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A Lesbian-centered Critique of Second-parent Adoptions

Julie Shapiro

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At the 1997 Lavender Law conference, a group of respected veterans of the legal struggle for lesbian and gay rights was asked to select the most significant accomplishments of the movement over the last twenty years.[1] One woman identified the widespread availability of second-parent adoptions[2] as the movement's crowning achievement. Others on stage and in the audience agreed. Indeed, the relatively broad acceptance of second-parent adoptions is often noted as evidence of the success of the lesbian and gay civil rights movement.[3]

I do not doubt the value of second-parent adoptions to many women; I have completed one myself.[4] Yet I believe that the lesbian

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1. "Lavender Law" is the title of the annual conference of the National Lesbian and Gay Law Association. The conference attracts lawyers, law students, legal academics, and legal activists from around the country. It is the largest gathering of its kind in the United States.

   This particular conference was held in West Hollywood, California on October 23-25, 1997. The events I relate here occurred at the major plenary session of the conference, a "civil rights round table discussion," held on October 24. Participants in this discussion included leaders from the Lambda Legal Defense and Education Fund, the National Center for Lesbian Rights [hereinafter NCLR], the National Lesbian and Gay Task Force, as well as independent activists.
2. A second-parent adoption is the legal procedure that allows a lesbian to create a legally-recognized parental relationship with a child previously born to or adopted by her lover, without severing the lover's legal ties to the child. *See infra* notes 26-67 and accompanying text.
3. *See generally* NCLR, 20TH ANNIVERSARY ALBUM 1977-1997 (NCLR, S.F., Cal.), 1997 [hereinafter NCLR 20TH ANNIVERSARY ALBUM].
4. By completing a second-parent adoption, I have obtained legal recognition of my relationship with my son. From this, many benefits flow. I can obtain health insurance for my son through my employer's group plan. I am also able to claim my son as a dependent on my income taxes and can set aside pre-tax dollars to pay for childcare through a dependent daycare allowance. Should I die intestate, my son will automatically inherit a share of my estate. Also, in the event my lover and I separate and cannot agree on arrangements for the care of our son, I will be able to go to court to claim custody and/or visitation like any other legally recognized parent.

community,[5] and more particularly the lesbian legal community, has been uncritical in its celebration of this achievement. Lesbians have been too quick to assume that second-parent adoptions are an adequate solution to a serious problem. Much more critical consideration of second-parent adoptions is warranted because they are only a partial and troubling solution. As second-parent adoptions have become part of the legal landscape in many jurisdictions, we must acknowledge and address the problems they create.

In this essay, I will use lesbian legal theory to critically examine second-parent adoptions. First, I will describe lesbian legal theory. I will then review how second-parent adoptions developed, what they accomplish, and why they are valuable. Next, I will use lesbian legal theory to uncover and explore the problematic aspects of second-parent adoptions. Finally, I will offer some thoughts as to how we might address the problems that lesbian legal theory has brought to light, both with regard to second-parent adoptions and other challenges facing the lesbian community.

I take as my starting point Ruthann Robson's call to develop a lesbian legal theory.[6] As Robson defines it, lesbian legal theory puts lesbians at the center of analysis, rather than women or gay men and lesbians generally.[7] The central purpose of lesbian legal theory is to promote lesbian survival.[8] In examining a legal strategy or device through the lens of lesbian legal theory, one must ask whether the strategy or device promotes or impedes lesbian survival.[9]

Lesbian survival has two potentially contradictory dimensions. The first is daily, individual survival that depends on food, shelter, and love—including for some, love relationships with children.[10] The second is the individual as well as collective survival that depends on some sort of iden-

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5. I recognize that to speak of a "lesbian community" is problematic for a number of reasons, among them that the very category "lesbian" has been called into question in recent scholarship. Without meaning to minimize these issues, I will not explore them here, as they are well beyond the scope of this essay. I take comfort that others engaged in projects like mine have made similar choices. *See* Ruthann Robson, *Resisting the Family: Repositioning Lesbians in Legal Theory*, 19 SIGNS 975, 976 n.4 (1994) [hereinafter Robson, *Resisting the Family*].

6. *See* RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW (1992) [hereinafter Robson, (OUT)LAW]. *See also* Ruthann Robson, *Convictions: Theorizing Lesbians and Criminal Justice*, *in* LEGAL INVERSIONS 180 (Didi Herman & Carl Stychin eds., 1995) [hereinafter Robson, *Convictions*] (noting the inherent problems with law and how its recognition of "but for lesbians" is magnified in the criminal justice context); Ruthann Robson, *Mother: The Legal Domestication of Lesbian Existence*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL EDUCATION OF MOTHERHOOD 103 (Martha Albertson Fineman & Isabel Karpen eds., 1995) [hereinafter Robson, *Mother*] (writing that lesbians need to critically examine the legal category of mother or risk legal domestication); Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377 (1994) [hereinafter Robson, *Third Parties*] (arguing that lesbians must challenge and discard the male-female dyad that has relegated all other parenting combinations to "third party" status).

7. *See* Robson, (OUT)LAW, *supra* note 6, at 12-13.

8. *See id.* at 11-12.

9. *See id.*

10. *See id.* at 11.

tity as lesbians.[11] These dimensions may be in tension with each other when strategies aimed at short-term survival rely on the denial of lesbian identity. For example, in order to maintain a job or an apartment, avoid physical violence, or continue contact with her children, a lesbian might remain closeted. She might explicitly deny that she is a lesbian and present herself as heterosexual. This strategy might enhance the daily survival of this particular lesbian, but it would not advance the survival of any form of lesbian community.

In maintaining its focus on lesbian survival, lesbian legal theory is suspicious of the operation of law. Lesbian legal theory does not demand that lesbians reject the use of law, but it teaches us that lesbians must use the law cautiously and maintain a critical stance with respect to the law.[12] Law has been a tool for the repression of lesbian existence more often than it has been a tool for lesbian liberation. Throughout history, the law has been used to criminalize lesbian conduct (as with sodomy statutes); to penalize lesbian identity (as with the military's "don't ask/don't tell" policy); and to marginalize lesbian concerns (as with the absence of legal recognition for lesbian relationships).

The method by which the law functions gives further reason for suspicion. The law often operates through the creation and regulation of categories. Those who fit into a particular category are granted benefits and privileges. Those who do not fit are excluded from the receipt of associated benefits and privileges. Further, in order to maintain membership in the category (and maintain the benefits and privileges), one must comply with the restrictions that define the category.

Given the substantial benefits that flow from membership in a particular legal category, there may be great incentive to argue that one fits into a particular category and to maintain membership in that category. It is easy to focus too quickly on the benefit to be gained without adequately considering the possible detriments that might result from inclusion.

This general dynamic has particular implications for lesbians. As some lesbians are admitted into a category, they will be subject to the restrictions imposed upon members of that category. At the same time, they will be separated from lesbians who do not gain admission to the category.

For example, specific benefits flow from the legal decision to categorize a lesbian lover as a "spouse."[13] Some lesbians argue that their lovers

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11. *See id.*
12. *See id.* at 17-19.
13. Such benefits include tax benefits, insurance benefits, "family" memberships at various clubs, and the authority to act as a surrogate decision-maker.

fit within the category of "spouse,"[14] so that they will be eligible to receive various benefits of the law.[15] However, this category also brings with it significant restrictions. For instance, a spousal relationship must be monogamous. Those who support the notion that lovers should be treated as spouses (or that lesbian couples are like married couples) typically accept this restriction without any critical consideration of it. The question of whether limiting benefits to monogamous couples promotes or impedes lesbian survival is neither asked nor answered. The category of "spouse," together with its restrictive definition, is simply accepted.[16]

In addition to awarding benefits to monogamous couples, the legal category of "spouse" divides the lesbian community into two groups: one composed of those privileged to receive the benefits, and one composed of those who will not receive benefits. The effect of this division on lesbian survival often remains unrecognized. Uncritical acceptance and use of the law's categorization has the potential to limit lesbians and divide the lesbian community.

This is an instance of what Robson refers to as the "legalization" of lesbian existence.[17] "Legalization" is the replacement of lesbian categories and concepts with legal ones.[18] It is one form of a more general process Robson calls "domestication," which refers to the replacement of lesbian cultural categories and concepts with more mainstream categories.[19] "Domestication occurs when the views of the dominant culture are so internalized that they seem like common sense." [20] For example, lesbians who accept monogamy to receive spousal benefits. become domesticated.

Legalization and domestication impair the ability of lesbians—both individually and collectively—to make independent choices in their lives. They constrain lesbians' ability to see the options that are available to us and may even obscure the very fact that we are making choices. For example, when a lesbian argues that her lover is a spouse, she accepts the restrictions that come with that category and forecloses other possibili-

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14. There has been a vigorous debate within the lesbian and gay community over the importance and wisdom of seeking the right to marry. *See* Brenda Cossman, *Family Inside/Out*, 44 U. TORONTO L.J. 1 (1994) (writing that the legalization of the gay marriage debate has deepened the divide in the lesbian/gay community between those who support gay marriage and those who do not); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994) (arguing that the *Baeher* decision divides the gay/lesbian community but also presents an opportunity for both sides to re-examine the institution of marriage). Those critical of the lesbian and gay community's emphasis on obtaining the right to marry have identified many of the same issues with which I am concerned here.

15. This example is discussed in greater detail in Didi Herman, *Are We Family: Lesbian Rights and Women's Liberation*, 28 OSGOODE HALL L.J. 789, 791-99 (1990).

16. *See id.*

17. *See* Robson, (OUT)LAW, *supra* note 6, at 17-18.

18. *See id.*

19. *See id.* at 18.

20. *See id.*

ties.[21] It is one thing to carefully choose this path, but quite another to uncritically travel along it.

When lesbians use the law, we risk legalization and domestication. To use the law, one must often accept the law's categories and the accompanying restrictions that define the categories. The law promises benefits in exchange for the acceptance of restraints.[22] If we do not carefully consider the restraints—if we do not even see them—then we are domesticated.[23] On the other hand, if lesbians are alert to the trade-offs often required to use the law, then domestication and legalization can be resisted. Lesbian legal theory does not conclude that lesbians should never use the law, but teaches that *when* they do, it must be with a skeptical view and vigilant attention to the alluring perils that may await us.[24]

Domestication and legalization are central concerns of lesbian legal theory. Lesbian legal theory seeks to reveal the nature of domestication so that we may consciously resist it. Critical scrutiny of the law is essential. Through critical scrutiny, we can begin to perceive the operation of the law and resist our domestication.

My intention here is to explore the ways in which second-parent adoptions have the potential to domesticate individual lesbians and lesbian existence itself. I do so for two reasons.

First, I am concerned that we have been uncritical in our acceptance of second-parent adoptions.[25] It is *uncritical* acceptance of the law that poses the greatest danger for lesbian survival. I will therefore examine second-parent adoptions critically and explore the problems that they present for lesbian survival. In so doing, I hope to help to resist our domestication and improve upon the prospects for lesbian survival.

Second, I believe that the *practice* of lesbian legal theory is essential to lesbian survival. Lesbian legal theory can help us assess the relative worth of various legal strategies as well as understand and resist the operation of the law where it impedes lesbian survival. To be useful, the theory cannot be abstract. It must become concrete so that it applies to the situations lesbians actually encounter. This article is an exercise in the practice of lesbian legal theory. I hope it is valuable not only as a critique of a specific legal device, but also as an example of an approach that can and should be used in evaluating other legal questions. It is with these goals in mind that I engage in an analysis of second-parent adoption.

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21. *See id.* at 12.
22. *See id.* at 18.
23. *See id.* at 20.
24. *See id.* at 19.
25. As Robson states, "[w]hen the reasoning for our lesbian decisions is predicated upon an uncritical adoption of the rule of law, we abdicate our lesbianism in favor of legalism." Robson, (OUT)LAW, *supra* note 6, at 140.

A BRIEF HISTORY OF SECOND-PARENT ADOPTIONS

Second-parent adoptions were advanced and have been promoted in the lesbian community to solve a recurrent and profoundly troubling problem. When two lesbians wish to bring a child into their relationship, they usually proceed in one of two ways: either one woman conceives and gives birth to a child or one woman legally adopts a child. In either case, only one woman is entitled to legal recognition as a "parent" or "mother" of the child. In the eyes of the law, the child has one, and only one, legal parent.[26] The other woman has no parental rights. She is a non-legal mother.[27]

During the course of the relationship between the women, the non-legal mother is at a consistent disadvantage when it comes to the outside world. For example, she may be unable to consent to medical care, meet with school officials, or represent her child's interests to various govern-

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26. *See* 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. REV. 135, 136-37 (1991). For cases in which the court found that only one mother was a legal parent, see Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1991), Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991), and Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997). For a discussion of *Alison D. v. Virginia M.*, see *infra* notes 34-37 and accompanying text. For a discussion of *Titchenal v. Dexter*, see *infra* notes 83-97 and accompanying text.

27. I have chosen to use the term "non-legal" rather than "non-biological" for several reasons. First, it is more accurate. While often the legal mother is also the biological mother, this is not always the case. Lesbians may also become legal mothers through adoption. In these cases, the child has two non-biological mothers, one of them a legal mother and the other a non-legal mother. *See, e.g.*, Dexter v. Titchenal, *infra* notes 83-97 and accompanying text.

Second, the use of the terms "legal" and "non-legal" highlight the precise issue at stake: the legal (rather than social or cultural) recognition of motherhood. *See* Robson, *Third Parties*, *supra* note 6, at 1391 n.54.

Most importantly, I intend "non-legal mother" to be a more inclusive term than "non-biological mother." "Non-biological mother" is generally used to describe only those women who, though lacking a biological connection, are in parental relationships with children born or adopted into *their own* lesbian relationships. "Non-biological mother" does not include lesbians who have parental relationships with children born to or adopted by their partners during a *previous* relationship. In other words, the term excludes women who are in a position somewhat analogous to step-mothers. I suspect that the exclusion of these women from the category "non-biological mother" rests on some unstated assumption that these women are not "mothers" in a social and cultural sense, and so are not really "mothers" at all. Ultimately, I think it is a mistake to employ narrow definitions of "mother" that exclude these lesbians, and I intend the term "non-legal mother" to include them.

There are, of course, many differences between lesbians raising children who were conceived or adopted into their own lesbian relationships, and lesbians raising children who were born into previous relationships. The latter group may face significant issues of coming-out to former spouses and heterosexual partners and to their children, as well as issues arising from the introduction of a new adult into the child's life. For women in the former group, issues surrounding conception or initial adoption are of obvious importance. Without denying these differences, it seems problematic to adopt legal strategies that emphasize distinctions rather than commonalties among lesbians raising children.

All of this calls into question the definition of "mother." This is a broad and controversial question that has attracted a great deal of scholarly attention. *See generally* Robson, *Mother*, *supra* note 6. It is also beyond the scope of my project. For the purposes of this commentary, I will simply assume that a mother is a woman in a parental relationship with a child.

ment agencies.[28] Her position is most perilous if the relationship between the two women ends. She is legally unrelated to her child and, in many jurisdictions, has no right to any continuing contact with the child.[29]

The relationship between the two women may end because they decide to separate. If they do so, they may be unable to agree on dividing childcare responsibilities and contact with the child. The women might attempt to resolve this dispute in court.[30] Although their case may resemble a traditional custody dispute between heterosexual parents, courts will not treat it as such. In a custody dispute between two legally-recognized parents, the parties begin the litigation on an equal footing.[31] While one parent may ultimately demonstrate that she or he should be awarded sole custody, neither parent begins with any special advantage over the other. In contrast, when lesbian mothers litigate custody, the legal mother begins with a nearly insurmountable advantage over the non-legal mother.[32] This is because of the general rule that a court prefers a parent to a non-parent in a custody matter.[33]

One well-known case of this type is *Alison D. v. Virginia M.*[34] Until their separation, Alison and Virginia were raising a child together. Virginia

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28. Specialized legal devices can address some of these issues. For example, medical consent forms allow a specified individual to make medical decisions. However, medical consent does not grant the non-legal mother equivalent status to the legal mother, who must still give her approval. *See* Sella, *supra* note 26, at 137.

29. *See id.* at 138.

30. Unfortunately, the incidence of litigation between lesbians who have been raising a child together appears to be increasing. The 1997 docket for the National Center for Lesbian Rights reveals that the Center is involved in at least as many custody cases between lesbians as between lesbians and their former husbands. *See* NCLR 20TH ANNIVERSARY ALBUM, *supra* note 3, at 12-14. This may simply reflect the increasing number of lesbians raising children together.

In most of the reported cases, the non-legal mother initiates legal proceedings despite her weak legal position. In such cases, this seems to happen because the child continues to reside with the legal mother when the women separate. As the legal mother has actual physical custody and control over the child, it is within her power to restrict the non-legal mother's contact with the child. When and if she does so, the non-legal mother resorts to court action in order to regain contact with the child. *See, e.g., infra* notes 34-37 and accompanying text.

31. *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 471 (1990) [hereinafter Polikoff, *Two Mothers*].

32. *See id.* at 471-72.

33. *See* HOMER H. CLARKE, JR., 2 THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.6 (2d ed. 1987); *see also* Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 628 (1996).

Not surprisingly, the rule favoring parents over non-parents is not always enforced when a case involves a lesbian legal mother against a non-lesbian non-parent. *See* White v. Thompson, 569 So. 2d 1181 (Miss. 1990) (awarding paternal grandparents custody as opposed to lesbian legal mother); *cf.* Weigand v. Houghton, No. 97-CA-01246-SCT, 1999 Miss. LEXIS 69 (Miss. Feb. 4, 1999) (determining the child should remain with his mother and step-father, although there was clear evidence of domestic violence in their home, as opposed to awarding custody to the child's openly gay father). However, where a lesbian custodian appears unavoidable—as is the case when a lesbian non-legal mother litigates against a lesbian legal mother—the parental preference is generally honored. *See* Shapiro, *supra*. I found no reported opinions awarding custody to a lesbian non-legal mother instead of a lesbian legal mother.

34. 572 N.E.2d 27 (N.Y. 1991). This case was watched closely in the lesbian and gay legal community because, in the previous year, the New York Court of Appeals had adopted a broad defini-

had given birth to the child and was therefore recognized as the legal mother. After the women separated, Alison sought visitation with the child. Virginia refused and instead terminated all contact between Alison and the child. Since Alison was neither a biological nor an adoptive mother, she was not a parent in the eyes of the law.[35] The court would not resort to equitable doctrines to recognize and credit Alison's involvement and relationship with the child.[36] Instead, it quickly concluded that, as a legal stranger to the child, she lacked the standing to seek visitation, and affirmed the dismissal of her claim.[37]

There are several similar decisions. Though they differ in the details, each court concludes, without reaching the merits, that the non-legal mother is unable to assert a claim to custody or visitation.[38] The legal basis for the decisions—which almost always turn on a finding that the non-legal mother lacks standing to sue—leaves no room for consideration of the best interests of the child. At the suggestion of the legal mother, the legal reality of the non-legal mother's relationship to her child is obliterated. In the eyes of the law, the non-legal mother becomes a stranger to the child, like the next-door neighbor and the baby-sitter. It does not

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tion of the term "family" that included the surviving lover of a gay man. *See* Braschi v. Stahl Assocs., 543 N.E.2d 49 (N.Y. 1989).

35. *See Alison D.*, 572 N.E.2d at 28.

36. *See id.* at 29-30. Relying on a strict biological definition, the court held that Alison was not a "parent" entitled to seek visitation under New York law.

37. *See id.*

38. *See* Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1991) (holding that non-legal mother was not a parent and therefore could not challenge award of custody to the legal mother absent a finding that custody by the legal mother would be detrimental to the children); *see also* Curiale v. Reagan, 272 Cal. Rptr. 520 (Ct. App. 1990) (denying lesbian non-legal mother standing to assert a claim for custody or visitation against lesbian legal mother); Kulla v. McNulty, 472 N.W.2d 175 (Minn. Ct. App. 1991) (affirming trial court's finding that lesbian non-legal mother failed to make a *prima facie* showing that parent-child relationship existed, and dismissing non-legal mother's petition for visitation); *In re* Interest of Z.J.H., 471 N.W.2d 202 (Wis. 1991) (holding that lesbian non-legal mother lacked standing to bring action to obtain custody or physical placement of former lover's adopted child). Similar decisions continue to appear with depressing regularity. *See* West v. Superior Court, 69 Cal. Rptr. 2d 160 (Ct. App. 1997) (setting aside order granting visitation to non-legal mother because trial court lacked subject matter jurisdiction over nonparent); Liston v. Pyles, No. 97APF01-137, 1997 WL 467327 (Ohio Ct. App. Aug. 12, 1997) (affirming trial court's dismissal of non-legal mother's petition for support determination and visitation because of lack of standing and jurisdiction); Jones v. Fowler, 969 S.W.2d 429 (Tex. 1998) (denying non-legal mother's petition for visitation because she lacked standing). For recent press on similar cases, see *Lesbian's Ex-Partner is Denied Custody Rights*, BUFF. NEWS, June 16, 1998, at A9; *Birth Mother Wins Lesbian Custody Case*, BOSTON GLOBE, Sept. 24, 1998, at A15.

However, courts have not uniformly rejected claims by non-legal mothers seeking contact with their children. Some courts have allowed the non-legal mother to seek visitation. *See* A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992); J.A.L. v. E.P.H, 682 A.2d 1314 (Pa. Super. 1996); In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995) (distinguishing and partially overruling *In re Z.J.H.*, *supra*). One recent decision appears to grant the non-legal mother rights to seek custody as though she were a legal mother. *See Lesbian's Ex-Partner Wins Custody Rights*, WASH. POST, Nov. 4, 1998, at A9 (discussing New Jersey Superior Court decision to award non-legal mother visitation rights). While these cases may be welcome within the lesbian community, they do not resolve the problem of the non-legal mother. That the non-legal mother does not always automatically lose does not diminish the difficulties caused by the instances in which she does.

matter whether the non-legal mother had been integral to the child's life[39] or whether she and the legal mother had entered into an agreement to raise the child together.[40]

As might be imagined, the decisions characterizing non-legal mothers as strangers raised serious concerns among lesbians with children, lesbian legal activists, and those supportive of lesbian rights. Faced with such cases, as well as the more ordinary disadvantages experienced by non-legal mothers, the lesbian legal community sought a solution.[41]

Distilled to its essence, the problem was understood to be the courts' failure to recognize the non-legal mother's relationship with the child.[42] As courts denied the reality of the non-legal mother's relationship, they also denied the possibility of a legal family with two mothers.[43]

In defining the problem, the lesbian legal community and those supportive of lesbian rights assumed a narrow definition of "non-legal mother."[44] Since the cases involved children born or adopted into a lesbian relationship that was dissolving, activists focused on gaining legal protection only for these mother-child relationships.[45] Neither the courts nor the lesbian legal community addressed the absence of legal recognition for

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39. *See, e.g., West*, 69 Cal. Rptr. 2d 160 (denying visitation to a non-legal mother who had helped raise the child for over two and one-half years).

40. *See, e.g., Curiale*, 272 Cal. Rptr. 520 (denying standing to a non-legal mother despite her two agreements with the legal mother to raise the child together and share custody).

41. *See generally* Paula L. Ettelbrik, *Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513 (1993) [hereinafter Ettelbrik, *Who is a Parent?*] (discussing how the law must adopt solutions for lesbians who have children together in a way that accommodates lesbians' experiences and perspectives); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269 (1991) (explaining and justifying the argument advanced in *Alison D. v. Virginia M.* in favor of a functional definition of family rather than a legal definition turning on marriage and adoption); Polikoff, *Two Mothers*, *supra* note 31 (proposing an expanded definition of parenthood embracing all functional parental relationships formed with the intent to create a parental relationship); Sella, *supra* note 26 (exploring the benefits and drawbacks of existing legal options for nonbiological lesbian mothers to attain parental status over children born into existing lebian relationships); Kimberly P. Carr, Comment, Alison D. v. Virginia M.: *Neglecting the Best Interests of the Child in a Nontraditional Family*, 58 BROOK. L. REV. 1021 (1992) (arguing that *Alison D. v. Virginia M.* was wrongly decided because the court failed to consider the best interests of the child, and refused to recognize standing based on Alison D.'s parental relationship to the child).

42. *See, e.g.*, Carr, *supra* note 41, at 1022-23.

43. *See id.*

44. I prefer a broader definition of "non-legal mother." *See supra* note 27. A number of articles also suggest that it would be appropriate to use a broader definition of "parent" that includes psychological or functional parents in addition to legal ones. *See, e.g.*, Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need For Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879 (1984) (arguing that the law should recognize alternative familial relationships for children beyond the exclusive parental status traditionally granted to only one set of parents); Ettelbrik, *Who is a Parent?*, and Minow, *supra* note 41; Polikoff, *supra* note 31. This strategy has not been generally successful. The courts' reluctance to adopt a broader definition may in part be attributable to the acceptance of second-parent adoptions. For an example, see Titchenal v. Dexter, *infra* notes 83-97 and accompanying text. While it is beyond the scope of this essay, these more liberal tests can also be subjected to a lesbian-centered critique and raise many of the same problems that are discussed here. *See* Robson, *Resisting the Family*, *supra* note 5, at 985-91.

45. *See, e.g.*, Sella, *supra* note 26; Carr, *supra* note 41.

other non-legal mothers, including those who, like step-parents, had developed relationships with children born into a *previous* relationship involving the legal mother. It is therefore unsurprising that the solution developed does not assist these lesbian mothers.

Having posed the problem in these narrow terms, legal theorists and activists posited second-parent adoption as a solution. Second-parent adoptions resolve the problem of the non-legal mother by transforming her into a legal mother. They allow the non-legal mother to adopt child, creating a family with two legally recognized mothers.[46] Once a second-parent adoption is completed, the two women have legally indistinguishable rights.[47] In the event of a custody dispute between them, a court would face a case involving two legal mothers with standing to sue for custody.[48]

Second-parent adoption is an unusual form of adoption. In a traditional adoption, a couple establishes a legal parental relationship with a child.[49] In recent years, single-parent adoptions have also become common.[50] Such adoptions require the termination of all previously recognized parental rights as a condition precedent.[51] The adoptive parent or parents are substituted for the original parent or parents.[52] This ensures that a child retains only a limited number of legal parents (generally two).[53] For example, before a non-biological mother could adopt a child, the parental rights of the biological mother would have to be extinguished.[54] After the adoption, the child would have the adoptive parent as a mother in place of the biological mother.

This, of course, is not the result that advocates sought for lesbian couples. They sought legal recognition of the parental relationship between a lesbian and her partner's biological or adopted child, without termination of the partner's already legally-recognized parental rights. They wanted the child to end up with both the initial mother *and* the adopting partner as legal parents. The desired result explains the name given the

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46. While gay men and heterosexuals can also complete second-parent adoptions, they were initially developed by and for lesbians. *See* NCLR 20TH ANNIVERSARY ALBUM, *supra* note 3, at 7. Furthermore, the term second-parent adoption was coined in an article focusing on lesbian adoption rights. *See* Elizabeth Zuckerman, Comment, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 731 n.7 (1986).
47. *See generally* 1 JOAN HEIFETZ HOLLINGER ET AL., ADOPTION LAW AND PRACTICE § 3.06[6] (Joan Heifetz Hollinger & Dennis W. Leski eds., release 11, 1998).
48. *See id.* § 3.06[6], at 56.
49. *See id.* § 3.06[5], at 50.
50. *See id.*
51. *See id.* § 4.03[1], at 90; § 4.04[1], at 92-93.
52. *See id.* § 1.01[2][c].
53. This reflects the law's linkage between parenthood and biological reproduction. *See* Robson, *Third Parties*, *supra* note 6.
54. For lesbians who give birth through insemination by an anonymous donor or who initially adopt as single women, there is no legally recognized father. Hence, no termination of rights is required. *See generally* HOLLINGER ET AL., *supra* note 43, § 3.06[6] at 57-58.

procedure, because it adds a second parent rather than substituting one for another.

Second-parent adoptions do not challenge the notion that a child can have only two legal parents. If a child has two parents, a third person generally cannot complete a second-parent adoption unless one of the two existing parents' rights are terminated.[55] Thus, if a child has a legally recognized father, either because a known individual was used as a sperm donor or because the child was the product of a heterosexual relationship, the father's parental rights must be terminated before the second-parent adoption can be completed.[56] For this reason, second-parent adoptions are often not available to a legal mother's subsequent lesbian lover, no matter what her relationship with the child.

The result sought in second-parent adoptions is not unfamiliar to the law. The closest legal analogy is the step-parent adoption, in which a person married to the legal parent of a child becomes a legal parent without extinguishing the parental rights of their spouse.[57] For example, in the case of a step-mother who adopts, the original father remains a legal parent, the step-mother becomes a legal mother, and the original mother's parental rights are extinguished.

Step-parent adoptions, however, are only available to married couples and are therefore not available to lesbians.[58] Nevertheless, advocates

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55. *See* Bartlett, *supra* note 44, at 893-99 (discussing how adoption perpetuates the exclusivity of parenthood by only permitting the child to retain a parent or one set of parents).

56. *See generally* CLARKE, *supra* note 33, § 21.2 (discussing the constitutional limits on terminating a father's rights). *But see In re* Adoption of A.O.L., No. 1JU-85-25-P/A (Alaska Super. Ct. July 23, 1985) *discussed in* Polikoff, *Two Mothers, supra* note 31, at 522-23 (recognizing three legal parents, including two mothers and a father).

57. *See generally* Bartlett, *supra* note 44, at 912-19. There are both differences and similarities between second-parent and step-parent adoptions. The position of the prospective adoptive mother in a second-parent adoption is often different than the position of the prospective adoptive parent in a step-parent adoption. The child in a step-parent adoption was born or adopted into a previous relationship of the already-recognized parent, while the child in a second-parent adoption often was born or adopted into the existing relationship between the prospective adoptive parent and the already-recognized parent. Of course, this is not always the case. The child in a second-parent adoption may have been born into a previous marriage or heterosexual relationship where the father's rights subsequently have been terminated. *See supra* note 27. Regardless, the result in a second-parent adoption is the same as the result in a step-parent adoption—the addition of a new legal parent without the loss of one of the old ones.

Typically, in order for a step-parent to adopt, the non-spouse's parental rights must be terminated. Thus, step-parent adoptions do not challenge the assumption that a child can have at most two parents. In using step-parent adoptions as the model to explain and justify second-parent adoptions, advocates implicitly accepted this restriction and imported it into lesbian family law. This reinforced the assumption that children can have only two parents—even children of lesbians. This restriction is obviously problematic for many within the broad range of non-legal mothers with whom I am concerned. *See supra* note 27. The tacit acceptance of this two-parent restriction, even if only for purposes of litigation strategy, has devalued and left unprotected relationships between women and children in settings that include more than two parents.

58. *See* Emily C. Patt, *Second Parent Adoption: When Crossing a Marital Barrier is in a Child's Best Interests*, 3 BERKELEY WOMEN'S L.J. 96 (1987-88). *But see* Unif. Adoption Act § 4, § 4-101(b) (1998) (permitting a *de facto* step-parent who is not married to the custodial parent, to adopt as if he or she were a *de jure* step-parent, if the individual has the consent of the custodial parent and

used step-parent adoptions as the model to explain and support second-parent adoptions.[59] The relationship between the lesbian mothers was likened to that of a married heterosexual couple, one of whom had legally-recognized parental rights.[60] Advocates argued that the legal device available to married couples raising a child should also be available to lesbian couples raising a child, as it would advance the policy goal of promoting the interests of children raised in lesbian families.[61]

Despite the availability of step-parent adoptions, recognition of second-parent adoptions did not come easily. Lesbian rights advocates systematically and tenaciously promoted second-parent adoptions through academic writing and litigation.[62] The first decisions do not appear until the mid-to-late 1980s.[63] These efforts successfully secured the availability of second-parent adoptions in a number of densely populated jurisdictions.[64] While there are still few reported opinions,[65] second-parent adoptions are now commonplace in a number of major metropolitan ar-

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the court) *and* § 4-102(b)(1) (1998) (noting such an adopotion would not terminate the rights of the custodial parent).

59. *See* Patt, *supra* note 58, (writing that the liberal interpretation of California adoption statutes allowing step-parent adoptions laid an important foundation for courts to make an analogous interpretation in favor of second-parent adoptions); Carrie Bashaw, Comment, *Protecting Children in Nontraditional Families: Second Parent Adoptions in Washington*, 13 U. PUGET SOUND L. REV. 321 (1990) (describing the similarities between step-parent and second-parent adoptions and noting that the liberal interpretation of Washington adoption statutes identifying a step-parent as a "parent" is a step towards recognizing second-parent adoptions); Zuckerman, *supra* note 46 (finding second-parent adoptions would be a natural extension of step-parent adoptions). *See also* Polikoff, *Two Mothers*, *supra* note 31, at 476-77, 525 (arguing that since limitations in adoption law—restricting a child to one mother and one father and terminating the rights of all other parents—affect step-parents as well as lesbian mothers, both would benefit from a broader approach to adoption).

60. *See, e.g.*, Polikoff, *Two Mothers*, *supra* note 31 (noting that stepfamilies "are similar to lesbian-mother families in that both may contain an adult whom the child views as a parent and who fully functions as a parent with the legal parent's consent").

61. *See generally* Julia Frost Davies, Note, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055, 1069-74 (1995) (noting that "co-parent adoptions" would provide greater security for children in terms of custody and visitation, as well as the more tangible benefits of inheritance, health insurance, and life insurance).

62. *See* Polikoff, *Two Mothers*, *supra* note 31; Bashaw, *supra* note 59.

63. *See, e.g.*, Nancy D. Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. REV. L. & SOC. CHANGE 907 (1986) (opening the article with the statement that: "[t]his coming week, two women in San Francisco will enter a courtoom as open lesbians and ask a judge to grant their petition to adopt a child together"); Polikoff, *Two Mothers*, *supra* note 37 at 522-23 (discussing the "small but growing number of cases" where courts have approved second-parent adoptions, including *In re* E.B.G., No. 87-5-00137-5 (Wash. Super. Ct. Mar. 29, 1989)); NCLR 20TH ANNIVERSARY ALBUM, *supra* note 3, at 5 (stating that the organization completed its first second-parent adoption in 1987). For the first reported appellate decision on second-parent adoptions, see *In re* Evan, 583 N.Y.S.2d 997 (Surr. 1992).

64. *See supra* note 50.

65. *See In Re* L.S. for Adoption of Minor (T.), No. A-269-90, A-270-90, 1991 WL 219598 (D.C. Super. Aug. 30, 1991); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); *In re* Adoption of Child by J.M.G., 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993); *In re* Adoption of Evan, 583 N.Y.S.2d 997 (N.Y. Surr. Ct. 1992); Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993). *But see In re* Adoption of Baby Z., 247 Conn. 474 (1999); Liston v. Pyles, No. 97APF01-137, 1997 WL 467327 (Ohio Ct. App. Aug. 12, 1997); *In re* Angel Lace M., 516 N.W.2d 678 (Wis. 1994).

eas.[66] Second-parent adoptions are widely seen as the preferred answer to the problem of the unbalanced rights of lesbian parents.[67]

A LESBIAN-CENTERED CRITIQUE OF SECOND-PARENT ADOPTIONS

The growing acceptance, ease, and frequency of second-parent adoptions is generally viewed as a victory for lesbian legal rights.[68] On one level, it is fair to conclude that second-parent adoptions are a striking success for the lesbian legal reform movement. A second-parent adoption creates a legally recognized and virtually indissoluble relationship between the child and the hitherto non-legal mother.[69] This relationship, coupled with the initial mother's legally recognized relationship, protects the lesbian family from outside interference and, in the event the relationship between the two women ends, ensures judicial recognition of each woman's relationship to the child.

Had Alison D., from *Alison D. v. Virginia M.*,[70] successfully completed a second-parent adoption, the opinion of the appellate court would have been different. Rather than finding her to be a legal stranger to the child, the court would have had to recognize Alison D. as a legal parent and determine the visitation and custody arrangements that would best serve the interests of the child.

But how do second-parent adoptions fare under Robson's critique? If we examine them from a lesbian-centered perspective, in which lesbian survival is the essential goal, are second-parent adoptions the solution we should be seeking? Or have second-parent adoptions served to domesticate us by enhancing the law's power to define which of our relationships matter?

I am troubled by the generally uncritical acceptance of second-parent adoptions.[71] I am not persuaded that the availability[72] of second-parent adoptions is good for all lesbians. To the contrary, it seems to me that—as with so many legal devices—second-parent adoptions are a dou-

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66. *See generally* Lambda Legal Defense and Education Fund (visited Feb. 5, 1999) <http://www.lambdalegal.org>.
67. *See supra* notes 1-3 and accompanying text.
68. *See supra* notes 1-3 and accompanying text.
69. *See supra* notes 46-48 and accompanying text.
70. 572 N.E.2d 27 (N.Y. 1991). For a discussion of this case, see *supra* notes 34-37 and accompanying text.
71. I do not mean that I am troubled by the celebration of individual second-parent adoptions. Rather, it is striking to me that lesbians celebrate state approval of their existing relationships with a child although they generally live their lives outside of the law. This contradiction strikes me as evidence of the legalization of lesbian existence. *See also* Robson, *Mother*, *supra* note 6, at 104.
72. Adoption is not a matter of right. What has been won is the right to ask a court to approve a second-parent adoption. For some, the request to adopt will be unsuccessful, not because second-parent adoptions are prohibited, but because individual lesbians are judged unworthy.

ble-edged sword. If lesbians are to employ such a tool, we must be fully aware of its nature.

I have two major concerns about second-parent adoptions. First, I believe they divide our community. Second, I believe that the uncritical acceptance of second-parent adoptions contributes to our domestication. These two concerns are interrelated. It is in the nature of the law to create categories, to separate those who will receive a benefit (in this case, parental rights) from those who will not. This categorization creates division that in itself is problematic. But if we do not scrutinize the operation of the law, then we may internalize the law's divisions in ways that operate to domesticate and to divide us. The law has a significant influence on cultural ideas in the United States, even within the lesbian community. If we are not attentive and critical, we may credit the law's division of lesbians into worthy and unworthy. In so doing, we devalue lesbians who are not favored by the law; we substitute legal judgment for our own judgment; and we are domesticated.

THE DIVISION OF OUR COMMUNITY

Second-parent adoptions divide the lesbian community in at least two ways. First, they benefit some—but only some—lesbian non-legal mothers.[73] They are no use to lesbians raising children born into their partner's previous heterosexual relationship, where the father remains a legal parent to the child.[74] Second-parent adoptions offer no protection to the relationships that these non-legal mothers have with their children. In serving the needs of some but not all non-legal mothers, second-parent adoptions reinforce the idea that there are two distinct categories of lesbians raising children: "real" lesbian mothers, who may be able to adopt if they are fortunate, and those other lesbians, whose status as women raising children is diminished.[75] In this way, the existence of second-parent

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73. For those they do not benefit, they may actually be a detriment. *See infra* notes 83-97 and accompanying text. This disadvantage to some, of course, makes the division of our community even more troubling.

74. These lesbian mothers are excluded from second-parent adoption because their children already have two parents. *See supra* note 56 and accompanying text. Their position is similar to that of a step-mother.

75. It is noteworthy to me how widely known within the lesbian community are the cases like *Alison D.* that deny recognition to the non-legal lesbian mother who participates in the conception or adoption of a child. The indignation generated by those opinions is widely shared, even beyond the lesbian community. By contrast, though there are many instances in which a lesbian helps to raise her partner's children from an earlier marriage only to be cut off from those children when her relationship with their legal mother ends, I know of no case in which the issue of her continuing contact with the children has even been litigated.

The fact that we rarely hear about these non-legal mothers losing contact with children they helped raise shows how little we know about those situations, and may indicate that such relationships are devalued in the lesbian community. *See also supra* notes 27, 44-45 and accompanying text. I suspect the failure of second-parent adoptions to address the needs of the broad range of

adoptions, which allow the creation of "real" lesbian families with two legally recognized mothers, may actually work to the detriment of those lesbian non-legal mothers who would never even be considered for adoption.

Second-parent adoptions create division in a second way: they divide those they were intended to benefit. For lesbians raising children that were planned within existing lesbian relationships, successful second-parent adoptions are enormously beneficial. Yet they are no use and may even be detrimental to those lesbians who do not or cannot complete them.

Second-parent adoptions are not available to all lesbians within jurisdictions that permit them. They are not available to low-income lesbians[76] or other lesbians practically excluded for any number of personal characteristics, including a history of drug or alcohol abuse, a criminal record, or an unconventional lifestyle. In this way, second-parent adoptions divide us into "good lesbians" who will be rewarded and "bad lesbians" who will be punished.[77]

As is too often the case in law, the lesbians who benefit from second-parent adoptions tend to be those who begin with most of the privileges. Lesbians like myself, who live in jurisdictions that permit second-parent adoptions, will have little difficulty completing second-parent adoptions.[78] Such lesbians have been referred to as "but for"[79] lesbians, be-

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non-legal mothers is both a product of this devaluation and a further reinforcement of it. Step-parents in general suffer from a similar devaluation of their relationships with their children.

76. Women may not be able to adopt because they cannot afford the costs of an adoption. In this way, wealth and class affect access to adoption. Wealth and class have also played a significant role in the courts' consideration of many leading cases permitting second-parent adoptions. Nearly all the major reported opinions concern lesbians with professional employment who own property. *See* Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay Victories*, 4 LAW & SEXUALITY 83, 103-05 (1994). Several come from wealthy families. The ability of a woman to transmit wealth to her child is often cited as a reason to permit adoption. *See In re* Adoption of Evan, 583 N.Y.S.2d 998-99 (Sur. Ct. 1992); Robson, *Third Parties*, *supra* note 6, at 1401-02. These factors do not favor women who do not own property or earn significant amounts of money. Thus, even if efforts to reduce the costs of second-parent adoptions are effective, low-income women may still be unable to adopt their children.

77. Several authors have examined the ways in which custody cases involving lesbians who leave heterosexual relationships turn on the good lesbian/bad lesbian distinction. *See generally* Katherine Arnup & Susan Boyd, *Familial Disputes?: Sperm Donors, Lesbian Mothers and Legal Parenthood*, *in* LEGAL INVERSIONS, *supra* note 6 at 77, 82-83 (discussing the fact that, in reported cases, judges attempt to distinguish between discrete lesbian mothers and openly lesbian mothers); Davina Cooper & Didi Herman, *Getting the Family Right*, *in* LEGAL INVERSIONS, *supra* note 6 at 162, 176 (explaining that, in Britain, legislative developments have reflected the idea that to the extent lesbians reproduce dominant values, they are more acceptable); Robson, *Mother*, *supra* note 6, at 108-10 (arguing that class-priviledged lesbians who are willing to downplay their lesbian identity are more likely to be successful in custody disputes); Katherine Arnup, *"We Are Family": Lesbian Mothers in Canada*, 20 RESOURCES FEMINIST RES. 101, 101-02 (1991) (opining that judges still consider "lesbian lifestyles" when making custody determinations); Shapiro, *supra* note 33, at 647-48 (comparing courts' treatment of lesbian mothers who are open about their lesbianism to those who keep that information from their children).

78. I belong to many privileged groups. I am a law professor. I am white. I own property, am relatively wealthy, am in reasonably good health, and have no criminal record.

79. *See* Robson, *Convictions*, *supra* note 6, at 181 ("...I call 'but for' lesbians, who, 'but for' their lesbianism, are 'perfect.'").

cause "but for" their lesbianism they are perfect. Professionals who are well-educated, own property, and raise children within planned nuclear families will be able to find the right lawyers, social workers, and judges to pursue second-parent adoptions with little doubt of eventual success. Their relationships with their children will be protected.

The availability of second-parent adoptions to some lesbians within the group they are intended to benefit may disadvantage other lesbians in three ways. First, second-parent adoptions meet the needs of the most politically powerful members of the lesbian community. Not coincidentally, this includes the most privileged, most assimilated, and least "threatening" lesbians. If the elitist nature of second-parent adoptions is not recognized, then the most powerful members of the lesbian community may consider the victory won and turn to other issues. This weakens the position of those lesbians for whom second-parent adoptions are not an answer, as they are deprived of their most politically powerful allies.[80]

Second, second-parent adoptions validate "but for" lesbian families,[81] reinforcing the model of a two parent, nuclear family as the preferred family form. This works to the disadvantage of lesbians raising children in less traditional settings.[82] As the two-parent model is strengthened, the choice to reject that model is further marginalized.

Last, and most concretely, the availability of second-parent adoptions in a jurisdiction may directly undermine the legal claims of women who have *not* completed an adoption. A recent Vermont case, *Titchenal v. Dexter*,[83] highlights this problem.

Chris Titchenal and Diane Dexter lived together and wanted to have a child. In 1991, after their efforts to have a child through insemination failed, they turned to adoption. In July of that year, Dexter legally adopted an infant daughter who was named Sarah Ruth Dexter-Titchenal.[84]

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80. The availability of second-parent adoptions to some lesbians also undermines general claims of anti-lesbian bias in the judicial system. Non-lesbian allies may believe that, since some lesbians can adopt, the inability of others to complete their adoptions reflects an individual lack of merit rather than systemic bias. This misguided view further weakens the political position of lesbians excluded from second-parent adoptions.

81. This term builds on Robson's idea of "but for" lesbians. I use it to describe families that are perfect "but for" the fact that the parents are lesbians. Typically, of course, the parents are "but for" lesbians.

82. It may seem curious to refer to any setting in which lesbians are raising children as traditional, but many lesbian households with children are quite traditional, "but for" the detail that the parents are lesbians. Other lesbian households—collectives for example—bear less resemblance to the traditional, two-parent, private household.

83. 693 A.2d 682 (Vt. 1997).

84. There is no information in the opinion about why it was Dexter and not Titchenal who completed the adoption. It appears that the women were equally well-qualified to adopt and that either could have been the adoptive parent. In the end, of course, the fact that it was Dexter and not Titchenal is of critical significance.

For the first three-and-a-half years of Sarah's life, Dexter and Titchenal lived together and shared responsibility for the child. Titchenal herself cared for the child sixty-five percent of the time.[85]

In November 1994, the parties separated. Dexter moved out of the home she had shared with Titchenal, taking Sarah with her. For five months following their separation, Titchenal had substantial contact with Sarah, caring for her from Wednesday afternoons to Friday evenings. In the spring of 1995, however, Dexter ended this arrangement and severely curtailed Titchenal's contact with Sarah. Litigation followed.[86]

Titchenal sued for regular, unsupervised contact with Sarah. Since Titchenal was not legally recognized as a parent, she could not proceed under the state custody statutes, nor could she properly invoke the jurisdiction of the family court. Instead, she sought relief in the superior court, a court of general jurisdiction, by invoking various equitable doctrines.[87]

The Vermont Supreme Court rejected Titchenal's effort to seek contact with Sarah. Notably, the court found Titchenal's failure to adopt to be legally significant.[88] The court decided that because Titchenal did not take advantage of the opportunity to protect her relationship with Sarah, she could not seek recourse to equitable remedies.[89]

In this way, the availability of second-parent adoptions hindered Titchenal in her efforts to continue her relationship with her child.[90] Had second-parent adoptions been unavailable in Vermont, Titchenal's position might have been stronger. She could have more readily invoked an

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85. *See Titchenal*, 693 A.2d at 683.

86. *See id.*

87. These included *in loco parentis*, which is a temporary relationship where "[i]n the place of a parent . . . [one is] charged factitiously with a parent's rights, duties and responsibilities without the benefit of formal legal approval." BLACK'S LAW DICTIONARY 787 (6th ed. 1990); *see also* Polikoff, *Two Mothers*, *supra* note 31, at 502-08 (discussing *in loco parentis* doctrine and case law, and adressing the limitations and strengths of the doctrine). Titchenal also sought to rely upon *de facto* parenthood, which the California Supreme Court defined in *In re B.G.*, 523 P.2d 244, 253 n.18 (Cal. 1974), as "that person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his [sic] psychological need for affection and care." *See also* Polikoff, *Two Mothers supra* note 31, at 491-502 (discussing the equitable estoppel doctrine and its application to lesbian-mother family custody disputes).

88. The Vermont Supreme Court approved second-parent adoptions in 1993. *See In re* B.L.V.B., 628 A.2d 1271 (Vt. 1993). The legislature embraced that decision in 1995. *See* VT. STAT. ANN. tit. 15A, §§ 1-101-1-102(b) (1998).

89. *See Titchenal*, 693 A.2d at 683 n.5.

90. Legal developments in Wisconsin suggest that the reverse might also be true. In other words, not only might the availability of second-parent adoptions curtail the availability of equitable remedies, but the *unavailability* of second-parent adoptions might provide an incentive for courts to make equitable remedies available. In 1991, at least one Wisconsin court denied a non-legal mother's appeal to equitable grounds. *See In re* Z.J.H., 471 N.W.2d 202 (Wis. 1991) (denying a non-legal mother standing to seek custody or visitation of her child). However, several years later, the Wisconsin courts refused to grant second-parent adoptions. *See, In re* Angel Lace M., 516 N.W.2d 678 (Wis. 1994). Following that decision, Wisconsin became one of the very few states to allow non-legal mothers some limited appeal to equitable grounds. *See* Holtzman v. Knott, 533 N.W.2d 419 (Wis. 1994) (recognizing that non-legal mothers have standing to seek visitation, but not custody, based on equitable factors).

existing body of law recognizing *de facto* parenthood and *in loco parentis*. In addition, she might have been able to argue that she, Sarah, and Diane constituted a functional family, and that her relationship with Sarah was therefore entitled to some protection.[91]

Titchenal v. Dexter shows that the failure to adopt can be critical even when a reasonable excuse for that failure exists. The Vermont Supreme Court rejected Titchenal's excuse for her failure to adopt, even though she argued that she had a reasonable belief that adoption by a same-sex partner was not permitted under Vermont law. The legal history of second-parent adoptions in Vermont supported her belief. At the time Diane Dexter adopted Sarah, in July of 1991, the Vermont adoption statute then in force provided that "[a] person or husband and wife together . . . may adopt."[92] This language appeared to preclude joint adoption by two people who were *not* husband and wife. Yet in *Titchenal*, the Vermont Supreme Court stated that the statute "certainly did not preclude [Titchenal] from seeking to adopt Sarah."[93] In support of this position, the court observed that by December 1991, at least one probate court had approved a second-parent adoption.[94] The court did not mention, however, that the probate court was apparently not within the county where Titchenal and Dexter lived and that the opinion of that court was a slip opinion not collected in any reporter.[95] In fact, it was not until June 1993 that the Vermont Supreme Court clearly authorized second-parent adoptions.[96]

Ultimately, it appears that the court was unconcerned with the reasonableness of Titchenal's decision not to attempt to adopt. It simply stated that Titchenal should have tried to adopt. The particular reasons

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91. Some have argued that the law should recognize as familial those relationships that are functionally the same as spousal or parental relationships. *See, e.g.*, Minow, *supra* note 41. This approach has been adopted in some cases involving the definition of family. *See In re* Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991); Braschi v. Stahl, 543 N.E.2d 49 (N.Y. 1989). Some courts have also used this reasoning to accord a non-legal mother an entitlement to continued contact with a child after her separation from the legal mother. *See* J.A.L. v. E.P.H, 682 A.2d 1314 (Pa. Super. 1996).

While the functional family approach may benefit a greater number of women than second-parent adoptions, it is also exclusionary and divisive. Only those women whose relationships sufficiently resemble traditional families will benefit. For a thoughtful critique of the functional family approach, see Robson, *Resisting the Family*, *supra* note 5, at 985-91.

92. VT. STAT. ANN. tit. 15 § 431 (repealed 1995).

93. *Titchenal*, 693 A.2d at 686.

94. *See id.*

95. Instead, *Titchenal*, 693 A.2d at 687, cited *In re* B.L.V.B., 628 A.2d 1271, 373 n.3 (Vt. 1993). The *B.L.V.B.* court, in turn, cited *In re* Adoption of R.C., No. 9088, slip op. at 5-7 (Addison Prob. Ct. Dec. 9, 1991). This decision of the probate court is still neither published nor available in Westlaw or Lexis electronic databases.

96. *See In re* B.L.V.B., 628 A.2d 1271 (Vt. 1993).

for her failure to adopt were irrelevant, all that mattered was the failure itself.[97]

Second-parent adoptions are at most a partial solution to the problem of the law's failure to recognize a non-legal mother's relationship with her child. They are not available to everyone in the lesbian community and they create division among those to whom they are available. These problems must be acknowledged if the harms resulting from second-parent adoptions are to be addressed.

LESBIAN DOMESTICATION

Second-parent adoptions must also be viewed far more critically if lesbians are to avoid domestication. The legal possibility of second-parent adoptions may domesticate lesbians in at least three different ways. Each works not simply through the existence of second-parent adoptions, but through the uncritical acceptance of second-parent adoptions.

First, the availability of second-parent adoptions provides a powerful incentive to mold oneself to fit the "good lesbian" model, because courts typically approve second-parent adoptions for "good lesbians."[98] I do not mean simply that on the afternoon the social worker comes for the home study we may dress up or speak in a manner more studied than that in which we usually speak. Rather, I mean that in order to qualify for second-parent adoptions, lesbian couples must walk, talk, and act like heterosexual parents, and must conform to the nuclear family model. That means the lesbian couple must live together. They must be a couple, not a trio or quartet. They must be monogamous. Most critically, a lesbian family must present itself as a family like any other, and renounce visible and vocal challenges to the familial institutions that have so frequently oppressed lesbians. If we do not do these things, then we may be denied adoption, leaving our relationships with our children unrecognized and unprotected. Given the general level of legal hostility to lesbian mothers, this knowledge may have a far-reaching effect on the choices we make for ourselves.[99] Even as we are enticed by the promise of protection for

97. Titchenal was penalized for failing to attempt a second-parent adoption. It seems reasonable to question whether the court would be more sympathetic to a woman whose petition for a second-parent adoption was judicially denied.

98. This aspect of domestication is intimately connected with the law's division of our community into "good lesbians" and "bad lesbians." *See supra* notes 55-61 and accompanying text.

99. For example, a lesbian may be influenced to define a relationship as monogamous rather than non-monogamous. This might not be because monogamy meets her needs or the needs of her lover or children, but because, in the eyes of the law and society generally, it is the best arrangement, and will therefore be favored with both legal and societal approval. *See* RUTHANN ROBSON, SAPPHO GOES TO LAW SCHOOL 115-19 (Columbia 1998); CATHERINE SAAFIELD, LESBIAN MARRIAGE (K)NOT, IN SISTERS, SEXPERTS, QUEERS: BEYOND THE LESBIAN NATION 187-95 (Arlene Stein ed., 1993). In the same way, we may be moved to turn away from confrontational political advocacy or collective living arrangements.

our relationships with our children, we are coerced into cooperation, accommodation, and assimilation.

Second, the legal possibility of second-parent adoptions may domesticate lesbians by convincing us to internalize the mainstream notion that a "real" mother must be a legal one. Not all lesbians are subject to domestication in the same way. For those non-legal mothers who could never qualify for second-parent adoptions—those whose children already have two legal parents—there is no incentive and no pressure. The law's treatment of these non-legal mothers demonstrates a different aspect of domestication: the danger of internalizing the law's social impact. Non-legal mothers who adopt become legal mothers. Those who cannot adopt are, in the eyes of the law, not mothers. This difference in legal status is not without social meaning. Legal labels are powerful. Even within the lesbian community, the social category "mother" is, in part, shaped by the law's definitions. Being recognized as a legal mother helps to make one a "real" mother.[100] That, in turn, reinforces the idea that non-legal mothers are not "real" mothers.[101]

Third, and perhaps most fundamentally, second-parent adoptions are domesticating because they foster the belief that the law will protect rather than constrain lesbians. Because second-parent adoptions do protect some lesbians, those lesbians may be inclined to view the law's power and authority as more legitimate than they would otherwise. Yet in the context of adoption, judges are granted a great deal of discretion in deciding which couples merit adoption. Judges will exercise their discretion, not with an eye towards lesbian survival, but in light of their own views of appropriate relationships and families.[102] In accepting this process, we partially cede the power to decide for ourselves which of our relationships are worthy.

We have uncritically accepted second-parent adoptions. We have thereby eagerly participated in the institution of a system that rewards those who conform and punishes those who do not. When we applaud this restrictive system, we are domesticated.

CONCLUSION

It is always easier to criticize than to create. Having identified the complex and problematic operation of second-parent adoptions, what

100. This, I suspect, is in part why some celebrate completion of the adoption.

101. This idea does not originate in the lesbian community, but rather in the heterosexual community with respect to step-parents. The very term "step-mother" conveys that she is not a "real" mother. The lesbian community has not, however, challenged the devaluation of women in this position.

102. Of course, some judges and social workers are lesbians and might in fact exercise discretion with an eye towards lesbian survival. But this would surely be the exception rather than the rule.

should we do? I do not advocate the abolition of second-parent adoptions. We have struggled for and won their availability in many states; loss of that entitlement would be a defeat. Whatever the problems that attach to second-parent adoptions, abolition would not foster lesbian survival for lesbians who can and do complete them. Neither would I suggest that individuals who can complete second-parent adoptions refrain from doing so.[103] For those who can complete them, second-parent adoptions offer a measure of security and protection that cannot be obtained in any other way.

To move forward, we must pursue two strands of action. First, to the extent that we continue to rely on second-parent adoptions, we must fully acknowledge and explore their problematic nature. We must recognize them as an imperfect solution, and one that is available to some but not to all. We must be conscious that second-parent adoptions benefit some at a cost to others. This may be most important for those of us who can and do complete second-parent adoptions. Ultimately, we must not only hold this knowledge in our hearts, but make it commonplace in our community.

The second strand of action requires us to continue seeking a solution for those who cannot take advantage of second-parent adoptions. In seeking a new solution, I return to Robson's insights. She has suggested that it may be useful to distinguish external conflicts between lesbians and non-lesbians, from intra-lesbian conflicts.[104] A non-legal mother may encounter both external and intra-lesbian conflicts. It is useful to consider them separately.

Non-legal mothers are consistently at a disadvantage in dealing with the outside world, including doctors, school authorities, and various bureaucracies. As I noted earlier,[105] some of these external conflicts can be resolved by using specific legal devices. However, such devices are beyond the scope of this article.

The intra-lesbian conflicts involving non-legal mothers are more troubling. The drive for second-parent adoptions has been fueled by the desire to address conflicts between lesbian mothers. Cases like *Alison D. v. Virginia M.* attracted attention and spurred lesbian legal activists to action. These activists identified the problem, like the one at issue in *Alison D.*, as a failure of the courts and of the law.[106] Since the problem was identified as a legal one, the solution was sought in the realm of the law. Second-parent adoptions were the legal solution to the legal problem.

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103. It would be, among other things, extremely hypocritical of me to advocate that position. As I noted at the outset, I completed a second-parent adoption. Additionally, failure to complete a second-parent adoption can be used against a non-legal mother. *See supra* notes 83-97 and accompanying text (discussing *Dexter v. Titchenal*).

104. *See* Robson, (OUT)LAW, *supra* note 6.

105. *See supra* note 28.

106. *See supra* note 42 and accompanying text.

Yet it is not necessary to identify the *Alison D.* problem as a legal one requiring a legal solution. Only if one starts with the law will the problem be defined as the law's failure to recognize rights in the non-legal mother. It is equally valid to suggest that the problem is that lesbians—never the favorites of the judicial system—resorted to the legal system in the first place. If that is the problem, the solution is to discourage lesbians from resorting to the courts in order to resolve disputes about their children. In other words, if we can dissuade legal mothers from going to court to deny the validity of the non-legal mother's claim, there will be less of a need for second-parent adoptions, and their limited availability will not be as problematic.

Of course, I do not assume that we can prevent lesbians who are raising children together from separating, sometimes in painful and destructive ways. I do not think we can prevent disputes from occurring in the first place. Yet we, as individuals and as a community, can and should offer a viable, lesbian-centered way of resolving these disputes. In order to encourage women to use new mechanisms rather than those of the legal system, we should be very clear about the costs to lesbian survival of rejecting lesbian resolutions in favor of legal ones. We must prove that the legal option is undesirable and even unacceptable.

The first task, then, is to develop a viable, non-legal, lesbian-centered way of resolving disputes between lesbians over their children. This may not be a task for lawyers or legal theorists. There are many within the lesbian community who are skilled at dispute resolution and mediation, and much work has been done to ensure that alternatives to litigation do exist.[107]

The second task is to educate our community about the costs of using the legal system, and to thereby dissuade lesbians from choosing the legal option. Those of us who teach or practice law bear a special responsibility in this regard. We can use our familiarity with the legal system to fully explore the perils posed by second-parent adoptions. In doing this, we may be called upon to challenge our own self-interest. Since we are generally among the more privileged lesbians, the individual benefits of second-parent adoptions will probably be available to us. As lawyers and law professors, we are professionally invested in seeking legal solutions and training others to do the same. Nevertheless, we are obligated to expose the domesticating effects of the law and to guard against them. We must examine and discuss the ramifications of cases like *Alison D.* and *Titchenal* for lesbians, their children, and their partners' children. Though

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107. *See* Nicole Berner, *Child Custody Disputes Between Lesbians: Legal Strategies and Their Limitations*, 10 BERKELEY WOMEN'S L.J. 31, 34-39 (1995) (suggesting a legal presumption of parenthood for unmarried co-parents as an alternative to second-parent adoptions, contractual agreements, and equitable solutions); William Mason Emnett, *Queer Conflicts: Mediating Parenting Disputes Between Lesbians*, 86 GEO. L.J. 433 (1997) (examining the benefits and drawbacks of mediating custody disputes between gays and lesbians).

we cannot (and probably should not) make the legal option impossible, we can work to show that it is both undesirable and unacceptable.[108] We must recognize, as Robson says, that "[w]hen we use the law against each other, we are ultimately being used by the law to sustain its own non-lesbian power."[109]

At the same time, we can nurture and sustain "an ethic that says that a lesbian biological mother may not rely on the patriarchal definitions of parenthood to defeat her partner's rightful claims to visitation or custody."[110] I am confident that there are instances where lesbians in disagreement over their continued relationships with children do not resort to litigation.[111] These non-legal resolutions are largely invisible. They produce neither newspaper articles nor appeals to the public for support. Yet we must recognize and acknowledge that these resolutions strengthen our community and that the legal resolutions—whatever their outcomes—are inherently dangerous.

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108. Perhaps out of respect for individual choices and an unwillingness to judge others, we have been too accepting and uncritical of second-parent adoptions. *See* Paula Ettelbrik, *Who is a Parent?*, *supra* note 41, at 547 ("Naturally, when conflict [between women who have had a child together] arises, the biological mothers will rely on the advantage the law gives them, regardless of the 'lesbian ethic' that we honor our agreements with each other with regard to parenting"). While this reliance may be "natural," it is neither acceptable nor desirable.

109. Robson, *Mother*, *supra* note 6, at 115.

110. Paula Ettelbrik, *Letters to the Lesbian/Gay Law Notes*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y.), June 1993, at 1 (writing that such an ethic already exists).

111. *See* Jean Godden, *In Left Field Over Wrong Number...*, SEATTLE TIMES, Dec. 9, 1998, at B1 (noting the breakup and subsequent joint-custody agreement of Seattle City Councilwoman Tina Podlodowski and her partner Shelle Mileur).