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Mostly Monogamous Moms?: An Essay on the Future of Lesbian Legal Theories and Reforms

*Ruthann Robson**

In the past, we discussed the future.¹ If this were then and I was who I was several years ago, this is what I might say:

We are approaching a choice in our theories, our litigation, and our reforms. We can choose the path of what variously might be named domestication, assimilation, “a place at the table,” or conservatism. Or we can choose a path, which might variously be called radicalism, progressivism, separatism, anti-assimilation.

This was called a false choice by some theorists.

Not coincidentally, such theorists advocated the first path, the non-radical, more assimilationist choice.

Perhaps coincidentally, and perhaps not, the first path has received the most traffic and it has now become a road, the road.

So, because this is now, the years 2000 and 2001, I can no longer say that the choice awaits us; it seems to me that we have made our choice.

Or that some of us have made our choice.

For lesbians, the choice is this: mostly monogamous moms.

* Professor of Law, City University of New York School of Law. Portions of this essay are based upon a talk at *Chronicling a Movement: A Symposium to Recognize the Twentieth Anniversary of Lesbian/Gay Law Notes*. The author wishes to express her appreciation to the organizers of the Symposium, the editors and staff of the Journal, to the CUNY students who attended the symposium, and to S.E. Valentine. I also wish to express my congratulations and appreciation to Professor Art Leonard, whose work the Symposium celebrates.

The form of this “essay” is more closely aligned to the form of “fiction-theory” as developed by lesbian theorist Nicole Brossard, see NICOLE BROSSARD, *THE AERIAL LETTER* (1988), than to a traditional essay, although the experimental and lyrical essay as it is presently being practiced in non-lesbian venues is also pertinent. Unlike a traditional law review article, for the most part this piece will minimize footnotes, assuming a certain familiarity with the topic and a certain indulgence from readers. I am grateful to the editors of the New York Law School *Journal of Human Rights* for their flexibility in matters of form.

¹ The title of the panel for which these remarks were originally prepared was “Reaching Goals: Choosing Strategies and Issues for Advancement.”

We/they are the focus of our litigation reform, our theorizing, our legal efforts. Our litigation dockets, our lobbying efforts, our law review articles, and our conferences evince this.

(Insert and delete the narrative impulse. What about the personal stories of mostly monogamous moms? What about your status? What about mine? Should I divulge some personal fact that would perhaps support or perhaps undermine my theoretical position? What facts would support and which would undermine?)

During the conference, one panelist voiced the opinion that we need to disabuse straight society of the stereotype that sexual minorities are prone to shallow purely sexual relationships. I remain unconvinced. I remain committed to a legal theory and program that will preserve a space for shallow purely sexual relationships.

I do not believe that replacing economic notions for sexual and moral ideas is an improvement.

The reference is to marriage, including the new civil union status available in Vermont. The Vermont litigation and resulting statutory scheme is widely touted as a success, except to the extent that it imposes a sort of “separate but equal” status analogous to the infamous segregationist mandate of *Plessy v. Ferguson*.²

But the statute makes me squeamish.

First, I wonder why I can’t marry my mother.

(Again, insert and delete a narrative tangent. Explaining I may not really want to marry my mother and I’m not sure what my mother — or my father — would think of this. Consider a lengthy textual footnote to some ancient Greek dramas.)

In other words, I would like an acceptable explanation of the basis for excluding blood relation marriage in same-sex marriage, when the usual justification for prohibiting blood relation marriage is the genetic quality of offspring. I suppose Lévi-Strauss kinship theories might be invoked here.

(Get out your old anthropology textbooks).

I really want to marry my girlfriend to cement and extend my relations with her family.

(Include and delete another narrative tangent on my girlfriend’s relatives.)

² Barbara Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 Vt. L. Rev. 113, 127 (2000) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1890)).

(Do not include a narrative tangent on my biological family and how they might be an “advantage” in attracting a mate.)

The theory is: everyone needs in-laws.

(But I thought that applied to hunting and gathering societies. I neither hunt nor gather. I can barely garden.)

So, I am waiting for someone to adequately explain what purpose the relative exclusion serves, other than that it mimics heterosexual marriage.

My second source of squeamishness derives from monogamy.

I can only have one civil union or one marriage at a time. I am assured that the dyadic model is the mature model, the natural model, the only workable model and that the roots of monogamy in ownership and property are irrelevant.

I have theoretical misgivings.

(Fundamentalist religions. The patriarchal history of marriage. Women as property themselves as so unable to own property. Children as property. The sin of adultery transformed into the only grounds for divorce and only available to the husband: In New York this persists until 1966).

My misgivings are also experiential: this may be a shock to some of us, but some lesbian couples separate.

(Perhaps you have even known a few?)

Each woman often enters a new relationship, which is allowable under the marriage and civil union schemes, as long as the previous relationship is terminated using the correct legal processes. Those correct legal processes are another source of squeamishness, since even amicable divorce is an ugly procedure during which a judicial officer will determine whether or not the legal relationship can be ended, and on what economic terms.

But we have to take the good with the bad, it is argued, for that is what equality means. The benefits and burdens of marriage are inseparable. If we would like to have the benefits that the state confers, we must also assume the burdens that the state confers and the burdens the state requires that we assume vis-a-vis each other.

Why do we have to take the good with the bad?

(My argument is for freedom.)

Shouldn't marriage be good and not bad?

Yes, it is also argued that we can change the institution of marriage.

The contours of our ability to change marriage may be more constricted than we realize. The Vermont statutory scheme specifically provides that parties to the civil union may only “modify the terms, conditions, or effects of their civil union” to the same extent as parties to a marriage may do by an antenuptial agreement.³ Like marriage, a civil union is a contract between three parties: the two individuals and the state, with the state retaining the ultimate authority to control the terms of the contract.

(My argument is that we may have less freedom than we assume.)

The state’s primacy in the contractual triumvirate means that the state retains the ability to change us and our relationships.

I have general worries and specific worries.

In the general sense, I worry that the institution of marriage will cabin all of our relationships into acceptable and not-acceptable categories by creating the ultimate expectation of marriage, and therefore defining all other relationships as lesser.

The word fiancé.

In the specific sense, I am concerned that the “benefits” so vociferously claimed for marriage include opportunities for the state to be punitive against both couples who are married and those who are not, especially in the shrinking context of public benefits and welfare “reform.”

The word poverty.

Then there is the word: mom.

Doubled: two moms.

I wonder whether we will be content to live together until we decide to have children, when we will marry for their “sake.”

As we assume we must make so many other compromises.

Present litigation between lesbian moms occurs in a marriage-less legal terrain; and thus, the task of the nonlegal lesbian mom is to argue herself into parity with the lesbian legal mom.

(This argument is made necessary by the fact that these two lesbian moms are no longer a couple, the relationship’s termination is caused/evinced through non-monogamy.)

My anxieties regarding lesbian motherhood are in many ways similar to my misgivings regarding marriage and civil unions. At first glance, the legal arguments that nonbiological mothers should

³ VT. STAT. ANN. tit. 15 §1205 (2000).

not be “legal strangers” to their children has a tantalizing appeal. The functional test for parenthood, first fully explicated by the Wisconsin Supreme Court, and recently adopted by the New Jersey Supreme Court,⁴ can be articulated in terms of equality. Yet the standard for equality in these cases is the lesbian legal mother, a person who often disappears from our theorizing and concerns, or if she is included, she is villainized. It is the lesbian legal mother, after all, who is the person denying the parenting rights of her former partner. It seems to me that we need to do more interrogation of the source of the legal parent’s beliefs and how our legal culture shapes and emboldens those beliefs.

(Where do we get these ideas?)

In other words, the legal mother has derived her constructions of herself as not just mother but as *legal* mother from somewhere, otherwise she would not be relying upon her legal rights to resist claims of visitation from her former partner. And indeed, no one knows how many legal parents do not rely upon their juridical status, but instead attempt to resolve disputes with their former partners through nonlegal methods.

Perhaps the revolutionary import of the lesbian nonlegal mother litigation is to dethrone biology and crown “reality” in parenting relations.

Or perhaps not. Biology remains primary. As the New Jersey Supreme Court opined, a child’s “search for self-knowledge” and “roots” is biologically based, requiring preference to the biological parent in any controversy.⁵

(The basis for inequality has often been biologically grounded, using “facts” such as skin color, blood, and genes, using sexual or-

⁴ See *V.C. v. M.J.B.*, 748 A. 2d 539 (N.J. 2000); *In re Custody of H.S.K.-H. (Holtzman v. Knott)*, 533 N.W. 2d 419 (Wis. 1995). The functional test requires that a “parent-like” relationship between any petitioner and the child, must be proved by meeting four elements:

- 1) the legal parent fostered and consented to development of a parent-like relationship between the petitioner and the child;
- 2) the petitioner and child lived together in the same household;
- 3) the petitioner assumed the obligations of parenthood by taking responsibility for the child’s care, education, and development, including but not limited to financial contribution, and did not expect financial compensation;
- 4) the petitioner has been in a parent-like relationship a sufficient amount of time to have a bonded relationship.

⁵ *V.C.*, 748 A. 2d at 554.

gans, using physical distinctions that constitute “disability.” Is this something we want to incorporate, even minimally?)

Biology aside, functionalism has a problem.

Notably, the recurrent exclusion and inclusion problem.

Who will be included will only be those parents who seem to us (let’s be honest: not to us, to the judiciary) to be most like parents are supposed to be. The evidence in the cases about how parents are, again, mimics the most traditional parent-child relationships.

A small but significant example: what the child is taught to call the putative parent.

Some derivation of “mom” is *de rigueur*.

If our lesbian parents believe titles cause false hierarchies and everyone should call everyone else by their names, this will be an obstacle to overcome.

(My own mom would approve: she thinks first names show a lack of respect.)

Then there are the more explicit exclusions. Under the legal definitions, only some nonlegal lesbian mothers can qualify as “functional” parents. For example, living in a different household is verboten. It renders one’s parental status incognizable.

The legal positivist in any of us who have been trained as lawyers (and some of us who have not) will protest: this is the nature of legal rules. Rules decide what situations are encompassed and what situations are not. Moreover, there must be exclusions of some sort or the rule will be meaningless.

(Insert and delete a digression about legal positivism).

But even if we have not accomplished a wholesale rejection of legal positivism, I believe we have spurned the pretense of the law’s objectivity and neutrality. There are social judgments being made and costs being exacted in the decisions about who is included and who is excluded.

Shall we mention race, class, and sexual practices?

Why complicate the analysis?⁶

Why not mention, instead, that lesbians and other sexual minorities are not the only groups experiencing controversies about the parameters of inclusion and exclusion.

⁶ For further discussions, see Ruthann Robson, *Making Mothers: Lesbian Legal Theory and the Judicial Construction of Lesbian Mothers*, 22 WOMEN’S RTS. L. REP. 16 (2000) (forthcoming); Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN’S L.J. 17 (1999).

“To assimilate or not to assimilate?” That is the question.

It has been variously posed by legal scholars in racial and religious communities as well as by feminist legal scholars.

But perhaps this current controversy is no longer current.

We have recently been repeatedly advised that what were once called the “culture wars” are over. The notion of conservatives and radicals fighting for the soul of the nation in a “Kulturkampf” as Justice Scalia so tellingly phrased it,⁷ is apparently passé. Instead, we have blurred and merged into an economically prosperous mass, differentiated only to the extent that we are recognizable niche markets.

But some of us are less sanguine.

Many of us continue to believe that lesbians are more than mostly monogamous moms. That equality is a narrow goal. That sex belongs in the word “homosexuality.” That something like liberation is a laudable goal, assuming it means more than a few benefits for some of us. And even that liberation needs to be reconceptualized, so that it is not merely liberation *from* the state.

Once we proclaimed that the future was queer.

The future is still here.

Where are we?

⁷ *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

