viewpoints of parenthood.¹⁷ Even the “best interest of the child” standard, a supposedly gender-neutral paradigm that presently pervades the child welfare field, harbors the vestiges of those problematic models.¹⁸ Applying these doctrines to lesbian families has provoked a variety of reactions from the courts, ranging from open hostility to lesbian motherhood to well-intentioned attempts at squeezing lesbian relationships into the mold of heterosexual marriage.¹⁹ In the words of William Rubenstein, a gay and lesbian legal scholar, “the governing legal regime offers [the family judge] limited guidance,” leading courts to “force the queer peg into the square hole, to apply to the gay family the structure of heterosexual family law.”²⁰ As a result, “each family judge is pioneering her own course” when confronted with cases like those that faced the California Supreme Court.²¹

The combination of the surging gayby boom with an anachronistic judicial system that has yet to recognize fully lesbians’ legal rights has forced lesbian families and the lesbian rights movement to reach a crossroads. As evidenced by the three cases that stood before the California Supreme Court, some lesbians exploit the current state of the law to deprive their former partners of custody of the children that they chose jointly to raise. Watching members of our own community use the laws against us in such a way not only betrays us in the moment, but also sets terrible precedents for future lesbian rights struggles.²² As the

16. According to The Word Spy, available at <http://www.wordspy.com/words/gaybyboom.asp>, the earliest citation of the term occurred in an article about lesbian and gay Americans. See Eloise Salholz, *The Future of Gay America*, NEWSWEEK, Mar. 12, 1990, at 22.

17. See *infra* Part III.

18. *Id.*

19. See cases cited *supra* note 4.

20. William B. Rubenstein, *Divided We Propagate: An Introduction To Protecting Families: Standards for Child Custody in Same-Sex Relationships*, 10 UCLA WOMEN’S L.J. 143, 144-45 (1999).

21. *Id.* at 144.

22. See *id.* at 147. Throughout this Article, I make references to the “lesbian community,” but I acknowledge that no such monolithic community exists. I recognize and honor the fact that lesbians span a wide array of races, ethnicities, religions, abilities, classes, places of

lawyers at Gay & Lesbian Advocates and Defenders assert, “it is improper and unethical to appeal to anti-gay laws or sentiments [because] [i]ndividuals should not use the fact that gay and lesbian relationships are not recognized under current law to gain some advantage.”²³ Nevertheless, members of our lesbian and legal communities are doing just that, and they will continue to do so unless an alternative arises.

Due to the legal system’s failure to recognize and understand lesbian-headed households, I propose an alternative framework for settling child custody disputes among dissolved lesbian relationships. Working from a lesbian legal theoretical standpoint, which prioritizes lesbians and their concerns, I suggest a model of mediation that stems from and is supported by the lesbian community.²⁴ Although courts may refer disputing parties to this mediation and perhaps participate in the training of mediators, my model stands separately from the official judicial system. Such a separation is necessary in order to break away from the problematic child welfare doctrines and embody a uniquely lesbian perspective. I build my model upon the values that characterize lesbian motherhood, including warmth, equality, community, and tolerance. Although my proposal does little to expand the formal judiciary’s paltry accommodation of lesbian families, I believe that it represents a feasible and vital means for the lesbian community to cease setting dangerous legal precedents, which it currently does by denying “the very relationships for which we are seeking legal and societal respect”²⁵ in order to receive sole custody.

I recognize that, as a practical matter, some women may disregard my model and choose to litigate in court if it will benefit them directly.²⁶ As Professors Robert H. Mnookin and Lewis Kornhauser impart in their seminal article, *Bargaining in the Shadow of the Law: The Case of Divorce*, the legal landscape that exists outside the mediation room

origin, and numerous other identifying factors. For the purposes of this project, I intend the phrase “lesbian community” to symbolize the hundreds of diverse groups of lesbians who have formed and defined their own communities. Other lesbian legal theorists have made similar decisions in their works. See Ruthann Robson, *Resisting the Family: Repositioning Lesbians in Legal Theory*, 19 SIGNS 975, 976 n.4 (1994); Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN’S L.J. 17, 18 n.5 (1999).

23. Gay & Lesbian Advocates & Defenders, *Protecting Families: Standards for Child Custody in Same-Sex Relationships*, 10 UCLA WOMEN’S L.J. 151, 161 (1999).

24. See *infra* Part II; see also RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992).

25. Gay & Lesbian Advocates & Defenders, *supra* note 23, at 154.

26. Special thanks to Judah Garber for bringing this to my attention. Interview with Judah Garber, Friend of the Court, Washtenaw County Courthouse, in Ann Arbor, Mich. (Oct. 24, 2005).

greatly shapes and influences the mediation itself.²⁷ They explain that “the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips.”²⁸ In other words, the legal rules that govern child custody issues “give each parent certain claims based on what each would get if the case went to trial,” so “neither spouse would ever consent to a division that left . . . her worse off than if . . . she insisted on going to court.”²⁹ Indeed, this is exactly what we see in the current legal landscape as women who are recognized as legal parents do go to court and employ the laws that are skewed in their favor to deny their former partners parental rights.³⁰

Thus, I present this project as a plea to lesbian parents everywhere: respect ourselves, our families, and our communities by refusing to employ the laws against one another. I encourage us to stop setting poor precedents that will endanger legal recognition of our families for years to come. The stakes are high for us and our families, and we will never gain the full civil rights that we deserve if we allow this kind of litigation to continue to hinder us.³¹ By turning to a framework that is created by and specifically for lesbian mothers, we strengthen ourselves individually and communally because we own and command the dispute resolution process. We resist outsiders from defining and judging our families. Such a community-based mechanism is beneficial to all those who value lesbian-led households, including mothers who choose to leave the lesbian community and nonlesbians who support lesbian motherhood generally.

Part II of this Article describes lesbian legal theory and contextualizes my project within its goals. Part III examines the development of the legal doctrines that courts apply to child custody disputes and illustrates that lesbian families are not represented by such regimes. Part IV demonstrates how courts’ applications of these laws harm lesbian mothers by constructing an identity of lesbian motherhood that mimics heterosexual motherhood. Part V surveys the limited social

27. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

28. *Id.* at 968.

29. *Id.* at 969.

30. *See supra* text accompanying notes 3-11.

31. At the time of writing this Article, five states had banned adoption and/or foster parenting by gay couples and individuals (Florida, Mississippi, Nebraska, Oklahoma, and Utah). Ballot measures to amend states’ constitutions and enact similar bans are expected in a dozen more states over the next two years. *See* National Gay and Lesbian Task Force, Parenting by LGBT People, <http://www.thetaskforce.org/theissues/issue.cfm?issueID=30> (last visited Oct 24, 2006). *See generally* National Gay and Lesbian Task Force Home Page, <http://www.thetaskforce.org> (last visited Oct. 24, 2006).

science research that pertains to lesbian motherhood and extracts the values that characterize lesbian-headed households. Part VI combines those values with lesbian legal theory in order to create an alternative framework, a model of mediation that grows from and is supported by the local lesbian community, for lesbian partners to determine jointly their parental rights and responsibilities.

II. LESBIAN LEGAL THEORY INSPIRES AND PROPELS THIS PROJECT

My desire to create a mediation model specific to child custody disputes between lesbian partners stems from my admiration for lesbian legal theory and my hope to promote its growth as a form of legal examination. Lesbian legal theory represents a jurisprudence that places lesbians at the center of its analysis.³² Traditional laws and legal doctrines render lesbians invisible, and even feminist or queer legal theories subsume or minimize lesbian concerns.³³ Lesbian legal theory, on the other hand, focuses first and foremost on lesbian survival, and my project is a concrete exercise in that goal.³⁴

Ruthann Robson is widely regarded as the founder and prominent voice of lesbian legal theory. She defines the theory as that which “puts lesbians at the center of analysis, rather than women or gay men and lesbians generally.”³⁵ Doing so entails scrutinizing the laws that affect lesbians from both individualistic and communitarian lesbian perspectives, as described below.³⁶ The central purpose of such an examination is lesbian survival, as one questions whether a particular law or policy promotes or impedes the livelihoods of lesbians.³⁷

Robson views lesbian survival as having two potentially contradictory dimensions.³⁸ The first comprises the daily, individual survival that depends on food, shelter, and love, whereas the second represents a collective survival that relies on identity as lesbians.³⁹ As a Robson protégée, Julie Shapiro, describes, “in order to maintain a job or apartment, avoid physical violence, or continue contact with her children,

32. See Shapiro, *supra* note 22, at 18.

33. See Theresa Raffaele Jefferson, Note, *Toward a Black Lesbian Jurisprudence*, 18 B.C. THIRD WORLD L.J. 263, 268 (1998).

34. See Shapiro, *supra* note 22, at 18.

35. *Id.*

36. See Mary Eaton, *At the Intersection of Gender and Sexual Orientation: Toward Lesbian Jurisprudence*, 3 S. CAL. REV. L. & WOMEN'S STUD. 183, 194 (Spring 1994).

37. See ROBSON, *supra* note 24, at 17.

38. See Shapiro, *supra* note 22, at 18.

39. See *id.* at 18-19.

a lesbian might remain closeted.”⁴⁰ However, such a strategy for individual survival harms collective survival, as presenting oneself as heterosexual “would not advance the survival of any form of lesbian community.”⁴¹ Lesbian legal theory, therefore, must question if existing legal constructions are advancing or encumbering lesbians’ survival, both as individuals and as a collective group.

By focusing on lesbian survival, lesbian legal theory views the operation of law with suspicious eyes.⁴² The “theory does not demand that lesbians reject the use of law, but it teaches . . . that lesbians must use the law cautiously and maintain a critical stance.”⁴³ Shapiro notes, “Law has been a tool for the repression of lesbian existence more often than it has been a tool for lesbian liberation,” as evidenced by the U.S. military’s “don’t ask/don’t tell” policy and the absence of recognition for lesbian relationships.⁴⁴ Perhaps even more telling of the law’s repression of lesbians is its blatant denial of lesbianism: whereas antisodomy statutes criminalized male homosexual acts for decades, sexual acts between women were rarely acknowledged by the law.⁴⁵ The absence of lesbianism in criminal law “should not be interpreted as a reflection of greater tolerance of lesbianism, but rather of the inherent sexism of lawmakers and their failure to understand female sexuality.”⁴⁶ Lesbian legal theory attempts to limit the power of traditional and patriarchal legal contexts, but it does not seek to replace those regimes completely. In other words, “lesbian jurisprudence does not aspire to paradigmatic status [The] theory makes no attempt to install itself as a total, objective, and authoritative account of the relationship between law and society.”⁴⁷

Since Robson’s breakthrough works on lesbian legal theory in the early 1990s, very few scholars have accepted her call to practice and to develop it further. Those interested in a sexuality jurisprudence have turned to queer legal theory instead, but its “primary danger . . . is that gay male androsexism could marginalize lesbian voices, experiences, and

40. *Id.* at 19.

41. *Id.*

42. *See id.*

43. *Id.*

44. *Id.*

45. For more information on the law’s blindness towards lesbianism, *see generally* Nadine Gartner, *Articulating Lesbian Human Rights: The Creation of a Convention on the Elimination of All Forms of Discrimination Against Lesbians*, 14 U.C.L.A. WOMEN’S L.J. 61 (2005).

46. Julie Dorf & Gloria Careaga Pérez, *Discrimination and the Tolerance of Difference: International Lesbian Human Rights*, in WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 324, 328 (Julie Peters & Andrea Wolper eds., 1995).

47. Eaton, *supra* note 36, at 193.

interests in the same way(s) that society generally has subordinated the female to the male.”⁴⁸ Mary Eaton, one of the few scholars of lesbian legal theory, notes this danger, stating that “[l]esbians most often find themselves grouped somewhat indiscriminately with other ‘others’ under legal-theoretical paradigms of various and often discordant sorts.”⁴⁹ Indeed, some scholars attempt to lump lesbian legal theory with feminist legal theory, but doing so gravely mischaracterizes the lesbian perspective. Feminist jurisprudence has been crafted primarily from the viewpoint of heterosexual women, and “the introduction of lesbian feminist thought into legal feminism has been very slow.”⁵⁰ Whereas the essential exercise of feminist legal theory “is comparing women to men and achieving equality with them on their terms,” lesbian jurisprudence presents a different aim and method: “[i]f lesbians are women-identified women, then measurements are not relative to men; men’s measurements are in some sense irrelevant.”⁵¹ Without adequate representation in either queer or feminist legal theory, lesbians and their allies must promote a uniquely lesbian jurisprudence.

The practice of lesbian legal theory is essential to lesbian survival, so theorists must inquire whether legal constructions are doing justice to lesbians, both as individuals and as a collective group. I aim to participate in that inquiry by examining the problematic child custody doctrines that courts impose upon lesbian partners. I view this paper as a concrete application of lesbian legal theory, an exercise that I hope will prove useful not only to other lesbian legal theorists, but also to lesbian mothers and others concerned about the well-being of lesbian communities. I create my mediation model specifically with lesbian-led families in mind; it is not intended to apply to other family structures, although it may inspire others to embark upon similar projects for their own cultural communities.

III. LESBIAN FAMILIES ARE NOT WELL SERVED BY EXISTING CHILD CUSTODY DOCTRINES

The legal doctrines that courts use presently when settling child custody disputes stem from models of heterosexual marriage and

48. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 11, 356 (1995).

49. Eaton, *supra* note 36, at 184.

50. *Id.* at 188.

51. *Id.* at 194 (citing Ruthann Robson, *Lesbian Jurisprudence?*, 8 LAW & INEQ. 443, 449 (1990)).

embody stark gender biases that do not translate when applied to lesbian couples. The doctrines have shifted over time, from the patriarchal notion of a father's absolute rights to a gender bias in favor of the mother, and led to the creation of "the best interest of the child" standard.⁵² Despite feminists' and child advocates' efforts to make that standard gender neutral, it still reflects the discriminatory vestiges of the preceding doctrines. The vagueness of that standard gives judges tremendous leeway to insert their own preferences for the biological parent and prejudices against lesbian families.

Heterosexual marriage represents the foundation from which the law recognizes individuals as parents. In the words of family law professor Kath O'Donnell, marriage "provides the basic framework for the allocation of the legal status of parenthood."⁵³ Historically, marriage as an indicator of parenthood preceded any other potential factor, as the "law's emphasis on the formal link and status of parenthood was essentially secondary to and derived from the formal relationship of marriage."⁵⁴ The centrality of marriage in determining legal parenthood has shifted over the last century towards recognizing "the nature and quality of a given relationship between adult and child," but it heavily influenced the development of the child custody doctrines that led to the "best interest of the child" standard.⁵⁵ As a result, the laws regarding child custody are infused with heterosexism, because "the heterosexual imperative in law reiterates and imposes 'norms' that make up the idea of 'parent.'"⁵⁶

Heterosexism pervades the early development of child custody law by constructing strict gender norms for parents and basing custody awards upon those biases. Marriage originally signified the transfer of property (the wife) from one man (the wife's father) to another (her husband), so the law first recognized the father's absolute rights in receiving full custody on the sole basis of property rights.⁵⁷ Lesbian legal theorist Ruthann Robson notes that "the father had an absolute right to sole custody (of legitimate children), an obvious result given the man's

52. See ROBSON, *supra* note 24, at 130.

53. Kath O'Donnell, *Lesbian and Gay Families: Legal Perspectives*, in CHANGING FAMILY VALUES 77, 86 (Caroline Wright & Gill Jagger eds., 1999).

54. *Id.*

55. *Id.*

56. Sarah Beresford, *The Lesbian Mother: Questions of Gender and Sexual Identity*, in LEGAL QUEERIES: LESBIAN, GAY AND TRANSGENDER LEGAL STUDIES 57, 61 (Leslie J. Moran, Daniel Monk & Sarah Beresford eds., 1998).

57. See ROBSON, *supra* note 24, at 130.

ownership of both the wife and the children.”⁵⁸ Courts also favored fathers simply on the grounds that they could provide greater economic support, a completely unjust reason considering that women’s career options and wages were limited. In the early twentieth century, courts moved away from the notion of the father’s absolute rights and toward the tender years doctrine, which favored placing young children with their mothers.⁵⁹ This belief system “gave the mother a presumption of custody unless the father could prove the mother was unfit.”⁶⁰ Justification for the doctrine stemmed from essentialist notions of womanhood: “[m]other love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother’s care even more than a father’s.”⁶¹

In response to the second wave feminist movement,⁶² facially gender neutral legal doctrines emerged. The first comprised the primary caretaker presumption, which awarded custody to the parent who met the definitional requirements of a primary caretaker.⁶³ Such criteria consisted of who prepared and planned meals, bathed, groomed, and dressed the child, and transported the child to school and extracurricular activities, tasks that most likely fell upon the mother.⁶⁴ As a result, although the primary caretaker presumption was developed as a gender neutral alternative to the tender years doctrine, the same gender bias in favor of the mother often prevailed.⁶⁵ Realizing this problem, child advocates promoted a second alternative, the “best interest of the child” standard. The primary caretaker presumption was then subsumed into calculating the “best interest,” as one factor of many to be evaluated by the trial court in determining with whom the child should reside.⁶⁶

The “best interest of the child” standard, the dominating doctrine in child welfare law today, represents a facially gender neutral rule for

58. *Id.*

59. See JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 445 (2001).

60. ROBSON, *supra* note 24, at 130.

61. *Freeland v. Freeland*, 159 P. 698, 699 (Wash. 1916).

62. “Second-wave feminism refers to a period of feminist thought that originated around the 1960s and was mainly concerned with independence and greater political action to improve women’s rights.” It followed the first wave, which was the feminist movement in the nineteenth and early twentieth centuries, primarily focusing on gaining the right of women’s suffrage. See University of Montana Women’s Center, http://www.umt.edu/wcenter/derault_files/Page862.htm (last visited Oct. 10, 2006).

63. See GREGORY ET AL., *supra* note 59, at 449.

64. See *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981).

65. See GREGORY ET AL., *supra* note 59, at 448-49.

66. See *Wolf v. Wolf*, 474 N.W.2d 257, 258 (N.D. 1991) (“[T]he primary caretaker factor is not a presumptive rule but only one of the many considerations to be evaluated by the trial court in making its finding as to the best interests of the child.”).

courts to apply in child custody disputes.⁶⁷ The “rule supposedly allows the parents to start off in equal positions” so that the court “then applies numerous factors depending upon the particular state statute or case law in order to weigh the relative merits of the parents.”⁶⁸ Some state statutes neglect to denote any factors;⁶⁹ others provide detailed descriptions, including items such as the preference of the child, interactions with parents and siblings, potential permanence as a family unit, parents’ capacities to give love and guidance, and the child’s cultural background.⁷⁰ Despite delineating such specificities, “much must be left to the discretion of the trial court. Some statutory criteria will weigh more in one case and less in another.”⁷¹ The test, therefore, “often is applied as if it is the best-interest-of-the-state test, especially when judges reason that it is in the best interests of a child to grow up in a conventional state-approved family.”⁷²

By giving judges wide discretion to insert their own homophobia and other prejudices, the “best interest of the child” standard does not serve lesbian households. Professor O’Donnell observes that lesbian families “present more of a challenge for this new approach [best interest of the child] to relationships with children than other forms of family diversity, because they are so clearly removed from the norm of the heterosexual ideal.”⁷³ The first cases that applied this standard to lesbian motherhood involved mothers in heterosexual relationships who bore children and later came out as lesbian.⁷⁴ Robson classifies courts’ responses to these cases in one of three ways: first, ruling that living with a lesbian mother can never be in the best interests of the child; second, holding that living with a lesbian mother can be in the child’s best interests so long as the mother does not “flaunt[] her lesbianism,” live with a lover, or engage in lesbian politics; or, third, applying a nexus test “to determine whether the mother’s lesbianism actually harms the

67. ROBSON, *supra* note 24, at 130.

68. *Id.*

69. See ARK. CODE ANN. § 9-13-101 (1987) (providing that custody award “shall be made without regard to the sex of a parent, but solely in accordance with the welfare and best interest of the child”).

70. See MINN. STAT. ANN. § 518.17 (West 1990) (listing twelve different factors, ranging from the wishes of the parents to the child’s cultural background).

71. Maxfield v. Maxfield, 452 N.W.2d 219, 223 (Minn. 1990).

72. ROBSON, *supra* note 24, at 130.

73. O’Donnell, *supra* note 53, at 87.

74. See, e.g., White v. Thompson, 569 So. 2d 1181 (Miss. 1990) (granting custody to the paternal grandparents because the father is an alcoholic and the mother a lesbian); T.C.H. v. K.M.H., 784 S.W.2d 281 (Mo. Ct. App. 1989) (“[A] parent’s homosexuality ‘can never be kept private enough to be a neutral factor in the development of a child’s values and character.’” (quoting G.A. v. D.A., 745 S.W.2d 726, 728 (Mo. App. 1987))).

child.”⁷⁵ Harms that these courts derived from being raised by a lesbian mother comprised molestation, the development of a gay or lesbian identity in the child, society’s stigmatization of the child, and living in an immoral and illegal environment.⁷⁶ Although some courts have found that a mother’s lesbianism does not harm the child, O’Donnell asserts that “in general a presumption has operated that a lesbian mother is implicitly an unfit mother.”⁷⁷

Some courts may transfer this homophobia to cases involving two lesbian mothers, even though there is no option of granting custody to a heterosexual parent. In these cases, the major issue is “whether the court will recognize that the child has two lesbian mothers,” a difficult task for most courts because “[m]any judges deciding lesbian-mother family dissolution cases do not have experience with or knowledge about life growing up with lesbian mothers.”⁷⁸ Such ignorance may lead the court to deny custody to one mother simply because it is “uncomfortable with lesbian families [and] could easily find that the child’s best interests are adequately satisfied by one mother rather than two.”⁷⁹ Even when the parties present evidence that lesbian and gay parenting is no more harmful than heterosexual parenting, “it tends to be disregarded or is outweighed by a judicial preference for other factors involved in the child’s welfare.”⁸⁰ Some courts may mask their surreptitious antilesbian biases by making “the parent’s sexual orientation relevant to the decision, while at the same time declaring it to be irrelevant.”⁸¹ The “best interest of the child” standard enables such inconspicuous maneuvering because it gives judges wide discretion to insert their preferences. A judge may first declare that “the mother’s lesbianism is not an automatic disqualification of her claims to care for her children” and then contradict herself “by a clear preference expressed for placing the child in a ‘normal’ environment.”⁸² A “normal environment” emerges as that with a feminine-appearing mother who does not publicly declare her sexuality.⁸³

75. ROBSON, *supra* note 24, at 130-31.

76. *See id.* at 131.

77. O’Donnell, *supra* note 53, at 90; *see, e.g.*, S.N.E. v. R.L.B., 699 P.2d 875, 878-79 (Alaska 1985); Doe v. Doe, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983); M.P. v. S.P., 404 A.2d 1256, 1259-60 (N.J. 1979); Guinan v. Guinan, 102 A.D.2d 963, 964 (N.Y. 1984); Stronman v. Williams, 353 S.E.2d 704, 705-06 (S.C. Ct. App. 1987).

78. Polikoff, *supra* note 3, at 544.

79. Carmel B. Sella, *When a Mother Is a Legal Stranger to Her Child: The Law’s Challenge to the Lesbian Nonbiological Mother*, 1 UCLA WOMEN’S L.J. 135, 160 (1991).

80. O’Donnell, *supra* note 53, at 89.

81. *Id.* at 90.

82. *Id.*

83. *See* discussion *infra* Part IV.

Such prejudice forces lesbian mothers “to render themselves and their sexuality invisible in the legal process,” which damages their identities as mothers and lesbians.⁸⁴

The “best interest of the child” standard fails lesbian families because it derives from a heterosexual model and gives judges wide discretion to insert antilesbian biases into their final judgments. When courts apply this standard, they commit additional harm by constructing a narrow identity of what constitutes an acceptable lesbian mother, thereby abolishing these women’s autonomy to define themselves and their families.

IV. CONSTRUCTION OF IDENTITY BY COURTS HARMS LESBIAN MOTHERS

The ways that some courts interpret “the best interest of the child” standard greatly damages lesbian mothers because it reconstructs their identities. By deviating from the heterosexual family unit, lesbian mothers challenge patriarchy and traditional notions of motherhood. A number of courts have grappled with that challenge by delineating categories of “good” and “bad” lesbian mothers, pitting feminine and private lesbians against butch and public ones, and rewarding the former with custody.⁸⁵ Such practices encourage lesbian mothers to alter their appearances and public behavior in order to present themselves as nonthreatening to some courts’ “traditional ideology of family life [which] promotes the privileged position of heterosexual relationships within society.”⁸⁶ By promoting an identity of lesbian motherhood that mimics that of heterosexual motherhood, these courts rob lesbian mothers of their autonomy and thwart their efforts to create a viable alternative to the heterosexual, two-parent household.

Lesbian mothers challenge patriarchy by deviating from the heterosexual, two-parent norm and creating a matriarchal lineage. Professor Margaret Randall, a writer and lesbian mother herself, notes that “the lesbian mother represents the most frightening of Others: a woman who does not need a man to make her feel complete, and who disregards convention to the extent that she would bring a child into such an abnormal family configuration.”⁸⁷ Combining mothering, “the sublime and sacred reason for every woman’s existence,” with lesbianism, “the essence of deviance,” radically challenges the patriarchy

84. O’Donnell, *supra* note 53, at 89.

85. See Beresford, *supra* note 56, at 62.

86. O’Donnell, *supra* note 53, at 78.

87. RANDALL, *supra* note 1, at 91.

that permeates single family units and greater society because “no other identity so visibly rejects the male-controlling-female equation through which patriarchy holds onto power.”⁸⁸ Defeating patriarchal lineage is one such rejection. Cheryl Muzio describes, “The threat that lesbian mothers represent to this patriarchal rule of the father is self-evident in that they circumvent the traditional genealogical order. . . . It is not that children born to lesbians do not have biological fathers; it is that they do not belong to them in the same way children born to a heterosexual couple ‘belong’ to their fathers.”⁸⁹ Indeed, as “the children born to lesbian families tend to carry the surnames of one or both of their mothers,” the “traditional patriarchally based genealogy” becomes impossible, requiring “new kinds of language, new systems of nomenclature, new relations of social and economic exchange . . . a complete reorganization of the social order.”⁹⁰

Some courts have responded to lesbians’ threats to the existing social order by rewarding those mothers who conform to gender norms and hide their sexuality. Scholar Susan S.M. Edwards states that “[l]esbianism has been considered as axiomatically antipathetical to the interests of the child and incongruous with the construction of motherhood,” so “the more a lesbian conforms to the pre-existing legal attributes conventionally associated with the construction of ‘woman’, the more likely she is to be successful” in custody cases.⁹¹ Indeed, certain lawyers advise their lesbian clients to wear skirts and makeup in the courtroom because a more feminine appearance “presents a ‘lesser’ threat to the dominant male ideology than [butch].”⁹² Such gender performance also conforms to these courts’ usual (heterosexual) expectations of mothers, as “the ‘feminine lesbian’ body physically presents herself as visibly little different from her heterosexual counterpart.”⁹³ Deviations from these gender norms may trigger judicial determinations “that a particular lesbian is not within the category of

88. *Id.*

89. Cheryl Muzio, *Lesbian Co-Parenting: On Being/Being with the Invisible (M)Other*, in *LESBIANS AND LESBIAN FAMILIES* 197, 198 (Joan Laird ed., 1999).

90. *Id.* (citing ELIZABETH GROSZ, *SEXUAL SUBVERSIONS* (1989)).

91. SUSAN S.M. EDWARDS, *SEX AND GENDER IN THE LEGAL PROCESS* 69 (1996); Beresford, *supra* note 56, at 61. The secondary sources that I cite in this Part arrive at their conclusions via close readings of judicial opinions and interviews with the lawyers and parties to such proceedings. See generally EDWARDS, *supra*; Beresford, *supra* note 56, at 61; ROBSON, *supra* note 24.

92. Beresford, *supra* note 56, at 62.

93. *Id.*

mother as the law defines it," thereby justifying denial of custody to such lesbians.⁹⁴

In addition to differentiating between feminine and butch women, a number of courts further construct identities of lesbian motherhood by distinguishing between "public" and "private" lesbians. Public lesbians are those who openly express their sexuality, from holding a lover's hand on the street to participating in a lesbian rights rally.⁹⁵ Private lesbians, on the other hand, remain silent about their sexuality by not publicly acknowledging their lovers or engaging in political or social activities.⁹⁶ For example, one judge in the United Kingdom drew a distinction between "lesbians who are private persons who [] do not believe in advertising their lesbianism" and "militant lesbians who try to convert others to their way of life."⁹⁷ He ultimately praised the private lesbian and granted her custody, while regarding the public lesbian with suspicion.⁹⁸

By creating and delineating categories of "good" and "bad" lesbian mothers, courts may deprive women of the autonomy to construct their own identities. Lesbians are forced to alter their appearances, public behavior, and their political activities in order to present themselves to the court as acceptable mothers. Denying these women the freedom to be themselves creates and perpetuates a sense of shame for the entire family, as the children learn that fighting for lesbian rights or being affectionate with a same-sex partner is detrimental in the eyes of the legal system. This judicial construction of identity also reinforces essentialist notions of mothers as feminine and tied to the privacy of the home, as opposed to playing an active role in the public sphere. Such traditional views towards motherhood damage not only lesbian mothers, but all those who do not follow gender norms and roles strictly, including heterosexual working and single mothers.

Encouraging lesbian mothers to pattern themselves after heterosexual families also depletes the potentially revolutionary effects that lesbian motherhood presents. By challenging patriarchy and the existing social order in such fundamental ways, lesbian mothers have the opportunity to imagine a more egalitarian future and to be the harbingers for dramatic social change. As Professor Randall states, the lesbian family "model is different, and that's a start. Children who grow up

94. ROBSON, *supra* note 24, at 129.

95. *See* Beresford, *supra* note 56, at 62.

96. *See id.*

97. *B v. B*, [1990] 1 Fam. 402, 410 (U.K.); *see* Beresford, *supra* note 56, at 62.

98. Beresford, *supra* note 56, at 62; *see B*, [1990] 1 Fam. at 410.

experiencing love and caring from women, or women who do not reflect the prescribed norm, are also more open to other deviations from that norm . . . [and] teachers and other students are also forced to look at the woman-centered home as a possible option, thus broadening their horizons as well.”⁹⁹ Diversifying the ways in which individuals configure their families and greater communities could truly revolutionize society by moving away from current patriarchal structures and towards more favorable alternatives.

Lesbian mothers must have the autonomy to control the dissolution of their families so that they may reclaim their identities and open others’ minds about viable alternatives to traditional, familial structures. The vehicle for navigating the dissolution process must honor lesbian motherhood by reflecting its values. In order to understand what those values encompass, we must first examine lesbian-led families and extract the principles that characterize their households.

V. LESBIAN HOUSEHOLDS COMPRISE WARMTH, EQUALITY, COMMUNITY, AND TOLERANCE

As a result of the surging “gayby boom,” psychologists and sociologists have begun researching and surveying lesbian-led households in order to delineate the similarities to and differences from heterosexual families. The very first studies transpired in response to child custody cases among lesbian mothers and their former heterosexual partners.¹⁰⁰ Courts had refused to give custody to the lesbian mother, finding that it was not in the best interest of the child because

the children would be teased and ostracized by their peers and would develop emotional and behavioral problems as a result, and also that they would show atypical gender development (i.e., that boys would be less masculine in their identity and behavior, and girls less feminine, than their counterparts from heterosexual homes).¹⁰¹

The research focuses specifically on these issues and finds no evidence of gender identity confusion, differences in gender performances, or a higher likelihood of psychological disorders.¹⁰² Concluding that “growing up in a lesbian family has not had an adverse effect on [the

99. RANDALL, *supra* note 1, at 103.

100. See Susan Golombok, *New Family Forms: Children Raised in Solo Mother Families, Lesbian Mother Families, and in Families Created by Assisted Reproduction*, in CHILD PSYCHOLOGY: A HANDBOOK OF CONTEMPORARY ISSUES 429, 435 (Lawrence Balter & Catherine S. Tamis-LeMonda eds., 1999).

101. *Id.* at 435-36.

102. See *id.* at 439.

children's] social, emotional, or gender development," the studies observe that lesbian-led households comprise warmth, equality, community, and tolerance.¹⁰³

My purpose in researching and presenting the following social science data on lesbian-led households is twofold. First, I want to differentiate our families from those led by heterosexual couples in order to underscore the need for a different dispute resolution mechanism. Lesbian mothers, by their very existence, challenge sexual and gender norms.¹⁰⁴ As two women who are subjected to both gender and sexual orientation discrimination in the outside world and yet actively choose to raise a child, lesbian mothers may have a different outlook on parenthood. This is not to say that lesbian mothers are better than any other kind of parent, but as the research below demonstrates, children of lesbian parents are as well adjusted as their peers from heterosexual coupled and single households. Secondly, I study lesbian-led households because I want to distill the values that most strongly characterize our families. In my goal to create an alternative dispute resolution that accurately reflects lesbian family values, I must first discern exactly what those values comprise. Of course, just as it is impossible to define a monolithic lesbian community, there is no single lesbian family that represents all lesbian families.¹⁰⁵ The sociological research that I impart does not claim to speak for every pair of lesbian mothers; rather, it reports the patterns that emerge from a close investigation of a number of lesbian-led homes.

Social science research on lesbian-led families suggests that lesbian mothers are extremely warm and engaged in their children's lives, even more so than mothers in heterosexual, two-parent households. One of the most widely cited studies, led by Golombok, Tasker, and Murray, compares families led by lesbian mothers, heterosexual, single mothers, and two-parent heterosexuals.¹⁰⁶ The researchers discover that "the mothers in fatherless families show[] greater warmth with their children, and interacted more with them, than did the mothers in the two-parent heterosexual families."¹⁰⁷ They also determine that "[t]he children without fathers [are] also more likely to be securely attached to their

103. *Id.*

104. *See supra* Part III.

105. *See* discussion *supra* note 22.

106. *See* Susan Golombok, Fiona Tasker & Claire Murray, *Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers*, 38 J. CHILD PSYCHOL. & PSYCHIATRY 783 (1997).

107. SUZANNE M. JOHNSON & ELIZABETH O'CONNOR, *THE GAY BABY BOOM: THE PSYCHOLOGY OF GAY PARENTHOOD* 59 (2002).

mothers.”¹⁰⁸ Psychologists Suzanne M. Johnson and Elizabeth O’Connor believe that fostering that attachment is integral to being a good mother, as “[t]here is a large body of research that supports the notion that the quality of children’s early attachment to their parents is related to their subsequent emotional and social development.”¹⁰⁹

Related to this increased warmth is lesbian mothers’ discouragement of negative disciplinary techniques. Johnson and O’Connor discovered in their own surveys of lesbian families that every participant reported “quite low levels of use” of spanking, angry yelling, and withdrawing privileges.¹¹⁰ The minimal use of physical punishment starkly contrasts from that of heterosexuals: “The low rates of corporal punishment are remarkable in that they differ so much from the rates reported by heterosexual parents.”¹¹¹ The researchers find that lesbian mothers use authoritative parenting, meaning that they “rely on methods that are more respectful of the child, such as reasoning and discussing,” which “helps the child assume an increasing amount of control and responsibility for his own behavior.”¹¹² Such methods foster a warmer and more loving environment, as authoritative parents “are more attentive to their children, use more explanations and reasoning with them, and are more warm and affectionate toward their children.”¹¹³

Lesbian-led families are also characterized by a great sense of equality, one that can exceed that of heterosexual families. One aspect of good parenting is “a relatively egalitarian approach to dividing up the family work roles,”¹¹⁴ and lesbian mothers tend to follow that approach much more frequently than heterosexuals. The Golombok study finds that “household and child-rearing responsibilities are shared more evenly in lesbian couples than in heterosexual couples,”¹¹⁵ and Johnson and O’Connor’s surveys illustrate that “[i]n almost all cases, [lesbian mothers] are equally involved in childcare or one partner does only slightly more than the other.”¹¹⁶ These findings are underscored by two other studies, one determining that “the majority of lesbian couples with children . . . apportioned their employment, childcare, and household

108. *Id.*

109. *Id.* at 12.

110. *Id.* at 165.

111. *Id.* at 166.

112. *Id.* at 167; *id.* at 16.

113. *Id.* at 167 (citation omitted).

114. *Id.* at 18-19.

115. *Id.* at 60.

116. *Id.* at 155.

work in an egalitarian manner,” and another showing that “lesbian couples generally divide tasks in a fairly egalitarian manner.”¹¹⁷

One of the strongest markers of lesbian families is the importance of community, including the partners’ own friends and family and the larger lesbian community in their town or city. A mother in the Johnson and O’Connor survey observes that “[o]ur child benefits from the lesbian community’s ethic of helping one another.”¹¹⁸ As women who may have been shunned by certain blood relatives or supposed friends for their lesbianism and decision to raise children, lesbian mothers have the luxury of creating their own, unique families. Social worker Betty Morningstar advocates that “the importance of community must be emphasized in every phase of the process of forming and evolving as a lesbian family.”¹¹⁹ Although all families can benefit from the support provided by individuals beyond the single family, she feels that “it is particularly important for lesbian families to have some degree of involvement with others like themselves, for purposes of validation, support, sharing of resources, political organization, creation of rituals, and belonging.”¹²⁰ Indeed, as one daughter raised by lesbian mothers expresses, the community of lesbian families represents “a culture that welcomes people who do not fit into other models,” and that once one identifies with such a culture, “you want to be a part of it.”¹²¹

Evidence of the importance of community to lesbian households materializes in the abundance of resources available to such families. In progressive geographic areas with sizeable lesbian populations, medical, social, psychological, and political support services are targeted to lesbian families.¹²² Less formal networks for lesbians and their children also emerge and revolve around “community building, educating school systems, effective parenting techniques, and social support for children.”¹²³ New family and community rituals have evolved from these support networks, including “families marching together in the annual lesbian/gay pride parade, a multicultural celebration of the winter holidays, or a gathering of lesbian families to celebrate Mother’s Day.”¹²⁴

117. *Id.* at 150 (citing Maureen Sullivan, *Rozzie & Harriet? Gender and Family Patterns of Lesbian Coparents*, 10 GENDER & SOC’Y 747 (1996)).

118. *Id.* at 131.

119. Betty Morningstar, *Lesbian Parents: Understanding Developmental Pathways*, in LESBIANS AND LESBIAN FAMILIES: REFLECTIONS ON THEORY AND PRACTICE 213, 236 (1999).

120. *Id.* at 236-37.

121. Interview with woman and her lesbian, nonlegal mother, in Ann Arbor, Mich. (Apr. 2, 2005).

122. See Morningstar, *supra* note 119, at 237.

123. *Id.*

124. *Id.*

Such benefits have sparked curiosity and even envy by the heterosexual community, as one lesbian mother remarks that “[s]traight families have been amazed by the level of community support we enjoy in raising our child.”¹²⁵

The most frequently cited values of lesbian families, even more so than warmth, equality, or community, are tolerance and diversity.¹²⁶ The notion of tolerance shines through these women’s parenting techniques, as Johnson and O’Connor find that they most want to instill in their children a sense of respect for others.¹²⁷ This may be the result of having “experience[d] discrimination and bigotry from other people, and . . . want[ing] to make sure that their children do not treat others that way.”¹²⁸ Indeed, many lesbian mothers believe that “their children would be more empathic and tolerant toward others, more open to different points of view, and more accepting of their own sexuality.”¹²⁹ Another study conducted in the United Kingdom arrives at a similar conclusion, finding that “the experience of growing up in a family that is perceived as ‘different’ would make their children more accepting of differences in others.”¹³⁰

However, lesbian families do not merely want to tolerate others’ differences but to celebrate that diversity as well. A project that takes a “longitudinal study of lesbian families” by tracing the families from pregnancy through infancy holds that “[n]early 90 percent of the mothers planned to enroll their children in educational programs that included children and teachers of diverse racial, cultural, and economic backgrounds.”¹³¹ Their reason for doing so is the belief “that exposing their children to diversity was the best way to inoculate them against homophobia.”¹³² In addition to racial, cultural, and economic diversity, lesbian mothers also expose their children to gender diversity, as “lesbian

125. JOHNSON & O’CONNOR, *supra* note 107, at 131.

126. *See id.* at 132.

127. *See id.* at 133.

128. *Id.*

129. *Id.* at 66.

130. *Id.* at 128 (citing Lisa Saffron, *Raising Children in an Age of Diversity: Advantages of Having a Lesbian Mother*, 2 J. LESBIAN STUD. 35 (1998)).

131. *Id.* at 62-63 (referring to Nanette Gartrell et al., *The National Lesbian Family Study: 1. Interviews with Prospective Mothers*, 66 AM. J. ORTHOPSYCHIATRY 272 (1996); Nanette Gartrell et al., *The National Lesbian Family Study: 2. Interviews with Mothers of Toddlers*, 69 AM. J. ORTHOPSYCHIATRY 362 (1999); Nanette Gartrell et al., *The National Lesbian Family Study: 3. Interviews with Mothers of Five-Year-Olds*, 70 AM. J. ORTHOPSYCHIATRY 542 (2000)).

132. *Id.* at 63.

mothers [make] greater efforts than heterosexual mothers to provide their children with contact with their fathers and with men in general.”¹³³

The values that characterize lesbian-led households—warmth, equality, community, and tolerance—also ought to inform and infuse the process for settling child custody disputes. Part VI presents an alternative dispute resolution that does just that by focusing on the above characteristics of lesbian motherhood and incorporating those values into its creation and mechanics. However, just like mainstream mediation models, my proposal also empowers the individual participants to sculpt their mediation sessions with their specific values. I advocate that the lesbian community’s values shape the broader structure of a mediation program but that immense flexibility exists for participants to make each individual session reflective of their own unique families.

VI. MODEL FOR SETTLING CHILD CUSTODY DISPUTES BETWEEN LESBIAN MOTHERS

The law’s failure to represent and serve lesbian families requires that lesbian theorists imagine an alternative dispute resolution mechanism to settle child custody matters between former lesbian partners. Working from a lesbian legal theoretical perspective, I suggest a mediation model, rather than litigation, because it best reflects lesbian family values and circumvents a potentially heterosexist judiciary. I advocate that the model grow from and be supervised by the local lesbian community in order to ensure full respect for lesbian lives and interests. I propose that the parties work under a “maximizing collective interests” standard in order to consider equally the needs and interests of the mothers and the children. By providing an alternative to the formal legal system, my model empowers lesbians and prevents the state from defining our familial relationships.

A. *A Lesbian Legal Theoretical Perspective*

In order to best serve lesbian mothers, any dispute resolution process must originate from a lesbian legal theoretical perspective. As defined by founder Ruthann Robson, “[a] legal theory that is lesbian puts lesbians at its theoretical center.”¹³⁴ Such a viewpoint “requires a critical attitude toward law,” meaning that one must continuously interrogate “whether legal constructions are serving lesbians, both as individuals and

133. Morningstar, *supra* note 119, at 220 (citing Martha Kirkpatrick, *Clinical Implications of Lesbian Mother Studies*, 13 J. HOMOSEXUALITY 201 (1987)).

134. ROBSON, *supra* note 24, at 22.

as insuring a broader conception of lesbian survival.”¹³⁵ Therefore, when approaching child custody disputes, we must first question “whether or not the law is appropriate in a particular situation.”¹³⁶ As discussed earlier, the existing child custody doctrines do not serve lesbian families because they were created for heterosexual divorce cases and force lesbians to forsake their own identities and model themselves after heterosexual mothers.¹³⁷ The law as it stands today is not appropriate for disputes between lesbian mothers, so an alternative theory is needed. Such an alternative must put lesbians at its theoretical center; I accomplish this by making my model the creature of the lesbian community, giving lesbians the autonomy to tailor the process appropriately to serve their own individual and diverse needs, and incorporating the values that characterize lesbian households. Robson believes that “[i]n the best of all possible lesbian utopias, the two lesbians would exercise their lesbian choices in a way that honored themselves, each other, and the child.”¹³⁸ My plan aims to achieve that goal by emphasizing community and equality and promoting a “maximizing collective interests” standard in place of the “best interest of the child.”

B. Mediation

Before delving into my own mediation model, it is important to understand mediation generally. Mediation may be defined as “a method of settlement negotiation in which the parties to a dispute meet with an impartial third party, the mediator, and attempt to reach a mutually satisfactory resolution of their dispute.”¹³⁹ It represents “a finite process that produces specific outcomes, using the ‘values, norms, and principles of the participants’ rather than those of the neutral third-party mediator.”¹⁴⁰ Some of the goals embodied in mediation are creating win-win situations, empowering the parties, reconciling the parties’ interests, producing an agreement that the participants can accept and with which they will comply, and preparing participants to accept the consequences of their decisions.¹⁴¹ Understanding oneself and one another is an

135. *Id.* at 20; Robson, *supra* note 13, at 17.

136. ROBSON, *supra* note 24, at 20.

137. *See supra* Parts III-IV.

138. ROBSON, *supra* note 24, at 138.

139. Colleen N. Kotyk, Note, *Tearing Down the House: Weakening the Foundation of Divorce Mediation Brick by Brick*, 6 WM. & MARY BILL OF RTS. J. 277, 280 (1997) (quoting BETTE J. ROTH ET AL., THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE 23-3 (1996)).

140. *Id.* at 281 (quoting Alison Taylor, *A General Theory of Divorce Mediation*, in DIVORCE MEDIATION 61, 61 (Jay Folberg & Ann Milne eds., 1988)).

141. *See id.* at 280-81.

essential part of any mediation: the parties must take into account the realities that they each face, which they do by understanding each other's interests and the strengths and weaknesses of their claims.¹⁴² Ultimately, the parties will adopt a problem-solving approach to their dispute and make their own decisions so that the "mediation belongs to the parties."¹⁴³

The mediation format is better suited to respecting lesbian family values than formal litigation. Mediation requires that the disputing parties discuss their differences and craft their own outcomes with the help of a neutral third-party. Court litigation, on the other hand, represents a patriarchal structure with its inherent hierarchy and ultimate demarcation of winners and losers. In the words of Professor Mary Becker, "Litigation is patriarchal in that it valorizes qualities and attributes culturally defined as male: aggression, toughness, and other warrior qualities."¹⁴⁴ Mediation starkly contrasts with litigation by emphasizing listening, sharing, and understanding in a nonhierarchical manner, as the parties are encouraged to cooperate and determine a jointly acceptable outcome. Unlike the judge in a trial, who listens to each side and then names a winner, the mediator merely guides the discussion and ensures that the parties engage equally throughout the process. Robson supports mediation as a lesbian-positive alternative, observing that the "notion that lesbians and gays should be willing to resolve conflicts without resort to an adversarial and patriarchal legal system is one that continues to have resonance."¹⁴⁵

In addition to reflecting lesbian family values, mediation is preferable to litigation for a variety of reasons. Participants in mediation tend to respect and follow the outcome of the proceedings because they feel a sense of ownership over the solution: they worked towards it together, and it belongs to them.¹⁴⁶ "Indeed, studies have shown that mediation clients are more satisfied with their divorce outcomes than persons using the adversary system."¹⁴⁷ Mediation also teaches participants life skills on how to tackle problems and work with one another, so negotiating an acceptable outcome in the present sets the

142. H. Scott Flegal, *Advocating for Understanding—Why the Understanding-Based Mediation Model Works*, 46 N.H. BAR J. 18, 18 (Summer 2005).

143. *Id.*

144. Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 82.

145. Robson, *supra* note 13, at 17.

146. Interview with Judah Garber, *supra* note 26.

147. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE. L.J. 1545, 1548-49 (1991).

stage for future, successful negotiations.¹⁴⁸ From a more mechanical perspective, mediation is more cost effective and timely, as well as less risky and painful, than traditional litigation.¹⁴⁹

A lesbian legal theoretical mediation process must stem from and be supervised by the local lesbian community in order to maximize lesbian autonomy and emphasize the value of community. As long as lesbians or supporters of lesbian families lead the process, mediation will reject the anti-lesbian prejudice that seeps into formal court proceedings. Mediators must be people who cherish lesbian-led households and acknowledge each woman as a valid parent, no matter their biological or legally-recognized ties to the child. Additionally, community mediation enables lesbians to resolve their disagreements according to their community's values. Clark Freshman, who has researched lesbian and gay mediation, proposes that "community-enabling mediation would encourage parties to consider the range of possible values and practices that could affect how they resolve a dispute or structure an agreement."¹⁵⁰ Training and assigning mediators from their community assures mothers that their lesbian family values will inform and influence the process.

1. Assigning and Training Mediators

The value of community informs the mechanics of assigning and training a mediator. I propose that a group of women from the local lesbian community, either volunteers or elected by their peers, form a committee to manage the mediation process. This committee would oversee the training of mediators, provide guidelines and physical spaces for the sessions, and interact with all relevant parties, including the mothers, mediators, and even the courts when necessary. Mediators may be selected by the parties or assigned by the committee. Ideally, in the spirit of expanding lesbian choices, the couple would choose its particular mediator together with the committee's approval to ensure that she does not harbor any bias against one party. If the couple cannot agree upon a mediator, the committee may appoint one. The mediator will be trained by the lesbian community under the auspices of the committee. Perhaps such training would be organized by the local gay and lesbian community center or, for smaller or less progressive towns that lack such a center, by another group of volunteers. Trainers may

148. Interview with Judah Garber, *supra* note 26.

149. Mnookin & Kornhauser, *supra* note 27, at 956.

150. Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1762 (1997).

refer to courts' mediation processes as initial resources for leading workshops and training future mediators, but such information should only be used as a starting point. From a lesbian legal theoretical perspective, which prioritizes lesbian viewpoints, the lesbians who create and oversee the procedures must have the flexibility to exercise their own creativity and infuse their local community's values into the process. As a product of the community that recognizes the worth of lesbian families, the training course and the mediators themselves will exude the values that mark lesbian parenting.

2. Road to Mediation

The process that leads to mediation should also be embedded within the lesbian community. Just as lesbian communities currently host workshops and support services for mothers-to-be,¹⁵¹ they should provide fora for lesbian couples to contemplate their children's futures if their relationship terminates. Such sessions should include contract drafting in which each partner agrees in writing to participate in mediation to settle a child custody dispute. Although such an agreement may not be held valid in a courtroom, the women would bind themselves to one another, their future children, and their broader community.¹⁵² Lesbian rights litigators encourage couples "to create legal and other documents articulating their intentions and expectations about the families they have and are creating" because "the process of reaching an agreement can uncover, and encourage resolution of, areas where the understanding among the parties is unclear or where there is outright disagreement."¹⁵³ Discussing the parental roles that each mother expects to play, the values with which they plan to raise their children, and the importance of mediating child custody disputes, will greatly benefit the individual family and improve the broader lesbian community.

Another route to mediation may be by court referral. Ideally, the couples would have agreed mutually to participate in mediation, either through a prior contract or present agreement. However, for those sparring couples who head directly to court, the judges should send them to this forum before allowing litigation to proceed. This referral process could work in a manner similar to those cases in which courts presently

151. See, e.g., The Lesbian, Gay, Bisexual & Transgender Community Center, Providing for our Families, <http://www.gaycenter.org/support/circle/families.html> (last visited Sept. 11, 2006).

152. See *Kristine H. v. Lisa R.*, 120 Cal. App. 4th 143, 149 (Cal. Ct. App. 2004) (holding that a decree declaring both women as equally legal mothers is invalid).

153. Gay & Lesbian Advocates & Defenders, *supra* note 23, at 156.

direct combative parties to alternative dispute resolutions. Thus, attempts should first be made to settle child custody cases outside of the formal legal establishment in order to “not risk making bad law that ‘reinforc[es] narrow legal versions of what counts as a family,’ setting back gay rights in other areas.”¹⁵⁴ Settling child custody disputes outside the formal legal system protects the lesbian community’s values and prevents outside forces from defining who lesbian mothers are and mandating how they should live their lives.

3. Mechanics of Mediation Sessions

The actual procedures of the mediation sessions should follow the standards set forth by the lesbian community but allow for alterations to be made by the particular couple and mediator. As a vehicle for promoting lesbian choice and putting lesbians in the front and center, the mediation must be flexible enough to incorporate the varying interests of the particular parties. This also reflects the broader community’s value of diversity and tolerance, because it allows for a diversity of viewpoints and deviations from a suggested standard. The role of friends and family within these proceedings represent one factor that may vary with each case. As discussed previously, lesbian families receive tremendous support from their friends, blood relatives, and the immediate community. There may be several adults who have played a large role in raising the children or supporting the mothers. The couple and mediator must consider whether or not these individuals contribute to the mediation and in what manner, perhaps as actively participating parties, character witnesses, silent supporters, or in another capacity altogether.

Although the exact procedures and methods for each mediation may vary by couple or community, one ideal that must encompass every lesbian mediation is equality. Just as lesbian parents share equally the responsibilities of childcare, they must participate equally throughout this process. Two prongs emerge from this idea. The first prong concerns the mechanics of the mediation sessions. Each woman should be given equal time to express her interests, suggest solutions, and respond to her former partner’s presentation of the same. If one woman chooses not to fill her allotted time, that is her choice, but each participant must be given an equal platform from which to state her case initially. The exact format of that dialogue will be in the parties’ discretion, but the mediator and the couple must ensure that each woman has equal time to state her

154. Rubenstein, *supra* note 20, at 147 (quoting Gay & Lesbian Advocates & Defenders, *supra* note 23, at 155).

concerns. The second prong refers to respecting one another as equals. Each partner must enter the mediation process with the understanding that she has her own particular interests and that her former partner has another set of needs. They must respect one another as equals and respect the importance of each other's viewpoints. If one or both women fail to act in this way, the mediation may break down, and the women may put themselves, their children, and their lesbian community through the grief and anxiety of a heterosexist court proceeding. Such a problematic option should encourage these women, individuals who chose mediation in order to avoid the pitfalls of litigation, to put forth increased effort and really push one another to make the mediation a successful means of resolving their child custody dispute.

C. "Maximizing Collective Interests" Standard

Mutual respect for one another and each other's needs leads to my advocacy for a "maximizing collective interests" standard. As opposed to the "best interest of the child" standard, which privileges the child over the parents, my standard treats every family member equally. I choose this standard because I believe that, from a lesbian legal theoretical perspective, the focus of these proceedings is lesbian, so lesbians and lesbian concerns must be at the forefront. However, I choose not to privilege lesbians over the children because that would violate the tenets of lesbian motherhood. As previously discussed, lesbian-led households treat children with incredible warmth, respect, and equality, so I want those values to shape the standard for determining custody. Thus, each party must bring her own needs to the proceeding, but she must realize that not all of her needs will be met. In the spirit of cooperation and equality, which characterizes the ways that lesbian mothers parent, these women must function under the philosophy that it is best to meet the greatest number of the parties' collective needs, rather than reaching a wildly unequal outcome. Indeed, the reason that I encourage mediation over litigation is to avoid the determination of winners and losers. When it comes to our families and our children, no one should have to "lose." We may not achieve every objective that we desire, but we should be able to reach the optimum level of collective happiness.

I acknowledge the danger that moving away from the "best interest of the child" presents.¹⁵⁵ Historically, the loudest calls for a different standard have come from fathers' rights advocates, a group that has

155. Thanks to Judah Garber for bringing this to my attention. Interview with Judah Garber, *supra* note 26.

included convicted domestic violence offenders demanding to be given joint custody rights.¹⁵⁶ Some children's advocates fear that moving the focus away from the children will only produce detrimental results. For the purposes of this project, however, I disagree. I create this standard specifically from a lesbian legal theoretical perspective, and, for that reason, I do not advocate that it be adopted in custody proceedings between heterosexual or gay male couples. I believe that my standard, which takes into account equally the interests and needs of both mothers and the children, will not subject the children to additional harm. Indeed, the true "best interests" of the child, not a judicial construction that fails to capture those interests accurately, are incorporated into the "maximizing collective interests" standard. A child would not be placed with an abusive or neglectful parent because that would not fulfill any of the child's needs. By cooperating with one another and reaching an agreement that best serves the family as a collective body, including meeting the true best interests of the child, I believe that children of lesbian mothers will fare better under my standard than the judicially constructed and faulty "best interest of the child" standard.

In order to maximize a group's collective interests, parties must enter mediation with a full understanding of their own interests and a willingness to listen to the others' interests. Depending on the child's age and maturity level, the couple may choose to bring her into the proceedings in order to represent her own needs directly. However, this is a personal determination that ought to be made by the partners and the mediator on a case-by-case basis, keeping in mind the tricky balance between shielding the child from conflict and respecting her as an autonomous being with developed preferences. If the mothers determine that asking the child to represent her own interests is inappropriate, then they must also articulate what they each perceive to be the child's interests. Once each partner and child (or the partners on behalf of the child) enjoy equal time in presenting and articulating their own interests, they must then agree upon a solution that best meets the greatest number of those needs; that is, they must maximize the group's collective interests. An exercise that may prove useful in crafting that solution requires that the parties work separately for some time and develop a solution from the point of view of the other side. Hence, each mother envisions herself in the shoes of her former partner and thinks about how best to meet her needs. Such an activity cultivates empathy and enables the women to better understand each other's viewpoints.

156. *Id.*

No matter what specific exercises or methods the mediator and parties use, the overarching goal for the mothers remains the same: to cooperate with one another and to settle their child custody dispute in a way that reflects and cherishes the values that they instilled in their lesbian-led households. By incorporating lesbian mothers' values, emphasizing involvement by the broader lesbian community, giving participants the flexibility to shape the procedures to meet their unique needs, and working under the "maximizing collective interests" standard, my mediation model represents a lesbian legal theoretical approach toward resolving child custody disputes between two lesbian mothers.

My analysis remains the same even for those couples in which one or both partners choose to leave their lesbian community. The mothers should recognize and honor the fact that their children have two mothers who, at the time of conception or adoption, were members of a lesbian community. Even if they no longer want to be a part of that community, the mothers should not turn to litigation because doing so may deprive their children of the nonlegal parent and harm their lesbian friends' and neighbors' chances at future legal recognition of their families and relationships.

VII. CONCLUSION

As courts continue to accept and adjudicate cases involving former lesbian partners' child custody battles, lesbian legal theorists must remain wary. Although some courts may rightly recognize the nonbiological or nonadoptive mother as a legal parent, as did the California Supreme Court,¹⁵⁷ we must ask ourselves if such litigation represents the best means for lesbian survival. Even in victorious cases, we are subjecting ourselves to the courts' definitions of parenthood, thereby stripping away our autonomy to define and create for ourselves what it means to be a mother. I believe that "we can nurture and sustain" "an ethic that says a lesbian, biological mother may not rely on the patriarchal definitions of parenthood to defeat her partner's rightful claims to visitation or custody."¹⁵⁸ Perhaps one day, the formal legal system will respect and honor lesbian-led families in a manner that does promote lesbian survival. Until that day arrives, however, an alternative must be made available. In the words of lesbian legal theorist Julie Shapiro, "we, as individuals and as a community, can and should offer a viable, lesbian-

157. See cases cited *supra* note 4.

158. Shapiro, *supra* note 22, at 39; Paula Ettlbrick, *Letters to the Lesbian/Gay Law Notes*, LESBIAN/GAY L. NOTES, June 1993, at 1, *quoted in* Shapiro, *supra* note 22, at 39.

centered way of resolving these disputes.”¹⁵⁹ I adamantly agree with her sentiment, and my project represents one such option.

By embodying lesbian family values and putting lesbians at its core, my proposal enables disputing partners and their community to work together and negotiate solutions that will best serve everyone’s collective interests. I advocate a resolution mechanism outside of the formal judicial system because the current “best interest of the child” doctrine harms lesbian families by propagating homophobia and reconstructing lesbian mothers’ identities. Moving away from that problematic history empowers lesbians to create a new tradition that represents the values cherished by lesbian families: warmth, equality, community, and diversity. Only by creating our own models and mechanisms to raise our families will we truly be able to engender meaningful social change in the patriarchy in which we reside currently. In the words of lesbian political activist Urvashi Vaid, “Lesbians have a radical social vision—we are the bearers of a truly new world order.”¹⁶⁰ By transforming society’s understandings of family and motherhood, lesbian mothers symbolize the harbingers of that new world order.

159. *Id.* at 38.

160. Urvashi Vaid, *Let’s Put Our Own House in Order*, in *LESBIANS, GAY MEN, AND THE LAW* 566, 568 (William B. Rubenstein ed., 1993).