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Codifications: The Regulation of Lesbian Relationships

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THE CODIFICATION OF LESBIAN RELATIONSHIPS: EXAMPLES FROM LAW AND LITERATURE IN THE UNITED STATES

Ruthann Robson*

In this post-modern era celebrating diversity, admitting fragmentation, and arguing for polymorphous perversities, there is nevertheless a trend in the United States (US) as well as in other common law nations\(^1\) toward the codification of Lesbian relationships. By codification, I mean the process of proscribing normative rules as well as the set of prescriptions which result from that process.\(^2\) Such normative understandings shape our judgments about lesbianism and lesbian relationships. We decide which incidents fit within the category of 'lesbian relationship'. We then make further judgments about those incidents which do fit within the category, dividing them into subcategories such as 'acceptable' or 'not acceptable'.

It could be argued, however, that there have always been such rules regulating lesbian relationships, including two longstanding and contradictory edicts: lesbian relationships do not exist and lesbian relationships are sick. Happily, although these rules certainly still operate, they no longer possess the regulatory force that they did a mere 20, or perhaps even 10, years ago.\(^3\) Yet the movement away from these very restrictive rules does not necessarily mean a movement into greater liberty. Ironically, the very repressiveness of these twin rules of invisibility and perversity at times created a space for freedom and experimentation. In some instances, this space allowed for rather undesirable conditions, such as a normative rejection of all norms or a rigidly enforced set of alternative norms;

* Professor of Law, City University of New York School of Law and author of several books of Lesbian fiction. This article is based upon remarks delivered at the University of Melbourne, the University of Sydney, and the Waikato University, July 1996. I wish to express my appreciation to the many Australian feminists who participated in conversations about this topic. I especially want to express my appreciation to Di Otto for her encouragement and to the anonymous reviewers at Australian Feminist Law Journal for their comments.

1 The emphasis in this piece is on developments in the United States, although there seem to me to be parallels in Australia, as well as in Canada, Great Britain, and New Zealand. However, because my argument is not simply derived from legal and literary texts but also upon their cultural meanings, as a resident of the United States, I am wary of making judgments about Australia, and certainly about making more global generalisations. However, it is my hope that readers in various localities can draw parallels and make distinctions based upon the arguments presented here.

2 This general process has been explored in detail by numerous legal theorists from various schools of jurisprudential thought. For an excellent overview and incisive analysis, see Margaret Davies, Asking the Law Question, Sydney: The Law Book Company, 1994.

3 The one caveat I might add would be in the literary field, in which an increasing number of 'lesbian' novels are childhood memoirs in which any lesbian relationships barely exist, and in fact, there is little explicit recognition of any possibility of Lesbianism. See eg, Dorothy Allison, Bastard Out of Carolina, 1992; Blanche McCray Boyd, The Revolution of Little Girls, 1991; Karin Cook, What Girls Learn, 1997; Jacqueline Woodson, Autobiography of a Family Photo, 1995.
the critiques of Lesbian cultures on these bases are well known. Nevertheless, there could be the possibility and subjective sense of 'making up the rules' rather than conforming behaviour.

The current process of codification is much more diffuse, as befits its postmodernist stage. Certainly, there is no totalising body of regulation that is indexed and titled like the civil and criminal codes of many nations. There is also not a conspiracy of codification that meets on a board, panel, or committee to review and promulgate regulations. Nevertheless, it does seem as if there are particular 'laws' which are understood as such, and for which there are benefits for those who comply and costs for those who defy.

While this process of codification may occur in many sites, this piece concentrates on the fields of Law and literature. This concentration occurs not because these two pursuits are either the most blameworthy or most important, but because of my idiosyncratic situation. I work within both of these fields, and during this work I have been struck by some similarities that I did not expect.

I have also been marked by my own participation in these processes of codification, as well as the participation of colleagues who I like, respect, and admire. Thus, I am not arguing that either law or literature is some repressive force 'out there'; I am more interested in our complicity. For example, in the legal field, we make decisions about what cases to take, what arguments to advance, what scholarship to write. Likewise, in the literary field, we make decisions about what to write, how to write it, where (if anywhere) to publish it, what to review, and what to read. The normative channelling which occurs is often expressed in terms of our 'success' within these fields. In the law, we choose the cases we think we can win, the arguments which will prevail, the scholarly topic which will be published, or make a contribution, or be acceptable for tenure. In literature, we revise and market our work, we read the work of others that has received acclaim, and we engage in public criticism.

Given such shared pursuits and concerns, it seems natural that a set of shared values would develop among the participants who might constitute an 'interpretative community'. Yet I think it

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4 For example, Alisa Solomon writes:

[Lesbian] Writers as politically diverse as Barbara Deming, Joan Nestle, and Audre Lorde have told dismayed tales of being ostracised because they thought the wrong things, wanted sex the wrong way, or had a child of the wrong gender. To this day, arguments rage over whether leather dykes and toddler male children should be allowed at lesbian music festivals...

At the Michigan Womyn's Music Festival in 1989, a white performer who sang about being cradled as a child in 'ebony arms' was publicly condemned for condoning racism. A few summers ago, Brooklyn Women's Martial Arts boycotted the annual women's training camp objecting to — among other things — a instructor who worked for her local police department. In both cases, a critique could well be made, but suppressing deviation and closing down discussion do not advance the cause. And more and more lesbian activists are convinced that the motivation for these structures is fear — of ideological contamination by patriarchy...


5 This essay is not concerned with the intersection of Legal and literary theorising in what is variously known as legal narrative theory, 'outsider narrative' legal scholarship, or the law and literature movement, which I discuss elsewhere, see Ruthann Robson, 'Beginning with (My) Experience: The Paradoxes of Lesbian/Queer Legal Narratives' (1997) Hastings Law Review (forthcoming). Instead, this essay treats law and literature as parallel regimes as they represent and affect lesbians and lesbianism. Instead, my work in the field of Literature upon which these piece draws is my work as a lesbian author, reviewer, and critic, of works of fiction.

6 Stanley Fish, Is There a Text in This Class?: The Authority of Interpretative Communities, Cambridge, MA: Harvard University Press, 1980.
is vital to remember that not all the members who participate in a 'community' are situated equally. In fact, a disturbing propensity in the US context is toward smaller and smaller concentrations of power, despite the postmodernist perception of diffusion. In the lesbian legal context in the United States, there are a handful of gay/lesbian advocacy organisations which effectively decide which cases are worthy of a devotion of resources, which arguments are advanced, and which issues should be the subject of Legislative lobbying. Similarly, in the literary context, the publishing industry in the US is more and more an 'industry', with the vast majority of books published by eight huge media conglomerates more devoted to entertainment profits than to literature.

Independent publishing houses and independent bookstores, once cultural institutions within lesbian, gay, feminist, and progressive communities, now struggle for existence. While mainstream publishers are supposedly looking for the 'big gay book', this book is not literature or serious nonfiction, but a 'celebrity' book. And while mega-chain bookstores often have a 'gay' shelf, the books shelf will feature only the titles from mainstream publishers who have provided substantial discounts to have their books included in stock.

Keeping in mind the above explanations, qualifications, and disclaimers, I now turn to what seem to me to be some of the developing rules of Lesbian relationships and their problems.

**RULE ONE: LESBIAN RELATIONSHIPS ARE MIMETIC OF THE MYTHS OF HETEROSEXUAL MARRIAGE AND ROMANCE**

Under this normative proscription, lesbian relationships are deemed subject to the same aspirations and expectations as the heterosexual romantic tradition which posits 'true love' and defines it as

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7 In the United States, the predominant legal organisation is the Lambda Legal Defense and Education Fund. The major lesbian organisation is the National Centre for Lesbian Rights (NCLR). Additionally, the American Civil Liberties Union (ACLU) has projects devoted to sexual orientation issues. Other gay, lesbian, bisexual and transgender organisations such as National Gay and Lesbian Task Force (NGLTF) and Gay and Lesbian Alliance Against Defamation (GLAAD) do not engage in litigation, although they do lobby for legislative change.


9 See Victoria Brownworth, 'Who Will Publish Our Books?' (1997) 5 *Lambda Book Report* 10 (interviewing numerous lesbian and feminist publishers in the US and concluding that 'there can be no question' that independent publishers, as well as bookstores, are in serious trouble); See also Thomas Goetz, 'War for Independents: Can Small Presses Survive Megapublishing?' *The Village Voice*, 25 March 1997, 52.

10 Both Brownworth, 'Who Will Publish Our Books?' above n9 and Goetz, 'War for Independents' above n9, make the point about celebrity books. Frank Rich makes a more extensive argument in 'Star of the Month Club', an Op-Ed piece in *The New York Times* (23 Sunday March 1997), arguing that there has been a 'Hollywoodization' of publishing which seeks books by celebrities as well as attempting to portray authors as 'Calvin Klein models'.

11 The collusion between chain bookstores and publishers has not been limited to lesbian/gay or other minority interest books. The American Booksellers Association, which represents 4,500 US bookstores sued the several major publishers in June 1994 alleging violations of the Sherman Anti-Trust Act due to discriminatory pricing policies. Most of the defendants have entered into settlement agreements which promise standard criteria for pricing and promotions, but the largest publisher of trade books in the United States, Random House, has refused to settle and has boycotted the annual ABA convention. *New York Times*, 12 August 1996, D7.
‘forever’ and ‘only’. Thus, lesbian relationships — as normatively proscribed, if not normatively experienced — must exhibit longevity and exclusivity.

In the legal realm, longevity and exclusivity have been the twin grounds upon which the recognition of Lesbian (and gay) relationships rests. In a ground-breaking case in the US involving the tenancy of a rent controlled apartment in Manhattan, the court was willing to consider the named tenant’s lover as fitting into the category of ‘spouse or other family member’ based upon evidence of the duration of the relationship and the fact that it seemed exclusive. Thus, Michael Braschi was able to forestall an eviction from the apartment which he shared with his lover because the testimony showed that the pair were monogamous and had been together a suitable length of time (eleven years). Presumably, a relationship which was not mimetic of the aspirations of heterosexual romance — a relationship which occurred in a triage, for example, no matter how mutually committed the parties were, or a relationship which had been for some lesser period of time, would not have qualified Michael Braschi for the rights of tenancy.

There is a similar emphasis on exclusivity and longevity in domestic partnership registrations. In the US beginning in the mid-1980s, municipalities, some other government employers such as universities, and progressive corporations, began to offer so called domestic partnership benefits to their employees. Such benefits usually include bereavement and family leave that would include the domestic partner, and medical, dental, and vision insurance supplied by the employer which would generally only be extended to an employee’s legal spouse and dependent children. By the late 1990s, the availability of these benefits has spread, perhaps to as many as 10 per cent of private employers, and to many municipalities and a few

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16 Berkeley, California was the first municipality in the United States to pass a domestic partner ordinance. Many other major cities such as Seattle and New York City followed suit within the next decade. See O’Brien, ‘Domestic Partnership’, above n14, 181.

To date, the most expansive domestic partner policy in the United States is in the City of San Francisco. Ordinance 481-96, the Non-Discrimination in City Contracts and Benefits Ordinance, which came into effect 1 June 1997, requires all entities having contracts with the city to extend domestic partnership benefits to their employees on the same terms as benefits are extended to married couples. The ordinance has caused some consternation on the part of the Catholic Church; Catholic Charities receives over five million US dollars from the City per year to provide various services to city residents, including services for persons with AIDS. While the Archbishop of San Francisco and the mayor, Willie Brown, originally appeared to be headed for litigation, there has been an agreement about the terms by which the Catholic Church will comply with the ordinance. See generally Victoria Slind-Flor, ‘San Francisco’s Domestic Partnership Law Causes Big Stir’, The National Law Journal A6 February 1997, 1 (col. 17).
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states.\textsuperscript{17} All such employers define domestic partner with requirements that the relationship meets a minimum time frame (usually six months), that the relationship is intended to be enduring, and that the relationship is one's only domestic partnership.\textsuperscript{18}

Should legal marriage become possible in the US as a result of the ongoing situation in the state of Hawai'i,\textsuperscript{19} this would further enforce the codification of Lesbian relationships as mimetic of traditional heterosexual ones. In legal marriage, the expectation of Longevity is conveyed by the difficulty of the process of dissolving the marriage; even in the most simple of cases (no property, no

\textsuperscript{17} In the states, this is usually accomplished through the governor's executive order, or through orders or policies of chief executive orders relating to their departments. With the election or appointment of new officials, these orders can be rescinded. Further, these orders can often conflict across agencies or with other policies within the agency. For example, the situation in the state of New York is especially noteworthy:

State Attorney General Dennis Vacco says his little-noticed action extending health benefits to the domestic partners of his staff, including homosexuals, proves he is not the bigot critics have made him out to be. Just weeks after he took office in January, he drew fire for rescinding an order that forbade discrimination against job applicants in his office on the basis of sexual orientation; state law has no such provision, he noted. At almost the same time, he extended health benefits to live-in lovers, giving to non-unions workers the same benefits as unionised staff. 'If I were such a narrow-minded bigot, I would have said, "They can't have health benefits either,"' he told the Associated Press.


\textsuperscript{18} See generally, O'Brien, 'Domestic Partnerships', above n14.

\textsuperscript{19} The Hawai'i Supreme Court in \textit{Baehr v Lewin} 852 Pd. 44 (Haw 1993) held that the denial of a marriage licence to a same-sex couple must be evaluated under the Hawaii state constitution's equal protection clause which includes discrimination on the basis of sex. The Hawai'i Supreme Court found that unless the state could prove a compelling state interest, the denial of a marriage licence to same-sex couples constituted a denial of equal protection and remanded the case for trial. At trial, the Honourable Kevin Chang found that the sex-based classification in the Hawaii statute was unconstitutional on its face and as applied under the state constitution's protection clause. \textit{Baehr v Miike} 65 USLW 2399, 1996 WL 694235 (Circ Ct Haw (December 3, 1996). Lawrence Miike is the Director of the Department of Health, substituted for the previous director, Lewin.

Ordinarily, a marriage valid in one state would be valid in other states pursuant to the US Constitution, Article IV s1, the 'full faith and credit clause', which provides that full faith and credit shall be given in each state to the public acts, records and proceedings of every state. However, the clause, as well as conflicts of Laws doctrine has a 'public policy' exception which has prompted legal scholars to advocate and to predict the application of these doctrines in the context of one state's recognition of same-sex marriage. See eg, Robert L Cordell, 'Same-Sex Marriage: the Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause' (1994) 26 Columbia Human Rights Law Review 247; Barbara J Cox, 'Same-sex Marriage and Choice-of-law: If We Marry in Hawaii, Are We Still Married When We Return Home?' (1994) \textit{Wisconsin Law Review} 1033; Deborah M Hanson, 'Will Same-sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States\' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's \textit{Baehr v Lewin}' (1993-4) 32 \textit{University of Louisville Journal of Family Law} 551; Thomas M Keane, 'Aloha Marriage? Constitutional and Choice of Law Arguments for Recognition of Same Sex Marriages' (1995) 47 \textit{Stanford Law Review} 499.

However, the US Congress has recently passed the \textit{Defense of Marriage Act}, DOMA, PL 104-99, 110 Stat 2419 to be codified at 28 USC s1738C, which provides,

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such a relationship.

Additionally, many individual states have passed statutes which declare that same-sex marriages will not be recognised under their state laws, even if validly entered into in another state.
child) divorce is a legal process governed by strict rules. Additionally, one of the traditional grounds for such a dissolution is adultery — non-monogamy, which remains a crime in many states. Adopting marriage as the model for lesbian relationships results in the primacy of the dyadic couple. 'Lesser' relationships, such as 'mere' roommates or 'mere' friends are not really relationships, and are not deserving of Legal respect. Thus, the legal trend toward marriage and domestic partnerships codifies lesbian relationships as mimetic of traditional heterosexual romance which ends in marriage.

This trend is also part of contemporary lesbian literature. The romance novel has become the normal genre for serious lesbian literary fiction in ways that we can barely recognise. At one time, the norm was the coming out novel in which a woman fell in love with another woman as a way of recognising her true identity as a lesbian. As lesbian critic Bonnie Zimmerman noted in her classic *The Safe Sea of Women: Lesbian Fiction 1969-1989*, early lesbian coming out novels conformed to the classic *bildungsroman*, while post-Stonewall and lesbian-feminist novels expanded to include the picaresque, the quest tale, and even the religious motif of exile and revelation. In all coming out novels, however, the major dramatic tension is the protagonist's realisation of her lesbianism.

For readers well past the coming out stage themselves, such narrative structures can become tiresome relatively quickly. But it is difficult not to succumb to a certain nostalgia for coming out novels when compared to the crop of contemporary novels which read as romances. For it does seem as if the coming out novels did contain a wider affirmation — even if it was an innocent and essentialist affirmation — of Lesbian identity and existence. This is true despite the fact that many coming out novels appear to be romances themselves; as Zimmerman notes: 'Most heroes of Lesbian

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20 In the United States, most states have a residency requirement and most require at least a declaration that the marriage is 'irretrievably broken'. All such legal proceedings at a minimum require service of process on the partner and a court appearance. In some localities, judges routinely order the parties to attempt reconciliation or attend mediation.

21 As in Australia, many states in the United States allow so-called no fault divorce. However, in most states in the United States, one party must demonstrate that the marriage is 'irretrievably broken'. One of the easiest methods of demonstrating that fact would be for the party to represent that she had 'fallen in love with someone else'. In those states, such as New York, which still have rather conservative laws, adultery remains one of the available grounds for divorce.

22 Although adultery prosecutions are rare, they do occur. For example, in *Commonwealth v Stowell*, 449 NE2d 357 (Ma 1983), the Massachusetts Supreme Court declined to declare the state adultery statute unconstitutional as an infringement of privacy. Ms Stowell had challenged the statute after being charged with adultery based upon police officers looking in the window of a van parked off a wooded road and seeing the adult occupants engaged in sex. Responding to the officers, the occupants of the van told the police officers they were married but not to each other. Both were arrested for adultery.


24 The issue of marriage is further discussed infra at notes 73-79 and accompanying text.


26 Zimmerman noted that most of the lesbian writers in her study, which ended in 1989, seemed to believe in an essential self or core identity. *Ibid*, 51. Zimmerman then analysed the derivation of this core identity as either innate or chosen, arguing that in literature these 'two models of identity do not necessarily oppose each other'. *Ibid*, 52.
coming out novels end their quests by falling in love and setting up housekeeping with another woman'. 27 If the first myth of Lesbian literature is the creation of the ‘lesbian self’, the second ‘recounts the formation and definition of the lesbian couple’. 28

Yet this coupling is distinct from heterosexual coupling, especially as it is portrayed in heterosexual romances. As Ann Barr Snitow theorises, mass-market romances have as their subject the sexual difference between men and women:

The novels have no plot in the usual sense. All tension and problems arise from the fact that the Harlequin [the Canadian company that is the major publisher of mass market romance books] world is inhabited by two species incapable of communicating with each other, male and female. In this sense these Pollyanna books have their own dream-like truth: our culture produces a pathological experience of sex difference. 29

On the contrary, the lesbian novels about which Zimmerman writes are not based upon the ‘institutionalised inequality’ of gender. 30 Further, and perhaps even more importantly, these novels also participate in what Zimmerman calls the third myth of Lesbian literature — community. Even in a classic novel titled with reference to a couple, June Arnold’s The Cook and the Carpenter, the notion of community is integral. While in heterosexual coupling novels, the woman’s ‘achievement’ of marriage marks her acceptance within mainstream society (a fact so assumed it bears little exposition), in lesbian novels the relationship sets the couple apart from mainstream society, making the existence of an alternative community vital.

Community in these lesbian novels, however, is not subservient to the couple. As Zimmerman notes, the plots of such classic American lesbian novels as Maureen Brady’s Folly (1982) and Ann Allen Shockley’s Say Jesus and Come to Me (1982) ‘revolve around the creation of feminist political networks’. 31 The bar serves as a focus for lesbian community and the setting for multitudes of characters in much of Lee Lynch’s work, including Toothpick House (1983), as well as in Nissa Donnelly’s novel, The Bar Stories (1989). In these novels and many others published in the 1980s, lesbian romance is situated in a larger political context; a context that distinguishes itself from the myths of heterosexual romance. Additionally, there were many novels that portrayed struggles against the acceptance of these myths. For example, in the Medusa Head (1989), by the Canadian writer Mary Meigs, three women characters struggle with preserving their three-way love affair. This struggle against heterosexually defined romance also resulted in a spate of novels of speculative fiction, including

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27 Ibid, 77.
28 Ibid.
30 Zimmerman, The Safe Sea of Women above n25, 110.
31 Ibid, 133.
Les Guérillères, the classic by the French writer Monique Wittig, as well as in novels such as The Wanderground, Retreat, and Paz.

More recently, however, the trend seems to me to be an absolute acceptance of the myths of heterosexual romance, including the myth of isolation. As Snitow noted in her analysis of mass market heterosexual romances, even the ideal of female virginity is without a history, without parental figures to support it or religious convictions to give it a context. Nor can anyone say money is a value; rather it is a given, rarely mentioned. Travel and work, though glamorous, are not really goals for the heroine either ... Of course, the highest good is the couple ... Everyone is young ... There is no context, no society, only surroundings ... The realities of class — workers in dull jobs, poverty, real productive relations, social divisions of Labour — are all, of course, entirely foreign to the world of the Harlequin [novel].

Comparable to Harlequin, the largest publisher of Lesbian fiction in the US, Naiad Press, continues to emphasise novels that proudly proclaim their status as romances and routinely become best-selling lesbian novels. For example, in last year's Seasons of the Heart (1996) by Jackie Calhoun and Courted (1996) by Cecilia Cohen, the 'highest good' is undoubtedly the couple and romantic fulfilment occurs in a social vacuum.

Comparing lesbian romance novels to heterosexual romance novels may yield predictable results, and it is probably unfair and elitist to expect more of Lesbian romances than their heterosexual counterparts. Disturbingly, however, the myths of heterosexual romance are also evident in so-called literary novels. The myths of heterosexual romance may be at their most poignant, in fact, in recent literary novels which might be termed anti-romance, such as Sarah Van Arsdale's Toward Amnesia (1996) and Carol Anshaw's Seven Moves (1996). In both these novels, the protagonist is dealing with the loss of a lover. Readers are meant to understand the loss as devastating because it violates the norms of heterosexual romance. The codification of Life-long monogamy means that anything other than life-long monogamy is a loss; it is lesser and amounts to a failure. Thus, the lesbian protagonist is meant to be sympathetic because the normative aspiration that the relationship should not have ended has been violated. Unfortunately, little else in these novels arouses interest. There is no community. There is no work; both protagonists abandon their jobs without financial qualms in reaction to the loss of the lover. There is no context; only surroundings.

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33 Sally Gearheart's The Wanderground was originally published by Persephone Press in 1978, and after that press' demise was reprinted by Alyson Books in 1984. Donna Young's Retreat was published in 1979. Camarin Grae's Paz was published in 1984. She is better known for her subsequent books such as The Secret in the Bird (1988), and Edgewise (1989).

34 Snitow, 'Mass Market Romance' above n29, 250-2.
In some ways, the mimetic quality of Lesbian relationships in both the legal and literary realms appears harmless, and perhaps even beneficial. Part of our oppression has always been that lesbian relationships were deemed to be not as valuable or meaningful as heterosexual ones. Yet it will only be a partial liberation if our relationships are valued to the extent that they mimic heterosexual traditions and myths.

**Rule Two: Lesbian Relationships Are Apolitical**

Lesbian relationships are increasingly being codified as apolitical. To even consider a lesbian relationship as political has become rather ludicrous, conjuring up stereotypes which in the US would invariably include a pair of indistinguishable women with certain food habits (vegetarianism), footwear (Birkenstocks), hair styles (short), and tones of voice (shrill). As I have elsewhere argued, this mandate of an apolitical appearance is related to capitalism, consumerism, and commodification. As lesbian theorist Robyn Wiegman expresses it, 'products' have become equated with 'political progress', and the notion of 'political' itself becomes not simply impoverished but erased. For example, as Sue O'Sullivan brilliantly argues, the present media images of how 'cool it is to be a dyke' depend upon the retreat of the 'boring old lesbians' who represent not only 'unattractiveness' but 'politics'.

Similarly, American lesbian journalist Alisa Solomon explains that the rejection of Lesbian politics is because 'political analysis has become equated with political correctness — as if hairy legs and flannel shirts had been reduced to an official lesbian-issue uniform and everyone had lost sight of the underlying intentions to free ourselves from objectification and restricted movement'. As Sue O'Sullivan notes, however, to collude with the denunciation of the stereotyped image of the outdated


36 Robyn Wiegman, 'Introduction: Mapping the Lesbian Postmodern', in Laura Doan (ed) The Lesbian Postmodern, 1994,1&3. Weigman’s insight is especially important because she describes lesbian complicity in this equation:

- Music, clothing, vacation cruises, festivals, artwork, publishing — in all these areas, lesbian identity functions as the means for defining the specificities of both production and consumption. While this relation — of Lesbian-made, -sold, and -owned materials — approximates in the 1990s a tamed separatism, it is more than disturbing that the commodification of the lesbian as a category of identity is often what passes, inside and outside the lesbian community, for evidence of political progress. At a recent women's music festival, for instance, the growth of the merchant area — in terms of both the number of products available and their diversity — was lauded by one performer as a sign of growing lesbian political power ... Can we unproblematically herald the consolidation of the lesbian as a category of being when this being is increasingly signified by our saturation in commodity production, both countercultural and, to a limited but growing extent, 'mainstream' as well? Must we, in other words, embrace a liberation contingent on production, marketing, and then vampiristically consuming 'us'?


38 Solomon, 'Dykoromies', above n4, 210, 214.
political lesbian is to reject the 'radical political agenda of feminism, including its analyses of the social, cultural and economic.' It is this trend toward the apoliticalisation of Lesbianism that I here want to discuss in terms of its regulatory force in law and literature.

In the legal realm, the normativity of apoliticism was strikingly evidenced in the famous litigation surrounding Sharon Kowalski. After a car accident which rendered Sharon Kowalski severely disabled, the legal issue became whether her lesbian lover Karen Thompson could be her legal guardian. Originally denied this status in favour of Sharon Kowalski's parents, Thompson continued to litigate and the lesbian and gay community supported her in her struggle. This support became an issue for the court, however, which denied Thompson guardian status even after Sharon Kowalski's parents withdrew their claim. The court’s reasoning was based in part on the fact that Thompson participated in political activities and took Sharon Kowalski to some of these events, all of which were a method of gaining the support of the lesbian and gay community. The trial judge found that such political activities constituted harm to Sharon Kowalski by revealing her sexual orientation, although this was fortunately disregarded on appeal.

The mandate of apoliticism is also pronounced in cases involving children, either custody or adoption, including so-called second parent adoptions. The good lesbian parent has a level of politics that stops at parent-teacher conferences. Any sort of political activity, meaning any activity on behalf of Lesbian or feminist issues, is considered as potentially embarrassing to the child, and thus detrimental and not in the child’s 'best interests'. As Professor Julie Shapiro notes:

Typically, courts are especially critical of openly lesbian ... parents, contrasting them with those who are secretive, 'discreet', or closeted. Thus, a lesbian mother who shields her children from all knowledge of her sexual identity is seen as less problematic than a lesbian mother who is involved in a relationship of which her children are aware. Most problematic of all is a lesbian mother who is open about her lesbianism, so that others in the community as well as her children are aware of her identification.

The reasons why courts find an open lesbian mother more problematic than one who is 'discreet' are directly related to the underlying concerns that motivate the court. If, for example, neither the child nor the surrounding community is aware of the mother's sexual identity, then the mother's identity poses no problem in terms of the child's sexual identity, gender role, or potential exposure to stigma. If the child is aware of the mother's sexual identity, but the surrounding community is not, then at

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39 Ibid, 91. Sullivan notes, however, that just as the strident lesbian politico is a stereotype, so too is the lesbian who is young and 'provocatively attractive and fashionable'. 'Both images are fantastical; neither image corresponds any more to the multilayered realities of Lesbians' lives than any other media caricatures of women do'. Ibid, 92.


41 In re Kowalski, 478 NW2d 790, 795 (Minn App 1991) (discussing unreported trial court’s opinion and disagreeing).

42 The best interest standard governs awards of child custody and visitation in all United States jurisdictions, although it is interpreted with great variety.
least the problem of stigma may be nonexistent. If the child and the community are aware of the mother's identity, then all of the potential problems may be implicated. Thus, the concerns may be seen to arise not from the mother's [sexual] conduct (which at least theoretically could be kept sufficiently private) but from her identification as a lesbian.43

Even more disastrous than participating in political activities so that one's sexual minority status is public is including the children in that participation. As one appellate court declared, in upholding a denial of custody and restricting visitation:

We are not presuming that Wife is an uncaring mother. The environment, however, that she would choose to rear her children in is unhealthy for their growth. She has chosen not to make her sexual preference private but invites acknowledgment and imposes her preference upon her children and her community. The purpose of restricting visitation is to prevent extreme exposure of the situation to the minor children. We are not forbidding Wife from being a homosexual, from having a lesbian relationship, or from attending gay activist or overt homosexual outings. We are restricting her from exposing these elements of her 'alternative life style' to her minor children. We fail to see how these restrictions impose or restrict her equal protection or privacy rights where these restrictions serve the best interest of the child.44

Community activities, especially if the children have knowledge of them or attend them, can result in a lesbian mother being denied custody or visitation.45 Thus, being apolitical is the normative good, rewarded with the label good parent and the legal status of custody.

The proscription against political activity is also inherent in the United States military regulations which allow the discharge of Lesbians on the basis of their revelation of sexual identity.46

The US military's present 'don't ask, don't tell' policy is a liberalisation of previous policies in which

44 SEG v RAG 735 SW2d 164 (Mo App 1987).
45 See also, McKay v Johnson WL 12658 (Minn App 1996) (Mother agreed never again to allow children to accompany her lover to a gay and lesbian pride parade); Hertel v Hertel 908 P2d 946 (Wy 1995) (Appellate court reconsidered trial court's finding that a political event harmed the child, stating 'When the judge asked Jimmie about the gay and lesbian pride parade, there was no indication that Jimmie was upset by the parade. In fact, he stated that he did not know what type of parade it was and that the people wore colorful shirts').
the identity need not have been self-revealed, resulting in accurately named witch-hunts. Nevertheless, a revelation of Lesbianism sufficient to satisfy the 'tell' portion of the policy can consist of a political activity, such as attending a lesbian/gay pride parade. Thus, the Senate Report specifically notes that activities such as 'frequenting gay bars, reading gay literature, or marching in a gay rights parade are non-verbal statements which show a propensity to engage in homosexual acts.' Further, there is of course the argument that the affirmation of Lesbian identity is itself a political act. As Kenneth Karst has observed, 'especially in the context of the central expressive function of the Army's exclusion regulation, coming out is not just an act of self-definition but an act of political expression'.

In literature, disapproval of many lesbian novels is certain if the novel is deemed 'politically correct'. For characters in a relationship to have a political discussion, it would have to survive the pencil of editors who readily proclaim that political discussions are unrealistic and bore the reader. Certainly, there have been many lesbian novels in which the political discussions were boring. For example, in Heather Conrad's News (1987), a character takes the stage to give a speech and then the fictional speech is reproduced for seven pages. The problem, however, is not political writing, but a lapse in good writing — a speech on any topic, no matter how engaging, is usually tedious in a fictional narrative context. In the current climate, if political dialogue or action survives beyond the editorial impulse and appears in serious lesbian fiction, it is often derided or ignored. A case in point in Sarah Schulman's recent novel Rat Bohemia (1995) a novel many people expected the novel to win a Lambda Literary Award, the 'Academy Awards' of the US gay/les/bi/trans book industry, yet although it was nominated, it did not win. In talking with gay/les/bi/trans booksellers, editors, publishers, and writers — the people who serve as judges in the award — the overwhelming objection to the book was that it was 'too political'. Comments from persons I had always considered as serious readers included judgments that the lesbians and their relationships in the book were 'too serious', 'not funny enough', 'really downbeat', and 'not personal enough', always followed by some reference to politics as not really interesting.

As Schulman herself noted in a recent interview, she 'got incredible pressure to change the political content' of her work: agents were telling her 'write formula, throw in a murder, write an erotic thriller; political books are dead; your career is over; let's bring in a book doctor'.

49 As lesbian theorist Marilyn Frye has noted, 'politically correct' has come to be a 'term of negative valuation signifying a praxis of righteous bullying combined with superficial and faddish political thought or program'. Yet as Frye argues, this usage is a reversal of its original intent. Frye also argues that the term is worth reclaiming, for being political is valuable, as is being correct. Marilyn Frye, 'Getting It Right' (1992) 17 Signs 781; reprinted in Marilyn Frye, Willful Virgin: Essays in Feminism, 1993, 13.
50 Heather Conrad, News, 1987, 238-244.
51 Despite too many of these lapses, News is an engaging novel about ordinary women throughout the world, many of whom are employed as clerical workers, who 'take over the world' through their access to corporate and government computers in order to prevent war, famine, and bring economic justice.
52 Interview with Sarah Schulman by Michael Bronski, (Spring 1997) 16 Gay Community News 20.
I am not arguing that lesbian relationships, either in law or literature, are best perceived through a relentlessly political lens. I am also not arguing that all or even most lesbian relationships should be characterised as political. What I am contending, however, is that a normative valuing of Lesbian relationships, in either the legal or literary contexts, based upon the extent to which such lesbian relationships are apolitical is a disturbing trend. It is at least as disturbing as any previous trend toward valuing lesbian relationships to the extent to which such relationships could be characterised as political; although I do think it is worth noting that such a trend was never evident in legal realms and only sporadically evident in literary ones. Thus, the codification of Lesbian relationships as apolitical is not simply explicable as a pendular compensation. In any case, however, this codification of Lesbian relationships imposes a particular norm upon our relationships in which those which are apolitical reap the rewards which can bestowed in the legal and literary realms.

**Rule Three: Lesbian Relationships are Sexually Privatised**

It might seem that the public acknowledgment of the sexual content of Lesbian relationships is at a pinnacle. There are various media representations, including advertising campaigns for products, mainstream movies, television serials, and the ubiquitous talk shows featuring descriptions of all variety of sexual encounters. Nevertheless, a demarcation between good lesbian relationships in which sexuality is privatised and less-than-good lesbian relationships in which sexuality is allowed to be public is evident in both the legal and literary contexts.

In the law, much of the codification comes from cases involving children. Courts often make much of the issue of whether or not the lesbian couple ever ‘demonstrated affection’ in front of the child — a public and therefore wrong expression of sexuality. As Professor Julie Shapiro has demonstrated, while it is ‘an undeniable fact of Life that most parents have sex lives’, when those parents are lesbians ‘conduct which would be deemed irrelevant to parenting abilities if engaged in by two adults of opposite sexes (holding hands, for example) may become determinative’ in custody and visitation decisions.\(^{53}\)

Perhaps the most well known example in the US occurs in the notorious *Bottoms v Bottoms* litigation in which Sharon Bottoms lost custody of her child Tyler to her mother, Pamela Kay Bottoms. In *Bottoms*, the trial judge's brief judgment noted that Sharon Bottoms ‘readily admits her behaviour in open affection shown to April Wade in front of the child’. Examples given were kissing, patting, all of this in presence of the child.\(^{54}\) That kissing and patting in front of a toddler are inappropriately public displays of Lesbian sexuality is apparently accepted by the highest court in the state of Virginia which affirmed the trial judge’s ruling (reversing an intermediate appellate court which had reversed the trial judge) and including in its recitation of relevant facts Bottoms’ testimony

\(^{53}\) Shapiro, ‘Custody and Conduct’, above n43.

\(^{54}\) In *re Doustou*, No CH99JA0517-00 (Cir Ct Of Cty Of Hendrico, Va 7 Sept 1993) (on file with author) (Doustou is the child Tyler’s last name).
that there were signs of affection displayed in front of the child.\textsuperscript{55} Importantly, the legal standard applicable in \textit{Bottoms} was ‘unfitness’: this was not a custody dispute between two parents with an equal presumption of custody, but between a grandmother, a legal third-party, who had to overcome a presumption of custody in the legal parent, Sharon Bottoms, by showing her unfit.\textsuperscript{56} Thus, the public display of affection within a lesbian relationship can support a finding of unfitness to be a parent.

\textit{Bottoms} and similar cases exemplify a codification of an extreme privatisation and expansive definition of sexuality within a lesbian relationship. In \textit{Bottoms}, the public characterisation is accorded to acts which occur within the privacy of a home, but are public because witnessed by a toddler. The sexualisation of displays of affection such as kissing and patting, activities which can span a range from perfunctory to erotic, is assumed, perhaps due to the lesbian context. In \textit{Bottoms}, the enforcement of this norm is the incredibly harsh sanction of Loss of child custody. In other cases, the enforcement of this norm can have criminal consequences.

Although there are varying nomenclatures, in every jurisdiction in the US as well as in many other nations, public sex is a crime. Such public sexual activity is often criminalised under statutes which criminalise ‘lewd’ behaviour,\textsuperscript{57} although there is also criminalisation of the exposure of certain bodily parts, including breasts.\textsuperscript{58} The definition of public is expansive. It can include a private house, if such acts are observable from the outside of the home\textsuperscript{59} or by persons within the home.\textsuperscript{60} For the lesbian and gay community, the prosecution of sex in public lavatories has been especially widespread. For example, the Supreme Court of Nevada upheld convictions for open or gross lewdness and/or indecent or obscene exposure based upon the homosexual activities of several men in a park lavatory, although these activities were observable to the ‘public’ only through surreptitious technological

\textsuperscript{55} \textit{Bottoms v Bottoms}, 457 SE2d 102 (Va 1995) reversing \textit{Bottoms v Bottoms}, 444 SE2d 276 (Va Ct App 1994).


\textsuperscript{57} See eg, \textit{New Jersey Review of Statutes} §2c:14-4 (criminalising public lewdness); \textit{Vermont Statutes} title 13 §2601.

\textsuperscript{58} See eg, \textit{McGuire v State} 489 So2d 729 (Fl 1986) (upholding conviction for indecent exposure of female jogger who did not wear a top on public beach); \textit{State v Turner} 382 NW2d 252 (Minn Ct App 1986) (upholding conviction for violation of city ordinance which prohibited topless sunbathing for females); \textit{Borough of Belmar v Buckley} 453 A2d 910 (NJ App Div 1982) (upholding conviction of borough ordinance which prohibited indecent exposure for sunbathing topless female).

\textsuperscript{59} In \textit{In re Williams} 464 SE2d 816 (Ga 1996), the Georgia Supreme Court accepted an attorney’s argument in an attorney disciplinary proceeding (which could result in suspension of the attorney's license to practice law) that the attorney’s conviction for public indecency was not a crime of moral turpitude and did not bear on his fitness to practice law. Interestingly, the court describes the attorney’s crime thusly: ‘Williams was convicted for conduct which took place in his own apartment, not directly relating to any third persons, other than the two state’s witnesses, neighbors in Williams’ apartment complex, who had observed Williams while they were on the grounds outside Williams’ apartment’.

\textsuperscript{60} See eg, \textit{State v Whitsker} 793 P2d 116 (Ar App 1990) (upholding conviction of ‘public’ lewdness which occurred in living room of man’s house when man exposed his genitals to members of his family); \textit{Greene v State}, 381 SE2d 310 (Ga App1989) (upholding conviction for public indecency based on defendant’s appearing nude in the presence of a teenage female babysitter in the bedroom and bathroom of his own home.); \textit{McGee v State}, 299 SE2d 573 (Ga App 1983) (allowing conviction for masturbation of man in a woman’s apartment).
surveillance. Interestingly, public is interpreted to mean 'the place' in the case of a 'public' lavatory, while 'public' is interpreted to require the observation of persons in the home cases.

The enforcement of the norm of sexual privatisation does not occur exclusively through prohibition. Much of the rhetoric and a few of the successes in the US and global controversies concerning sex statutes rest upon the legal rock (or pebble) of privacy. Such arguments tend to conflate privacy and autonomy, so that the private realm is a quasi-sacred enclave protestable against governmental intervention. While there are various positions concerning the doctrinal efficacy of such arguments, I am here interested in the manner in which privacy based arguments solidify the norm that acceptable sexuality is privatised. Furthermore, sexual matters then become relegated to the private sphere — a sphere beyond the reach of any positive interventions from the state — as feminists have compellingly demonstrated. Such a relegation can result in a privatisation of Lesbian relationships per se, resulting in a restriction of the public sphere to a display of heteronormativity.

This display of heteronormativity can lead not only to a privatisation of our sexual activities, but to a denial of them. As Theresa Bruce argues in her piece, 'Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back Into the Courtroom', the doctrinal development in the US distinguishing homosexual conduct (permissibly regulated under Bowers v Hardwick and homosexual status (perhaps not permissibly regulated, despite the military’s continued ban on homosexuals), has lead to a desexualisation of Lesbians, gay men, and bisexuals. While a common argument in the military context has therefore been that simply because a woman has declared she

61 In Young v State 849 P2d 336 (Nev 1993), The court described the lavatory as follows: the restroom in which the offences occurred is approximately ten feet wide and fifteen feet long, with a door at the entry which is 'locked open' with a deadbolt. Upon entering in an easterly direction, there are two wash basins and two urinals on the south wall. A metal partition separates the basin-urinal area from two commodes. The commodes are on the south wall facing north and are further separated by a partition. Although both stalls are doorless, one cannot see into the stalls from the entrance or the basin/urinal area. The partitions are partial, estimated to be approximately two feet off the ground and extending upward about six feet. The partial partitions allow anyone entering the restroom to see under the partition to determine whether the stalls are occupied.

Thus, although the detectives suspected illegal homosexual activity, their efforts to apprehend the perpetrators were frustrated because 'they could be seen and heard approaching the stalls, thus enabling the individuals to discontinue their activities and elude detection'. The detectives therefore sought an order authorising surreptitious surveillance. It was through a strategically placed camera that the state gained the evidence of 'public' sex. The court rejected the argument that 'public' required being observed by someone other than a person viewing through surreptitious surveillance, as well as to constitutional attacks to the surveillance, and sustained the convictions.


63 See eg, Thornton, Ibid.

64 See eg, Mason, '(Out)Laws', above n62.


is a lesbian this is ‘not compelling evidence that she will engage in same-sex erotic activity while under the jurisdiction of the army, unless you believe that, as a lesbian she is simply incapable of self-control’, Bruce finds this argument ‘intellectually and emotionally dishonest’.

Further, Bruce concludes that such an argument

endangers the health and well-being of individual members of the gay community by dismissing as insignificant the erotic relationships they share with one another, by abdicating the celebration of sexuality for which the gay-rights movement originally stood, by feeding the tradition of secrecy that surrounds homosexuality, and by providing a foundation upon which anti-gay activists can attack same-sex erotic conduct.

Thus, the privitisation of our sexuality can be equivalent to its erasure.

In the non-legal public sphere, the situation seems rather different at first glance and it could be argued that lesbian sex is no longer privatised in the arts as it is in the law. Yet although there is certainly a proliferation of Lesbian literary erotica, there has been a simultaneous desexualisation of so-called literary lesbian fiction as well as other genre fiction. It is generally understood that in order for a book to have mainstream appeal, the lesbian sex must be minimised. For example, in the anti-romance novels previously discussed, the cessation of the relationship means that any sex is recalled, usually diffusely. Even in the romance novels, the sexuality is scant. Thus, in non-erotic lesbian literature, the lesbian sex increasingly occurs ‘off the page’, and in the genre of mystery novels, the very relationship often occurs off the pages. This is not a problem for readers who can fill in relationships or their sexual aspects which do occur off the pages, but if one is not able or does not desire to fill in the details, then the message is that one should not be reading serious lesbian fiction, or even detective novels. Instead, one should be reading erotica.

The process of codification here results in a demarcation between fiction and erotica. In practice, a lesbian author who has written a piece of short fiction will be faced with a choice concerning its publication, and a dilemma. Submitted to a collection of erotica, the piece may be rejected or edited if there is too much non-erotic content. Also at issue is the definition of erotic — an erotic narrative is supposed to provoke sexual feelings — and not just literary meanings — from the reader. In other words, as the submission criteria will request and the jacket copy later attest, the story must be ‘hot’. On the other hand, submitted to a collection of non-erotica, the piece may be rejected or edited if there is too much sexual content, especially because sexual narrative is easily criticised as irrelevant, off-putting, or possibly offensive to potential non-lesbian readers. Obviously,

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68 Ibid, 1173.
69 See supra at text between n33-34.
the judgments about the acceptable quantity of sexual content are subjective — how much is ‘too much’ lesbian sex in a serious lesbian novel? The answer in many mainstream novels seems to be about one-half of a page. If one wants more, the message seems to be that what one wants is erotica.

Thus, the codification of Lesbian sex as privatised results in a demarcation between literature and erotica, with erotica becoming the category in which sexuality is allowed and literature becoming the category in which lesbian sex is privatised beyond the page. In this construction, the norm and its transgression are symbiotic. The norm, however, still occupies the privileged position, for although erotica is often popular, its popularity is transgressive. In other words, the publication of erotica depends upon the privatisation of sexuality in other types of fiction, the types of fiction which are normalised and valorised as serious and meritorious. The types of fiction suitable for a bookshelf in a house in which lesbian parents wanted to retain custody of their child.

**RULE FOUR: LESBIAN RELATIONSHIPS ARE DEFINITIONAL OF LESBIANISM**

Perhaps this is not a rule at all, but the assumption which underlies the other rules. In discussions about lesbianism, in both law and literature, a slippage often occurs so that the discussion turns into one about relationships. My argument is not that lesbian relationships are irrelevant to lesbianism; my argument is simply that the conflation of Lesbianism as a category is disserved by an exclusive focus on lesbian relationships, a subcategory. In other words, it is a mistake to assume that a part adequately represents a whole.

Lesbianism as a category can be legally relevant. For example, in the few jurisdictions which allow a claim based upon sexual orientation discrimination, proving that one is a lesbian or perceived as such, would be a necessary element of one’s claim.\(^\text{70}\) In a less attractive circumstance, a prosecutor might attempt to prove that the complaining witness in a rape is a lesbian to rebut the male defendant’s defence that the victim consented to sex.\(^\text{71}\) As an offensive matter, a person in a custody dispute might want to prove that the other person with a claim to the child is a lesbian, a definite disadvantage.\(^\text{72}\)

The manner in which lesbianism is most often proved is through a relationship. The woman herself testifies not only that she is a lesbian, but that she has a lesbian sexual relationship. Or, better yet, another woman testifies that she has had a lesbian relationship — meaning again a sexual one — with the woman in question. In some cases, the absence of a heterosexual relationship can render a woman a lesbian by default because the existence of some sexual relationship is assumed.

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\(^{70}\) Several states in the United States have statutes which prohibit discrimination based upon sexual orientations, including Wisconsin (the first state in 1982), Massachusetts, Hawai‘i, Connecticut, California, Massachusetts, and New Jersey. Additionally, there are more than 100 municipal ordinances.

\(^{71}\) The admissibility of such evidence is subject to a state’s rape shield statute, which would generally prohibit testimony about a victim’s prior sexual history. Compare *People v Kembrowski* 559 NE2d 247 (Ill App 1990) (court reversed admission of victim’s testimony that she was a lesbian based upon rape shield statute); *State v Williams* 487 NE2d 560 (Oh 1986) (court allowed defendant to produce evidence of victim’s reputation in the community as a prostitute because she testified on direct examination that she never consented to sex with men because she was a lesbian).

\(^{72}\) See generally Shapiro, ‘Custody and Conduct’, above n43.
The view that relationships are definitional of Lesbianism is also evident in legal reform movements. With marriage taking the front seat of the legal reform movement in the US, it is almost as if the 'right to marry' becomes definitional of civil rights. According to much current rhetoric, the right to marry will guarantee other rights, include equality in employment and child custody. This is considered logical given the conclusion that it is our relationships that are the basis of the discrimination against us. Yet such an articulation obscures the fact that it is not simply our relationships but often our sexual practices, either within or without relationships, that are relevant. Much of the anti-gay propaganda in the US centres upon 'homosexual' sexual practices. Additionally, it is often — although not always, of course — true that if women's relationships are considered asexual, a level of tolerance might accrue.

Furthermore, the fight for the right to marry seeks to codify certain lesbian relationships as definitional of good lesbianism, while relegating other relationships to a lesser status. While it is true that marriage would not be compulsory and one is always 'free' not to marry, codification does not always operate through compulsory measures. The method of enforcing the norm of a certain relationship will be an award of benefits to those who comply and a concomitant disadvantage to those who do not comply. Interestingly, it is the availability of these benefits and costs at the present time that make the argument for marriage compelling; I do not expect that they will evaporate as normative channellers once the 'right' is available. In other words, the availability of marriage will channel lesbian relationships into those deserving of Legal protection and those not deserving. While the arguments on this issue have been well-developed and cannot be fully rehearsed in this limited space, I would note that the fact that marital status can result in discrimination is well

74 While most of the anti-gay rhetoric and representation is devoted to gay male sexuality, lesbian sexuality is easily assimilated into the model of 'disease, anarchy, excess, deceit' and satanism. See Didi Herman, The Anti-Gay Agenda: Orthodox Vision and the Christian Right, 1997,108-9.
75 See generally, Lillian Faderman, Surpassing the Love of Men, 1980 (an historical analysis of the toleration of women's 'romantic' friendships and the demise of that toleration with the sexualisation of women's relationships).
recognised; some jurisdictions in the US prohibit marital status discrimination.\textsuperscript{77} Interestingly, an ordinance has been proposed in San Francisco to update the city's non-discrimination policy to not only include marital status but also to prohibit domestic partnership discrimination.\textsuperscript{78} A landlord who would refuse to rent to lesbian couple because they are unmarried or not in a registered domestic partnership (either because the landlord believes in the sanctity of marriage or simply prefers to rent to a stable couple) does not seem to me an improvement over a landlord who would refuse to rent to the women because they are lesbians.\textsuperscript{79}

In literature, also, lesbian relationships become constitutive of Lesbian fiction. While there are many recent novels which constitute examples, I would like to indulge in an anecdote from my own experience. It concerns my own work, a novel, entitled \textit{Another Mother}, published by a mainstream publisher in 1995. The main character is Angie Evans, a high profile lesbian attorney who represents lesbian mothers, first in custody cases and eventually in a few murder prosecutions. Part of what I wanted to write about in the novel was work, the costs and rewards and consuming nature of political work. Part of what I wanted to write about was also class, for Angie comes from an impoverished background but is now a successful attorney. Part of what I wanted to write about was mothering. Angie's clients reverberate with ties to their children and their mothers, which is refracted through Angie's own relationship with her adopted daughter and difficult mother.

Angie is not a sympathetic character because she has an underdeveloped capacity for coming to terms with her own history. Given her unsympathetic role, it was necessary for her to have a foil — both in terms of conventions of the novel as a genre and to avoid certain conventions of Lesbian stereotypes. That foil is her lover, a character named Rachel.

\textsuperscript{77} The genesis of such statutes against marital status discrimination, however, is not based upon preferences given to married persons, although married men were routinely awarded higher wages in the United States under the so-called 'family wage' custom. Instead, marital status discrimination was necessitated by the routine and widespread discrimination against married women. See generally, Deborah Rhode, \textit{Justice and Gender}, 1989, 24-8; Reva B. Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930", (1994) 82 \textit{Georgetown Law Journal} 2127.

\textsuperscript{78} As reported by \textit{The San Francisco Chronicle}, 15 April 1997, A15, at the weekly supervisors meeting the day before Board of Supervisor Leslie Katz introduced ‘Measures updating the city's human rights ordinance to add anti-discrimination language against people based on their marital status and their domestic partner status. The proposal also would ban discrimination based on the perception of someone’s status’.

\textsuperscript{79} This example is derived from litigation in the United States concerning marital status discrimination against unmarried heterosexual cohabitants by a landlord who raises a religious exemption. See \textit{Swanner v Anchorage Equal Rights Comm'n}, 874 P2d 274 (Alaska) (per curiam), cert denied, 115 S. Ct 460 (1994); \textit{Smith v Fair Employment and Housing Comm'n}, 30 Cal Rptr 2d 395 (Ct App), review granted and opinion superseded by 880 P2d 111 (Cal 1994); \textit{Donahue v Fair Employment and Housing Comm'n}, 2 Cal Rptr 2d 32 (Ct App 1991), review granted and opinion superseded by 825 P2d 766 (Cal 1992), review dismissed, 859 P2d 671 (Cal 1993); \textit{Attorney General v Desilet}, 636 NE2d 233 (Mass 1994); \textit{State by Cooper v French}, 460 NW2d 2 (Minn 1990).

The anecdote I wish to relate is about Rachel. The following conversation occurs while the novel is still a manuscript with a lesbian who has some power to insure that the manuscript becomes a published novel.

'Rachel needs development', she says.

'How so?'

'We need to know more about her. How she became a lesbian. Her background. She needs her own chapters.'

'But she's a minor character.'

'She can't be a minor character.'

'Can't?' (I resist the urge to say it's my book I can make her anything I want).

'Of course not. She's the protagonist's lover.'

'Well, yes. But the novel isn't about them.'

'Of course it is. What you don't understand is that this is a serious lesbian novel and serious lesbian novels are about relationships.'

'They don't have to be.

'Of course they do. What else would they be about?'

As it turns out, I didn't add much about Rachel or give her chapters or explain why she became a lesbian. But when the book was finally published, the reviews most often focused on — the relationship between Rachel and Angie. The reviews gave only a passing mention to Angie's work and few even mentioned her impoverished background. Instead, the book was interpreted as the saga of the relationship between Angie and Rachel. Given this interpretation, a few reviews opined that the book was weak — which seems to me the correct assessment if one has mistaken subplot for plot. More disturbingly, however, many reviews thought the book was a compelling story about a relationship in trouble. And so it seems to me now that the lesbian who advised me that 'serious lesbian novels are about relationships', was prophetic. As I writer, I overestimated my ability to subvert strictures and control the manner in which my work would be interpreted.

There are some who might argue that not only lesbian novels are about relationships, but that all women's novels are about relationships. There are even some who might argue that not only are all women's novels about relationships, but that all novels are about relationships. Certainly this is true if we abandon our romantic dyadic definition of relationships and include all intra-human interactions, as well as extra-human ways of relating. We must read lesbian novels and other fiction allowing for these broader interpretations. Recalling lesbian literary critic Bonnie Zimmerman, we must recall that the couple was only one of the several myths of Lesbian literature — it should not be reduced

80 Zimmerman, The Safe Sea of Women, above n25.
to the singular one. Further, we must not be limited to the previous myths of Lesbian novels. Although as British lesbian writer Jeanette Winterson notes, 'these are hard times' for experimental writing of any kind,81 as writers and readers — and as lesbians — allowing our literature and ourselves to be defined by romantic relationships is to restrict the possibilities of what we could be.

**CONCLUDING THOUGHTS**

I have argued that there is a legal/literary trend toward codification of Lesbianism as meaning lesbian relationships, and toward lesbian relationships as being most properly mimetic of heterosexual romantic traditions, apolitical, and sexually privatised. While normative rules are not an inherent evil, it seems to me that this particular process of codification narrows our lesbian choices. This narrowing also seems to me to occur at a point in history at which we have an opportunity to expand our experimentation and multiplicitous attempts to construct lesbianism and our relationships. At its most timid, my claim is that we can afford to be more creative than we are presently being in law and in literature. At its most bold, my claim is that we cannot afford to be otherwise.

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