LESBIAN MOTHERS, LESBIAN FAMILIES: LEGAL OBSTACLES, LEGAL CHALLENGES

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This coming week, two women in San Francisco will enter a courtroom as open lesbians and ask a judge to grant their petition to adopt a child together.[1] The California Department of Social Services has already recommended that the adoption be granted. The proposed new birth certificate submitted by the Department of Social Services has "mother" and "father" crossed out and instead reads "parent one" and "parent two." For the first time, a court may confer upon a lesbian couple the legal status of joint motherhood.[2]

I would like to use the occasion of this historic event to reflect on several separate but related issues relevant to lesbian and gay parents, our legal advocates, and the larger community of which we are a part. I am still in the process of developing and refining my ideas on these topics. I share them with you in this unfinished form.

The legal system is not friendly to lesbians and gay men. We have lost more battles in the courts than we have won, and things are likely to get worse, not better.[3] While no formula will guarantee victory in courtroom custody disputes involving lesbian mothers or gay fathers, one thing is clear: the more we appear to be part of the mainstream, with middle class values, middle-of-the-road political beliefs, repressed sexuality, and sex-role stereotyped behavior, the more likely we are to keep custody of our children. On the other hand, communal child-rearing arrangements, radical feminist activism, sexual experimentation — these choices are all predictably fatal to any custody action. The courtroom is no place in which to affirm our pride in our lesbian sexuality, or to advocate alternative child-rearing designed to produce strong, independent women.

A lesbian mother must portray herself as being as close to the All-Ameri-

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1. This presentation was delivered on February 22, 1986.

2. The joint adoption was granted. In re N.L.D. and D.J.H., No. 17945, slip op. (Cal. Super. Ct. Feb. 24, 1986). Information on other cases involving adoption by two same sex parents is available from the Lesbian Rights Project, 1370 Mission Street, 4th Floor, San Francisco, CA 94103.

3. For a review of appellate case law, see Sheppard, *Lesbian Mothers II: Long Night's Journey Into Day*, 8 WOMEN'S RTS. L. REP. 219 (1985). *See also* Bowers v. Hardwick, 106 S.Ct. 2841 (1986).

can norm as possible — the spitting image of her ideal heterosexual counterpart — and preferably asexual. Only then does she stand a chance of retaining custody. The necessity of assuming a role that contradicts her identity has important consequences, both for the lesbian mother and for her lawyer.

The toll on the client is obviously enormous. She is forced to deny any pride in her lesbianism, any solidarity with other lesbians; she may even be compelled to deny or alter her sexual relationships. There is no guarantee that, at the end of this ordeal, she will be allowed to keep her children.

The complicity of lesbian and gay lawyers in this system has its own effects. When we construct courtroom scenarios that deny our differences from heterosexual society, we quickly forget that our strength and our promise are rooted in those very differences. For example, a study comparing heterosexual and lesbian mothers concluded that the two groups have similar sex-role behavior and attitudes toward ideal child behavior.[4] My immediate response as a lawyer was to be elated — one more piece of evidence to help convince a judge that our clients are not really "different" kinds of mothers at all.

But as a lesbian, a feminist, and a mother with a vision of an entirely different way of raising our children, I was horrified. I am not pleased to discover that my lesbian sisters pose no threat to the perpetuation of patriarchal child-rearing. As a lawyer, I worry that my role within the system of adjudicating custody rights has a conservatizing effect on all gay and lesbian people. It is hard to maintain a clear vision of lesbian/gay/feminist/socialist/anti-racist social change while constantly asserting in the courtroom an image as "mainstream" as possible of the life of a lesbian mother and her children. Similarly, it is hard to be committed to the development of sexual diversity while adopting the courtroom strategy, effective when custody of older children is at stake, of offering scientific proof that sexual orientation is immutably determined by the age of five.

As lawyers we must respond to this predicament. I suggest two possibilities. First, we can support our clients' most progressive political awareness even as we build an acceptable courtroom demeanor. Our clients should clearly see that it is not we who make unreasonable and repressive demands of them, and that we, too, are actors playing a role.

Second, we attorneys need to develop and strengthen a radical vision that will not be extinguished in the painful process of negotiating through a hostile system. Perhaps we should consider taking affirmative steps in some arena other than lesbian mother litigation. We certainly must recognize that assessing the political value of lesbian mother litigation is a complex matter. It is wrong for society to deny lesbian mothers their children, and it is right to oppose that effect of homophobia. But when we constantly assert in the public arena that we will raise our children to be heterosexual, and that we will protect them from manifestations of our sexuality and from the larger lesbian and

4. *See* S. Kweskin and A. Cook, *Heterosexual and Homosexual Mothers' Self-described Sex-role Behavior and Ideal Sex-role Behavior in Children*, 8 SEX ROLES 967 (1982).

gay community, we lose something that affects all lesbians and gay men. We essentially concede that it is preferable to be heterosexual, thereby foreclosing an assertion of pride and of the positive value in homosexuality.

A lesbian mother emerging from a heterosexual relationship and facing a custody dispute is in a *defensive* posture. I contrast this with lesbians choosing to have children in lesbian families. This is an *offensive* step. It opens the possibility of affirmation, rather than denial, of our differences from the heterosexual norm. However, it brings its own legal and political risks.

For the past year and a half, I have been talking and writing about the political significance of lesbians choosing to have children. My questions about lesbian motherhood are intended to expose any potentially negative political effects of this choice of lifestyle. I have criticized the perspective that suggests that the choices involved are purely personal,[5] and the failure of many to place lesbians choosing motherhood in the context of a fiercely pro-natalist period.[6] I have asked whether we — including myself — have chosen to have children as a retreat from the political to the personal, from the public to the private; whether having children reflects a desire to fit into mainstream society, arising after personal traumas and political differences shattered naive beliefs in building the lesbian alternative community.[7] I have defended, and encouraged other mothers to defend, the right and the value of lesbians choosing *not* to have children and choosing *not* to fight for custody of children born of heterosexual marriages.[8] I have urged lesbian mothers not to see themselves as having more in common with heterosexual mothers than they have with lesbians who have no children.[9] I have also urged them to resist, in every conceivable forum, the presumption of heterosexuality that attaches to motherhood. I have asked others to examine, as I continue to examine, how the institution of motherhood functions to maintain and promote patriarchy. I have argued that our lesbianism, by itself, does not negate or transform that institution.[10]

I believe that all these points are still valid and will bear repetition and refinement. But having made them, I will move on to examine the positive political value of lesbians choosing motherhood, and the challenge to lesbian and gay lawyers of fitting our families within the existing legal system.

I began this presentation by talking about a lesbian couple gaining legal

5. N. Polikoff, Lesbians Choosing Children: The Personal is Political Revisited (unpublished manuscript on file at the office of the New York University Review of Law and Social Change) (forthcoming in POLITICS OF THE HEART: A LESBIAN PARENTING ANTHOLOGY).

6. I use the term "pro-natalism" to characterize a system of beliefs which explicitly values child-bearing and simultaneously devalues and discourages the option of not bearing children. Reflections of contemporary pro-natalism include the hostility to abortion and the recurring media depictions of successful working women who become mothers in their thirties and then explicitly or implicitly reject the value of their previous accomplishments.

7. Polikoff, *supra* note 5, at 8.

8. *Id.* at 5-6.

9. *Id.* at 8-9.

10. *Id.* at 11-12.

recognition as co-mothers. Despite their success, legal recognition of our families will remain the exception rather than the rule. Therefore, I would like to discuss briefly the legal status of most lesbians raising children together.

The system confers great power on the legal mother, whether biological or adoptive. Her lover, regardless of her role within the family, can be easily disenfranchised. Lawyers serving lesbian and gay clients can expect to face requests for representation when these co-mothering relationships dissolve. To protect the status and interests of the unrecognized mother, we should consider both litigation and legislative strategies.

We must remember that our efforts are not made in a vacuum, but rather in the context of the developing law of custodial rights. For example, as we think about obtaining legal rights for unrecognized lesbian mothers, it is tempting to argue for expanded rights for non-parents. However, we must bear in mind that if we ask judges to stretch case law and statutes to reach such a result, those very interpretations may be used against lesbians and political or non-traditional heterosexual women in other cases.

Already, under current law, many non-parents — usually grandparents — have successfully obtained custody from lesbian mothers.[11] Under the prevailing "best interest of the child" standard, non-parents have an easier time obtaining custody than they would under a standard reflecting strong parental preference. Advocates for lesbian mothers in custody disputes have long recognized the importance of a strong preference for parents over non-parents. Such a standard would require clear and convincing evidence that the parent is unfit before a non-parent could be awarded custody.

The theory of psychological parenthood[12] may be useful in assessing which of two parents with equal legal rights should get custody. However, the same theory has been used against mothers, mostly poor ones, who require the extensive assistance of relatives, friends, or even baby sitters, and who subsequently lose custody to someone who is designated the "psychological parent."[13] Extending the theory increases the likelihood that a lesbian mother will lose custody of her children. The potential for misuse is frightening.

How do we fit our families into an alien legal framework structured to

11. Hunter and Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFFALO L. REV. 691, 705-11 (1976).

12. *See* J. GOLDSTEIN, A. FREUD, AND A.J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979). The authors define a psychological parent as "one who, on a continuing, day to day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological, adoptive, foster, or common-law parent, or any other person." *Id.* at 98.

13. *See generally* Martin v. Sand, 8 Fam. L. Rep. (BNA) 2272 (Del. Fam. Ct. Feb. 22, 1982) (homemaker assigned to help family after mother suffered injuries in car accident began keeping child with her and was later awarded custody as psychological parent); Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152, 158 (1966) (father who sent son temporarily to his maternal grandparents after the mother's death lost custody to the grandparents); Mansukhani v. Pailing, 318 N.W.2d 748, 753 (N.D. 1982) (mother who intended to take children back after finding a job lost custody to grandparents).

preserve and perpetuate patriarchy? In the present system, known sperm donors who originally intend to remain unidentified and uninvolved can later change their minds and gain full parental rights.[14] A minimally involved father of a child raised by a lesbian couple will almost certainly obtain custody if the legal mother dies. Under the law, after all, he is the sole surviving parent.

The answer — simpler to describe than to realize — lies in the recognition of legal parenthood for both mothers. The adoption laws of some states may be interpreted to permit adoption without automatically extinguishing the biological mother's rights.[15] In those states, before sympathetic judges, there may be room to take the offensive and gain this legal recognition. In most states legislative change will be the only recourse, an unlikely occurrence at present. But perhaps we need to put it on our public agenda now, and dig in for a struggle that may extend beyond our lifetimes.

It is not only because I believe that both mothers should have equal rights upon the dissolution of their relationship that I consider legal recognition important. I am also profoundly concerned with issues of power within our relationships and in the transmission of values to our children.

Fundamental to lesbian/gay relationships is a potential equalization of power more difficult to achieve in a heterosexual context. Numerous factors come into play in any specific relationship, including class of origin, race, financial or vocational differences, and the internal dynamics of roles, expectations, sexual fantasy, and sexual practice. In this context, we do not know whether the different legal status which each woman has in relation to the child in a lesbian family has significant ramifications. It would be highly unusual to find a biological mother willing to relinquish all her legal parental rights so that her lover could adopt their child. To me, this predictable reluctance is a clue that legal status means something to the couple and does affect their relationship.

We know that children are sensitive to emotional undercurrents and nonverbal communications in their environments. If the difference in legal status affects the adults, it may affect the child as well. This phenomenon is signifi-

14. *See* Jhordan C. v. Mary K., 12 Fam. L. Rep. (BNA) 1320 (Cal. Ct. App. 1986)

15. *See, e.g.*, In re A.O.L., No. 1 JU-85-25 P/A, slip op. (1st Jud. Dis. Alaska Aug. 9, 1985) (copy in possession of the author). Adoption statutes customarily envision two sets of circumstances in which adoptions may take place. In the first, where one biological parent has died or consented to the adoption, a stepparent may adopt the child when he or she marries the other biological parent. In this situation, the stepparent simply acquires the legal status of the absent parent. Lesbians cannot legally marry, and thus cannot take advantage of the statutory provisions for stepparent adoption. In the second situation, a child can become part of a new family; adoption extinguishes the rights of the biological parents, in order to protect the stability of the new family unit. The language of these statutes is mandatory. *See* D.C. Code § 16-312(a) (Michie 1981) ("All rights and duties . . . between the adoptee, his natural parents, their issue, collateral relatives, and so forth, are cut off, except that when one of the natural parents is the spouse of the adoptor, the rights and relations as between adoptee, that natural parent, and his pare collateral relatives . . . are in no wise altered."). To accomplish an adoption whereby a lesbian partner became a second mother, the court would have to waive the operation of the statute. The court in *A.O.L.* accepted such an argument.

cant because the emergence of lesbian families provides a unique opportunity in history to raise children in a home with two parents of potentially equal power. The opportunity to grow up observing such equality in the home could have a lasting impact on children in lesbian families, and we need to embrace that possibility. If legal inequality diminishes or eliminates the experience of equal power within the home, we are missing the chance to make what might be our biggest contribution to future generations.

I believe, therefore, that the equal rights approach is essential because of its impact on both the adult relationship and the children. However, it is far from a perfect solution. What happens if two legally equal mothers split up? Conflicts will probably be resolved in our court system according to the cardinal unwritten principle governing custody disputes between lesbian mothers and straight fathers: that mainstream, conventional, non-threatening values are more likely to prevail. The political activist, the outspoken sexual outlaw, the proud lesbian, and the butch will all lose. The mother who goes straight will win. And the parent with access to more money may exploit that fact to the fullest. The concept of equal rights, without control over its application, is form without substance.

I am now watching close friends who have raised a child together for more than three years begin to break up. I am worried about the extent to which the legally recognized mother will respect the relationship between her ex-lover and the child. In private conversations I have been extolling the equal rights theory, even though it is not, of course, a legal reality. Recently, as I privately defended the right of the mother with no legal access to frequent overnight visitation, someone asked how I would feel if this co-mother went straight and exposed the child to her heterosexual relationship. I was taken aback. Surely it is a destructive and offensive message to a child raised in a lesbian relationship if one mother later rejects lesbianism. I would rather not have this child, or any of our children, exposed to such a phenomenon.

The person suggesting this hypothetical then stated she would be happy if the legal mother had the right to curtail visitation under those circumstances. I countered by saying that if the legal mother could not be stopped from exposing the child to heterosexuality or any other adverse influence then the other mother had to have the same rights. Better to save some of the children, and equal rights be damned, was the reply I received.

It may be the lawyer in me that clings so tenaciously to equal rights theory, in spite of its shortcomings as applied. More likely, it is my concern for equal power within our ongoing relationships that compels me to fight for legal recognition of our families.

The strength and value to all lesbians of some lesbians choosing to have children is that we mothers are pushed to be "out" to the world, that we challenge at home and in public the transmission of patriarchal values, and that we offer the opportunity to explore the significance of equal power between two mothers. In our time, we may be able to offer our children signifi-

cantly different models from those that are patriarchal, because we can build a community of lesbian families that will include substantial numbers of women who have chosen motherhood outside the context of heterosexuality. Realization of this potential depends on our resistance to the pressure to blend our families and our community into mainstream heterosexual society. We must evaluate the role of the legal definition of "family" in furthering or undermining our goals.

I would like to close by discussing the impact the AIDS crisis has on lesbians and lesbian mothers. I have come to appreciate the extent to which AIDS is a lesbian issue in the context of lesbian mother custody disputes. I offer two stories. Last year I happened to be speaking to a West Virginia Supreme Court Justice. In West Virginia, the primary caretaker parent within a marriage is entitled to custody upon divorce unless proven unfit.[16] I asked the Justice whether a lesbian mother would be considered unfit under his state's standard. His first response was: "We don't have much of that around here." His second statement was: "We have to rethink our opinions on that since the coming of AIDS."

In a second instance, a custodial father refused to permit the non-custodial lesbian mother to exercise Christmas visitation with her son, as she had done for over ten years. He gave as his reason the fear that the boy would contract AIDS. Although the case was ultimately settled without a court hearing, the mother was forced to retain an attorney and convince the father's attorney that his position was not supportable.[17]

As these stories demonstrate, homophobia generated by the AIDS crisis strikes lesbians as well as gay men. But lesbians are affected in other ways as well. Never has gay male sexuality been so visible in mainstream culture. Reference to gay men and AIDS in the media is an almost daily occurrence. This new prominence for male homosexuality means that only lesbian sexuality remains in the closet. We are *less* visible than ever, except as targets of homophobia, now that our gay brothers are attracting so much attention.

If this invisibility contributes to the decision of many lesbians to work on AIDS-related issues, it has ironic consequences: lesbians are no more recognized as AIDS workers than we are in the mainstream. Further, we must not let our desire to make our sexuality visible lead us to focus on finding a lesbian mode of AIDS transmission, or on encouraging HTLV-III/LAV testing[18] of lesbians. AIDS *is* relevant to lesbians, but it does not raise precisely the same issues for us as it does for gay men. We should fight the homophobia that

16. Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981).

17. Telephone conversation with the mother.

18. The test which is currently available determines whether there are antibodies to the virus associated with AIDS in the blood. It is therefore an appropriate device for blood screening. However, a positive test result does not predict whether the individual will ever become sick, as estimates vary between a 5% and 20% probability that an HIV-infected individual will develop AIDS. Selwyn, *AIDS: What is Now Known*, HOSPITAL PRACTICE, May 15, 1986, at 67, 68.

AIDS engenders, and we have a right to be recognized for our work. But we also need to affirm our sexuality outside the context of the AIDS crisis.

In this time of increased repression, when the opposition finds AIDS a ready excuse and when we are so frequently on the defensive, it is imperative to the lifeline of our community that we seek positive measures to strengthen our culture. Forthright discussion and analysis of our sexuality, along the lines of the work of Carole Vance[19] and others, is one such measure. Politically conscious lesbian families is another.

19. C. VANCE, PLEASURE AND DANGER (1984).