Dalhousie Journal of Legal Studies

Volume 9 Article 16

1-1-2000

Much to Do About Something: Destabilizing Law's Support of Dominant Ideologies in the Context of Lesbian Mother Custody Claims in Canada

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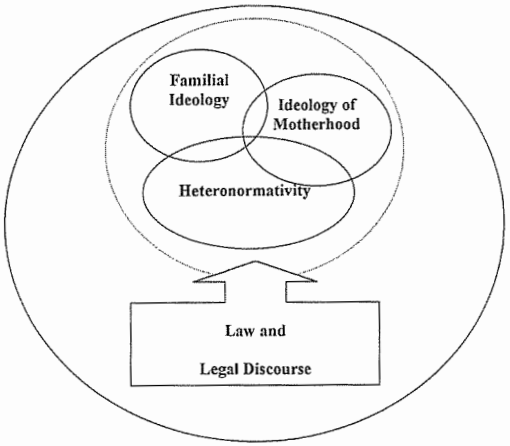

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MUCH TO DO ABOUT SOMETHING: DESTABILIZING LAW'S SUPPORT OF DOMINANT IDEOLOGIES IN THE CONTEXT OF LESBIAN MOTHER CUSTODY CLAIMS IN CANADA

NATASHA KIM

I. INTRODUCTION

The last five years have been witness to numerous legal "successes" in the sphere of equality rights for lesbian and gay persons. Individuals and groups have fought with the legislatures and in the courts, often persuading judicial decision-makers that lesbian and gay individuals and their relationships are *of the same worth* as heterosexual persons and their relationships. The importance of this recognition cannot be overstated. It is now no longer legally acceptable to discriminate against, and in some cases, to deny benefits to, an individual on the basis of her or his sexual orientation.

In 1992, the Supreme Court of Canada heard Brian Mossop's claim for recognition of his partner as a "spouse" under the collective agreement at his place of work. While rejecting the argument that non-

recognition was discrimination under the ground of "family status", the majority of the Court expressly opened the door to claims based on sexual orientation.[1] This occurred in 1995, when James Egan convinced the bench that sexual orientation was an analogous ground under the section 15 equality rights of the *Canadian Charter of Rights and Freedoms*.[2] Later, in 1998, an overwhelming majority of the bench agreed with Delwin Vriend that the exclusion of sexual orientation as a protected ground of discrimination from the Alberta human rights code[3] constituted a violation of section 15 and was not saved as a reasonable limit under section 1 of the *Charter*.[4] Most recently, in 1999, the Court found that the Ontario *Family Law Act* definition of "spouse" unconstitutionally excluded the claims of same-sex partners for spousal support.[5]

However, while these decisions are undeniably valuable and progressive landmarks in Canadian equality rights jurisprudence, using them as a starting point for this analysis is problematic for several reasons. First, the development of "sexual orientation" as a legal concept has occurred predominantly through the arguments and experiences of gay men, rather than lesbian women.[6] Secondly, there is the problem of perception. The widely publicized decisions of the Supreme Court of Canada tends to create the illusion that sexual orientation discrimination did not exist before being heard by the Canada's highest court. The air of finality also implies that the issue has now been "dealt with" and is no longer a problem which requires attention. Thirdly, the recent protections under the *Charter* and human rights legislation fail to cover the gaps and cracks in the legal system where the influence of heterosexist assumptions can still have a detrimental impact on peoples' lives. Lastly, arguments for "equal

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[1] *Mossop* v. *Canada,* [1993] 1 S.C.R. 554 [hereinafter *Mossop*].

[2] *Egan* v. *Canada,* [1995] 2 S.C.R. 513 [hereinafter *Egan*]. However the court rejected Egan's claim for pension benefits for his spouse John Nesbitt under the *Old Age Security Act.*

[3] *Individual's Rights Protection Act,* R.S.A. 1980, c. I-2.

[4] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 [hereinafter *Vriend*].

[5] *M.* v. *H.*, [1999] 2 S.C.R. 3.

[6] See *e.g. Mossop, Egan, Vriend, supra* notes 1-3. See also *Layland* v. *Ontario (Minister of Consumer and Commercial Relations*), [1993] O.J. No. 575 (Ont. C.J., Gen. Div.), where it was found that the refusal to grant a marriage licence to two gay men was discriminatory under section 15. *M.* v. *H.* is the first case to be dealt with by the Supreme Court that specifically involved lesbian litigants, and this case was not decided until earlier this year.

rights" or the "same" treatment in law, often fail to adequately challenge the dominant conceptions or idea(l)s underlying law.[7]

For these reasons, I have chosen to survey a very specific legal context: the claims of mothers, who are lesbians, in custody disputes over their children, with their heterosexual ex-spouses,[8] in Canadian courts. I will examine the developments in judgments surrounding custody involving a lesbian mother over the past two and a half decades, focusing on the line of reasoning within the judgments rather than the substantive results (that is, to whom custody is granted).[9] The end result will be an attempt to better understand the interaction between law as a discourse and the dominant ideologies of familialism, motherhood, and heteronormativity.

In Part Two, I will set the "legal stage" by outlining the specificities of custody law, which remain relatively insulated from other aspects of legal equality discourse. Next, I will problematize the underlying assumptions of the dominant ideologies of familialism, motherhood, and heteronormativity, and the support they receive in law. For this section, I will draw mainly from feminist work to deconstruct the institutions of family and motherhood and their effect on the oppression of women in society. I will also show how these ideologies interact with each other, and in tandem with the ideology of heteronormativity, to oppress the experiences of lesbians in law – in particular, lesbian mothers. In Part Three, I will take specific examples of lesbian mothers' custody claims, outlining the dominant approaches judges have taken in

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[7] See D. Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994) at 54-76, outlining the positive and negative implications of using rights discourse in legal struggles for equality.

[8] This is not to imply that lesbian women have not been involved in "familial" relationships where they have arranged to have children through the aid of reproductive technologies or other means. To make this assumption would once again result in the erroneous belief that, unless the law has dealt with a certain situation, it does not exist. For a discussion see D. Herman & C. Stychin, eds., *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (Philadelphia: Temple University Press, 1995); K. Arnup, "Living in the Margins: Lesbian Families & the Law" in K. Arnup, ed., *Lesbian Parenting: Living With Pride and Prejudice* (Charlottetown: gynergy, 1995) at 386-94. See *e.g. infra* note 111.

[9] I have chosen this focus in part due to deference to the unique position of the judge as being aware of many circumstances which may not be included in the final judgment, and in part because of my deference to the litigating party. As neither a lesbian nor a mother, I am hesitant to raise normative claims regarding their circumstances or experiences; appropriation of (an)other's experience and oppression is a serious deviance from substantive equality progress.

certain historical periods, and I will show how these approaches support the perpetuation of dominant ideologies and the consequent marginalization of lesbian mothers. Lastly, in Part Four, I will draw some preliminary conclusions and propose a principled legal approach which may assist in avoiding the mistakes of the past. Before embarking on this journey however, it is first necessary to conduct a brief review of the legal landscape in which we will be travelling.

II. The State of (the) Play

1. The Legal Stage

It is difficult to find an area other than custody law where as much discretion and power is invested in the trial judge. The dynamic of custody proceedings are often quite informal and the adherence to rules of evidence and procedure are not overly strict.[10] While the history of divorce and custody law is a long one,[11] it will be sufficient for our purposes to look at the current legislation and its predecessor.

Before the 1986 *Divorce Act*, the legislation in place was blatantly discriminatory against a homosexual spouse. As part of the fault-based rationale in place at the time, the statute read in part:

> 3. Subject to section 5, a petition for divorce may be presented to a court by a husband or wife, on the ground that the respondent, since the celebration of the marriage
>
> (a) has committed adultery;
>
> (b) has been guilty of sodomy, bestiality or rape, or has *engaged in a homosexual act*;

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[10] This is not formalized in the sense that different rules of evidence apply, but rather, in practice, due to the nature of the issues and the prospective nature of the order, little is excluded as "irrelevant". While important to ensure the judge has all the information before her or him, this can also open the door to a great deal of subjectivity and discretion. Further, many procedures have been implemented under, for example, Nova Scotia Civil Procedure Rule 70, to encourage alternative methods of dispute resolution in the family law context, however, the relationship between the parties is likely to be quite "adversarial" by the time trial is reached, especially in situations where a heterosexual ex-husband is claiming custody for children after he has discovered his wife's sexual orientation. See *e.g.*, *Bezaire* v. *Bezaire, infra.*

[11] See the historical review written by L'Heureux-Dube in *Young* v. *Young*, [1993] 4 S.C.R. 3 [hereinafter *Young*]. See also C. Smart, *The Ties that Bind: Law, marriage and the reproduction of patriarchal relations* (London: Routledge & Kegan Paul, 1984).

(c) has gone through a form of marriage with another person; or
(d) has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

11. Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so *having regard to the conduct of the parties and the condition, means and other circumstances of each of them,* make one or more of the following orders, namely:

...

(c) an order providing for the custody, care and upbringing of the children of the marriage. [12]

While an improvement over strict gender-based, natural-rights approaches of the past,[13] it is possible to see how the "fault" of one parent for "engag[ing] in a homosexual act" could influence the broad discretion of the court in custody determinations.[14]

Although the focus in section 11 is exclusively on the parents and their "conduct", "condition" and "circumstances", through judicial interpretation, the "best interests of the child" approach became the main focus of most custody determinations in the 1970s.[15] Thus, while important to note the statutory language at this time to infer the greater context and atmosphere of custody proceedings, the legal test has remained relatively constant during the periods surveyed in Part III.[16]

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[12] *Divorce Act,* R.S.C. 1970, c. D-8, s. 3 [emphasis added].

[13] See *Young*, *supra* note 11, at 34:

> "At common law...[f]athers were regarded as possessing a natural right to their children, which flowed from the belief that they knew best about the interests of their children and that those interests were best served by upholding their proprietary rights";

and at 36:

> "the tender years doctrine, which was described by an Ontario court in 1933 as the common sense proposition that, in general, children under the age of seven needed the care of their mothers (*Re Orr*, [1933] O.R. 212 (C.A.)). A related presumption favoured the placement of older children with the parent of the same sex."

[14] An argument could be made that judges were legally mandated to take into account a previous homosexual act of a parent in determining custody, but this is not necessarily so. Even under the discriminatory legislation, a homosexual act as a ground for divorce between the parties, as opposed to a negative influence in determining custody of a child, could remain a distinct and separate concept.

[15] *Talsky* v. *Talsky*, [1976] 2 S.C.R. 292.

[16] *Infra* at 20-44. These periods include: 1974-84, 1985-94, and 1995-99.

The 1986 Federal *Divorce Act*[17] entrenched and nationalized the "best interests of the child" test for custody proceedings, using an explicit child-based approach rather than a parental-rights or parental-fault approach. However, the broad discretion and power of the trial judge to determine "right" and "wrong" remains. Section 16 gives any court of "competent jurisdiction" – a superior court of the province – the power to make any custody order which is in the "best interests of the child":

> 16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage
>
> (8) In making an order under this section, *the court shall take into consideration only the best interests of the child* of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.[18]

The statute also explicitly rejects the fault-based rule of its predecessor.[19]

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[17] R.S.C. 1985 (2nd Supp.), c. 3, s. 16(8), assented to 13 February 1986, S.C. 1986, c.4.

[18] The Family Law statutes of the provinces contain similar vague directions to Family Court judges. For example, in Nova Scotia, for an order of custody not made during divorce proceedings in the Supreme Court by a superior court judge, the court is directed to consider the "welfare of the child" as the paramount consideration. See *Family Maintenance Act,* R.S.N.S. 1989, c. 160 s. 18(5).

[19] *Divorce Act,* 1985 (2nd Supp.), c. 3, s. 16(9) reads:

> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

The statute also includes another principle to guide the court, known as the "Friendly Parent Rule" which reads at s. 16(10):

> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

This rule has often been criticized by feminist commentators as causing particular strain in the lives of women , especially those who were victims of domestic violence at the hands of the former husband. See Nova Scotia Advisory Council on the Status of Women, *Brief to the Special Joint Committee on Custody and Access,* May 1998, online: <http://www.gov.ns.ca/staw/Custodyb.htm> (date accessed: 29 November 1999).

The Supreme Court has recognized that "[c]ustody and access decisions are pre-eminently exercises in discretion,"[20] however, the legal system has consistently upheld this test as the best way to respond to a myriad of factual situations and to retain flexibility. Thus, judicial clarification has not added much guidance. In *Young* v. *Young,* the Supreme Court of Canada, while upholding the constitutionality of the "best interests of the child" test, made the following comments regarding appropriate factors to be considered in making custody orders:

> In making a determination as to the best interests of the child, courts must attempt to balance such considerations as the age, physical and emotional constitution and psychology of both the child and his or her parents and the particular milieu in which the child will live.[21]

Unfortunately, this test still remains quite broadly worded and subject to numerous interpretations depending on the facts of each case. While an individualized approach and flexibility is certainly a positive aspect when dealing with delicate issues surrounding custody, the tint of the judicial lens in weighing these factors is a cause for great concern. The Nova Scotia Advisory Council on the Status of Women highlights some of the drawbacks with the indeterminacy of the test for historically under-represented (and unheard) groups:

> [T]he vagueness of the 'best interests' concept leaves it so open to interpretation that it can lend itself to becoming misunderstood, or subject to the latest fashion in social science research, or worse, hostage to the ideas of specific socially active groups... [I]f it is built on white middle class norms and values "the best interests of the child" criterion can sometimes be used to discriminate against poor people, racially visible persons, or ethnocultural minorities. ... We must take care, therefore, that we do not undermine respect for diversity by introducing more systemic bias into the system.[22]

Certainly, it could be added to the above critique that the test is built on "white middle class" *and heterosexual* norms and values, through which the heterosexist biases of some judges may shine through when dealing with claims for custody by lesbian mothers or gay fathers. How this unwritten norm influences the law will be explored in the next section.

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[20] *Young, supra* note 11 at 67.

[21] *Young, supra* note 11 at 66.

[22] NSACSW, *supra* note 19.

2. The Theoretical Backdrop

In this section I will examine three predominant ideologies of contemporary society: familialism, motherhood, and heteronormativity. It is difficult to adequately separate these ideologies from each other as they are mutually reinforcing concepts in perpetuating the inequality of lesbian mothers.[23] However, it is the very interrelated nature of these "interlocking systems of domination"[24] on which I want to focus. For this reason, although I draw upon the work of feminist and lesbian academics, I would prefer to move away from strict, group-centred theories which attempt to reduce inequality to one simple characteristic.[25] Systems of oppression based on characteristics such as sex, race, class, sexual orientation, disability and other traditionally recognized grounds of marginalization[26] interact on numerous levels,

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[23] Some explanations may be needed at this point. Firstly, the term "ideology" is used because of S.A.M. Gavigan's definition of the term as

> "'a reading, rather than a direct translation, of the political meaning of "experience."' The analysis of 'experience' through the use of the concept of 'ideology' may illuminate the significant dissonance between many (but not all) people's *lived* experience and the *dominant* ideology of the family."

She also highlights the role of the "'ruling ideology [in that it] does not so much combat alternative ideas as thrust them beyond the very bounds of the thinkable.'"

For this reason, I believe ideology is more suitable in describing these pervasive and dominant discourses than a term such as "institution" or "construct", although they may be those as well. S.A.M. Gavigan, "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian, and Gay engagement to Law"(1993) 31 Osgoode Hall L.J. 589 at 604, 589, quoting T. Eagleton, *Ideology: An Introduction* (London: Verso, 1991) at 58 [herinafter "Paradox"].

Secondly, I would also like to note that when describing non-heterosexual women who are mothers, it is often linguistically inadequate to refer to them as simply "mothers", but the qualifier of "lesbian" is also required for the reader to make a distinction from the heterosexual mother. This in and of itself is some evidence of the heterosexualized nature of the ideology of motherhood – the interlocking systems of heteronormativity and motherhood.

[24] S. Razack, *Looking White People in the Eye: gender, race, and culture in courtrooms and classrooms* (Toronto: University of Toronto Press, 1998) at 12.

[25] The prime examples of this would be Catharine MacKinnon in her feminist analysis of sex. Similarly, Ruthann Robson's "Lesbian Jurisprudence" has received critiques of essentialism in the consequential construction of the "natural lesbian" by the narrow focus on one characteristic – sexual orientation. See D. Herman, "A Jurisprudence of One's Own? Ruthann Robson's Lesbian Legal Theory" (1994) Can. J. Women & the Law 509.

[26] It is conceivable that each of these characteristics could be further divided into even more specific characteristics. For example, race can include issues of visible as opposed to non-visible minorities, or distinctions between different visible minorities and cultures; disability

and it is this interaction which I plan to explore on the ideological levels of the family, motherhood and compulsory heterosexuality.[27] In each section I will further attempt to highlight the extent to which these ideologies have influenced each other and the law in custody determinations.[28]

i. Familialism

> Feminists working on law's ideological aspect have explored the ways in which law as a privileged state discourse reproduces, often indirectly, economic or sexual power through complex ideological processes, often involving non-state institutions such as "the family".[29]

The dominant('s) notion of the family – often referred to as the "traditional family" – consists of two heterosexual parents and at least one child. Socialist feminism is the most comprehensive source for highlighting the connection between the familial institution "to the specificity of women's social, economic, and sexual subordination," which primarily developed with the rise of patriarchal, liberal and capitalist relations of power.[30] The state and legal support of familialism is evidenced in the sheer number of statutes which are based on this concept(ion).[31]

Key premises of the familial ideology include assumptions about the nuclear family as being naturally heterosexual, private and rooted in

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is a broad topic which can be divided into physical as opposed to mental disability, or a certain aspect of one's physical or mental condition. This is the sort of endless divisibility I want to avoid in this paper, although I acknowledge and apologize in advance for the possible dangers of alienation and essentialization in doing so. Further, I do not intend to explore comprehensively the intersection of lesbianism and race or class, but hope a more principled approach would provide a useful analysis by way of extrapolation or analogy.

[27] It is important to stress that I am trying to make a distinction between family or motherhood as a social *reality or occurrence* and the Family and Motherhood as an *ideology*.

[28] This will only be done on a broad scale in this section, whereas in the next section, specific examples will be taken.

[29] S.B. Boyd, "(Re)Placing the State: Family, Law and Oppression" (1994) 9 Can. J. L. & Soc. 39 at 60.

[30] S.A.M. Gavigan, "Paradox" *supra* note 23, at 594.

[31] See *e.g.* Bill 5, *An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H.*, 1st Sess., 37th Leg., Ontario, 1999 (assented to 28 October 1999, S.O. 1999, c. 6), which changes the definition of spouse to include same-sex partners affects 67 statutes in the one province alone. See also J. Ibbitson & R. Mackie, "Equal rights: Worth the price?" *The Globe and Mail* (29 October 1999) A18.

(re)productive, biological and gendered roles of "man and wife".[32] Thus, the dynamic of father as breadwinner and mother as (dependent) housewife who gives care and emotional support to children has led to numerous euphemisms and popular cultural idea(l)s: "Home as a haven in a heartless world"; women in the kitchen, barefoot and pregnant; "a man's home is his castle"; "a woman's place is in the home" (that is, in the man's castle and not her own). Some feminist commentators have exposed the fallacy of these assumptions and their lack of fit with the reality of "family" life:

> The family is both idealized and ideologized. Images abound of the ideal family, ranging from the extended family of days gone by; the "Father Knows Best" family; the family we think we remember from childhood; or the family as sanctioned by the Bible, the Koran, or the Torah. It is seldom, if ever, the family in which we actually live.[33]

In short, our current notion of the "traditional family" is both historically and culturally contingent, perpetuated and reinforced by the media, religion and other social institutions – it is not just a social construct, but an *inaccurate* normative imposition. The Family, especially for women, has always been a site of contradiction, struggle, and sometimes violence[34] or strength.[35] Family forms have changed over time and continue to change in size, membership and dynamic.[36]

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[32] See *e.g.* C. Smart, *The Ties that Bind: Law, marriage and the reproduction of patriarchal relation* (London: Routledge, 1984); C. Smart, "Disruptive bodies and unruly sex: the regulation of reproduction and sexuality in the nineteenth century" in C. Smart, ed., *Regulating Womanhood: Historical essays on marriage, motherhood and sexuality* (London: Routledge, 1992) at 7; W.A. Wiegers, "Economic Analysis of Law and 'Private Ordering': A Feminist Critique" (1992) 42 University of Toronto L.J. 170.

[33] S. McDaniel, "The Changing Canadian Family: Women's Roles and the Impact of Feminism" in S. Burt et al, eds., *Changing Patterns: Women in Canada*, 2nd ed. (Toronto: McClelland & Stewart, 1993) at 423.

[34] In 1991, wives killed by their husbands or heterosexual common law partners comprised the single largest group of domestic homicide. The same year, 43% of adult female victims of violence (of reported cases) were assaulted by their male partner. Statistics Canada, Housing, Family and Social Statistics Division, *A Portrait of Families in Canada* (Ottawa: Minister of Industry, Science and Technology, 1993) at 53-55.

[35] Black feminist academics have sometimes criticized white feminist portrayal of the family as *essentially* an institution of oppression because the family can often be a site of strength within a racist and white supremacist society. See *e.g.* b. hooks, "Homeplace: A Site of Resistance" in b. hooks, *Yearning: Race, gender and cultural politics* (Toronto: Between the Lines, 1990) at 41, cited in S.A.M. Gavigan, "Paradox" *supra* note 23. By "footnoting" this observation and not addressing it in the main part of the paper, I do not mean to be relegating Black women's experiences to footnotes.

Regardless, the privatized traditional family[37] remains a pervasive concept encoded in social and legal institutions and discourses. Indeed, when legal support is given to the Family, it is inevitably conditional on its continued privatization.[38] The perpetuation of the public/private divide and a sexual division of labour can be seen in both the "private realm" –women's disproportionate share of domestic chores and child-care – and in the "public" labour force with the advent of pink-collar ghettos, the glass ceiling, pay inequity, the double bind, and the under-representation in political and legal positions of power.[39] However, for our purposes, the effect of the familial ideology and its concomitant gendered inequities upon marital dissolution and in the context of custody claims, are the most relevant.

The purpose of the analysis is to show the fact that the Family is experienced differently by different people and thus the dominant ideology of familialism is erroneous and inadequate. The fact that many Black families do not conform to the dominant notions of women working solely in the home or men being the sole breadwinners actually supports this observation.

[36] See Statistics Canada, Housing, Family and Social Statistics Division, *Basic Facts on Families in Canada, Past and Present* (Ottawa: Minister of Industry, 1993) [hereinafter *Basic Facts*]: family size is decreasing and common-law parents are increasing, as are single parent families. See also *Mossop*, *supra* note 1, L'Heureux-Dube, J.

Family forms now and have always included single parent, two-parent, extended-family, blended-family, or other kinship based forms. In addition, more and more women are entering the paid labour force, two parent working families are the norm rather than the (stigmatized) exception.

[37] The Public/Private Dichotomy is a common term in feminist writings which refers to the traditional bifurcation of socially acceptable gender roles and, at another level, the extent of acceptable state (public) involvement in individual (private) lives. The "private" is traditionally associated with women, unpaid domestic work, and the home – where individuals should be free to act without state regulation. The reluctance of government involvement to find a place in "the bedrooms of the nation" however, also resulted in very few and long-awaited protections in addressing issues such as domestic violence. In contrast, the "public" realm is traditionally associated with men, waged labour and the marketplace.

[38] State involvement in divorce is a case in point. Judges are mandated to adjourn all proceedings if, in his or her opinion, there is any possibility of reconciliation between the parties. See *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, ss. 9-10.

In a non-custody context, see the statutory entrenchment of spousal privilege in criminal proceedings in the *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 4(3). This legal support for "marital harmony" privatizes all communications between a "wife or husband", while excluding protection for other family forms.

[39] See M. Luxton, *Through the Kitchen Window* (Toronto: Garamond, 1990). While these concepts are too complex to adequately address in this paper, there is much research and writing on the topic available. Suffice it for our purposes to say that the work of women tends to be undervalued and unrecognized, often at unacceptable social costs.

According to Statistics Canada, upon separation or divorce, the economic situation of ex-partners was drastically divided along gendered lines:

> The economic situation of spouses following separation or divorce differs greatly between men and women. One year after separation, women experienced an appreciable loss (-23%) in family income, adjusted for the number of family members. At the same time, men registered a gain of 10%...
>
> *Two factors explain the gap: first, women generally earn less than men, and thus lose a major source of financial support upon separation; second, most women have custody of children upon separation.*
>
> After one year of separation, women recovered a major portion of their losses. Five years after separation, however, women were still 5% or $1,000 below their pre-separation adjusted family income. In contrast, men gained 15% or $2,800 five years after separation.[40]

This occurrence has led to the sociological concept of the "feminization of poverty".[41] The first factor was explained above by showing how the gendered division of labour and ideology of familialism perpetuate economic, social and political inequality between the sexes. The second factor, however, requires further investigation into the ideology of motherhood, which, as an adjunct of familialism, persists with equal intensity after the dissolution of a relationship.

ii. Motherhood

The ideologies of motherhood and familialism are necessarily interrelated due to the way each are constructed: without the "mother" there is no "family" of which to speak – it is her reproductive capacity, as well as her subordination by (and to) society through the ideology of motherhood which is at the core of familial ideology.[42] The Mother is

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[40] Statistics Canada, *The Daily* (9 April 1997), online: Statistics Canada <http://www.statcan.ca/Daily/ English/970409/d970409.htm> (date accessed: 15 November 1999) [emphasis added].

[41] In 1991, 62% of female lone parent families had low incomes. Statistics Canada, *Basic Facts, supra* note 36 at 8. The "feminization of poverty" was also judicially noticed by L'Heureux-Dube in *Moge* v. *Moge*, [1992] 3 S.C.R. 853.

[42] I do not want to be taken as saying the ideology and culture of motherhood affect *only* biological mothers (women who have given birth); rather the negative effects are more

considered to be caring, nurturing, selfless, asexual, and committed to the sanctity of the Family; indeed, she should be willing to "cut off [her] head to save [her] babies."[43] Although not all find this *per se* objectionable, the *way* that this image is constructed – the theoretical basis for it, its pervasiveness and the implications for women pursuing legal custody of their children – undoubtedly *is*.

The enumerated characteristics listed above are socially constructed as being biologically determined by virtue of a woman's reproductive capacity; in other words, they are reduced to the "general concept of an essential, biologically determined 'maternal instinct'."[44] In this view, childbirth necessitates the continued role of the mother as child-rearer; the two concepts are inextricably linked through biology. This portrayal of *all* mothers and *all* women as submissive *only* to their child(ren) and their families can also be problematized in contrast to the expected roles of fathers within the family. Tied to the sexual division of labour and the public/private divide, childcare is seen as "natural" – indeed, biologically compulsory – for a mother, whereas participation by men in child care or other domestic roles is seen as benevolent and generous behaviour.[45] By fulfilling the "breadwinning"/provider function, the fatherly familial duties are discharged.

Whereas this construction currently tends to favour women in custody disputes,[46] there are harsh consequences for failing to reflect this image. Around the late nineteenth century, any adulterous behaviour by a wife would result in a determination of "unfitness" to parent; she was viewed as devious (having "betrayed" the family institution), dirty or sexual (having had sexual relations with someone other than her

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widespread where women, as women, and as potential pregnant women as mothers, are constructed in the same way. A woman's biological inability or choice not to give birth is often ignored. Further, an aspect of this construction is pervasive in that a woman's worth is often measured by her procreative ability: girls and women are bombarded with the socio-cultural message that it is their "destiny" to become mothers.

[43] S. Bordo, "Are Mothers Persons?" in S. Bordo, *Unbearable Weight: feminism, Western culture, and the body* (California: Regents, 1993) at 83.

[44] J. Brophy, "Child care and the growth of power: the status of mothers in child custody disputes" in J. Brophy & C. Smart, eds., *Women-in-Law: Explorations in law, family and sexuality* (London: Routledge & Kegan Paul, 1985) at 107.

[45] S. A. McDaniel, *supra* note 33, at 434.

[46] According to Statistics Canada, *The Daily* (18 May 1999), online: Government of Canada <http://www.statcan.ca/ Daily/English/ 990518/d990518b.htm> (date accessed (15 November 1999):

husband), and selfish (she has put her own desires ahead of the sanctity of the family life).[47] Similar penalties were not imposed on a father seeking custody. He further had the benefit of a paternal *right* to keep "his" children.[48]

With the rise of the "Tender Years Doctrine" in the early twentieth century, these stereotypes continued to play a role in custody determinations, even though there was now a maternal preference for young children. Susan Boyd describes the negative implications of the doctrine:

> Although [the judicial view of mothers under the tender years doctrine placed] women on a pedestal as parents, they were considered only as mothers rather than complete human beings. In turn, any deviation from the 'ideal' vision of motherhood such as leaving a child in the care of another person, working outside the home, or engaging in an adulterous relationship could defeat the maternal preference.[49]

After the enactment of the 1986 *Divorce Act,* the law has since been changed to gender-neutral, non-fault based grounds of divorce and custody, however, this approach fails to recognize systemic sexism in the public sphere, while simultaneously regulating the Mother's place in the private sphere.[50] For example, economic standard of living may be taken into account within the broad test of "best interests of the child"

> In 1997, there were 39,204 divorce cases involving a custody order for dependent children, almost half of the total number of divorces granted. Custody was granted to the wife in 61.2% of these cases, far ahead of joint custody to both husband and wife (27.6%) or custody to the husband (11.0%). It should be noted that in many cases not involving a custody order, residential arrangements are negotiated by parents outside of formal court proceedings.

However, these numbers can be compared to the statistics gathered in 1988: mothers received custody 76.1% of the time in comparison to 12.4% of fathers and 11.2% of the time when there was a joint custody order. Statistics Canada, *Basic Facts, supra* note 36 at 17.

[47] J. Brophy, *supra* note 44, at 103. See also S. Boyd, "From Gender Specificity to Gender Neutrality? Ideologies in Canadian Child Custody Law" in C. Smart & S. Sevenhuijsen, eds., *Child Custody Law and the Politics of Gender* (London: Routledge, 1989) at 131-32.

[48] *Ibid.*

[49] S. Boyd, "Gender Specificity to Gender Neutrality? Ideologies in Canadian Child Custody Law" in C. Smart & S. Sevenhuijsen, eds., *Child Custody Law and the Politics of Gender* (London: Routledge, 1989) at 134.

[50] Primary caregiving is a *factor* in the test; see *Young, supra* note 11. In this sense, the sexual division of labour has tended to favour women, but often at unacceptable and sexist costs.

and balanced with factors such as availability to the child.[51] This conceals the sexual division of labour and gender discrimination in the workplace under a veil of formal equality. The gendered wage gap in the labour force may require women to work more hours for less pay than their male counterparts, and thus disadvantaged under both the factors of economics and time. Further, if a mother is involved in the paid workforce, this tends to mitigate against her ability to be a "good mother", especially if the father can provide a substitute mother figure.[52] Thus, the public/private divide engendered in family law by the ideology of familialism, combined with a woman's failure to "fit" into the defined boundaries of "mother", will still often result in her losing an order for custody.[53]

Crossing the boundary from "good mother" to "bad mother" is a mark of significant shame and stigma in our society. As will be now discussed, the interaction of the dominant ideologies of familialism and motherhood with the system of heterosexism constructs the "lesbian mother" as an almost *de facto* "bad mother" and a rebuke to the traditional family.

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[51] See *e.g. Foley* v. *Foley,* [1993] N.S.J. No. 347 at paras. 19-20 (S.C.).

[52] See *e.g. Tyabji* v. *Sandana*, [1994] B.C.J. No. 469 where a woman who worked full-time as a MLA was denied custody of her three children. Custody was granted to the father, a grocery clerk, whose mother lived next door. On application two years later, ([1996] B.C.J. No. 1461) the judge noted that while Tyabji's current unemployment was a significant factor in favour of altering the custody order, her "aggressive" tendencies had not changed (*i.e.* she continued to assert that her children were not healthy despite the views of two doctors) and she was insensitive to the best interests of her children. The comments implied that she was conniving (by not requesting maintenance for the oldest child should she be granted custody, as this was perceived as attempting to sever the child's tie from his father) and selfish (by tendering into evidence a letter from one of the children which stated that he wanted to live with her this was seen as "embroil[ing]" him in the dispute). Further, blame was put on the mother for re-raising the custody issue at all because of the detrimental effects it was having on the oldest child.

For a comprehensive critique of *Tyabji* and an analysis of the relationship between working mothers and child custody law, see S.B. Boyd, "Looking Beyond *Tyabji*: Employed Mothers, Lifestyles, and Child Custody Law" in S.B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) at 253.

[53] *Infra* Part III. Cultural differences can also play a role in state regulation of the ideology of motherhood. The intervention of child welfare services in the families of women of colour were and are often based on colonialist, racist, and imperialist assumptions of dominant mothering norms. See T. Das Gupta, "Families of Native Peoples, Immigrants, and People of Colour" in N. Mandell & A. Duffy, eds., *Canadian Families: Diversity, Conflict and Change* (Toronto: Harcourt Brace, 1995).

iii. Heteronormativity

Like the binary oppositions of man/woman, father/mother, public/private, the dualism of heterosexual/homosexual is constructed as normatively prioritized and mutually exclusive. The former has been naturalized in our society while the latter, vilified. This results in what Adrienne Rich calls a culture of "compulsory heterosexuality".[54]

In a mutually reinforcing cycle, social, legal and political ideologies of the family, motherhood, and heterosexuality continue to convey the stereotype of non-heterosexual individuals as inherently sexualized – indeed reduced to their sexual orientation. As a recent example, the Supreme Court of Canada's rejection of Brian Mossop's claim of discrimination based on family status left the implicit conclusion that gay and lesbian individuals cannot claim on any ground *except* sexual orientation; all other grounds were heterosexualized.[55] Lesbian women may experience a particular form of oppression through this process, in that they are figuratively trapped at a crossroads between sex and sexual orientation discrimination in the context of a hetero-patriarchal society where male domination is valorized and heterosexuality as an ideology is naturalized.[56] The inability to "fit" in a categorical box may cause increased complications in the litigation conversation because the decision maker cannot or will not understand lesbian women's experiences of multiple discrimination.

The sexualization of lesbian women has a historical basis, stemming from the medicalization of lesbianism in the late nineteenth century, which led to the immense regulation and over-scrutinization of the lives of lesbian women in the otherwise insulated "private" sphere of the Family. Due to the pervasive Victorian notion denying female sexuality, "lesbianism" appears to have not "existed" prior to the end of the nineteenth century when, as an "outgrowth of and a reaction to capitalism, feminism, and the writings of sexologists," it was named.[57]

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[54] A. Rich, "Compulsory Heterosexuality and Lesbian Existence," (1980) 5 Signs 631.

[55] See N. Duclos [now Iyer], "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179.

[56] See Women's Legal Education and Action Fund, *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 (Intervener's factum at 11-13).

[57] K. Martindale, "What makes lesbianism thinkable?: Theorizing lesbianism from Adrienne Rich to Queer Theory" in N. Mandell, ed., *Feminist Issues: Race, Class and Sexuality* (Scarborough: Prentice Hall, 1995) at 71.

Because it challenged the patriarchal ideas of female dependence and lack of personhood,[58] lesbian sexuality became seen as "deviant". Sexologists in a patriarchal context united notions of the "bad" woman (and "bad" mother – *i.e.* one in touch with her own sexuality) with the "lesbian".[59] Named, categorized, and pathologized, lesbians were stigmatized for deviating from the assigned gender role of dependency on paternal and patriarchal hegemonic power.

This hierarchy of sexualities complicates lesbian engagement with the law, particularly family law. Perceived as "sexualized" beings, lesbian women do not fit the paradigm of Mother – an asexual and selfless entity. Further, lesbian women act as a challenge to the notion of the naturally heterosexual Family and a woman's assigned dependent role within it. This challenge has often been seen as a *threat* to the "basic social institution"[60] of society.

Through its support of the Family and its regulation of women as mothers, legal discourse is particularly pervasive in the context of lesbian women claiming custody of children. When the ideologies of heteronormativity, familialism, and motherhood interact, the result is

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[58] The history of the matrimonial property and divorce law is a prime example of the law's enforcement of patriarchal idea(l)s. See J.D. Johnston, Jr., "Sex and Property" (1972) 17 N.Y.U. L.Rev. 1033; L. Holcombe, *Wives and Property: Reform of the Married Woman's Property Law In Nineteenth-Century England* (Toronto: University of Toronto Press, 1983).

[59] This naming process denied the historical and contemporary existence of "romantic friendships" and "Boston marriages" which are long-term, intimate, monogamous woman-woman relationships which are devoid of genital sex. See also M. Foucault, *The History of Sexuality* (New York: Vintage Books, 1990).

[60] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 at 448, Gonthier J. In the course of his dissenting judgment, Gonthier J. cited an 1888 case of the United States Supreme Court to support his argument that there could be *"relevant"* distinctions under the section 15 equality analysis on the basis of biological differences or for the protection of "fundamental values":

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.
>
> . . .
>
> [Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

the construction of lesbian relationships as non-families and lesbian mothers as non-mothers.

II. The Socio-Juridical Actors

The following analysis takes a quasi-historical and empirical[61] approach towards revealing the intertwining of the ideologies of familialism, motherhood, and heteronormativity in the discourse of law. I will show how the law has worked to support the oppression of sexual minorities – taking lesbian mothers as an example – through various analytical approaches. To embark on this analysis I have divided this section into three periods: pre-*Charter*: 1974-1984;[62] early *Charter*: 1985-1994; and late-*Charter*: 1995-1999.

It is notable that the area of custody law tends to insulate itself from *Charter* scrutiny within broad tests of discretion – in fact, in the following cases, the judges never even cite the *Charter* for reference. Having said this however, it is apparent that the Law as a whole acts as a legitimizing and powerful discourse in social life and the *Charter*'s effect on social and judicial attitudes and behaviours cannot be easily overlooked. While the *Charter* is not directly applicable to the decisions of trial court judges,[63] the Supreme Court of Canada has ruled that *Charter* values should be considered when making custody determinations.[64] Thus, using the *Charter* – specifically, section 15 – as

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[61] I have attempted a comprehensive survey of the case law, however, I have encountered certain practical barriers, including unreported cases or judicial silence regarding the sexual orientation of the parties. Further, a large number of custody arrangements are privately negotiated and it can be speculated, especially in the earlier cases, that a lesbian mother would prefer to agree to a less preferable arrangement than confront the homophobia of the court or be unwillingly "outed" in legal proceedings. (See K. Arnup, "Living in the Margins: Lesbian Families and the Law" in K. Arnup, ed., *Lesbian Parenting: living with pride and prejudice* (Charlottetown: gynergy, 1995) at 379 [hereinafter "Living in the Margins"].) This reality of situations of considerable inequality of bargaining power especially emphasizes the need for a fair and just approach to be taken by judges in this context.

[62] Once again, I would like to reiterate that I am not attempting to reify lesbian existence through the law, but the illustrate the way the law has dealt with lesbian existence when confronted with it in this context, at these specific times.

[63] *RWDSU* v. *Dolphin Delivery*, [1986] 2 S.C.R. 573.

[64] *Young supra* note 12.

a socio-historical referent is not to valorize or overstate its impact on social life, but to rationalize the different approaches taken by judges in "factoring in" a mother's sexual orientation when evaluating custody cases.

1. Pre *Charter* – 1974-1985 – Likes Alike

In contrast to dominant biologically determined and medicalized stereotypes of the Lesbian, the law has traditionally preferred to relegate lesbian existence under a veil of invisibility.[65] When this veil is lifted, the law tends avoid biological pronouncements on one's sexual identity, but is still influenced by heterosexist assumptions and tends to emphasize the difference (read: deviance) of lesbians in other ways.[66] The judges in this period prefer an Aristotelian conception of equality or a "similarly situated" test. In other words, a lesbian mother would not be the same as or similarly situated with a heterosexual mother, thus, she

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[65] See K. Arnup, "'Mothers Just Like Others': Lesbians, Divorce, and Child Custody in Canada" (1989) 3 CJWL 18 at 19 [hereinafter "Mothers Just Like Others"]:

> Unlike homosexual men, lesbians have seldom been subject to formal legal prosecution. For the most part, lesbianism has been treated as a physical and emotional impossibility by lawmakers seeking to control other forms of 'immoral' activity. While legislators in nineteenth century England, for example, developed a great concern over the question of male homosexuality, they adopted an 'out of sight, out of mind' approach to relations between women.

A few cases in this period dealt with claims by Children's Aid Societies for removing custody from mothers who are lesbians. However, these cases often dealt with many other factors such as alcoholism or negligent care, because of which it is difficult to assess how much weight was given to the mother's sexual orientation. For this reason, I will not be reviewing these cases in the body text, but it is useful to note that lesbianism was always considered a negative affect in the same way as alcoholism, drug use, or negligence in the care of children. Further, the courts appear to be grateful to not deal with the issue, but rather base their decision on more overt factors, once again relegating sexual orientation to an invisible issue. See *Re A.S.*, [1982] O.J. No. 644 (Prov. Ct., Fam. Div.); *Bernhardt* v. *Bernhardt* (1979), 10 R.F.L. (2d) 32 (Man. Q.B.); *Children's Aid Society of Ottawa-Carleton* v. *S.V.*, [1981] O.J. No. 1253 (Prov. Ct., Fam. Div.).

[66] This attitude was recently illustrated in the decision of Gonthier J. in *Miron*, *supra* note 60, where he opened the door to the argument that 'relevant' biological distinctions will not be discriminatory, especially when to protect the 'fundamental values' of society, such as the institution of marriage. This is a direct illustration of the pervasive force of familialism in the law; the ideology prevents the judge to go any farther than its delineated bounds. Its construction as the "good" acts as an insurmountable barrier to any alternative experiences or discourses of "family".

need not be treated the same under the law. This likes/alike – unalikes/unlike approach to equality is also reflected contemporaneously in the human rights jurisprudence of the period under the *Bill of Rights*.[67] In short, the rationale of this time is that lesbian mothers are not "like" heterosexual mothers, unless they can better approximate the constructed caricature of the Mother, and thus should not be given the same treatment as other women who do.

Case v. *Case*[68] was the first reported Canadian decision where a mother's sexual orientation was put before the court in a custody determination. In addressing the issue, MacPherson J. writes: "homosexuality on the part of a parent is a factor to be considered along with all of the other evidence in the case. It should not be considered a bar in itself to a parent's right to custody."[69] The implication of this statement is that, while not an absolute bar, homosexuality is still seen as a *negative* factor. The judge then proceeds to assess Ms. Case's "irregular...way of life".[70] He notes that she had four "lesbian affairs", one which occurred "before and after the divorce". Further, she attended a "homosexual club in Regina and... a homosexual club in Saskatoon where she is vice-president...She frequently invites members of the club to her home in couples or singly."[71]

Other comments illustrate MacPherson J.'s perception of Ms. Case's credibility. "Untruths" or "exaggerations constituting untruths" consisted of:

(1) Ms. Case's concern that the father was careless with his firearms. This was found to be an untruth because of the judge's own experience that people who are skilful with firearms are also always very careful with them. Also, the judge took into account that Ms. Case had bought her ex-husband gifts relating to his hobby, "a fact which she did not deny and which is inconsistent with her alleged fear of the guns."[72]

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[67] See *e.g. Bliss* v. *Canada (Attorney General)*, [1979] 1 S.C.R. 183, where it was found that "Any inequality between the sexes in this area [of pregnancy] is not created by legislation but by nature."

[68] (1974), 18 R.F.L. 132.

[69] *Ibid.* at 136.

[70] *Ibid.* at 138.

[71] *Ibid.* at 136.

[72] *Ibid.* at 136.

(2) Ms. Case's allegations that Mr. Case had beaten the children. The judge dismissed this claim and found that: "[h]e has disciplined them but not with unreasonable force." In recounting one incident put into evidence, the judge implied that this allegation was not merely an "exaggeration", but a calculated and devious complaint because when it occurred, "Mrs. Case had already decided to leave the father."[73]

(3) Another incident of "exaggeration constituting untruth" cited by the judge occurred in 1968. Ms. Case had been residing in Florida with her daughter, Kimberley, and her partner, Ricky. He found that she did not return to Canada unwillingly, contrary to her testimony. While in Saskatoon,

> the father arrived, seized the child, pushed the mother around and left with the child. Mrs. Case was slightly hurt. The same night she took an aeroplane back to Miami alone. I am of the opinion that at that time she was more anxious to return to Ricky than she was concerned about her child.[74]

In writing this factual narrative, the judge effectively erased the physical violence experienced by Ms. Case when Mr. Case forcibly took her child. The implication is that Ms. Case's selfishness overshadowed this experience, as she wanted to hurry back to Miami to continue her "lesbian affair". The possibilities that she may have feared for her own safety if she were to confront the father, or that Ricky would be a source of solace and comfort for her after the conflict, were not canvassed in the reasons.[75]

Lastly, the judge speculated: "I have a strong feeling that [Ms. Case] hid Elaine Harris [her partner] from me and I do no know why."[76] This again implies deception on the part of Ms. Case, rather than fear or reluctance in subjecting her partner to a homophobic court or a grilling cross-examination.

In the end, the judge granted custody to the father, with access to Ms. Case. He stated that Mr. Case "is a stable and secure and responsible

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[73] *Ibid.* at 136-37.
[74] *Ibid.* at 137.
[75] *Ibid.* at 136-37.
[76] *Ibid.* at 138.

person" whereas Mrs. Case's "way of life is irregular... She did not come forward with a clear plan for them... I greatly fear that if these children are raised by the mother they will be too much in contact with people of abnormal tastes and proclivities."[77] The judge does not mention why Mr. Case is stable and responsible or what "plan" he had for the children. The impression from reading the judgment leads to a converse line of reasoning: because MacPherson J. had gone into such a deep analysis of why Ms. Case would be an *unstable* parent, then custody should go to the father.

The governing factor for denying the mother custody in *Case* has been subject to a variety of interpretations. While some have seen it as the failure of Ms. Case to call her partner as a witness,[78] or her "unfair and exaggerated charges...as to the father's conduct",[79] most subsequent judgments on the issue tend to hinge on the judge's observation of Ms. Case's involvement with the lesbian community. The result has been the creation of a new dichotomy: the "good lesbian mother" versus the "bad lesbian mother."

> Good lesbian mothers, women who live quiet, discreet lives, who promise they will raise their children to be heterosexual, who appear to the outside world to be heterosexual single parents, have in recent years increasingly succeeded in winning custody of their children. "Bad" lesbian mothers, women who are open about their sexual orientation, who attend gay and lesbian demonstrations and other public events, and who view their lesbianism positively or as one aspect of an entire challenge to society, are almost certain to lose custody of their children to their ex-husbands.[80]

In other words, while lesbianism "in itself is not a bar to custody", mothers must ensure they inhibit any behaviours and attitudes which judges "would consider to be coterminous with lesbianism."[81] They must *over*-compensate through strict conformity to the ideology of motherhood and familialism by having only "middle class values, middle-of-the-road political beliefs, repressed sexuality, and sex-role stereotyped behavior."[82]

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[77] *Ibid.*

[78] K. Arnup, "'Mothers Just Like Others'" *supra* note 65, at 26.

[79] *Re Barkley and Barkley* (1980), 28 O.R. (2d) 136 (Prov. Ct., (Fam. Div.)).

[80] K. Arnup, "Living in the Margins" *supra* note 61, at 382-83.

[81] K. Arnup, "'Mothers Just Like Others'" *supra* note 65, at 26.

[82] K. Arnup, "Living in the Margins" *supra* note 61 at 383, citing N. Polikoff, "Lesbian

Almost all the cases of this period reflect this dichotomy and intense regulation of the mother's personal life. In *Bezaire* v. *Bezaire,*[83] custody was granted to the mother on first instance, but on three specific conditions only: (1) that she obtain a residence that will be fixed and stable; (2) that the father maintain "extremely liberal access...because...it is extremely important that ...the father image be reinforced;" and (3) that Mrs. Bezaire does not reside with anyone else without the approval of the court, including "any open, declared, and avowed lesbian, or homosexual relationship."[84] The rationale for this last decision is found in the trial judge's statement, despite psychiatric evidence before the court to the contrary:

> The homosexuality of one parent...is a negative factor...[B]eing raised in a homosexual atmosphere, by a homosexual parent, who is openly associating with other homosexuals, must be considered by the Court as negative when one views the principles upon which this country was founded, and the beliefs held by a majority of society in this country.[85]

Thus, McMahon J. made explicit the observations of the court in *Case*: lesbianism is not an absolute bar to custody in and of itself – it is the mother's "perogative, that is her privilege"[86] – but it is a *negative* factor in custody determinations, and any behaviours indicative of lesbianism is to be considered *not* in the best interests of the child.

Subsequently, Ms. Bezaire moved to Toronto from Windsor for employment purposes, and "entered into another living arrangement which clearly involved a homosexual relationship."[87] As a result, the order was completely reversed in favour of the father and Ms. Bezaire lost an appeal despite strong evidence that the children were being abused by the father and the Official Guardian's support for returning custody to her. Thanks to independent academic commentary, other factors were revealed that were all but erased in the judgment, including:

Mothers, Lesbian Families: Legal Obstacles, Legal Challenges," (1986) 14 *Rev. of Law and Social Change* 907.

[83] [1980] O.J. No. 1320 (Ont. C.A.) [hereinafter *Bezaire*].

[84] *Ibid.* at para. 6, citing the trial court judgment which is unreported.

[85] Cited in K.A. Lahey, "On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory" in R.F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) at 330.

[86] *Elliott, infra* note 101.

[87] *Bezaire, supra* note 83, at para. 8.

domestic violence towards Ms. Bezaire during the marriage and Mr. Bezaire's criminal conviction for it; Mr. Bezaire's abduction of the children after separation; his failure to pay child support for which he was jailed; child abuse occurring while Mr. Bezaire had custody; and Mr. Bezaire's utter resentment of Gayle Bezaire's sexual orientation for which he wanted revenge.[88] How these circumstances may have impacted on Ms. Bezaire was not investigated at trial or on appeal. Further, the invasive conditions put on Ms. Bezaire's personal life and relationships was never questioned.[89] Ms. Bezaire broke the rules of the familialism game, she was a "bad mother" *because* she was a lesbian.

In contrast, the courts in *K.* v. *K.*[90] and *Re Barkley and Barkley*[91] distinguished *Case* on the facts and granted custody to the mothers. However, the line of reasoning in *Case* and *Bezaire* is still strictly adhered to and the distinguishable facts are what make the judgments problematic.

Rowe J. in *K.* v. *K.* found that Mrs. K. "is not a missionary about to convert heterosexuals" and her relationship "will be discreet and will not be flaunted to the children or to the community at large."[92] Further, as opposed to *Case,* Rowe J. received much more evidence from experts and witnesses as to Mrs. K.'s relationship with her daughter, her psychological "normality", and the fact that she is "not a crusader" nor a "preach[er]" of the joys of lesbianism.[93] Lastly, "in the eyes of the community [Mrs. K. and her partner] are single parents living together by virtue of economic practicality" and thus, not "overt" about their relationship.[94] Ms. K was judged to be a "good" lesbian mother.

Similarly, in *Re Barkley*, Nasmith J. found that: "any possible ill effects for Lynn [the daughter] from her mother's sexual orientation have been minimized by the following circumstances:

(1) She is not militant;

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[88] K.A. Lahey, *supra* note 85, at 330-31.

[89] *But* see *Bezaire, supra* note 83, at para. 26, Wilson J.A., dissenting,:

> I would like to add as an addendum to these reasons [ordering a new trial on the evidence] that in my view homosexuality is a neutral and not a negative factor as far as parenting skills are concerned.

[90] (1975), 23 R.F.L. 58 (Alta. Prov. Ct.) [hereinafter *K.*].

[91] (1980), 28 O.R. (2d) 136 (Prov. Ct., Fam. Div.) [hereinafter *Re Barkley*].

[92] *K., supra* note 90, at 63-64.

[93] *K., supra* note 90, at 61.

[94] *K., supra* note 90, at 60.

(2) She does not flaunt her homosexuality;
(3) She does not seem to be biased about Lynn's orientation and seems to assume that Lynn will be heterosexual;
(4) There is no overt sexual contact apart from sleeping in the same bed;
(5) The sexual partner has a reasonably good relationship with the child."[95]

Further, the daughter had expressed her preference to live with her mother. As with Ms. K., Ms. Barkley was a "good" lesbian mother: she closeted herself and her relationship for the interests of her child.

There is little or no information about the fathers in the decisions, which focus almost exclusively on the mothers' ability to parent as lesbians. However, in *K.* v. *K.,* it was noted that the father's economic situation was one impediment. Apparently, psychological testing on him did not seem necessary. Further, there was evidence of drug use on his part – to which Rowe J. thought fit to compare the mother's homosexuality. Another implicit factor however, is that neither Mr. K. nor Mr. Barkley presented the court with a surrogate mother figure as was done in future cases. This results in the court apparently picking the perceived lesser of two evils: a mother who is a lesbian – but discreet, overtly asexual, and consumed with love for her child, with a long term partner with the same characteristics – over a single father with greater economic responsibilities and duties in the "public sphere".

Despite the fact custody was granted to these women, neither decision can be seen as a direct challenge to the ideologies of familialism, motherhood, or heteronormativity, only manipulations of them. It becomes a contest of sorts between the parents: who ever can best approximate the ideal, "wins" custody.

Monette c. *Sylvestre,*[96] a 1981 Quebec case, is an example of how the ideology of familialism can sometimes trump a successful conformity to the "good" lesbian mother stereotype. Although Durocher J. spent half of the written judgment expounding the positive aspects of the mother's life, he granted the father's application to reverse a previous order and gave custody of the daughter to him. The father's claim was based on a material change of circumstances, namely, the

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[95] *Re Barkley, supra* note 91, at 140.
[96] [1981] C.S. 731 (Que. S.C.)

mother's lesbianism, alleged sexual contact with the daughter, and the instability of her life. Durocher J. found that Ms. Sylvestre's sexual orientation as one factor to be considered with others and the allegations of incest were unfounded. While not dealing with the last charge specifically, he did say that her life was "quelque peu boheme."[97] Thus, while noting that Ms. Sylvestre was a loving, attentive, discreet, and non-militant woman, that there was no promiscuity or exhibitionism in her home, that she had male friends as well as female friends, and that the daughter was intelligent and well adjusted, he decided it was "preférable de fournir à l'enfant un modèle de familial complet... l'enfant devrait avoir l'opportunité de vivre dans une cellule familiale complète, que notre société considère comme idéale et normale."[98]

The apparent basis for showing the stability of Mr. Monette's life-style was that he had remarried and "sa jeune épouse" was willing to act as a surrogate mother-figure to his daughter. Thus, the negative factors of the father's life –he had been married three times, for short periods in succession; he had a record of careless driving and once smoked marijuana while driving a friend and her two young children; his daughter got hit by a car and fractured her leg while under his supervision; he was bankrupt because of $12 000 arrears in support payments; and he had once considered suicide – were neutralized by the idea that he could provide a traditional heterosexual family environment. These indicia of instability were seen as "frivole et légère" in comparison to the mother's "choix personnel, quant à son orientation sexuelle".[99]

In this case, the judge was supported in his decision by the psychiatrist called by Mr. Monette. The now inaccurate opinion provided by the expert was irresponsible and speculative, as he had only interviewed the father and the daughter. He found the father could provide a stable and secure emotional environment, whereas

> les attitudes socials et les opinions sexuelles de madame...représent des dangers sévères pour l'avenir affectif et psycho-sexuel de cette fillette...[La mère doit] offrir à son enfant une image de femme sans confusion ne ambivalence dans son role sexuel. Autrement, il y a danger majeur de transmettre un modèle feminine confus, de susciter

[97] *Ibid.* at 733.
[98] *Ibid.* at 734.
[99] *Ibid.*

> le rejet du masculine.. [La vie avec Sylvestre dans un] milieu de promiscuité sexuelle est source de stimulation sexuelle prematurée et le modèle maternel ambivalent et marginal.[100]

Thus, without having even observed or spoken with Ms. Sylvestre, the psychiatrist relied on sexualized stereotypes of lesbian women as promiscuous and "dangerous" mothers. Further, these vestiges of 19th century pathologization of lesbianism may have had strong persuasive force for the judge because of its excessive use of familial discourse. The judge's greatest fear appears to have been that the mother's lesbianism would be transmitted to the daughter and that Ms. Sylvestre would fail to comply with the ideology of motherhood by not reproducing gendered roles of femininity and male dependence in her daughter.

Conversely, but with the same result, in *Elliott* v. *Elliott*[101] the judge granted custody to the father by undermining and shedding doubt on the report of a family court counsellor who supported giving custody to the mother. According to the counsellor, Ms. Elliott and her partner had a stable, "conventional and discreet" relationship, they were doing a "better than average job" in caring for the child, and the child was enjoying the security of having "two compatible mothers around."[102] Because the report did not thoroughly investigate the occasional marijuana use of the mother's partner, Trainor J. concluded that the counsellor's assessment contained "obvious omissions".[103] Further, in direct contrast to *Monette*, the potency of the report was diluted by the judge's note – without giving the actual amount of time – that "the length of time [the counsellor] was in the home and the basis upon which she could reach that conclusion [of the complementarities and compatibility of the women] seems to me to be rather slender."[104]

No investigation was conducted on Mr. Elliott's home life and the only evidence apparently accepted by the judge was the fact that he had become engaged to Valerie Smith, "who will be his wife to share with him that home and the responsibilities of that home."[105] He appears to

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[100] *Ibid.* at 732.
[101] [1984] B.C.J. No. 1092 (B.C. S.C.).
[102] *Ibid.* at para. 6.
[103] *Ibid.*
[104] *Ibid.* at para. 7.
[105] *Ibid.* at para. 13.

balances only this – despite Ms. Elliott's testimony of physical conflict during the marriage and the disciplinarian attitude of the father – with "the situation in which Mrs. Elliott is living, those circumstances, that atmosphere."[106] Nothing was cited beyond the criticisms of the court counsellor's report and the fact that Ms. Elliott allowed her daughter to go to the arcade, to support this ominous statement. What was mostly occurring was that, because the father could provide a traditional family model for the child, this, in and of itself, is sufficient to neutralize the mother's claim.

In almost all of the cases, there was also the judicial need, not just to state the mother's sexual identity, but to make a prediction as to whether this would continue;[107] the underlying rationale being that if the woman has not strayed too far from the motherhood path, and may even get back on the heterosexual one, then she has a much stronger case. However, at the same time, the presence of a long-term partner further widened the gap between the "good lesbian mother" and the "bad lesbian mother". The "good" mother, with a long-term stable partnership, could either approximate a heterosexual family rubric or else pass off the relationship as two single parents living together for economic reasons.[108] Conversely, the "bad mother" was seen as selfish (by spending time with other women) and promiscuous (by having a certain number of "lesbian affairs", which was always noted in the judgment[109]).

As a corollary of this, it is notable how extensive the investigation into the woman's sexual history goes, whereas there is usually little or no information about the man's relationships,[110] unless he is presenting a surrogate mother to the court to improve his case.[111] By remarrying, and providing a substitute heterosexual mother figure, the father gives the court an impression of greater stability and "normality", in accordance

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[106] *Ibid.*

[107] *Elliott, ibid.* at para. 5;.*Case, supra* note 68 at 136; *K., supra* note 90 at 62.

[108] *Elliott, ibid.; K., supra* note 90; *Re Barkley, supra* note 91.

[109] See *Case, supra* note 68 at 136, *Bezaire, supra* note 83 at para. 5.

[110] There could be many possible reasons for this I suppose, such as the man has not engaged in any other relationships or perhaps the mother is not as interested in putting these before the court. One other possibility is that, regardless of evidence before the court, the judge does not perceive the information as relevant as the mother's sexual history to merit including in the judgment.

[111] *Monette, supra* note 96, *Elliott, supra* note 101, *Bernhardt, supra* note 65.

with the working assumptions of the ideology of familialism. This ignores the legal barrier in most jurisdictions that preclude same-sex partners from marriage, thus reinforcing heteronormative ideology. Further, the information there is about the father usually consists of his employment status, in other words, his station in the "public" world.[112] This regulation and vigilance over women's personal and sexual lives can also be seen as a direct adjunct of the ideology of familialism – the public/private divide and paternalistic patriarchy.

The case of *Johnson* c. *Rochette*[113] is an interesting case from Quebec and a harbinger of the analytical shift which would occur with the passing of the *Canadian Charter*. Similar restrictive orders were placed on the visitation rights of the mother at trial as were included in *Bezaire*. The judge ordered that she could only visit her children in the absence of her partner. This clause was deleted on appeal as contrary to section 10 of the *Quebec Charte*. However, the appeal judge also noted that the deletion was appropriate primarily because "it was not even alleged that there had been any reprehensible attitudes or gestures in the presence of the children or that the wife had acted in a manner not becoming a normal mother."[114] Thus, while overt discriminatory distinctions were avoided regarding the personal characteristics of the mother, the "good"/"bad" lesbian mother dichotomy persevered by assessing her "lesbian" behaviours. While her sexual orientation is seen as a privatized "choice", its possible effects on children give the court free reign to regulate and assess her actions and activities.[115] This trend continues in the next period.

II. Early Charter – 1985-1994 – Difference Blindness

The legal context of this time is important to note. Section 15 of the *Charter* came into force in April of 1985 and, since then, the Supreme

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[112] *Elliott, supra* note 101, *K., supra* note 90, *Re Barkley, supra* note 91.

[113] [1982] C.S. 407, 27 R.F.L (2d) 380.

[114] *Ibid.* at 380.

[115] This is an example of the way liberalist and moral conservatist theories interact in the law. The "protect the children" discourse construct children as a "public" issue, and although the sexuality of the mother is "private", the paternalistic interventions become justified in law via the "best interests of the child" test.

Court of Canada has consistently affirmed its commitment to substantive equality. Further, the 1986 *Divorce Act* had also been passed expressly rejecting fault-based or parental rights approaches in favour of the best interests of the child test. Even though this test was used provincially and judicially, Parliament had shown its intention that the test was now to be the uniform and paramount consideration in custody disputes nationally. However, this period is prior to the *Egan* decision which added sexual orientation as an analogous ground. *Mossop* was the only case from the Supreme Court of Canada on sexual orientation, and the majority explicitly rejected his claim as "family". Lastly, the political climate is also important; in Ontario, a proposed bill to change the definition of "spouse" in the *Human Rights Code* and the *Interpretation Act* was defeated on the second reading.[116]

The main approach taken by the courts in this era was to name the lesbianism of the mother, yet expressly reject it as a negativing factor. This is a contrast to the pre-*Charter* period where homosexuality, while not a sole bar to custody was still a negative factor on par with drug use, and sometimes worse than child abuse. However, while a mild improvement, the dichotomy between acceptable and unacceptable (lesbian) *behaviours* remained hidden underneath the neutral words of the courts.

Susan Boyd outlines three areas of possible "heterosexist bias" encoded within judicial "neutrality" when applying the best interests test in the context of lesbian relationships.[117] First, because "stability" is often a factor of consideration, family forms which are "different from the heterosexual norm" could influence the assessment of a "permanent and stable family unit."[118] However, the bar against same-sex marriage, the closeted nature of lesbian relationships, and the absence of clear statistical information[119] all militate against challenging stereotypes of

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[116] Bill 167. For a commentary, including negative public reaction to the bill, see S.B. Boyd, "Expanding the 'Family' in Family Law: Recent Ontario Proposals on Same Sex Relationships" (1994) 7 CJWL 545 [hereinafter "Expanding the Family"].

[117] S.B. Boyd, "Lesbian (and Gay) Custody Claims: What Difference Does Difference Make?" (1997) 15 Can. J. Fam. L. 131 at 137-39 [hereinafter "Lesbian Custody Claims"].

[118] *Ibid.*

[119] Statistics Canada has announced that the year 2000 will be the first year when same sex relationships will be explicitly recognized. See V. Lawton, "Same Sex Legislation is Expected this Week" *The Toronto Star* (8 February 2000), online: Foundation for Equal Families <http://www.ffef.ca/main.htm> (date accessed: 23 March 2000).

promiscuity and instability of homosexual relationships. Second, "being in the closet may produce behaviour that is viewed as secretive or devious."[120] Thirdly, "a lesbian mother is viewed as placing her own needs over those of her child(ren) by choosing to be a lesbian and adopting a 'lesbian lifestyle.'"[121] To this list I would also add that the strict formal equality approach assumes both parents are equal in all ways, and that the standard to be measured against is the heterosexual norm.

This newfound neutrality towards sexual orientation has resulted in courts both recognizing and erasing lesbian existence at once, and the problems enumerated above are evident in almost all the decisions. There are even fewer reported cases in this period,[122] which could possibly be a consequence of judges refusing to recognize the sexual orientation explicitly while allowing it to influence their reasons, *or* a general reluctance to having to deal with it at all.

In *Tomenek* v. *Tomanek*[123] and *Daller* v. *Daller*[124] both courts were willing to avoid the issue of sexuality completely and treat it as a "non-issue"[125] or else non-existent[126] in granting custody to the mothers. In the

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[120] S.B. Boyd, "Lesbian Custody Claims" *supra* note 117.

[121] S.B. Boyd, "Lesbian Custody Claims" *supra* note 117.

[122] Again, I will not be dealing with extremely complicated cases that deal with issues such as alcohol or drug abuse. It is interesting to note, however, that in these cases the mother's sexuality was seen as contributing to her *other* "psychological and emotional" problems which prevented her from having custody of her child and instead granting custody to a (heterosexual and two parent) foster family. See *Adams* v. *Woodbury*, [1986] B.C.J. No. 2735 (S.C.); *Children's Aid Society of Halifax* v. *A.(M.)*, [1986] N.S.J. No. 423 (Fam. Ct.); *Manitoulin* v. *P.D.*, [1995] O.J. No. 1985 (C.J., Prov. Div.).

Further, I will also not deal with disputes between lesbian couples that are separating and have children. The cases in this context tend to not involve custody, but centre around assets and support. See *Anderson* v. *Luoma*, [1986] B.C.J. No. 3000 (S.C.) aff'd [1987] B.C.J. No. 600 (C.A.); *M.(D.E.)* v. *S.(H.J.)* (1996), 25 R.F.L. (4th) 264 (Sask. Q.B.); *Monk* v. *Sjoberg*, [1996] S.J. No. 411 (Q.B., Fam. Div.); *Re L.K.F.*, [1999] B.C.J. No. 819 (S.C.); *Bell* v. *Michie*, [1998] O.J. No. 675 (C.J. (Gen. Div.). But see *Buist* v. *Greaves*, [1997] O.J. No. 2646 (C.J., Gen. Div.) where the non-biological mother was denied custody and a declaration that she was a "mother" under the law, but ordered to pay child support.

Lastly, the case of *Robertson* v. *Geisinger*, [1991] S.J. No. 515 (Q.B.) is also beyond the scope of this paper. This case involved a custody dispute between a gay father and a lesbian mother. While neither party put sexual orientation into issue, it is notable that the mother's "stable" and long-term relationship was compared to the sexual history of the father.

[123] [1993] O.J. No. 1371 (Gen. Div.) [hereinafter *Tomanek*].

[124] [1988] O.J. No. 2116 (H.C.J.) [hereinafter *Daller*].

[125] *Ibid.*

[126] *Tomanek, supra* note 123.

facts of each case, the claiming fathers in both cases had a great deal of animosity towards the mothers and would use and manipulate the children as tools against them, specifically targeting their lesbianism; emotional abuse or harassment and threats were also present. Thus, the overt behaviour of the fathers was recognized as a negative factor. However, in making the orders, there were few concomitant positive characteristics attributable to the mothers. It is interesting to note the mere equivocal or strictly neutral characterization of the mothers' relationships; these forms were not valorized or privileged as unequivocally stable and permanent family forms as were the remarried heterosexual fathers in previous cases.

By contrast, in *Ewankiw* v. *Ewankiw*,[127] the judge penalized the mother for not "outing" herself in court; indeed he took it upon himself to do so. He rejected the mother respondent's testimony that she was not a lesbian or in a lesbian relationship with her roommate and used this denial to undermine her abilities as a parent:

> Both the mother and Tracy Scheel deny that they are having a lesbian relationship. This is in spite of overwhelming evidence to the contrary...
>
> The sexual preference of the mother is her own business and is not relevant to the issue of care and control. However, what is relevant to the issue of care and control is the mother's lying. The mother lied throughout her testimony. I am satisfied that dishonesty is an integral part of her life. This mother is a stranger to the truth![128]

This assessment may have failed to take into account the discrimination faced by lesbian women in society and in the legal system. The judge was not able to understand why a woman may want to stay in the closet for custody proceedings despite the legacy of Gayle Bezaire and previous custody cases.

The inability of the judge to comprehend or translate alternative discourses is illustrated in other parts of the decision as well. For example, Diamond J. refused to accept the women's testimony as to the first eight months of their relationship, despite the fact that "there is no evidence to contradict" them:

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[127] [1994] M.J. No. 692 (Q.B.).

[128] *Ibid.* at paras. 20-21.

> They apparently met in July of 1992, when Ms. Scheel, who was disguised as a man, was introduced to the mother as 'Bo Bodine'. After the separation, the mother and Ms. Scheel, who was still disguised as 'Bo Bodine' became very good friends...It was not until February of 1993, upon the mother confronting her friend as to her true identity, that Ms. Scheel confirmed that she was not a man and that her name was not 'Bo Bodine'. Truth is stranger than fiction! If this bizarre situation is in fact true, it reflects badly upon the mother's judgment in becoming best friends and roommates with a person who was dishonest.[129]

According to Judith Butler, performatives such as drag, are often political actions used to challenge and subvert traditional gendered dualisms: "[q]ueer theorists can further subvert [sexed and gendered] identities through the exploration of practices such as drag, butch-femme roles, cross-dressing, transsexuality, and the proliferation of erotic minorities, performed as self-conscious and voluntary parodies."[130] This failure to assimilate naturalized and socially assigned roles of (heterosexual) Woman or Mother strikes at the very heart of these naturalizations and assignments, however, as in *Ewankiw*, this failure can often have drastic consequences when untranslatable by those with power.

Similarly, in *S.* v. *S.*,[131] Melnick J. refused to understand why Ms. S. wanted to move to Vancouver from a small town in British Columbia, and eventually he trivialized any reasons she had and reduced them to her lesbianism. In his decision, he explicitly stated:

> The parties may be expecting a lengthy analysis of the appropriateness of lesbians or homosexuals having sole custody of children. I do not intend to provide such an analysis because it is not necessary...I start from the base assumption that being a lesbian or a homosexual does not, in itself, make a person unfit to be a parent or have custody of a child...[T]he state of development of Ms. S.'s awareness and experience of her being a lesbian has had some impact on my decision, but I wish to state very clearly that the same state of affairs could well have been brought about, in another case, by an entirely different cause.[132]

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[129] *Ibid.*
[130] Cited in Martindale, *supra* note 57 at 88.
[131] [1992] B.C.J. No. 1579 (S.C.).
[132] *Ibid.*

This facially neutral position, and the assumption that the situation and judgment would be the same if, for example, she was moving to foster a new family unit with a new husband,[133] is belied by his other statements.

Ms. S. set out several reasons for wanting to move if she were granted custody, the desire to "seek out new relationships so that she could experience her lesbianism" was only one of five stated reasons. However, the judge hinged on this in particular and characterized it as "an important, even essential, adventure for her...not an adventure the children should be part of." Thus, while sounding neutral, and even supportive of Ms. S.'s "need to be open about the fact that she was a lesbian", Melnick J. also denied custody to her on this ground. Her "adventure" was seen as selfish, personal and *not* in the best interests of her children:

> Ms. S.'s wish to move was, for the most part, grounded in her own personal needs, not those of her children... Ms. S. [is] so intent on moving away and so wrapped up in her own need to do so that she is blind to the needs of her children...[134]

Lastly, as a throwback to previous cases, the presence of a "girlfriend" in Mr. S.'s life also supported the judge's assumption of stability in the father's life, even though the children did not get along with her. As to Ms. S.'s future, he stated:

> I have no idea as to the shape of the relationship or relationships yet to be established by Ms. S. and how that will impact on the children...A move with Ms. S. to the Lower Mainland, particularly given Ms. S.'s present need to explore her lesbian nature, will not now, in the immediate future, provide anything approaching that which has been normal or stable in [the children's] lives.[135]

Thus, while couched in terms of judicial neutrality and formal equality, the same "good"/"bad" lesbian mother dichotomy remains pervasive between the lines. The implicit message is that, if Ms. S. truly

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[133] Parental mobility is a complex area of family law, however, the Nova Scotia Court of Appeal has recognized the importance of fostering a new family unit, even if this entails reducing the access of the non-custodial parent, see *Blois* v. *Blois* (1988), 13 R.F.L. (3d) 225 (N.S. C.A.). While the Supreme Court of Canada has found that the reason for the parent's move should be considered irrelevant (see *Gordon* v. *Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.)), it undoubtedly acts as at least an implicit consideration.

[134] *S.* v. *S.*, *supra* note 131.

[135] *S.* v. *S.*, *supra* note 131.

wanted to keep her children, she should have agreed to live in a place she never wanted to move, suppress her need to be open with her lesbianism, and assimilate into a heterosexualized model of a relationship. To take this route and to make these personal sacrifices still remain the most successful way of getting custody.

In *D.M.* v. *M.D.*[136] and *N.* v. *N.*,[137] both lesbian women were awarded custody by the court. They were in long-term and discreet relationships. In *D.M.* the judge only looked summarily at the mother's relationship in three short paragraphs before granting the respondent's lesbian aunt custody of the children. The biological mother had two other children, lived at her parents' house and had some emotional and psychological impediments. While the case is a mild improvement, in that the judge did not delve deep into the aunt's life-style, the factors governing his decision were that:

> these two women...were neither apologetic[138] nor aggressive about their relationship. They are very discreet. They make no effort to recruit others to their way of living. They make no special effort to associate with others who pursue that lifestyle. In short, D.M. and H.S. mind their own business and go their own way in a discreet and dignified way...
>
> ...There may be a problem of the absence of a male presence, but this is no worse ...than many single parent families.[139]

Thus, although recognizing the existence of other family forms, the judge still fails to challenge the traditional ideal. Single-parent families and two-parent lesbian families are still *problematic* in his mind.

In *N.* v. *N.*, the judge also implicitly privatized the mothers lesbian relationship by emphasizing the covert nature of the relationship. However, while he did not explicitly reject the father's position that, all things being equal between the parties, Ms. N.'s lesbianism would tip the scales in the father's favour, he did not apply it as a strict rule of law as was done in the past. Because there was no *evidence* of a detrimental

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[136] [1990] S.J. No. 679 (Q.B.) [hereinafter *D.M.*].

[137] [1992] B.C.J. No. 1507 (S.C.) [hereinafter *N.*].

[138] *But* see *J.E.B.* v. *R.G.B.*, [1996] B.C.J. No. 2717 (S.C.) where the mother repeatedly expressed her shame in engaging in a short "affair" with another woman. She was granted primary care and control.

[139] *D.M.*, *supra* note 136, at paras. 12-13.

impact, Warren J. did not find the lesbian relationship to be a bar to custody.

It is uncertain on whom the burden of leading evidence is to fall upon. One would assume that, since it is to act as a challenge against the mother's ability to parent, the father should bear the onus. However, in line with strict liberalist approaches, it may be that the mother will have to justify her "choice" to lead a lesbian lifestyle and to explain to the court *how* she plans to protect her child from a homophobic society. The latter option was certainly predominant in past cases and those from this period, and this is a predominant area where formal equality fails lesbian women claiming custody.[140] Warren J., however, appears to be approaching this legality from the other side: the *father* did not produce sufficient evidence to merit a rejection of the mother's claim.

With the advent of the *Charter*, and the stated goal of equality of all persons, the failure of judges to take difference into account in custody cases will further marginalize already-marginalized groups in society.[141] There is empirical evidence that lesbian (or gay) parents are more likely to raise tolerant children who develop with "a general social consciousness and awareness encompassing such issues as sexism, racism, nuclear disarmament, and non-violence," without the restrictions of the gendered expectations in traditional families.[142] The question that must be asked, according to Boyd, is:

> Where one parent is lesbian or gay, which parent is better suited to assisting the child(ren) in understanding issues of sexuality (including societal bias against lesbians and gay men) in a constructive and supportive manner.[143]

The assumption that heterosexual parents are best equipped to parent because they conform to the traditional norm – or that one lesbian parent is better because she conforms to the heterosexual norm – is a fallacy in

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[140] In *Gordon* v. *Goertz*, *supra* note 133, McLachlin J. advocated that there should be an evidentiary burden on *both* parties to show what is in the best interests of the child. This is a recent decision however, and *effectively*, it can be assumed from the judgments of past cases that once the father raised the issue, the mother was often left with an additional *effective* burden to justify her abilities as a parent.

[141] See *e.g. British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] 3 S.C.R. 3.

[142] J. Ainslie & K.M. Feltey, "Definitions and Dynamics of Motherhood and Family in Lesbian Communities" (1991) 17 Marriage and Family Review 63 at 69-71.

[143] S.B. Boyd, "Lesbian Custody Claims", *supra* note 117 at 151.

the *Charter* era. It allows heterosexism and homophobia to continue unchecked and unchallenged. One judge, in granting custody to the mother, compared denying custody on grounds of community homophobia to a situation of denying custody on grounds of inter-racial marriage, which may also be met with community objection.[144] To deny custody on racial grounds was ludicrous to him, in part because of a long history of combating racism and racist attitudes in our society.[145] It is still to be seen, now that the same protections have been afforded to lesbians and gay men, whether heterosexist assumptions will also been rejected.

III. 15 YEARS OF *CHARTER* DISCOURSE – 1995-1999 – SUBSTANTIVE EQUALITY?

During this short period of time, substantial gains have been made in the area of equality rights for gay and lesbian individuals, especially in the form of spousal benefits for same-sex partners. In the area of child custody however, there have been fewer cases from which to draw conclusions. There could be many reasons for this change. One beneficial reason may be that fewer fathers are contesting custody based solely on the mother's sexual orientation; the possibility of greater social tolerance of difference may have mitigated the animosity and hostility of ex-husbands towards their ex-wives' lesbianism.[146] There may also be practical reasons, such as unreporting or increased private settlement. However, one worrisome possibility is that there has been an increased judicial erasure of sexual identity as a result of the difference-blindness approach of the previous period. The Supreme Court had found sexual orientation to be an analogous ground under section 15, and by refusing to address the issue at all, judges may be attempting to insulate themselves from criticism.

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[144] *K.* v. *K.*, *supra* note 90 at 65.

[145] This comparison is not meant to imply a hierarchy of discrimination, but to interrogate whether the judiciary is able to move beyond strict categorical approaches to protection from discrimination and evolve past successes so that they apply on a larger scale.

[146] See *Parkinson* v. *Neil-Parkinson*, [1998] S.J. No. 371 (Q.B., Fam. Div.); custody was agreed by the parties to be joint, which each parent having primary care and control over one child. Compare this dynamic with *Bezaire, supra* note 83, and other earlier cases.

Of the two reported cases during this period,[147] one case certainly reflects little change in the dynamic between the parties, which surfaced in cases such as *Bezaire, Tomanek* and *Daller*. In *Anger* v. *Anger*,[148] the father vehemently objected to the mother having custody of the children because he found her "lesbianism repugnant and reprehensible on religious and moral grounds. He firmly believes that it is harmful to the children in some ill-defined way."[149] Master Nitikman firmly rejected this stance. He overturned a previous court order which forbade Ms. Anger from having overnight access or access in the presence of her partner. He further stated that:

> [the father] is so convinced of the righteousness of his stance vis-à-vis the [mother], he is not prepared to accept any evidence that, in fact, [she] can be a lesbian and still be a good mother.

There is nothing in the brief judgment assessing the "discreetness" of the mother's relationship and, in fact, the Master expressed his disapproval of *the father's views* and *its effect* on the best interests of the children. While it is possible that Ms. Anger was still required to lead evidence of how she would "shield their children from the unpleasant reality of homophobia in society"[150] – that is, her lesbianism – Master Nitikman did not appear to find this crucial enough include it in the decision. He ordered interim joint custody, consisting of four days with the mother and three days with the father. He further ordered that the parties were *not* to make disparaging remarks about one another.[151]

This development is certainly an important one. It appears that this court is beginning to ask Susan Boyd's important question of assessing parents on their ability to raise children in a constructive and supportive manner, rather than privileging the party who can best foster an ignorance of difference. This presents a substantial challenge to the unequivocal privileging of the traditional family paradigm, the heterosexualized and essentialized mother figure, and the heterosexist assumptions which underlie these ideologies. Further, it is possible that

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[147] There were only two cases which were directly applicable to this analysis. However, for a list of relevant cases which occurred *between* lesbian parents, see *supra* note 111.

[148] [1998] B.C.J. No. 1392 (S.C.).

[149] *Ibid.* at para. 18.

[150] S.B. Boyd, "Lesbian Custody Claims", *supra* note 117 at 143.

[151] *Anger, supra* note 148; the trial was scheduled for October 1998, but it is either unreported or a private agreement had been made between the parties.

this approach constitutes a new trend in custody determinations between a heterosexual father and a lesbian mother.

In *Ouellet* v. *Ouellet*,[152] Gordon J. ordered primary care and control of the children to the mother, who was in a one-year long relationship with another woman. The judge found that the main issue was to balance two aspects of each parent's life:

> There is a contrast here on two fronts...Firstly, the mother seems able to converse openly with the children about almost anything, barring certain personal and intimate subjects whereas the children apparently feel unable to freely converse with the father. The children's emotional stability can be assisted in open communications.
>
> Secondly, the father's relationship seems more stable than that of the mother. [He had been remarried for eight years at the time of trial].[153]

In previous cases, it was almost indisputable that the ability of the father to provide a traditional family form would result in the mother losing her claim, despite the positive aspects her care could provide. However, in this case, a more functional approach to parenting was taken, as opposed to falling back into non-questionable familial ideology. Gordon J.'s comment, that "society's tolerance or lack thereof in the present day concerns many adults and must surely present an anxious unknown for a child," actually served to assist Ms. Ouellet's claim rather than refute it. Her greater willingness to place the children in therapy "to enlighten, explain and strengthen the children to meet the reflections from and upon the mother's sexual orientation" was seen as "necessary" and positive.[154]

Although a significant sign of progress, it may still be too soon to celebrate.[155] On the facts of the case, Gordon J. placed much weight on

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[152] [1996] O.J. No. 1710 (C.J., Gen. Div.).

[153] *Ibid.* at paras. 12-14.

[154] *Ibid.* at paras. 23 & 25.

[155] *But* see *Re K.* (1995), 23 O.R. (3d) 679 (Prov. Div.) [hereinafter *Re K.*] where, in finding the legal barrier to adoption by same-sex couples was unconstitutional, Nevins J. provided an in-depth and comprehensive judgment rejecting previous stereotypes of homosexual couples. In the course of his reasons he also rebutted previous assumptions about the privileging of the traditional family:

> Recent studies on the effects of the non-traditional family structure on the development of children suggests that there is no reason to conclude that alteration of the family structure itself is detrimental to child development. The prevailing opinion of researchers in this area seems to

the children's stated preference to live with their mother. He also felt the need to outline the mother's relationship history when assessing the "instability" of her relationship. It is difficult, from the scarcity of cases, to fully analyze whether the courts have begun taking a more substantive-equality approach to custody cases involving lesbian mothers – whether they are recognizing that difference does not always equate with deviance.

4. Summary

The purpose of the foregoing survey was not to propose that mothers should always get custody, or that if lesbian mothers do not then this is *de facto* discrimination. Rather, I hoped to problematize oblivious deference to the dominant and dominating ideologies of familialism, motherhood, and heteronormativity and the effects it has in refusing to listen to alternative discourses. What then, is a proper approach to take in custody disputes? What determines a good parent? When and how should difference be recognized? These are questions I will attempt to address in the next section.

IV. The Sequel?

I am certainly not the first to address the oppressive effects of dominant ideologies on lesbian and gay individuals and relationships. The legal failures and successes surrounding the gay and lesbian equality rights movement has led to what Brenda Cossman describes as the "We are Family" – "We Are Not Family" debate. Whereas the former seeks inclusion within the legal and social definition of the Family, the latter seeks to destroy the assimilationist and coercive force of the Family definition.[156] In short, it is an offshoot of the sameness/difference debate which predominated feminist circles for so long

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be that the traditional family structure is no longer considered as the only framework within which adequate child care can be given.

He further emphasized that there are a "multiplicity of pathways" along which child care can take place. However, the thrust of Nevins J.'s reasons was to classify the relationships of the lesbian applicants as *the same as* heterosexual relationships.

[156] B. Cossman, "Family Inside/Out" (1994) 44 University of Toronto L.J. 1 [herinafter "Inside/Out"].

during and after second wave feminism. This debate is valuable to the custody context because of the pervasive role of family ideology imbued within it. Further it is helpful in grounding possible recommendations within the framework of those that will be affected by changes in custody law.

There are positive and negative aspects of both arguments. Whereas the sameness approach has resulted in increased recognition, greater benefits and greater tolerance of gay and lesbian relationships, it is certainly susceptible to the critiques of the We Are Not Family faction. By employing strict rights-based, formal equality discourse, and "by appropriating familial ideology, lesbians and gay men may be supporting the very institutional structures that create and perpetuate women's oppression."[157] Further, the formal equality approach erected many barriers to lesbians involved in custody disputes in the pre- and early- *Charter* periods, illustrated above. "By claiming our rights as spouses, rather than our rights/needs as people, we emulate and legitimize the ideological norm and we also compound the marginalization of others."[158] However, this is not to say the Difference side of the debate is without its flaws.

Ruthann Robson sees the Family exclusively as a site of assimilation, domestication, coercion, arrogation, and indoctrination for lesbian women.[159] She advocates rejecting the category and construction of the Family completely, to unname it as it would apply to lesbian relationships and "to reconceptualize ourselves and our relationships in as yet unimaginable ways... Within lesbian legal theorizing, this means theorizing not as if lesbian relations are commensurate to familial relations but as if lesbian relations are commensurate only to themselves."[160]

In contrast, Didi Herman calls attention to some difficulties with Robson's "lesbian standpointism".[161] She cautions against the

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[157] D. Herman, "Are we Family?: Lesbian Rights and Women's Liberation" (1990) 28 Osgoode Hall L.J. 789 at 797. See also D. Herman, *Rights of Passage: Struggles for Lesbian & Gay Legal Equality* (Toronto: University of Toronto Press, 1994) at 54-76.

[158] *Ibid.* at 799.

[159] R. Robson, "Resisting the Family: Repositioning Lesbians in Legal Theory" [1994] Signs 975.

[160] *Ibid.* at 992-93.

[161] D. Herman, "A Jurisprudence of One's Own? Ruthann Robson's Lesbian Legal Theory" (1994) 7 Can. J. Women & the Law 509 at 514 [hereinafter "Jurisprudence"].

exclusionary effects of privileging a single, lesbian experience as theory and overemphasizing difference:

> Rather than challenging [the construction of lesbians and gay men as "minorities"], the development of 'lesbian jurisprudence' may reinforce it. First, by insisting on the separation of lesbianism from feminism, second, by positing a homogeneous 'lesbian consciousness/ theory', and third, by rejecting an ethic of solidarity with gay men and heterosexual women... Rather than exploring the historically contingent production of gender categories and the accompanying regulation of sexuality, one would think that Robson views lesbians as a kind of 'third sex', somehow creating our own world outside of dominant social relations.[162]

Thus, a lesbian-centred, anti-Family, jurisprudence faces the dangers of: reinforcing the current social and legal pecking order; creating a new hierarchy between "real" or "natural" lesbians and others that do not subscribe to the theory;[163] and politically shooting itself in the foot by (re)positioning itself entirely outside of social and legal discourses. Lastly, as with most epistemological claims, lesbian jurisprudence theory appears to accept its position as a homogenous "other" – despite diversity within the lesbian community – and fails to problematize the source of the dualism: heterosexuality which posits itself as an ideology.[164]

The main problem with both sides of the debate is that each constructs itself and its position as "right" and "true". However, the presence of such a heated debate is itself cogent evidence that neither is, nor can be, the "right" answer; this struggle is complicated, contradictory and confusing, but necessarily so. Brenda Cossman recommends rejecting the dichotomous nature of the debate:

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[162] *Ibid.* at 521.

[163] For a discussion of the "real lesbian hierarchy" which is present in some lesbian communities, see D. Day, "Lesbian/Mother" in S.D. Stone, ed., *Lesbians in Canada* (Toronto: Between the Lines, 1990) at 36 where she explains:

> "Real lesbians don't have children. This is proclaimed with equal loudness by both straight women (and men) and 'real' lesbians. Real lesbians have never been fucked. Real lesbians have never had sperm inside their bodies. The thought of sperm makes them sick. Real lesbians are not interested in children – especially male children. Real lesbians find children boring and tedious. Real lesbians have much more important work to do."

[164] D. Herman, "Jurisprudence", *supra* note 161 at 521. See also B. Cossman, "Inside/Out", *supra* note 156.

> The family/not family dilemma begins to dissolve when we refuse to accept the dilemma on its own terms, when we reject its either/or, and recognize that we are both. Exploring the contradictory nature of subjectivity can help us begin to reveal the ways in which we live at multiple and conflicting sites of family, and the ways in which the increasing dichotomization of the debate obscures and negates the complexities of our lives. But contradiction is much more difficult for legal politics. Legal categories do not allow for contradiction.[165]

There is no "universal family" but there is a dominant discourse of Family. The We are Family – We are Not Family debate accepts the legal concept of "family" and runs with it, rather than questioning that concept and definition and trying to problematize it in the first instance. The question that needs to be addressed is how to make room for alternative familial discourses in custody law, in order to both challenge the privileged position of one ideology, and also to prevent the further marginalization of others.[166] While law is by far not the only site of domination and resistance, it is an important one. The question to ask now is how the law, and judges implementing the law, can adequately accommodate heretofore silenced experiences and discourses in the context of custody law.

1. The Question of Family

One's conceptual and emotional definitions of family can be quite different, and often contradictory.[167] However, from the judicial chair, it is most likely that only the conceptual traditional family is invoked when dealing in "Family Law" and the wide discretion of the "best interests of the child" test. Further, given the social position and

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[165] B. Cossman, "Inside/Out", *supra* note 156 at 30. See also B. Cossman, "Same-Sex Couples and the Politics of Family Status" in J. Brodie, ed., *Women and Canadian Public Policy* (Toronto: Barcourt Brace, 1996) at 223.

[166] As C. Smart writes in the context of marriage:

> "A primary goal must be to jettison the privileged status of the heterosexual married couple, but not in order to create a different hierarchy of 'unmarried' households."

C. Smart, *The Ties that Bind: Law, Marriage and the reproduction of patriarchal relations* (London: Routlege & Kegan Paul, 1984) at 146.

[167] For example, having been socialized in the dominant discourse of familialism, I instinctively conceptualize "family" as: parents + children. However, in my personal life, I consider a variety of relationships to be "familial" and none of these conform to the previous definition.

backgrounds of most judges, it is likely their personal experiences conform to this definition.[168] I do not propose anything so drastic as to abolish the family as a legal term – this would be impractical and impracticable at this time given the history of its importance as a social and legal term of reference. What I do propose to do is to highlight the difficulties of the present conception and discuss how it can be *broken down* so that it functions not only to tolerate, but also to substantively recognize the value of other family forms and conceptions of motherhood. There are certainly no "easy answers", no legal checklist, nor any magic antidote; however, recognizing the problem is undoubtedly a precondition to solving it.

According to some empirical studies, there are certain qualitative differences between lesbian and other relationships.

> Serial monogamy is the dominant pattern..., lesbians are more often involved in co-parenting than gay men, and may be more likely to resist gender roles..., [lesbian] relationships tend to be more egalitarian than heterosexual relationships in terms of finances, decision-making, and domestic labour.[169]

These differences, when filtered through a heterosexist or homophobic lens, may be interpreted as "non-familial" in the custody context.[170] We must decide what we want "families" to *do* as part of society, what functions they should fulfill, and how this can occur in tandem with the positive recognition of difference, without the marginalization of other family forms through prejudices, stereotypes and biases.

First, rather than confining one's self to a closed rubric of "family", consisting of isolated component parts, a functional and relational definition would be more helpful in deciding *what is actually* in the best interests of the child. Some structure or unit is needed in the context of child custody, which would be, at a minimum, two people – a "parent" and a "child"; but it is the *relationship* between the "members" that should be the focus of assessment. According to psychological research, "the most important element in the healthy development [of a child] is a

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[168] See R.F. Devlin et al, "Reducing the Democratic Deficit" (forthcoming, 2000).

[169] S.B. Boyd, "Expanding the Family", *supra* note 116, at 559. See also F. Nelson, *Lesbian Motherhood: An Exploration of Canadian Lesbian Families* (Toronto: University of Toronto Press, 1996).

[170] The debate around "Family" is somewhat more complex in the "spousal recognition" context which is beyond the scope of this paper.

stable, consistent, warm, and responsive relationship between [that] child and his or her care-giver"[171]:

Obviously, the enumeration of relationship characteristics, in and of themselves, is insufficient to foster meaningful participation and substantively equal treatment of lesbian mothers in custody cases. Certainly, many judges would whole-heartedly agree with factors such as caring, responsiveness, and love between parent and child. What is additionally required is that judicial officers question their familial, paternalistic, and heterosexist biases which arise in the application of these principles.

Secondly, "substantively equal treatment" should *not* mean the erasure of sexual or gender identity. This only encourages strict adherence to a heterosexual and dominant norm without questioning the assumptions that underlie it. If a "lesbian lifestyle" tends to increase tolerance in children or other valuable attributes – and there is evidence this is so[172] – then this should be recognized, affirmed, and supported. Further, so long as the sexual division of labour continues to push women into the private sphere and assign them the role of care-giver, their contribution to the parent-child relationship should be recognized and commended, rather than erased as part of a formal equality approach between the sexes.

Thirdly, and in relation to the second point, decision makers should make a concerted effort to appreciate and value difference between parties. The recent trend of using an extremely fact-based and individualized analysis is a positive sign,[173] however, if the arbiter has his/her own pre-conceived conception of what environment is "best", no amount of evidence would refute this standpoint. Different experiences and perspectives must be listened to and accepted with an open mind not a closed fist. If lesbian mothers are forced to closet themselves out of fear of persecution, then the principles of liberty, fairness, and equal dignity and respect are rendered meaningless.

Fourthly, the privatization of the Family has created numerous burdens for lesbian mothers and women generally. Courts and legislatures have simultaneously recognized children as a "public" issue

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[171] Cited in *Re K., supra* note 155.

[172] *Supra* note 142.

[173] See *Gordon* v. *Goertz*, *supra* note 133.

– necessary for the good of society – and yet relegated all responsibility into "private" domain. The lack of adequate public resources or social support, combined with the social stigma and pressure on mothers, creates a significant barrier that must be removed for true equality.[174] Similarly, the heterosexism of society should not act as a penalty to lesbian mothers and force them to bear the burden of discrimination. Liberal fictions of sameness between peoples and persons belie the reality of significant disparities in power and social position. This is where the idea of accommodation as developed in human rights jurisprudence should have a role in redressing these imbalances, rather than penalizing women or lesbian women for the discrimination of society.

Lastly, it must be recognized and admitted that the dominant norm of the traditional family is a misnomer. While still normatively dominant, it is no longer, and for some never was, an accurate reflection of reality. Stereotypes of the traditional family, the assignment of gendered roles within it, and the naturalization of familial heterosexuality[175] should be jettisoned. Law should reflect social reality and promote social equality, *not* serve to support and perpetuate outdated and oppressive ideologies.

V. Conclusion – Denouement or Climax?

In this paper I have attempted to show how law and legal discourse supports the ideological claims of Familialism, Motherhood, and Heteronormativity in the context of child custody cases involving lesbian mothers. The development of judicial interpretation of lesbianism – from an assumption of it as a negative factor, or a presumption that it is negative unless rebutted by showing one fits within the traditional rubric, to a strictly neutral analysis, and, finally, to a modest recognition of difference – has done little to challenge

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[174] S.B. Boyd, "(Re)Placing the State", *supra* note 29.

[175] Considering the great weight most judges put on factual evidence, an interesting statistic available for use is that one-third of lesbians are parents. M.A. McCarthy and J. L. Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course" (1998) 15 Can. J. Fam. L. 101 at 124.

underlying ideological premises and constructs. It is undeniable that substantial improvements have been made in how judges assess the "best interests of the child" in this context, but this does not mean that the battles are over.

One disturbing trend is the increasing invisibility and avoidance of a mother's sexual identity. While this could be positive in that judges may not have found it necessary to the determination of the case – that is, it was not used in a negative way – it is also troublesome in that there is no way of knowing *how* it was incorporated into their decision. The effects of insidious prejudice or bias are just as harmful as overt discrimination.

This paper has attempted to address this problem on three levels: the theoretical, the empirical and the legal. However, given the goals and objectives outlined, legal and judicial reform is only one battlefield; other terrains of struggle must also be crossed. Law, while a dominant and dominating discourse, also acts in tandem with other sites of oppression and resistance. Many past gains have been garnered politically,[176] socially,[177] and scientifically,[178] and dominant ideologies must continue to be destabilized and interrogated on these levels. How the story will end is uncertain, but it is imperative that the curtain does not close until after *all* of the players have taken a bow.

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[176] For example, although Ontario Bill 5, *supra* note 31, may appear a staggering improvement on its face, the governmental rhetoric surrounding it continues to be adverse, and even hostile to its purpose. The government rationale is that its hands are tied and they are being "forced" to pass the bill to prevent the costs and time consumption of lengthy litigation.

[177] Some public opinion polls appear to be supportive of familial recognition of same-sex couples. See A. McIlroy, "Most in poll want gay marriages legalized" *The Globe and Mail* (10 June 1999), online: EGALE Canada <http://www.egale.ca/~egale/archives/press/990610poll.htm> (date accessed: 29 November 1999); for other poll results see "Poll Results on Same-Sex Benefits", online: EGALE Canada <http://www.egale.ca/features/polls2.htm> (date accessed: 29 November 1999). While mostly supportive, it is uncertain, given the twin paternalistic discourse of "Child Protection" what public opinion would be on child custody or adoption.

[178] The pathological stereotypes of the past, as illustrated in *Monette*, *supra* note 96, shows the way even "science" is susceptible to fallacious stereotypes and assumptions. These have since been largely refuted through the increased participation of female and lesbian researchers in the field. See *e.g.* S. Reinharz, *Feminist Methods in Social Research* (New York: Oxford University Press, 1992).