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THIRD PARTIES AND THE THIRD SEX: CHILD CUSTODY AND LESBIAN LEGAL THEORY

Ruthann Robson*

The third party doctrine in child custody rests upon an assumption that a child has two parents—one of each gender—no more and no less.1 Thus, the third party doctrine results from a mandate of heterosexuality in the form of a male-female dyad, relegating all others to the less preferred position of “third” party. This specific legal doctrine is not unlike the sexology theory which likewise mandates heterosexuality in the form of a male-female dyad, rendering all those who do not couple in male-female formations as members of a “third” sex. Not only are the sexology third sex theory and the legal third party doctrine linked by their heterosexist assumptions, but both of these notions of “third” have little relevance to contemporary lesbian existence. This Article argues that just as contemporary discourse has abandoned the third sex theory as an explanation of lesbian relations, legal theory must reject the third party doctrine as a method of regulating lesbian relations inclusive of children. Further, this Article argues that as a matter of lesbian legal theory, because of the third party doctrine's fundamentally flawed origin in a male-female dyad, as well as its continued perpetuation of that heterosexual dyad, it must be discarded.

After brief discussions of the unrelated theories of the “third sex” and third party doctrine, this Article will examine the third party doctrine in the context of lesbian relations with children.3 This exami-

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1. Legal scholar Karen Czapanskiy describes this as the “Adam and Eve” model of parenthood.
2. Lesbian legal theory puts lesbians and lesbian survival at its theoretical center rather than law. See generally RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW (1992) [hereinafter ROBSON, (OUT)LAW].
3. The focus of this Article is thus narrow. For works which consider lesbian relations with children which are not focused solely on the effects of third party doctrine, see ROBSON,
nation will specifically consider three categories of third parties: the lesbian nonlegal mother,\(^4\) including her legalization as a second parent; the sperm donor; and the grandparents or other biological relatives. An examination of the cases reveals that the third party doctrine can operate both to the advantage and disadvantage of lesbians. While this inconsistency might be explained by the inconsistent positions lesbians occupy, all such inconsistencies are grounded in the inapplicability of the heterosexual dyad which underlies third party doctrine.

I. A SHORT HISTORY OF THE NOTION OF THE THIRD SEX

The "body and soul of a woman, the spirit and strength of a man," "a third sex which has not yet got a name," is the fictional self-description of the narrator of the 1835 French novel Mademoiselle de Maupin by Theophile Gautier.\(^5\) The sort of men who might guard Oriental harems, those members of the "third sex," is the uncomplimentary description of feminist reformers in the 1886 Congressional Record.\(^6\) Despite its influence on literary, social, and legal conceptions, however, the term "third sex" originates in neither discipline. Instead, the term "third sex," with its companion concept of "sexual inversion," is a product of nineteenth-century science, specifically medicine and the developing disciplines of psychiatry and psychology.\(^7\) As encapsulated by lesbian historian Lillian Faderman:

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\(^4\) For a discussion of the choice of the term "nonlegal" rather than the more common term "nonbiological," see infra note 54.


\(^6\) 71 CONG. REC. 2,786 (1886) (statement of Sen. Ingalls).

A lesbian, by the sexologists’ definition, was one who rejected what had long been the woman’s role. She found that role distasteful because she was not really a woman — she was a member of the third sex . . . . All her emotions were inverted, turned upside down: Instead of being passive, she was active, instead of loving domesticity, she sought success in the world outside, instead of making men prime in her life, she made first herself and then other women prime. She loved womankind more than mankind.8

The definition of the female members of the third sex began in 1869 when the German psychiatrist Carl von Westphal published the first study of female “sexual inversion.”9 His disciples included the British psychiatrist Havelock Ellis, author of the influential text Studies in the Psychology of Sex,10 and Richard von Krafft-Ebing, author of Psychopathia Sexualis.11 Such physicians and their American counterparts, collectively known as sexologists,12 sought to apply scientific methodology and rigor to the study of sex. Concentrating on sexual variance and pathologies, their investigations included the subject of homosexuality, which they conceptualized in medical-psychological terms. Under the medical model, homosexuality is reconceptualized as a medical condition, rather than a crime or a sin.13 While the sexologists’ attempt to remove homosexuality from the realms of law and religion could be interpreted as a liberalization,14 the
medicalization of homosexuality operated less as an ultimate liberalization than as a shift in the modes of regulation. Further, it did not completely supplant either religious or legal regulation.

The sexologists' deployment of the notions of third sex and sexual inversion rests upon a strict antipodal relation between gender identity and gender "object-choice," as well as the assumption of a heterosexual hegemony. The sexologists posited that if one was sexually attracted to women, one must be a man or a "man" inhabiting what might appear to be a woman's body. This "appearance" of being a bodily woman merited further interrogation by the sexologists, who concluded that the female members of the third sex did not appear entirely feminine, but evinced masculine traits. The articulation of these masculine traits was extremely racialized or ethnicized, as well as being class-coded. For example, Havelock Ellis used body-hair and musculature as indicators of female sexual inversion. Further, as lesbian historian Lillian...
Faderman notes, the sexologists’ case studies of female inversion were derived from “a captive population in prisons and insane asylums, daughters of the poor,” and did not exhibit an understanding that poor servant women “might have more difficulty surviving” if they were more feminine-acting. Perhaps even more problematic is the fact that not only is the identification of masculine traits racialized, ethnicized, and class-coded as it relates to notions of masculine/feminine polarized sex characteristics, but the very identification of sexual expression is similarly culturally determined. In a regime that regulated female sexuality in accordance with race, ethnic and class status, any expression of sexual interest was pathologized. In addition to a reliance upon culturally determined and perceived traits to assess masculinity, the sexologists emphasized the masculine invert while failing to adequately account for her only possible partner within their heterosexualized theory: a nonmasculine woman.

While the sexologists’ definition of female members of the third sex stressed the twinned scientific subjects of biology and psychology, it concerning muscle tone, Ellis does not speculate that such a diversity might be attributable to physical exertion, including work. Id. at 255.

Of course, not all of Ellis’ masculine attributes are coded. For example, “inverted women are very often good whistlers,” although Ellis cautions that mere “whistling in a woman is no evidence of any general or physical or psychic inversion.” Id. at 256.

18. FADEMAN, ODD GIRLS, supra note 7, at 41.

19. As Estelle Freedman and John D’Emilio argue in their excellent history of American sexuality:

In nineteenth century thought, sexual control helped differentiate the middle class from the working class, and whites from other races . . . . For the middle class, an elaborate ideal of femininity emphasized and stressed sexual purity as a means of controlling male excess and stressed women’s domestic and maternal roles. Women who did not achieve the ideal of purity were considered to have “fallen” into a lower class. If poor, they might even be arrested for committing such “crimes against chastity” as “lewd and lascivious behavior.”


20. As George Chauncey notes, “most of the early accounts of sexual inversion discussed only the invert, leaving her sexual partner anonymous and undefined . . . . Many accounts simply treated [these sexual partners] as normal wives, playing their proper feminine roles, as if it did not matter that their ‘husbands’ were biologically female.” Chauncey, supra note 7, at 125. Although Chauncey notes that subsequent sexologists began to take more interest in the so-called “passive homosexual woman,” id. at 128-29, there is a continuing argument that the nonmasculine lesbian remains essentially untheorized—and perhaps untheorizable—in the medical model of homosexuality which is based upon a heterosexual matrix. See, e.g., Esther Newton, THE MYTHIC MANNISH LESBIAN: RADCLYFFE HALL AND THE NEW WOMAN, in HIDDEN FROM HISTORY, supra note 14, at 281. 292 (referring to the nonmasculinized lesbian lover, Mary, in Radclyffe Hall’s famous lesbian novel, and stating that “Mary’s real story has yet to be told.”).
was not without its political implications. Thus, although the sexologists labeled a woman who had a sexual relationship with another woman as a "congenital invert," a "victim of inborn 'contrary sexual feeling,'" possessing a condition attributable to "tainted heredity," passed on by parents "who themselves lacked the appropriate 'strong sex characteristics,'"\(^{21}\) such characteristics could be linked with the political movement of feminism. For some sexologists who subscribed to a biological explanation of lesbianism, this connection was carefully negotiated.\(^{22}\) For others, feminism as a political ideology itself became theorized as almost an "organic" defect.\(^{23}\) For seemingly everyone, including Freud\(^{24}\) and United States senators,\(^{25}\) lesbianism and feminism became linked as pathologies. Although this linkage might not be solely responsible for the failure of "first-wave" feminism,\(^{26}\) it was certainly


22. For example, Havelock Ellis noted that although the women's movement of emancipation is on the whole "wholesome and inevitable," it has "certain disadvantages" when applied to the sexual sphere. ELLIS, *supra* note 10, at 262. He further stated that the influences of "modern movements cannot directly cause sexual inversion," they can "develop the germs of it, and probably cause a spurious imitation." *Id.*

As Carol Smith-Rosenberg observes,

The connections Ellis drew between what he believed was a rising incidence of middle-class lesbianism and feminist political and educational advances reveal a man troubled by changes he could not in principle oppose. Feminism, lesbianism, equality for women, all emerge in Ellis's writings as problematic phenomena. All were unnatural, related in disturbing and unclear ways to increased female criminality, insanity, and "hereditary neurosis."


23. Chauncey persuasively supports his conclusion of "the organic relationship between the women's movement and inversion" with this passage from an article published in 1900:

The female possessed of masculine ideas of independence; the viragint who would sit in the public highway and lift up her pseudo-virile voice, proclaiming her sole right to decide questions of war or religion, or the value of celibacy and the curse of women's impurity, and that disgusting anti-social being, the female sexual pervert, are simply different degrees of the same class—degenerates.


24. In his diagnosis in a "case of homosexuality in a woman," Freud disagrees with the notion of a third sex, instead concluding that there is a "continual mingling and blending . . . of inherited and acquired factors" which undergirds the importance of Freud's finding that his young female patient was "in fact a feminist." 2 SIGMUND FREUD, *The Psychogenesis of a Case of Homosexuality in a Woman* (1920), in COLLECTED PAPERS 202, 228-29 (1959). Of course, this patient also exhibited a strong attachment to her mother and an envy of her brother's penis, *id.* at 228-30, although Freud's earlier work describes such characteristics as universally female. See SIGMUND FREUD, *Femininity, in NEW INTRODUCTORY LECTURES* 112 (1965).

25. See *supra* note 6.

one strategy of anti-feminist rhetoric in the early 1900s.27

While we no longer conceptualize lesbians as members of the “third sex,” the importance of the sexologists’ conception of the “third sex” cannot be underestimated. It certainly influenced the entire field of psychology,28 as well as lesbian literary production,29 and it continues to influence our contemporary notions of lesbian and gay identities and their corresponding legal implications.30 Further, the sexologists’ rather

that the “effect of the new science of sexology was to scare women back into marriage and conformity” and stating that “one reason historians have cited for the demise of the first wave of feminism was the success of the sexologists’ diagnosis of feminists as suffering from the newly invented disease entity of lesbianism.”)

27. This strategy was also exhibited during “second-wave” feminism of the late 1960’s and 1970’s and is still practiced today. See Radicalesbians, The Woman Identified Woman, in RADICAL FEMINISM 240, 241 (Anne Koedt et al. eds., 1973) (“lesbian is the word, the label, the condition that holds women in line”); Anne Koedt, Lesbianism and Feminism, in RADICAL FEMINISM 246, 246-48 (Anne Koedt et al. eds., 1973) (discussing “lesbian baiting”).

28. Psychoanalysis is linked with sexology and sexual theory, and Freud’s work is undoubt-
edly indebted to the work of many sexologists. As the scholar Jeffrey Weeks notes, in Freud’s influential Three Essays on the Theory of Sexuality, published in 1905, Freud acknowledges the contributions of sexologists Krafft-Ebing and Havelock Ellis, as well as other sexologists. JEFFREY WEEKS, SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS AND MODERN SEXUALITIES 67-68 (1985).

29. The most obvious example is Radclyffe Hall’s The Well of Loneliness (1928), the first edition of which contained an introduction by none other than the famous sexologist Havelock Ellis, banned in Great Britain for its explicit defense of lesbianism, and considered to be the foremost lesbian novel for several decades. See JEANETTE FOSTER, SEX VARIANT WOMEN IN LITERATURE 279-80 (1985) (1st ed. 1956) (describing the publication of The Well, its reception, as well as a plot synopsis and critical evaluation); BONNIE ZIMMERMAN, THE SAFE SEA OF WOMEN: LESBIAN FICTION 1969-1980, at 7 (1990) (“for over forty years, The Well of Loneliness and Stephen Gordon [the main character] virtually defined lesbianism”); Newton, supra note 20, at 282 (discussing the implications of the fact that “The Well, at least until 1970, was the lesbian novel”).

30. However, I do not agree with the principle that the medical model created or invented homosexuality or homosexual, gay or lesbian identity.

The influential French philosopher and intellectual Michel Foucault is often considered the originator of the conclusion that nineteenth century medical (and legal) discourses “invented” the homosexual:

There is no question that the appearance in nineteenth century psychiatry, jurisprudence and literature of a whole series of discourses on the species and subspecies of homosexuality, inversion, pederasty, and “psychic hermaphrodisism” made possible a strong advance of social controls into this area of “perversity”: but it also made possible the formation of a “reverse” discourse: homosexuality began to speak in its own behalf, to demand that its legitimacy or “naturality” be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified.

tortured theoretical stance is not an historical curiosity. Instead, it was a fundamental preservation of a well-established heterosexual hegemony that continues to demand the integrity of two separate and distinct genders. This demand is necessary so that sex—and perhaps the entire natural world—can be conceptualized with reference to the norm of heterosexuality. Thus, although we no longer employ the term “third sex” to describe lesbian (or gay men’s) relations, we continue to deploy its underlying premise of paradigmatic heterosexuality.

reference to homosexual men did not originate until the late nineteenth century); WEEKS, supra note 28, at 73 (“Sexology did not appear spontaneously at the end of the nineteenth century. It was constructed upon a host of pre-existing writings and social endeavors.”).

31. Accord WEEKS, supra note 28, at 73 (“Sexology did not appear spontaneously at the end of the nineteenth century. It was constructed upon a host of pre-existing writings and social endeavors.”).

32. As theorist Michael Warner writes, heterosexual culture conceptualizes itself as the elemental form of human association, the model of gender relations, and the means of reproduction. Warner illustrates his point with reference to a drawing placed on NASA’s Pioneer 10 spacecraft designed to convey human society: a drawing of a man and a woman, immediately recognizable as “a heterosexual couple” testifying to the depth of cultural insistence that “humanity and heterosexuality are synonymous.” Michael Warner, Introduction to FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY at vii, xxii-xxiii (Michael Warner ed., 1993).
II. THIRD PARTY DOCTRINE

Third party doctrine in the realm of child custody is likewise a tortured doctrine which seeks to preserve the heterosexual matrix and the notion of two separate and distinct genders. At its most fundamental, third party doctrine posits that each child has one mother and one father—no more and no less. Outside of the two parties necessary to complete the heterosexual matrix, others occupy the less-privileged legal position of third parties. Like the sexologists’ theoretical stance, this legal doctrine is predicated upon current notions of biology. Also, like the sexologists’ notions of the third sex, third party doctrine is often convoluted and disparate.

The general rule—that third parties are in a less-privileged position with regard to claims of children as compared with parents—is derived from “natural” law which has found expression in constitutional principles. Parenting is thus deemed a “fundamental right” in as much as it is a liberty interest protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. The origins of parental rights as fundamental rights are generally traced to Meyer and Pierce, two cases which reached the U.S. Supreme Court during the 1920s, and which involve conflicts between parents and state regulations regarding the education of children. In Meyer, the Court expounded upon the liberty guarantee of the Fourteenth Amendment’s Due Process Clause as including:

the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to


34. While natural law is often impliedly invoked, common law doctrines which are products of particular patriarchal cultures are also relevant. For example, the notion that a biological parent has a claim on a child is arguably based upon the notion of children as property, often legally expressed as the notion of family unity or autonomy. Family unity ideology proclaimed the husband/father as head of the household and all other members subject to his economic and physical control.


37. Meyer involved a Nebraska statute which prohibited the teaching of any modern language other than English at any public or private grammar school. Pierce involved an Oregon statute mandating attendance at public schools, which did not include any private schools not operated by the State.
marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.\textsuperscript{38}

The Court in \textit{Pierce} relied upon \textit{Meyer} to posit “the liberty of parents and guardians to direct the upbringing and education of children under their control,” stating with a rhetorical flourish that the “child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”\textsuperscript{39} Importantly, as in \textit{Meyer}, the Court in \textit{Pierce} did not rely solely upon parental rights; in \textit{Pierce}, the Court also credited the liberty interests of the private institutions which would be deprived of property should the state statute mandating education at public institutions be deemed valid.\textsuperscript{40}

Despite the problematic precedential pedigree of \textit{Meyer} and \textit{Pierce}—as they treat freedoms of liberty and contract in a manner consistent with the approach that was prevalent in the discredited \textit{Lochner} era\textsuperscript{41}—and after remaining relatively dormant for several decades, \textit{Meyer} and \textit{Pierce} have been resuscitated in contemporary privacy doctrine. In familial—and later individual—privacy doctrine, the fundamental parental right becomes not only the right to make choices relating to the performance of one’s parental role, but also the right to make choices relating to whether or not one will assume a parental role.\textsuperscript{42}

\textsuperscript{38} 262 U.S. at 399.
\textsuperscript{39} 268 U.S. at 534-35.
\textsuperscript{40} Id. at 535-36.
\textsuperscript{41} The \textit{Lochner} era is generally dated from Allgeyer v. Louisiana, 165 U.S. 578 (1897) until Nebbia v. New York, 291 U.S. 502 (1934), during which time the U.S. Supreme Court invalidated approximately two hundred state statutes attempting to regulate economic relations. The era takes its name from its most notorious case, \textit{Lochner} v. New York, 198 U.S. 45 (1905), in which the Court declared unconstitutional a state statute limiting work hours in bakeries to sixty hours per week and ten hours per day because it interfered with “liberty of contract” protected by the Due Process Clause of the Fourteenth Amendment. According to one scholar, \textit{Lochner} is “one of the most condemned cases in United States history and has been used to symbolize judicial dereliction and abuse.” BERNARD H. SIEGAN, \textit{ECONOMIC LIBERTIES AND THE CONSTITUTION} 23 (1980). Other commentators agree. See generally C. Edwin Baker, \textit{Property and Its Relation to Constitutionally Protected Liberty}, 134 U. Pa. L. Rev. 741 (1986); Robert McCloskey, \textit{Economic Due Process and the Supreme Court}, in 1962 \textit{SUP. CT. REV.} 34-62 (Philip Kurland ed., 1962); Cass Sunstein, \textit{Lochner’s Legacy}, 87 COLUM. L. REV. 873 (1987).

\textsuperscript{42} This choice is an individual right to make the decision, but importantly, it is also a right of access to information about the decision. Thus, in \textit{Griswold}, involving arrests for providing “information, instruction and medical advice” concerning the use of contraception, Justice Doug-
This development results in the continuing line of contraception and abortion cases which give various effect to the freedom to decide whether or not one will become a parent. As most recently expressed by the Court, these “most intimate and personal choices a person may make . . . are central to the liberty protected by the Fourteenth Amendment.”

Related to contemporary privacy doctrine, as inclusive of contraceptive and abortion decisions affecting whether or not an individual will assume a parental role, are cases in which the parental right involves the state’s termination or nonrecognition of an individual’s parental status. In the termination context, the recognition of a fundamental parental right serves as a constitutional regulation of state procedures in which the state is seeking to terminate an individual’s parental status. For example, in Lassiter, although the Court recognized a fundamental parental right, the right seemed to suffer in comparison to the more tangible liberty interest implicated by imprisonment; thus, the Court did not hold that appointment of counsel was constitutionally mandated in a termination-of-parental-rights proceeding. A year later in Santosky, the Court recognized that a fundamental parental right is especially vital during termination proceedings and thus declared that due process required a showing of a relatively high standard of proof—clear and convincing evidence—before parental rights could be extinguished. In the context of the recognition of parental status, the problem centers on identifying individuals who merit a fundamental parental right rather than on an interpretation of the specific contours of any fundamental right. Such cases—which can be collectively referred to as the “unwed father” cases—result from contemporary challenges to traditional ide-
ology which bestows parenting status according to a gendered disparity: women are deemed parents through the biological "fact" of giving birth, while men are deemed parents through the legal "fact" of a formal relationship such as marriage with the woman who gave birth. Despite erratic recognition of fundamental parental rights for unwed biological fathers, the uneven application of such rights in the context of parental termination proceedings, and the volatile predicament of contraceptive and abortion rights, the notion of a fundamental parental right grounded in the liberty guarantee of the Due Process Clauses of the Fifth and Fourteenth Amendments remains firmly entrenched in constitutional doctrine.

The constitutional principle recognizing a fundamental parental right is indisputably not a solitary principle, but is situated within the complexities of a constitutional context in which the child is also accorded a measure of legal recognition. First, within a due process analysis, the parent's fundamental right is subject to infringement by the state if such infringement is narrowly tailored to serve a compelling state interest. The state's assertion of the best interest of the child is considered a compelling state interest; the state's interest and the child's interest become coextensive because the state relies upon its role as parens patriae in the assertion of the child's welfare. Second, within any constitutional analysis, there is the possibility of conflicting individual constitutional rights. So it is possible that the parent's constitutional rights would conflict with the child's constitutional rights, necessitating a balancing of rights. However, this approach has been relatively rare, perhaps because the state is invested with parens patriae status to assert the child's rights or possibly because the lesser status of minors' constitutional rights insure that any parental fundamental right would dominate.

47. This view is articulated by Justice Stewart dissenting in Caban, 441 U.S. at 394, and subsequently approvingly affirmed by the Court in Lehr, 463 U.S. at 266 n.25.
48. Justice Blackmun makes this clear in Santosky, 455 U.S. at 766, although in Santosky the Court is not applying the compelling state interest test but the less stringent test of Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (requiring the balancing of three distinct factors including the private interests affected by the proceeding, the risk of error created by the state's chosen procedure, and the countervailing governmental interest supporting the use of the procedure).
Against this backdrop of constitutional principles, individual states have taken different approaches to recognizing the existence of any fundamental parental rights in the custody and control of children by privileging parents over nonparental third parties. One commentator divides the state approaches into three distinct clusters: the parental rights standard, the parental presumption standards (including various types of presumptions), and the best interest standard. The vast majority of states explicitly accord some privileged position to parents in comparison to nonparents in custody determinations. Although the expression of this privilege differs, typically the privileging requires the establishment of some reason to depart from the general rule that parents are entitled to custody of their children. For example, in New York this principle is articulated as a requirement that “exceptional circumstances” are necessary for a court to create an exception to the recognition of rights afforded to both parent and child in their relationship. Nonrecognition of a parental privilege, perhaps best expressed as a “pure” best interest standard—in which courts “focus solely on the best interest of the child” without giving any preference to the child’s legal parents—is a relatively rare minority position. Nevertheless, the

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52. Haynie, supra note 50, at 721. Although the student commentator reported that “ten states currently apply a best interests standard to third-party custody disputes,” and listed six jurisdictions as explicitly doing so, id., the number is now significantly less. For example, the commentator included Connecticut as one of the six jurisdictions which have clearly adopted the best interest standard, id. at 721 n.58 (citing McGaffin v. Roberts, 193 Conn. 393, 479 A.2d 176 (1984), cert. denied, 470 U.S. 1050 (1985)). However, the Connecticut courts have subsequently rejected McGaffin in light of the Connecticut statute, enacted in 1985 and amended in 1986, which explicitly provides that “in any dispute as to the custody of a minor child involving a parent and a nonparent, there shall be a presumption that it is in the best interest of the child to be in the custody of the parent.” CONN. GEN. STAT. § 46(b)-56(b) (1985). See also Perez v. Perez, 212 Conn. 63, 561 A.2d 907 (1989). Similarly, the commentator cited Hawaii Revised Statutes section 571-46(2) (1976) which provides that “custody may be awarded to persons other than the father or mother whenever such award serves the best interest of the child.” While this certainly lends itself to an interpretation that it explicitly adopts a pure best interest test which would not include a parental preference and at the time of the comment no cases had construed the statute, subsequent Hawaii decisions have interpreted subsection 46(1) of the statute to unequivocally provide that child custody, including best interests, mandate “priority to the child’s parents.” In re John Doe, 786 P.2d 519, 523 (Haw. Ct. App. 1990); In re Jane Doe, 784 P.2d 873, 879 (Haw. Ct. App. 1989). And in yet another jurisdiction included as explicitly adopting the best interest test, the Supreme Court of North Dakota subsequently stated that in cases in which
rhetoric of best interests of the child can also privilege natural or legal parents. The best interest of the child standard accomplishes this privileging through the general rule that it is within the best interests of any child to be within the custody of her or his natural or legal parents. The best interest standard’s privileging of parents usually contains a caveat allowing for proof that the general rule might not be true in any particular instance.

Third party custody doctrine has thus developed into a rather arcane and convoluted set of preferences, presumptions, rhetoric, and caveats. Commentators have expressed dissatisfaction with the doctrine, employing examples such as unwed fathers, step-parents, foster parents, grandparents, and “surrogate mothers” to illustrate the incoherency of the doctrine in a society in which the doctrine’s underlying premise of the nuclear family is no longer accurate. For lesbians and our relationships with children, the underlying premise of third party custody has never been accurate, and its application is ill-equipped to serve our interests.

III. THIRD PARTY DOCTRINE AND LESBIAN RELATIONS WITH CHILDREN

The doctrine of third party custody is deemed applicable to three categories of lesbian relationships with children. The first category is embodied by the lesbian nonlegal mother and occurs in the context of her efforts to obtain custody or visitation in the case of a rupture of her relationship with the legal mother, as well as in the context of her efforts to adopt the child of the legal mother. In this category, the notion of “third party” can operate to bar the lesbian nonlegal mother from being recognized as a legal parent to her child. The second category of third parties includes putative fathers, especially sperm donors. These third parties are often extraneous to the lesbian legal mother, her partner who shares parenting as the lesbian nonlegal mother, as well as to the child. Nevertheless, largely due to their biological status, these third parties may be deemed not to be third parties, and thus may be erroneously privileged as parents. The third and final category consists

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a psychological parent and a natural parent each seek a court ordered award of custody, the natural parent’s paramount right to custody must prevail unless the court determines that it is necessary in the best interests of the child to award custody to the psychological parent to prevent serious detriment to the welfare of the child. Patzer v. Glaser, 396 N.W.2d 740, 743 (N.D. 1986).

of grandparents and other relatives of the child. Usually motivated by disapproval of the legal mother’s lesbianism, these third party relatives assert a right to custody and often prevail, despite their less-privileged status. Thus, taken in its entirety, third party doctrine does not simply disadvantage or advantage lesbian mothers. This inconsistency might be explained by the various positions lesbian mothers occupy, but it is also explainable by recognizing the underlying male-female dyad as a basis for third party doctrine. The inapplicability of the very notion of third parties is demonstrated by a further examination of cases within each of the three categories.

A. The Lesbian Nonlegal Mother

The lesbian nonlegal mother, usually the lover or former lover of a child’s legal mother, challenges the heterosexual matrix of third party

54. I use the terms nonlegal and legal rather than the more common terms nonbiological and biological for two reasons. First, many lesbian mothers become legal mothers through adoption rather than biological birth. Second, and more importantly, the issue for lesbian legal theory is exactly the legal identity of lesbians as determined and enforced through law. Although the term “nonlegal,” as well as “legal” may seem to foreclose the very issue to be decided, it should be recognized that both terms are contingent as well as being based upon interpretation rather than “fact.” As feminist scholar Isabel Marcus notes in another context:

Legal identity is a personification in law of values and roles attributable to individuals, groups, or organizations by courts or legislatures. The express purpose for this acknowledgement is connected with formal access to the legal system. The legal identity of parties determines whether they have standing in a legal contest.

In fact, legal identity is a social construct—a set of categories reflecting a socially constructed reality. It is premised upon a multitude of cultural choices regarding accepting societal arrangements, including a determination regarding the competence of persons or entities to operate in a civil society. It is underpinned by a set of cultural beliefs regarding the autonomy of persons in a category and a social assessment of their capacity to make meaningful choices. This competence or capacity is identified with the ability to recognize and to assume responsibility for morally differentiable acts, including those acts subject to legal sanctions . . . .

Legal identities developed and used for the recognition of classes of human beings tend to rely on such socially constructed categories as age, race, mental ability, sex, and marital status. To the extent that these socially constructed categories are visible or ascertainable with relatively minimal effort, they are treated as self-evident or natural. This apparent self-evidentness reinforces the sense of the cultural appropriateness of the category and the boundaries embodied in the category. And so, the fact that each of these categories is socially constructed and reinforces existing power relations is easy to ignore. At best, a particular argument about a hard case involving the margin of a socially constructed category may be left for the judge or scholar.


Of course, the term “lesbian” itself is a category, and this category is often enforced
custody by being the “other” mother in an ideology that acknowledges only one mother, the third party in an ideology that admits of only two parents, one of each gender. While there have always been lesbians who have shared their lives with children, within the last two decades lesbians have explicitly challenged the hegemony of the only-one-mother ideology in law, as well as in other forms of lesbian writings, including literature. Whether the challenge of the nonlegal mother is fundamental or superficial is, of course, debatable, as is through legal mechanisms. See, e.g., Nita Iyer, Categorical Denials: Equality Rights and the Shaping of Social Identity, 19 QUEEN’S L.J. 179 (1993); Ruthann Robson, Incendiary Categories: Lesbians/Violence/Law, 2 TEX. J. WOMEN & L. 1, 4-9 (1993); Ruthann Robson, The Specter of a Lesbian Supreme Court Justice: Problems of Identity in Lesbian Legal Theorizing, 5 ST. THOMAS L. REV. 433 (1993).


56. The important published legal works include Paula Ettlebrick, Who Is A Parent?: The Need to Develop a Lesbian Conscious Family Law, 10 N.Y.L. SCH. J. HUM. RTS. 513 (1993); Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459 (1990); Carmel B. Sella, When a Mother is a Legal Stranger to her Child: The Law’s Challenge to the Lesbian Nonbiological Mother, 1 UCLA WOMEN’S L.J. 135 (1991).

57. For a general work attempting to reconceptualize lesbian parenting as well as other lesbian and gay “kinship” relations, see KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP (1991).


59. As Carmen Sella notes, “[l]esbian motherhood is at once radical and reactionary. It is radical in the sense that lesbian couples are now empowered to create families in the absence
the nature of the challenges posed by any lesbian "family" formation.60

Litigation involving sundered lesbian relationships in which the nonlegal mother is seeking custody or visitation—and importantly, the legal mother is denying such custody or visitation—enforces the notion of a heterosexual dyad to exclude the lesbian nonlegal mother. In these cases, the other mother is a third party non-parent. Despite a plethora of theories which have been advanced in support of the nonlegal mother’s parental status,61 scholarly critique of judicial denial of parental status to the nonlegal mother,62 and legal scholarship which persuasively argues for expanded conceptions of parental status,63 the general rule is that the nonlegal mother is a third party, whatever her current or past relationship with the child.

Perhaps the most famous of these cases is Alison D.,64 decided by New York’s highest court.65 The factual background of Alison D. illustrates the typical scenario at issue in these cases: one member of a lesbian couple gave birth to a child through alternative insemination.66

of a male figure . . . . Yet, lesbian motherhood is reactionary in that lesbian couples are now replicating heterosexual norms and fulfilling women’s traditional function as mothers.”

Sella, supra note 56, at 140.

60. For discussions of family as a relevant category for lesbians, see Didi Herman, Are We Family?: Lesbian Rights and Women’s Liberation, 28 OSBOO0E HALL L.J. 789 (1990); Ruthann Robson, Resisting the Family: Repositioning Lesbians in Feminist Legal Theory, 19 SIGNS: A JOURNAL OF WOMEN AND CULTURE (forthcoming 1994). See also Susan Boyd, (Re)Placing the State: Family, Law & Oppression, 9 CAN. J. L. & SOC. 1 (forthcoming 1994) (arguing the interrelatedness of state and family in the oppression of heterosexual women, lesbians, and gay men); Shelley Gavigan, Paradise Lost, Paradise Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement to Law, 32 OSGOODE HALL L.J. (forthcoming 1994) (manuscript on file with author) (discussing the interlocking nature of various identities in legal enforcement of family ideology).

61. See infra notes 83-84 and accompanying text.

62. See, e.g., Ettlebrick, supra note 56; Polikoff, supra note 56; Sella, supra note 56.


66. Although the term “artificial” insemination is widely used in the legal literature, the term “alternative” insemination is preferred by many lesbians who have been involved in the process.
After the adult couple’s relationship dissolved, the legal mother eventually refused to allow her former lover to visit with the child. In the Alison D. litigation, the New York courts uniformly held that the lesbian nonlegal mother was not within the definition of parent and therefore had no standing to bring a petition for visitation against the child’s biological mother.\(^{67}\) The high court rejected the petitioner’s claim of “de facto parenthood” as insufficient to overcome the legal definition of parent.\(^ {68}\) Only the sole dissenting judge, the highly regarded feminist jurist Judith Kaye, gave credence to an empirical approach; in the first paragraph of her opinion she refers to estimates that “more than 15.5 million children do not live with two biological parents, and that as many as 8 to 10 million children are born into families with a gay or lesbian parent.”\(^ {69}\)

A few months later, the Supreme Court of Wisconsin decided In re ZJH (Sporleder v. Hermes).\(^ {70}\) In ZJH, the two women lived together as lovers for approximately eight years. As the court described, “after an unsuccessful attempt to have a child through the artificial insemination of Sporleder, they decided that Hermes would adopt a child.”\(^ {71}\) One month after the couple separated, Hermes’ formal adoption was completed and she prohibited her former lover Sporleder from visiting the child. The court upheld previous pronouncements that Sporleder had no standing to bring an action for either visitation or custody. The court first reasoned that Sporleder did not fit into any of the statutory categories allowing third parties to bring actions for visitation or custody, including circumstances in which “neither parent is fit and proper to have custody of the child” or in which “compelling circumstances”—defined by precedent as similar unfitness on the part of the parent such as “abandonment, persistent neglect of parental duties, or extended disruption of parental custody”—were present. The court then reasoned that Sporleder was not within the statutory category of “parent,” including any theory of in loco parentis.\(^ {72}\) As a nonparent, Sporleder was without standing to bring an action for custody, and was similarly without standing to bring an action for visitation.\(^ {73}\) Dissenting, Justice

\(^ {68}\) 572 N.E.2d at 29.
\(^ {69}\) Id. at 30.
\(^ {70}\) 471 N.W.2d 202 (Wis. 1991).
\(^ {71}\) Id. at 204.
\(^ {72}\) Id. at 205-06.
\(^ {73}\) Id. at 206-09.
\(^ {74}\) Id. at 204. As the court noted, under the Wisconsin statute the ability to bring an action
Shirley Abrahamson stressed the need for a hearing to examine the contract between the adults and the best interests of the child.\textsuperscript{75}

A court of appeals in Minnesota reached a similar result, although based upon a more liberal statute applied to more complicated facts. In \textit{Kulla v. McNulty},\textsuperscript{76} a referee had found that Kulla established a prima facie case under the Minnesota third party custody statute, but a court concluded otherwise and dismissed Kulla’s petition for visitation with the child, K.R.M. The child had been born to McNulty while she was in a lesbian relationship with Kulla, who became the child’s caregiver, at least while McNulty was “away from home working as an airline attendant.”\textsuperscript{77} McNulty, however, subsequently resumed a relationship with the child’s biological father and later married him. She specifically disavowed any implication that her relationship with Kulla was serious: “McNulty contends that she entered into the relationship [with Kulla] initially out of curiosity as to the gay lifestyle, and although she was fond of appellant [Kulla], McNulty asserts that the extent of her feelings were that she found appellant merely amusing and enjoyable for a time.”\textsuperscript{78} Applying the three prongs of the Minnesota third party visitation statute, which required the court to find that visitation be in the best interests of the child; that the petitioner and the child had established emotional parent-child ties; and that the visitation would not interfere with the custodial relationship between the parent and the child,\textsuperscript{79} the court held that the trial court did not abuse its discretion in finding that the third factor was not satisfied. Responding to Kulla’s argument that satisfaction of the third factor was practically impossible and could be effectively prevented by a biological parent’s non-cooperation, the court noted that, absent the statute, Kulla would have absolutely no right to petition for visitation.

Of the reported cases considering a nonlegal mother’s right to petition for visitation, only \textit{A.C. v. C.B.},\textsuperscript{80} decided by a New Mexico appellate court, does not per se exclude the nonbiological mother as a

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\textsuperscript{75} Id. at 210.

\textsuperscript{76} Id. at 213-14 (Abrahamson, J., dissenting). The other dissenting justice relied solely on the principle that the best interest of the child demands accommodations to a child’s rights in a nontraditional relationship. \textit{Id.} at 214-15 (Babbit, J., dissenting).

\textsuperscript{77} Id. at 177.

\textsuperscript{78} Id. at 178.

\textsuperscript{79} Minn. Stat. § 257.022(2b) (Supp. 1989).

nonparental third party. Reversing the trial court, the appellate court—like Justice Shirley Abrahamson dissenting in Z.J.H.—stressed the fact of the parties' coparenting and custody agreement, but also noted that the nonbiological mother had made a "colorable claim of standing to seek enforcement of such claimed rights" of visitation.82

From these cases, several theories of parenthood emerge as arguments to circumvent the harsh consequences of third party doctrine, especially in the absence of a statute. Almost all of these theories were explicitly considered by the California appellate court in Nancy S. v. Michelle G.83 Again, the factual details are excruciatingly typical. Nancy S. and Michelle G. lived together since 1969; Nancy S. gave birth to one child conceived through artificial insemination in 1980, and to a second child conceived through the same method in 1984. Both children had birth certificates which named Michelle G. as "father" and were given Michelle G.'s "family name." Both children also referred to both Michelle G. and Nancy S. as "Mom." When Michelle G. and Nancy S. separated in 1985, they agreed to a joint-custody arrangement which was successful for three years. After disagreements, Nancy S. instituted an action to declare Michelle G. as "not a parent of either child."84

In arguing that she was a parent, Michelle G. relied upon the theories of de facto parenthood, in loco parentis, equitable estoppel, and the functional definition of parenthood. All of these theories supported the position that Michelle G. should be deemed a parent, thereby forestalling the operation of third party doctrine which would place her in a position of considerably less entitlement than Nancy S.

The court considered and rejected the merit of each of these theories, although it did not necessarily disagree with their factual relevance. For example, the court found that Michelle G. might factually be entitled to the "status of a 'de facto' parent," but that de facto parental status was not equal to legal parental status.85 Specifically, the court considered the de facto parent as a third party, and applied its third party doctrine to conclude that "custody can be awarded to the de facto parent only if it is established by clear and convincing evidence that

81. See supra note 75 and accompanying text.
82. 829 P.2d at 665. The court also noted that sexual orientation alone is not determinative. Id. at 664.
84. Id. at 214.
85. Id. at 216.
parental custody is detrimental to the child." Similarly, the court decided that the concept of in loco parentis, even if it was factually relevant, was irrelevant in the context of custody decisions. Further, the court declined the invitation to declare Michelle G. a parent by equitable estoppel in accordance with her argument that the legal mother, Nancy S., should be equitably estopped from denying Michelle G.'s parental status because of Nancy S.'s prolonged encouragement and support of the parental relationship. The court rejected this argument by noting that equitable estoppel had never been applied in California "against a natural parent" and that its application in other states had rested upon important considerations not present in this case. Specifically, the court noted that the doctrine had been applied to prevent a wife from denying paternity of her husband. The court reasoned that this use was rooted in one of the strongest presumptions in law: that a child born to a married woman is the legitimate child of the marriage. The court then declared that "no similar presumption" applied to this case. The court's failure to analogize the lesbian relationship illustrates this Article's argument that the third party doctrine, even in its exceptions, results from the mandate of heterosexuality in the form of a male-female dyad. The logic of the court thus relegates the "third sex" relationship to "third party" status. Finally, the court considered the last theory proffered by Michelle G. and rejected any legal parental status derivative of functional parental definitions, ostensibly because the acceptance of functional parenthood would be impracticable.

In addition to family law doctrines of parenthood, the specter of constitutional privacy of the parental relationship haunts Nancy S. as well as the other cases involving lesbian nonlegal parents. Privacy considerations serve to constitutionalize third party doctrine by concep-

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86. Id.
87. Id. at 218 (citing Brenda J. Runner, Protecting A Husband’s Parental Rights When His Wife Disputes The Presumption of Legitimacy, 28 J. FAM. LAW 115 (1989-90)).
88. Id.
89. The court relied upon Polikoff, supra note 56, for its formulation of functional parenthood as including “anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature.” 279 Cal. Rptr. at 219 (quoting Polikoff, supra note 56, at 464).
90. The court stated that adopting the functional parenthood relationship would necessitate “years of unraveling the complex practical, social, and constitutional ramifications of this expansion of the definition of parent.” Id. at 219.
91. Although the court in Nancy S. does not explicitly refer to constitutional doctrine, the court notes that the “critical importance in California of the right to parent has been affirmed and reaffirmed.” Id. at 217.
tualizing it as state protection of the parent-child relationship from third party interference. In this construction, constitutional recognition of a parental fundamental right does not operate as a bulwark against state intrusion into parental rights, but as a preservation of parental rights against persons with non-cognizable legal claims. As one court observed, to the extent a decision grants rights to the nonbiological parent, it "diminish[es] the rights of legal parents."92

Given the prevalent application of third party doctrine to deny lesbian nonbiological or nonlegal parents visitation or custody, one solution would be to change the status of the nonlegal mother to that of a legal parent so that she would no longer be a third party. Explicated, outlined, and advocated as a necessary reform in the legal literature before its appearance in the courtroom,93 so-called "second-parent" adoptions are gaining some judicial acceptance. In allowing these adoptions, courts have struggled with the strict heterosexuality of parenting ideology which does not contemplate lesbian parents. This heterosexual ideology is often implicitly articulated in the statutory requirements for adoption. For example, in the first reported second-parent adoption case, In re Adoption of T. & M,94 the District of Columbia court had to construe the District of Columbia's code section which provided that a final decree of adoption terminated the relationship between the child and his or her natural parents except in the case in which one of the natural parents is the "spouse of the adoptor."95 Through the use of the term "spouse" as the only exception to terminating parental rights, the code section reinscribes (heterosexual) marriage as well as the notion of heterosexual parenting. In struggling with this issue, the District of Columbia court declined to read the statute literally; instead, it read the termination provision as directory rather than mandatory, analogizing the situation to a spousal, step-parent adoption, and stressing the best interest of the child.96 Similarly, New York trial courts,

93. See, e.g., Emily C. Patt, Second Parent Adoption: When Crossing the Marital Barrier is in a Child's Best Interests, 3 BERKELEY WOMEN'S L.J. 96 (1987-88); Elizabeth Zuckerman, Comment, Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother, 19 U.C. DAVIS L. REV. 729 (1986).
96. 1991 WL 219598, at *2-*3. The court stated:

[A]t bottom adoption cases are decided by the application of the best interests of the
first in *Evan*, 97 and later in *Caitlin and Emily*, 98 a New Jersey trial court in *J.M.G.*, 99 and the supreme courts of Vermont and Massachusetts in *B.L.V.B. & E.L.V.B.* 100 and *Tammy*, 101 all construed the applicable statutes as not requiring the termination of the legal parental relationship, relying on the step-parent analogy and the best interests standard. 102 While the favorable results in these cases are far from uniform, 103 it does portend a practical solution in some cases 104 to the problems caused by third party doctrine, which relegates nonlegal parents to disadvantaged status in custody proceedings. The interwoven nature of the relation between third party doctrine and second-parent adoptions has not gone unnoticed by the courts. 105

Nevertheless, although this intertwined relation has practical benefits, at a more theoretical level, the solution of second-parent adoptions...
to the problem of third party doctrine poses at least two problems. First, taken together, third party doctrine and second-parent adoptions not only mutually reinforce each other but structurally sustain the dyadic nature of parenthood. Although the successful second-parent adoption cases certainly advance an emancipatory agenda for lesbians by not perpetuating sexual orientation discrimination,106 lesbians must nevertheless carve themselves out as exceptions to the heterosexual mandate while remaining analogous to step-parents.107 This challenge requires lesbians to satisfy the most traditional and stereotypical terms of the heterosexual marriage mandate: the relationship between the two lesbians must be long-term, committed, and monogamous.108 Further, there must be a maximum of two lesbians: there can be a second parent, but a third lesbian cannot be a third parent; she must be a third party. It is difficult to imagine a court bestowing even its limited generosity to a

106. The trial judges in Evan and J.M.G. are most affirmative in their antidiscrimination rationale. As the judge stated in Evan, the “fact that petitioners maintain an openly lesbian relationship is not a reason to deny adoption,” supporting his conclusion with a lengthy footnote considering the social science, psychological and legal literature. 583 N.Y.S.2d 997, 1001 & n.1 (N.Y. Sup. Ct. 1992). The judge thereafter considered the law of New York that “a child’s best interest is not predicated or controlled by parental sexual orientation,” and the adoption statute’s explicit rejection of homosexuality as excluding prospective parents. Id. at 1001-02. Similarly, the judge in J.M.G. expansively stated that New Jersey law “has recognized that the rights of parents cannot be denied, limited or abridged on the basis of sexual orientation.” 632 A.2d 550, 553 (N.J. Super. Ct. 1993).

107. The New Jersey trial court expressed the compelling quality of the analogy first taking note of a precedent which did not foreclose the possibility that stepparent could apply to a person who lived with but was not married to the legal parent, 632 A.2d at 553 & n.3, and then concluded that it:

feels constrained by the state of the law from proclaiming J.M.G. an actual “step-parent,” given the fact that same-sex marriages are not legal in this state. However, I am convinced that in this adoption, J.M.G. should be treated as a stepparent as a matter of common sense, and in order to protect the child’s interests in maintaining her relationship with her biological mother.

Id. at 553.

108. The opinions invariably include in the recitation of relevant facts—often as the first sentence—a satisfaction of this implicit criteria: “The petitioners, Diane F. and Valerie C. have lived together in a committed, long term relationship, which they perceive as permanent, for the past fourteen years.” Evan, 583 N.Y.S.2d at 998; “[In both adoptions], the couples have lived together in committed, long term relationships for nine and twelve years respectively. Each couple viewed its relationship as permanent, akin to marriage.” Caitlin & Emily, 1994 WL 149782, at *1; “The plaintiff and E.O., the biological mother, have been in a committed relationship for approximately 10 years.” J.M.G., 632 A.2d at 551; “Appellants are two women, Jane and Deborah, who have lived together in a committed, monogamous relationship since 1986.” In re Adoption of B.L.V.B. & E.L.V.B., 628 A.2d 1271, 1272 (Vt. 1993); “Helen and Susan have lived together in a committed relationship, which they consider to be permanent, for more than ten years.” Adoption of Tammy, 619 N.E.2d 315, 316 (Mass. 1993).
configuration of three or more lesbian parents. Thus, because of its insistence on a dyad, second-parent adoption suffers from many of the same ideological shortcomings as same-sex marriage.\textsuperscript{109}

Second, the second-parent adoption cases reinforce a dominate social structure based upon economic stratification. Just as the sexology theory—and its consequences—differed markedly for women of the higher and lower classes,\textsuperscript{110} so too does the requirement that the dyad be heterosexual seem to relax with economic privilege. Typically, immediately after noting the dyadic nature of the relationship evidenced by its longevity and mutual commitment,\textsuperscript{111} the court recounts the indicators of the lesbians' elevated class status, including professional occupations and home ownership.\textsuperscript{112} In Tammy, the Supreme Judicial Court of Massachusetts explicitly includes a resultant economic benefit,
in the form of trust funds to which the child will become entitled, as part of its best interests of the child determination.\textsuperscript{113} Thus, because of its emphasis on economic privilege, second-parent adoption again suffers from many of the same ideological shortcomings as same-sex marriage.\textsuperscript{114}

The lesbian nonlegal mother, usually the lover or former lover of a child's legal mother, whether adoptive or biological, has the potential to challenge the heterosexual dyadic model of parenting. However, when she is deemed a third party, her challenge is unsuccessful because third party custody doctrine relegates her to an irrelevant or disadvantaged position. On the other hand, when she is accorded status as a second parent, her challenge is diluted because second-parent adoption doctrine assimilates her to the dyadic model of parenting. While in practical terms, the otherwise nonlegal mother may prefer second parent status\textsuperscript{115} to third party exclusion, especially in the event of a dissolution of the parenting dyad, lesbian legal theory must confront the ideological structures which produce this “practical” result. Politically and ethically, it is problematic that the practical protections are often necessary because one member of the former dyad is enforcing her desires through legal formalism.\textsuperscript{116} Theoretically, it is significant that the practical so-

\textsuperscript{113} As the court stated:
Susan indicated that the adoption is important for Tammy in terms of potential inheritance from Helen. Helen and her living issue are beneficiaries of three irrevocable family trusts. Unless Tammy is adopted, Helen's share of the trusts may pass to others. Although Susan and Helen have established a substantial trust fund for Tammy, it is comparatively small in relation to Tammy's potential inheritance under Helen's family trusts.

\textsuperscript{114} For example, although there are particular economic benefits of marital status, these economic benefits accrue only to certain classes of people. For other, less privileged classes, marital status or its imputation can be a marked disadvantage, as in the public benefits context. See generally supra notes 22-23.

\textsuperscript{115} This preference is based upon the continuation of the lesbian's desire to continue to parent the child and of both lesbians' desire to co-parent the child, as well as upon the child's desire to have the lesbians as parents.

\textsuperscript{116} As I have stated elsewhere, I believe lesbian legal theory must confront the issue of the construction of the dispute between the lesbian mothers in legal terms because this results in a domestication of lesbian lives and theories. See ROBSON, (OUT)LAW, supra note 2, at 139-41. Further, as stated by lesbian legal activist and theorist Paula Ettlebrick, the lesbian community has developed an "ethic that says that a lesbian biological mother may not rely on the patriarchal definitions of parenthood to defeat her partner's rightful claims to visitation or custody." Letters to the Lesbian/Gay Law Notes, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), June 1993, at 1 (letter of Paula Ettlebrick).
lution ultimately reinforces the dyadic structure of parenting which is responsible for the problem requiring a solution.

B. The Sperm Donor

In all of the so-called second-parent adoption cases, the sperm donor or biological father as the potential second-party to the parent dyad is either implicitly or explicitly relegated to impossibility. When the sperm donor or biological father is not so relegated, but instead sues for visitation or custody, he threatens to assume the status of a member of the parental dyad rather than a third party, even if the child has a lesbian dyad in the parenting role. As in the sexologists' theorizing of a "third sex," the sperm donor cases are tortured attempts to honor the interlocking and inconsistent analytics of biology and heterosexuality, as well as the preservation of male hegemony.

Biology threatens to become determinative of social realities when "sperm donor" and "father" become synonymous terms. While biological paternity is not always legal paternity under constitutional doctrine,\textsuperscript{117} statutes regulating artificial insemination usually exclude the donor from paternity only when the recipient is a "married woman," and the insemination is performed by a licensed physician.\textsuperscript{118} Thus, biological paternity achieves its greatest social stature when it is necessary to establish the heterosexual parenting dyad: if there is another male to occupy the male-member of the dyad, then the donor is irrelevant. However, if there is not such a male, then the donor is necessary

\begin{footnotes}
\item[117] See supra notes 46-47.
\item[118] For example, the Uniform Parentage Act § 5(b) applies to married women when the artificial insemination is performed by a licensed physician. For a list of states adopting the Act, see UNIF. PARENTAGE ACT, 9B U.L.A. 287 (1990). However, more recently, two other related uniform laws have been proposed which change the emphasis on marriage, although these have not been as widely adopted. See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. 152 (Supp. 1994); UNIF. PUTATIVE AND UNKNOWN FATHERS ACT, 9B U.L.A. 53 (Supp. 1994).

\end{footnotes}
to complete the dyad. For example, in a visitation proceeding brought by the sperm donor C.M. against the legal mother C.C.,\textsuperscript{119} the court declared C.M. the natural father and awarded him visitation, reasoning that:

In this case there is a known man who is the donor. There is no husband. If the couple had been married and the husband's sperm used artificially, he would be considered the father. If a woman conceives a child by intercourse, the "donor" who is not married to the mother is no less a father than the man who is married to the mother. Likewise, if an unmarried woman conceives a child through artificial insemination from semen from a known man, that man cannot be considered to be less a father because he is not married to the woman.

... There was no one else who was in a position to take upon himself the responsibilities of fatherhood when the child was conceived . . . . It is in a child's best interests to have two parents whenever possible.\textsuperscript{120}

While such an outcome is not inevitable,\textsuperscript{121} it can be the same even when the consideration of the donor as one-half of the parental dyad potentially excludes the lesbian nonlegal parent. For example, in one of the first known lesbian parenting cases, \textit{Jhordan H. v. Mary C.},\textsuperscript{122} the court awarded the sperm donor visitation over the objections of Mary, the legal mother, and Victoria, a "close friend who lived in a nearby town." Victoria had participated in the selection of Jhordan as the sperm donor; agreed "to raise the child jointly" with the legal mother; participated in the pregnancy; and assisted in the birth.\textsuperscript{123} The court applied both the marital-status limitation and the physician requirement of the artificial insemination statutes to declare inapplicable any of the

\textsuperscript{119.} C.M. v. C.C., 377 A.2d 821 (N.J. Juv. & Dom. Rel. Ct. 1977). C.C. is apparently not a lesbian. As described by the court, C.M. testified that he and C.C. had been "seeing each other for some time and were contemplating marriage. She wanted a child and wanted him to be the father, but did not want to have intercourse with him before their marriage." \textit{Id.} at 821.

\textsuperscript{120.} \textit{Id.} at 824-25.

\textsuperscript{121.} For example, in McIntyre v. Couch, 780 P.2d 239 (Or. Ct. App. 1989), \textit{cert. denied}, 495 U.S. 905 (1990), the court rejected the sperm donor's argument that the state statute should not apply because the statutory requirements of physician intercession and marital status were unsatisfied. The court construed the physician and marital language as not mandatory, remanding the case for determination of the existence of any agreement that the sperm donor assume parental status.

\textsuperscript{122.} 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

\textsuperscript{123.} \textit{Id.} at 532.
protections from donor interference. Further, the court specifically rejected the contention by Mary and Victoria that, with the child, they "compose a family unit" which should be accorded family autonomy. In addition to statutory interpretation, the court based its conclusion that any family formation must include the sperm donor on a record which "demonstrates no clear understanding that Jhordan's role would be limited to provision of semen and that he would have no parental relationship with [the child]." Facts deemed relevant by the court included the legal mother's failure to object to Jhordan's monthly visits after the birth and his pre-birth collection of baby equipment and establishment of a trust fund.

The question of the quality and quantity of "facts" necessary to transform the biological paternity of the sperm donor into the person of a legal father, as well as issues of legal interpretation, are presented in Thomas S. v. Robin Y. Rendered by a New York trial court in 1993 and presently on appeal, this case has attracted much legal and community attention and dissension. In Thomas S., the child in question was born in 1981 into a household comprised of two lesbian parents...
and another child born to her nonlegal mother the previous year. After several years, both children met their sperm donors, considering them as family friends but knowledgeable as to the men’s status as sperm donors or biological fathers. After a disagreement, Thomas S., a gay male attorney, brought an action arguing that as the child’s "proven biological father," he was "absolutely entitled to an order of filiation, and also entitled to an order of visitation." In resisting the request for filiation and visitation, the lesbian mother(s)’ arguments included that the doctrine of equitable estoppel should preclude Thomas S. from asserting his parental rights at this late date. The court accepted this argument, applying it as a common law principle relevant to adjudicating paternity “for families whose reality is more complex than a one mother, one father biological model.” In so doing, the court stressed the factual details of the case. Thus, although the trial court’s opinion in Thomas S. supports lesbian parenting, it is problematic because it leaves unresolved the quality and quantity of facts necessary to establish legal fatherhood. As demonstrated by the particular factual details in the opinion as well as the particular factual details proffered by those who disagree with the opinion, this cannot be a satisfactory solution to the problems inherent in lesbians’ relations with children.

130. 599 N.Y.S.2d at 378-79.
131. The court noted that both Thomas S. and Sandra R., the nonlegal mother, are attorneys. Id. at 378.
132. Id. at 380.
133. Id. at 382.
134. LEADING & GAY LAW NOTES, edited by Arthur S. Leonard, Professor of Law at New York Law School, related the facts as including that “a relationship was established” with visits, calls, cards, and letters between the parties and also surmised that as the child “grew older and her relationship with Steel [Thomas S.] became more extensive, her mothers apparently became concerned about encroachment on their New York-based family unit and sought to limit contact.” Judge Denies Parental Standing to Gay Sperm Donor, LEADING & GAY L. NOTES (Lesbian & Gay Law Ass’n of Greater N.Y., New York, N.Y.), May 1993, at 33. Letters in response ranged in content from direct factual disputes: “It was the plaintiff’s [Thomas S.] homophobe and insulting demand to introduce his biological daughter to his family in the absence of her mothers, whom he was ‘not comfortable’ including, that brought about this litigation,” see supra note 116, at 2 (letter of Lesley Yulkowski); to criticism that Professor Leonard departed from the trial judge’s findings. Other letter writers related their personal knowledge concerning Thomas S.’s “fatherly relationship.” See, e.g., letter of Ann Philbin. Among these writers was Thomas S.’s trial attorney who included quotes from letters and cards, and conclusions relating to the mothers’ intentions. Letter from Emily Olhansky.
135. As Professor Arthur Leonard stated in his reply to the letters criticizing his digest of the opinion in LEADING & GAY LAW NOTES:
I recently wrote a book for which I immersed myself in scores of court opinions on lesbian and gay issues. On the basis of that experience, I hesitate to accept the official findings of “fact” in court opinions as conclusive of reality. . . . [W]e should
Importantly, however, any contrary decision would be a tortured valorization of the interlocking and inconsistent analytics of biology and heterosexuality, as well as the preservation of male hegemony. It is clear that a biological valorization would occur if the court accepted the sperm donor’s argument that he is absolutely entitled to an order of filiation based upon his biological connection. Less clear are the intricacies of heterosexism and sexism should the sperm donor prevail, which are perhaps obscured by the identity of the sperm donor as a gay man.

In a situation in which a child is parented by a dyad, as in the situation in Thomas S., but for the fact that the dyad is a lesbian one rather than a married heterosexual one, Thomas S. would have no viable claim. The declaration of the sperm donor as a father—even if the sperm donor is not himself heterosexual—reestablishes heterosexuality as normative, natural, and inevitable through the “real” heterosexually coupled parents. Further, the disparity between the treatment accorded the male member needed to complete the heterosexual dyad and the “third party” nonlegal lesbian mother who is irrelevant to the heterosexual dyad is instructive. Seemingly, the sperm donor can establish himself as a legal father with sufficient “facts,” but no amount of good facts on the side of the nonlegal mother can establish her as a parent.

Even apart from sexual orientation constructions, the factual basis for declaring parenthood is gendered. It is difficult to imagine a judicial recognition of several visits, even many visits, over a period of ten years as an indication of motherhood. That custody determinations occur and reflect disparate power between the genders is well-known; less explored is how this gendered dynamic operates among lesbians and gay men. It is particularly troubling that Thomas S. view court “findings” in gay cases with some skepticism.

Id. at 4. My own experience in researching lesbian and gay judicial decisions mirrors Leonard’s, and thus, I agree wholeheartedly. However, I would not limit my skepticism of “facts” as “conclusive of reality” to the legal realm or confine it to discernible biases such as homophobia which often operate in judicial opinions, given the tremendous power and popularization of recent theory disputing such a correlation. Thus, I depart from any proffered model of “intentionality” based upon “conduct” rooted in factual conclusions to determine parenthood. Cf. Hill, supra note 63.

136. Victoria Brownworth reports on a decision in a similar case in California in which the trial court granted the sperm donor joint custody. Brownworth, supra note 129, at 45.

137. See supra Part III(A).

138. See, e.g., PHYLLIS CHESLER, MOTHERS ON TRIAL 65-92 (1986) (estimating that 70% of women lose custody if seriously challenged by men).

139. For a discussion of some of the similarities and differences between lesbians and gay
argued that a failure to accord him legal fatherhood status would "brand" the child "illegitimate." This argument seeks to capitalize upon and enforce antiquated notions of morality that are sexist, as well as heterosexist.

In arguing that their status as sperm donors entitled them to the privilege of parenthood, Thomas S., Jhordan K., and C.M. relied upon dyadic notions of parenthood, which would exclude any nonlegal mother from the dyad while installing themselves within the requisite heterosexually composed dyadic formation that is parenthood. If the sperm donor is not successful, he is relegated to status as a third party, a person outside of the parenting dyad, without recourse unless he can overcome the presumptions accorded to legal parents.

C. Grandparents

Grandparents are classic third parties. However, in many lesbian custody cases, these third parties have been granted custody over the objections of the lesbian legal mother. The third party doctrine, which in this case should protect lesbian legal mothers, is not applied to their advantage. Instead, the preference accorded to legal parents is overcome by reference to lesbianism, either explicitly or covertly.

The situation of Sharon Bottoms, which received extensive media coverage, exemplifies this predicament. Last year, a Virginia trial court granted a maternal grandmother’s petition for custody of her...
grandchild based upon the fact that the child’s mother—her daughter—was a lesbian.\footnote{144}

Delivering his oral judgment, the trial judge stated:

The dispute . . . presents the question of whether the child’s best interest is served by a transfer of the custody of the child from her mother to her maternal grandmother, Kay Bottoms. That’s the ultimate issue on the bottom line that we come to.

The mother, Sharon Bottoms, has openly admitted in this court that she is living in an active homosexual relationship. She admitted she is sharing a bedroom and her bed with another, her female lover, whom she identified by name as April Wade. Sharon Bottoms in this courtroom admitted a commitment to April Wade, which as she contemplates will be permanent, and as I understand her testimony, long lasting if not forever.

She readily admits her behavior in open affection shown to April Wade in front of the child. Examples given were kissing, patting, all of this in the presence of the child. She further admits consenting that the child referred to April Wade, her lover, as to quote the words “Da Da.”\footnote{145}

\footnote{144. \textit{In re} Doustou, No. CH93JA0517-00 (Cir. Ct. of Cty. of Henrico, Va. Sept. 7, 1993) (on file with author). The attorney representing the grandmother, Pamela Kay Bottoms, called as his first witness Sharon Bottoms. After establishing her identity as the child’s legal mother and the identity of his client as the child’s grandmother, the attorney immediately focused his questions on lesbianism:}

\begin{itemize}
  \item Q: Now, in the juvenile court you stated that you are in a lesbian relationship with whom?
  \item A: April Wade.
  \item Q: Now, for the record, would you tell me your definition of a lesbian relationship. What does it mean?
  \item A: It means two people of the same sex are together.
  \item Q: In what way are they together?
  \item A: In a relationship.
  \item Q: Now, you say a “relationship,” does that entail sex?
  \item A: Yes.
  \item Q: Hugging and kissing?
  \item A: Yes.
  \item Q: Sleeping in the same bed?
  \item A: Yes.
  \item Q: Now then, you’re not at all ashamed of that relationship, is that correct?
  \item A: No, sir.
\end{itemize}

\footnote{145. \textit{Id.} at 195-96.}
The trial judge then stated that the “mother’s conduct is illegal” rendering her “an unfit parent.” While cognizant of the “presumption in the law [being] in favor of . . . the natural parent,” the court found that Sharon Bottoms’ “circumstances of unfitness” were of “such an extraordinary nature” sufficient to rebut the presumption of parental custody. The court then denied overnight visitation to the legal mother as well as any visitation in the presence of April Wade.

On appeal, Sharon Bottoms contends that the evidence was insufficient to overcome the parental presumption and award custody to the third party grandmother. She also argues that the court did not apply the required best interests of the child standard after it had decided the legal parent and nonparent should receive equal consideration. The trial judge relied upon a Virginia Supreme Court opinion which applied a per se rule disqualifying a lesbian mother in a custody contest with the child’s father. In so doing, the judge gave little effect to the state court’s articulation of the third party custody standard. This standard, as applied in a case cited by the trial court, would deny a grandmother custody of her grandchild in a situation in which the child’s custodial parent continued to live with a killer, even the killer of the child’s other parent. As expressed by the appellate court, such circumstances, although a matter of concern, do not constitute an “extraordinary reason” to deprive the legal parent of custody.

The amount of press coverage devoted to the Bottoms’ situation might lead one to believe it is an aberration. However, the courts of Mississippi confronted a similar situation. In White v. Thompson, the paternal grandparents sought custody of their grandchildren on the grounds that their mother was an unfit parent. The bulk of the testimony concerned the mother’s lesbian relationship, which prompted the trial

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146. Id. at 196.
147. Id.
148. Id. at 197.
149. See Appellant’s Opening Brief, In re Doustou, No. 1930-93-2 (on file with author); see also Brief of Amicus Curiae National Center for Lesbian Rights, et al., In re Doustou, No. 1930-93-2 (on file with author).
150. Roe v. Roe, 324 S.E.2d 691 (Va. 1985). For a discussion of the different standards relating to lesbianism as applied in custody cases between parents, see ROBSON, (OUT)LAW, supra note 2, at 130-34.
152. Mason, 385 S.E.2d at 246.
153. 569 So. 2d 1181 (Miss. 1990).
court to find the mother "unfit, morally and otherwise, to have custody of her children." On appeal to the Mississippi Supreme Court, the mother argued that the trial court's finding was impermissibly predicated solely on her lesbianism. The Mississippi Supreme Court finessed the issue of her sexuality, deciding not to reach the issue of whether lesbianism alone was sufficient to render a parent unfit and allow the court to award custody to third parties:

Though the predominant issue in this case seems to have been Mrs. White's lesbian relationship, and the chancellor may have relied almost entirely on this, we find that a review of the entire record and the circumstances present... shows that the chancellor's decision that Mrs. White was an unfit mother, morally and otherwise, was not against the overwhelming weight of the evidence. The circumstances included some testimony that the children had not been properly supervised, clothed or fed. The level of such impropriety remains vague, and thus vaguely troubling. Further, considerations of class are again relevant: the label of unfit applied by the judiciary is as class-coded as was the label of third sex applied by the sexologists. As the dissenting justice in White explained at the outset of his opinion, any neglect of the children was "no more than one would expect to find in any case where a twenty four year old mother with but a high school diploma and no independent means" was attempting to support her children. Yet such neglect was sufficient to satisfy the state standard for rebutting the presumption of custody accorded to a legal parent.

154. Id. at 1183.
155. Id. at 1184.
156. Id.
157. See supra Part I.
158. 569 So. 2d at 1185 (Robertson, J., dissenting). As the court's opinion states, the legal mother last worked in a convenience store, she lived with her children and her lover in a trailer, she testified that "she sometimes slept until 11 a.m." and there was conflicting testimony about "the children being outdoors during cold weather with inadequate clothing." 569 So. 2d at 1182-83. The legal mother also testified that conditions at the trailer "were a lot better" now than when her husband, the grandparent's son, had lived there. Id. at 1183.
159. Both the majority and dissenting justices agreed that the standard in Mississippi is a presumption in favor of the legal parent which third parties can overcome only upon a clear showing that the parent has abandoned the child; or that the conduct of the parent is so immoral as to be a detriment to the child; or that the parent is unfit mentally or otherwise to have custody of the child. 569 So. 2d at 1183-86 (citing Milam v. Milam, 509 So. 2d 864, 866 (Miss. 1987)); Luttrell v. Kneisley, 427 So. 2d 1384, 1387 (Miss. 1983); Rodgers v. Rodgers, 274 So.
The message of *White* is that a court can deflect the contentious issue of lesbianism with reference to more vague and class-coded standards. Such an approach could be applied in *Doustou*, in which the appellate court could credit the grandmother's testimony that the two year old child once cursed and stood in the corner. Thus, even if the Virginia appellate court departed from a per se disqualification of lesbian mothers as parents, it could nevertheless affirm the trial judge's ruling.

Importantly, in both *Doustou* and *White*, the heterosexual dyadic model of parenting did not operate to the legal mother's benefit. In *Doustou*, the child's legal father had never expressed an interest in the child, and the attempt at any reconstruction of a dyadic parent model with April Wade was deemed criminal. Likewise, in *White*, the children's legal father was not a contender for legal custody, and again any attempt to reconstruct a dyadic parenting model with a woman was deemed unacceptable. In *Doustou*, the grandmother did not have a heterosexual mate at the time of the hearing; while in *White*, the

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2d 671, 673 (Miss. 1973)).

160. Such an approach would certainly be consistent with the testimony of Pamela Kay Bottoms. When asked by her attorney to tell the court why she believed she should have custody of the child rather than her daughter, she stated, "Tyler is a bundle of joy. You have to know him. He shouldn't be raised by two lesbians. He is being taught to call Sharon's lover "Da Da." I can do more for Tyler financially. He is going to be mentally - ". *Bottoms Transcript, supra* note 144, at 53.

161. Testimony of Pamela Kay Bottoms, *Bottoms Transcript, supra* note 144, at 57. The trial judge's oral ruling contains a reference to this "cursing" and "standing in the corner" as "other evidence" of the child being affected. *Id.* at 197.

162. Testimony of Sharon Bottoms, *Bottoms Transcript, supra* note 144, at 17.

163. The trial judge stated, "the mother's conduct is illegal. It is a class 6 felony in the Commonwealth of Virginia." *Bottoms Transcript, supra* note 144, at 196.

164. The paternal grandparents agreed that the children's father "should not have custody due to his financial situation and his drinking problem." *White v. Thompson*, 569 So. 2d 1181, 1183 (Miss. 1990). As the dissenting judge declared:

It is important that An's estranged husband makes no claim to custody. His closet is filled with as many skeletons as hers, if not more. David White is a career drunk who, after An threw him out, took up with a live-in girlfriend of his own. His financial neglect of his children has been massive. Indeed, most of An's neglect is attributable to the employment she has been forced to pursue because of David's irresponsibility. *Id.* at 1186 (Robertson, J., dissenting).

165. In this instance, this may have been beneficial. Sharon Bottoms testified that she had been sexually abused by her mother's male partner from the time she was about twelve years old until she left home at 17 or 18. She further testified that this man lived with her for 16 years, leaving only "about two weeks" before the first custody hearing regarding Sharon Bottoms' child. Testimony of Sharon Bottoms, *Bottoms Transcript, supra* note 144, at 20-25.
paternal grandparents present themselves in the heterosexual model. Thus, while the dyadic model of parenting should have operated in favor of the lesbian legal mothers—relegating others to less favored third party status—because the legal parents could not satisfy the implicit heterosexual requirement of the dyad, these members of the "third sex" become equated with "third parties."

Certainly, preferences for legal parents over grandparents or other third parties can operate in favor of a lesbian legal mother. Nevertheless, such preferences are certainly no guarantee—or even adequate insulation—against lesbian legal parents being deprived of relations with their children. Further, third parties can gain an advantage by invoking the most powerful third party of all—the state—to regulate the relationships of lesbian mothers.

IV. CONCLUSION

An examination of the application of third party doctrine in the context of lesbian relations with children reveals that the doctrine can operate to both the benefit and detriment of lesbians. Rather than attempt to refine the doctrine so that it might better accommodate lesbians, I suggest that the doctrine’s theoretical underpinnings in a notion

Interestingly, Sharon Bottoms told her mother about the sexual abuse by the male partner, but Pamela Kay Bottoms apparently did not initially believe her daughter. Id. at 23-24. However, Pamela Kay Bottoms did exclude her male partner from the house on the advice of the attorney she consulted after Sharon had refused to allow the child to visit while the male partner was present. This was also when she petitioned for custody. Testimony of Pamela Kay Bottoms, Bottoms Transcript, supra note 144, at 62.

166. For example, in Gerald D. & Margaret D. v. Peggy R., 1980 WL 20452 (Del. Fam. Ct. Nov. 17, 1980), although the court noted that the legal mother had been living with her parents and the grandparents participated in all aspects of the child’s life, it applied the standard in disputes between a parent and a third party (which the court articulated as “best interest determination but any third party seeking such custody bears a heavy burden of persuasion”) to award custody to the lesbian legal mother.

In another case, the Supreme Judicial Court of Massachusetts reversed a trial judge’s denial of the lesbian mother’s petition to remove guardianship from an unrelated third party, holding that the mother’s actions did not constitute abandonment and that her lesbianism did not render her unfit. Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980).

167. The state as third party, notably as a party in abuse, neglect, dependency, delinquency, or deprivation cases, in which the state assumes custody of the child or awards custody to another person, is beyond the scope of this Article. However, it is important to note that lesbianism does arise as an issue in such proceedings. See, e.g., In re Breisch, 434 A.2d 815 (Pa. Super. Ct. 1981); see also In re J.A. & L.A., 601 A.2d 69 (D.C. 1991). Further, in a recent situation, a grandmother reportedly contacted state authorities and charged her daughter and her daughter’s lover with abusing the daughter’s child, although the mother later posted bail for her daughter. See Ingrid Ricks, A Family Affair, THE ADVOCATE, Apr. 19, 1994, at 49.
of parenting as a heterosexual dyad render it problematic for lesbians, and objectionable from the perspective of developing a lesbian legal theory. Just as we no longer speak of lesbians as members of a "third sex," we should abandon the language of "third parties" in the lesbian context. Perhaps a rejection of the underlying heterosexism and sexism of the dyadic model of parenting will not be far behind.