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## Lesbian Jurisprudence?

Ruthann Robson\*

The inquiry is lesbian jurisprudence. Does it exist? Can it exist? How is it different from recent "attempts" at feminist jurisprudence,<sup>1</sup> if at all? How is it different from jurisprudential attempts to ground homosexuality,<sup>2</sup> if at all? And if lesbian jurisprudence exists, what are its characteristics, its concerns, its methodologies? And if lesbian jurisprudence is being created, what should be its characteristics, its concerns, its methodologies?

This article poses the question of lesbian jurisprudence. In order to understand the complexity of the question, this article first offers some preliminary definitions for lesbianism as well as a brief explication of jurisprudence. Combining lesbian and jurisprudence into a question, this article limits the question by rejecting two possible answers: that lesbian jurisprudence is feminist jurisprudence and that lesbian jurisprudence is a paradigm capable of universal application. The article then seeks to give present imaginative content to the question by drawing upon mythical metaphors from our collective past and by surveying science fiction conceptions of the future. The mythical metaphors serve a purpose similar to that served by the common embodiment of justice as a woman blindfolded and holding a scale. The futuristic conceptions serve a purpose similar to that served by visionary texts such as Plato's *The Republic*. After engaging in such imaginings, the ar-

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This article is part of a longer work of both a theoretical and practical nature entitled *Lesbian Law* to be published by Firebrand Books. This article has benefited greatly from my conversations with Sarah Valentine, and from conversations with the participants of a seminar in Feminist Legal Theory at Boalt Hall during the autumn of 1989, especially Lisa Orsaba, Professor Reva Siegel, and Margot Young.

1. Feminist jurisprudence has defined itself as being an "attempt"; a moving toward. See, e.g., Catherine MacKinnon, *Toward a Feminist Theory of the State* (1989); Ann Scales, *Towards a Feminist Jurisprudence*, 56 *Ind. L.J.* 375 (1981).

2. See, e.g., Richard Mohr, *Gays/Justice: A Study of Ethics, Society, and Law* (1988).

ticle concludes by posing questions about the bases upon which any imagined lesbian jurisprudence might be realized.

### Some Preliminary Definitions

#### *A lesbian is a lesbian*

A lesbian is a woman "who says she is."<sup>3</sup> Lesbian works have struggled with defining lesbian, at times being creative<sup>4</sup> and at times explicitly refusing to engage in definitive acts.<sup>5</sup> Nonlesbian works have also had difficulty defining the term.<sup>6</sup> The derivation of the word, from a Greek island once called Lesbos, but now named Mytilene, provides little insight.<sup>7</sup>

An often used synonym is woman-identified-woman, used especially when the term lesbian sounds too harsh, or too graphic, or too sexual.<sup>8</sup> Yet while lesbian certainly encompasses the sexual—and that sexual element should not be denied<sup>9</sup>—a lesbian may

3. Cheryl Clarke, *Lesbianism: An Act of Resistance*, in *This Bridge Called My Back: Writings by Radical Women of Color 128* (Cherrie Moraga & Gloria Anzaldúa eds. 1983).

4. See, e.g., Nicole Brossard, *The Aerial Letter* (1988) (translation by Marlene Wildeman):

The *lesbian* is a *woman* ablaze who is reborn from the essential of what she knows (she) is. . . . The *lesbian* is an initiator, an instigator. . . . The *lesbian* is a threatening *reality* for reality. She is the impossible reality realized which reincarnates all *fiction*, chanting and enchanting what we are or would like to be.

*Id.* at 121.

5. See, e.g., Sarah Hoagland, *Lesbian Ethics: Toward New Value* (1988). "In naming this work 'lesbian,' I invoke a lesbian context. And for this reason I choose not to define the term. To define 'lesbian' is, in my opinion, to succumb to a context of heterosexualism." *Id.* at 8.

6. See Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory 155-59* (1983) (discussing various dictionary definitions for 'lesbian').

7. The use of the word 'lesbian' to name us is a quadrifold evasion, a laminated euphemism. To name us, one goes by way of a reference to the Island of Lesbos, which in turn is an indirect reference to the poet Sappho (who used to live there, they say), which in turn is an indirect reference to what fragments of her poetry have survived a few millennia of patriarchy, and this in turn (if we have not lost you by now) is a prophylactic avoidance of direct mention of the sort of creature who would write such poems or to whom such poems would be written . . . assuming you happen to know what is in those poems written in a dialect of Greek over two thousand five hundred years ago on a small island somewhere in the wine dark Aegean Sea.

*Id.* at 160 (ellipses in original).

8. The term "radical feminist" has also been employed as a less harsh term for lesbian—which is not to say that all lesbians have identified themselves as radical feminists or that all radical feminists are lesbians. However, as Joan Nestle observes, "I realized I was saying *radical feminist* when I could not say *Lesbian*." Joan Nestle, *A Restricted Country 107* (1987).

9. It is tempting to some Lesbians to see themselves as the clean sex deviant, to disassociate themselves from public sexual activity, multiple partners and intergenerational sex. While this may be the choice for

have sexual relationships not only with other lesbians, but also may engage in sexual encounters with men, either for economic or erotic reasons,<sup>10</sup> or a lesbian may be celibate.<sup>11</sup> A definition of lesbian that relies on sexual activities is a partial and external one. Whether or not one believes that lesbian sexuality is innate or chosen, or whether one ascribes to some combination of the nature/nurture debate,<sup>12</sup> the external referent of sexual activities is unsatisfactory. Defining lesbianism in terms of sexual feelings—rather than activities—may be less problematic in some senses although incurring more difficulty by third parties in identifying other lesbians, especially of present lesbians claiming their own history and continuity with lesbians whose sexual ‘feelings’ may be less than ascertainable. Further, the focus on practices generates an empirical problem when lesbians seek to identify predecessors or lesbians who have lived their lives along the lesbian continuum.<sup>13</sup>

Thus defining lesbianism or lesbians in terms of sexual practices is simplistic. A notion of lesbian consciousness is more versatile and complete; it is a notion of *lesbianism*. As one lesbian thinker notes:

To me, lesbianism encompasses three clear areas: sex, culture

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some of us, it is not the reality of many others, not now and not in the past.

*Id.* at 123.

10. See, e.g., Jan Clausen, *My Interesting Condition*, 7 *Out/Look* 11 (1990); D.E. Langlois, *Dick Money*, 37 *Sinister Wisdom* 77 (1989).

11. See, e.g., Judith Beckett, *Recollections of a Sexual Life, Revelations of a Celibate Time*, 3 *Lesbian Ethics* 23 (1988).

12. For an excellent discussion about essentialist and social constructionist theories of lesbianism (and male homosexuality) and the political implications, see Sarah Franklin & Jackie Stacey, *Dyke-Tactics for Difficult Times*, in *Out the Other Side: Contemporary Lesbian Writing 220* (Christian McEwen & Sue O'Sullivan eds. 1988). See also Susan Cavin, *Lesbian Origins* (1985) (arguing that extreme separation characterizes human social origins and that lesbianism occurs within the perimeters of female community); Celia Kitzinger, *The Social Construction of Lesbianism* vii (1987) (arguing that “the shift from ‘pathological’ to ‘gay affirmative’ models merely substitutes one depoliticized construction of the lesbian with another, while continuing to undermine systematically radical feminist theories of lesbianism.”).

13. The ‘lesbian continuum’ is an idea developed by Adrienne Rich in her classic essay, *Compulsory Heterosexuality and Lesbian Existence*, 5 *Signs* 631 (1980), reprinted in Adrienne Rich, Blood, Bread, and Poetry: Selected Prose 1979-1985, at 23 (1986). For a critique and discussion of the possible ahistoricism of the lesbian continuum concept see Ann Ferguson, Jacquelyn Zita & Kathryn Pyne Addelson, *On “Compulsory Heterosexuality and Lesbian Existence”*: *Defining the Issues*, 7 *Signs* 158 (1981). For an enlightening and class-based discussion of the problems of identifying lesbians in prior historical periods, see Miriam Everard, *Lesbian History: A History of Change and Disparity*, 12 *J. Homosexuality* 123 (1986); Lillian Faderman, *A Response to Miriam Everard's Lesbian History: A History of Change and Disparity*, 15 *J. Homosexuality* 137 (1988).

and politics (that is, of course, just about everything). To be a lesbian is to have a world view. . . . We all know that being a lesbian means breaking the rules. As soon as a specific group universally breaks a rule, by its very existence, that group needs a theory.<sup>14</sup>

Thus, a lesbian is one who subscribes to lesbianism as theory; lesbianism as consciousness. While certainly circular: a lesbian is one who participates in lesbian consciousness; it is no less circular than defining lesbians as women who engage in lesbian practices. The participation in lesbian consciousness contributes to lesbian practices (sexual and otherwise); the participation in lesbian practices (sexual and otherwise) contributes to lesbian consciousness. They are not coextensive, but in many ways symbiotic; although not necessarily dependent on each other. This text does not mean to diminish practices (sexual and otherwise), and is directed to and produced by both consciousness and practices.

Lesbian consciousness, however, needs to be claimed as both an ontological and epistemological reality. As lesbian theorist Marilyn Frye aptly describes it:

The event of becoming a lesbian is a reorientation of attention in a kind of ontological conversion. It is characterized by a feeling of a world dissolving, and by a feeling of disengagement and re-engagement of one's power as perceiver. That such conversion happens signals its possibility to others.

Heterosexuality for women is not simply a matter of sexual preference, any more than lesbianism is. It is a matter of orientation of attention, as is lesbianism, in a metaphysical context controlled by neither heterosexual nor lesbian women. Attention is a kind of passion. When one's attention is on something, one is present in a particular way with respect to that thing. The presence is, among other things, an element of erotic presence. The orientation of one's attention is also what fixes and directs the application of one's physical and emotional work.<sup>15</sup>

Thus, while the phrase "feminism is the theory, lesbianism is the practice,"<sup>16</sup> has a certain resonance for feminist theory, it minimizes lesbianism as a theory. Lesbianism as a theory has been and is being developed diversely by lesbians. It is not merely about sexual orientation; thus, it is not coextensive with homosexual theories. It is not merely about applied feminism; thus, it is not coextensive with feminist theory. Lesbianism takes as its content

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14. Elana Dykewomon, *Lesbian Theory and Social Organization: The Knots of Process*, 37 *Sinister Wisdom* 29, 30 (1989).

15. Frye, *supra* note 6, at 171-72.

16. This phrase is attributed to Ti-Grace Atkinson, see Anne Koedt, *Lesbianism and Feminism*, in *Radical Feminism* 246 (Anne Koedt, Ellen Levine & Anita Rapone eds. 1973), but has been often repeated.

lesbian practices, sexual and otherwise; takes culture, politics; "just about everything." It has even begun to take as its content jurisprudence.<sup>17</sup>

*Jurisprudence is legal theory*

Jurisprudence, as defined by Black's Law Dictionary (which does not contain a definition for "lesbian") is "[t]he philosophy of law, or the science which treats of the principles of positive law and legal relations."<sup>18</sup> On either side of the disjunctive operating "or," philosophy and science vie for primacy in the field of law, engendering other conflicts such as the relevance of sociological insights to legal studies. Such battles and shifting ideas have produced various schools of jurisprudence such as positivism, legal realism, and critical legal studies. The definition of jurisprudence operative in this text has been stated most aptly by feminist legal theorist Catherine MacKinnon: jurisprudence is "a theory of the substance of law, its relation to society and the relationship between the two."<sup>19</sup> While MacKinnon states uncatagorically that feminism lacks a jurisprudence,<sup>20</sup> her work, as well as the work of other feminist legal scholars<sup>21</sup> certainly reveals that what has been named jurisprudence is actually patriarchal jurisprudence. Thus, in this text, the term jurisprudence will not appear unmodified:<sup>22</sup> patriarchal jurisprudence will be specifically named as such, thus clearing space for other types of jurisprudence, including lesbian jurisprudence.

*Lesbian Jurisprudence?*

Lesbian jurisprudence may be an anomaly, but it is not an oxymoron. The parameters of its definition are those of invention.<sup>23</sup> What I offer here is a particular vision, admittedly personal, bound by both time and culture, bound by idiosyncracies of experience

17. Patricia Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 Berk. Women's L.J. 191 (1989).

18. Black's Law Dictionary 767 (5th ed. 1979).

19. MacKinnon, *supra* note 1, at 159. The coherence or compatibility of MacKinnon's definition of jurisprudence with that of the various schools is not relevant to this text for reasons discussed below.

20. *Id.*

21. See, e.g., MacKinnon, *supra* note 1; Scales, *supra* note 1; Cain, *supra* note 17; Wishnik, *infra* note 26.

22. This 'move' is the converse of what MacKinnon does for the term feminism when she claims feminism as radical feminism to be known in her work henceforth simply as feminism. See Catherine MacKinnon, *Feminism Unmodified* 60, 137 (1987); MacKinnon, *Towards a Feminist Theory of the State* 117 (1989).

23. Monique Wittig, *Les Guerilles* 89 (1971) ("Make an effort to remember. Or, failing that, invent.").

and education. What I offer here is expectant of refinement and revision, subject to critique and abandonment. What I offer here is the invitation to discussion, to invention, to the possibilities of lesbian jurisprudence. What I offer here is not an answer, but the posing of a question.

### What Lesbian Jurisprudence Is Not

One of the most common methodologies of describing new phenomenon, both in the material and ideal realms, is to distinguish the new phenomenon from other familiar phenomenon. With this methodology in mind, there are two initial and related distinctions I would like to claim as necessary for even posing the question of lesbian jurisprudence. First, lesbian jurisprudence is not essentially a critique of feminist jurisprudence or feminist legal theory. Second, lesbian jurisprudence is not paradigmatic.

#### *Lesbian Jurisprudence Is Not a Critique of Feminist Jurisprudence*

Many lesbians are feminists; many are not. Many feminists are lesbians; many are not. Lesbian theory and feminist theory overlap, but they are not coextensive and are not reducible to each other. Lesbianism is not a "branch" of feminism; likewise, lesbian jurisprudence cannot be subsumed into feminist jurisprudence.

Feminist jurisprudence certainly has failed to incorporate lesbian visions, and to that extent it is heterosexist.<sup>24</sup> To the extent that feminist jurisprudence seeks to be a critique of patriarchal jurisprudence from the point of view of *all women*, any woman—whether she is lesbian, black, native, disabled, older, Jewish, fat, bisexual, Asian, African, Hispanic, poor, or in any way "other" than the (probably false) stereotype of the feminist legal philosopher as white, middle-class, heterosexual, privileged—who is ignored by feminist jurisprudence delegitimizes feminism's claim.<sup>25</sup> This delegitimatization of feminism on the basis of incompleteness is especially offensive in light of feminist jurisprudence's critique of patriarchal jurisprudence: that patriarchal jurisprudence is not legitimate because it excludes women.

The claim of feminist jurisprudence that 'jurisprudence' is actually patriarchal jurisprudence and therefore not legitimate as universal jurisprudence is a valid one. The feminist claim, how-

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24. Cain, *supra* note 17, at 197-205.

25. For a discussion of how exclusion of various women delegitimizes feminism's claims, see Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988).

ever, renders feminist jurisprudence as essentially a critique of patriarchal jurisprudence. While some feminists are in the process of imagining a feminist jurisprudence that is not a critique,<sup>26</sup> much of feminist jurisprudence is self conceptualized as a critique.

As I am conceptualizing lesbian jurisprudence, it is not intended as a critique of feminist jurisprudence—it is not a critique of the critique. It is not, as I envision it, a request to be included in the request to be included. Such an inclusionary request would be at odds with an honorable tradition within lesbianism; that of lesbian separatism. Lesbian separatism evinces not only a lack of desire to be included, but also a self conscious self-exclusion.<sup>27</sup> Separatism is not coextensive with lesbianism, but like other strands of lesbianism, it must be honored in any lesbian jurisprudence.<sup>28</sup> Further, lesbianism, whether separatist or not, is an “orientation of attention”:<sup>29</sup> it is an attention toward women and not toward men. Thus, not only is lesbian jurisprudence not essentially a critique of feminist jurisprudence, but its basic concern is different. “The terrain of feminism” is “relations between the sexes.”<sup>30</sup> Feminist jurisprudence is most often concerned with women vis-a-vis men: the difference/sameness debates on equality issues evince this preoccupation.<sup>31</sup> The essential exercise is comparing women with men; the essential goal is equality with men.

As I conceptualize lesbian jurisprudence, it has a different focus. If lesbians are women-identified-women, then measurements are not relative to men; men’s measurements are in some sense irrelevant.

26. See, e.g., Heather Wishnik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 Berk. Women’s L.J. 64 (1985).

27. See Anna Lee, *For the Love of Separatism*, 3 Lesbian Ethics 54 (1988) (“Separatism is focusing on each other as lesbians and minimizing the energy given to males. As a separatist, when I focus on lesbians, I include *all* lesbians who choose to focus on lesbians. The previous two statements define the separatist ideal.”). See also *For Lesbians Only: A Separatist Anthology* (Sarah Hoagland & Julia Penelope eds. 1988).

28. Thus, like feminist jurisprudence, lesbian jurisprudence is capable of being less than legitimate if it does not include all lesbians, lesbian separatists and lesbian nonseparatists are among many groups, in addition to ethnic, cultural, age, physical, and other differences.

29. Frye, *supra* note 6, at 172.

30. Ellen DuBois, Mary Dunlap, Carol Gilligan, Catherine MacKinnon & Carrie Menkel-Meadow, *Feminist Discourse, Moral Values and the Law — A Conversation*, 34 Buff. L. Rev. 11, 20 (1985) (remark of Catherine MacKinnon).

31. See, e.g., Ruth Colker, *The Anti-Subordination Principle*, 3 Wis. Women’s L.J. 59 (1987); Kathleen Lahey, *Feminist Theories of (In)Equality*, 3 Wis. Women’s L.J. 5 (1987); Christine Littleton, *Equality Across Difference: A Place for Rights Discourse?*, 3 Wis. Women’s L.J. 189 (1987).



A concrete example might demonstrate the distinctions in possible jurisprudential approaches. Suppose a university has several bowling teams: an all-male team, a mixed-gender team, a women's team, and a lesbian team. Each team is eligible for funding from the university. Under a patriarchal jurisprudential analysis, notions such as "equal protection" and laws such as Title X would control. Each team that is similarly situated must be treated the same. Events which will allow teams not to be similarly situated (more intercollegiate events scheduled for mixed-gender teams, for example) skew the equal protection analysis, as many feminists have noticed. Under a feminist analysis, the issue becomes whether the all-women team has resources equal to the male bowling team: access to resources "tops out" at the male allocation. If there are no male bowling teams, feminist jurisprudence is also capable of mounting arguments that some other male sport (men's football?) be taken as the measure, although in a patriarchal jurisprudential legal system arguments of comparable worth have not been that successful. It is difficult to imagine a court holding that the women's bowling team must have resources equal to the university male football team. Further, to the extent that the lesbian bowling team's efforts to reconceptualize itself in patriarchal terms are successful, the lesbian bowling team might have to alter itself drastically in order to obtain the requisite funding.<sup>32</sup>

Considering the lesbian bowling team's request for resources in a lesbian jurisprudential system might look quite different:<sup>33</sup> men's athletics, whether bowling or football, would not be the zenith. Even assuming scarce and limited resources—an approach that lesbian jurisprudence must reexamine<sup>34</sup>—the issue might be conceptualized as whether or not the lesbian team had enough re-

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32. See Julia Penelope, *The Mystery of Lesbians*, in *For Lesbians Only: A Separatist Anthology* 506, 523-24 (Sarah Hoagland & Julia Penelope eds. 1988) (discussing the rules excluding women athletes in the now-defunct women's pro-basketball league from going to "women's bars" and treatment of women athletes in Olympic games; concluding that "[s]ome women have made gains in the world of athletics, but they must, in exchange, allow men to make whatever use of them will immediately benefit heteropatriarchal society and perpetuate its underlying assumptions.").

33. The issue of the applicability of lesbian jurisprudence to the relationship between a lesbian bowling team and a university needs further exploration. See *infra* note 91 and accompanying text.

34. See Murray Bookchin, *Post Scarcity Anarchism* (1971) (arguing that scarcity is more than a condition of scarce resources, but is also a function of social relations, and that society is on the "threshold" of producing a post-scarcity potential of its technology which would insure a condition of post-scarcity if accompanied by an appropriate revolution); see also Nett Hart, *Spirited Lesbians: Lesbian Desire as Social Action* 109 (1989) (arguing that scarcity is not a reality in the lesbian way of living "without measure").

sources to achieve its goals and pursue its interests. The issue might not be one of balancing the needs of the lesbian bowling team against the awards to other bowling teams. The issue could simply be determining the needs of the lesbian bowling team. Such determinations necessitate alternative jurisprudences; jurisprudences which are not hierarchical and not hegemonic; systems which do not take men as the measure of all things or as the measurer of all things.

Thus lesbian jurisprudence is not merely a subset of feminist jurisprudence or of the feminist critique of patriarchal jurisprudence. Lesbian jurisprudence is a different way of philosophizing: it has different premises and desires different results.

### *Lesbian Jurisprudence Is Not a Paradigm*

Lesbian jurisprudence does not have as its focus an inclusion in either feminist or patriarchal jurisprudence. Concomitantly, lesbian jurisprudence does not seek to encompass or transcend feminist or patriarchal jurisprudence. As I am proposing lesbian jurisprudence, it is not an overarching Hegelian system which all of jurisprudential theory will adopt as its ultimate referent. Lesbian jurisprudence is not a paradigm.<sup>35</sup>

Any pretense to paradigmatic status on the part of lesbian jurisprudence would be as problematic as the claim to paradigmatic status on the part of patriarchal jurisprudence.<sup>36</sup> Positing one partial view as paradigmatic to replace another partial view solves few problems. Further, the entire concept of paradigmatic thinking is patriarchal. A theory which aspires to be a paradigm, and thus explicative of all else, is a theory which is necessarily hierarchical, hegemonic and hubristic.<sup>37</sup>

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35. The term paradigm here is used as Thomas Kuhn employed it in his influential book *The Structure of Scientific Revolutions* (1962). Briefly, Kuhn posited that scientific revolutions were paradigmatic shifts occurring when a scientific theory failed to explain newly discovered phenomenon, inducing a period of crisis and resulting in a new theory that explained the phenomenon. One of the many examples Kuhn used from the history of science was the shift from the Copernican view of the universe (earth as center) to the Galilean view (sun as center). Although Kuhn exclusively considers "physical science," *id.* at xi, his theories have been applied to other sciences, including the social sciences. See, e.g., Elizabeth Janeway, *Who Is Sylvia? On the Loss of Sexual Paradigms*, 5 *Signs* 573 (1980) (arguing that women need a new sexual paradigm "Sylvia" to replace the no longer useful madonna/temptress—Mary/Eve sexual paradigm).

36. Admittedly, lesbians do not comprise the whole of the world's human population. Similarly, patriarchs, especially if defined as white, heterosexual, middle-class, anglo males, do not comprise the whole of the world's human population. Of course, 'patriarchs' need not be white, heterosexual, anglo, middle-class, or even male.

37. Given this observation, it is interesting to consider in what ways feminist

As I am imagining lesbian jurisprudence, it does not aspire to paradigmatic status. It does not seek to explain all legal phenomenon; it does not seek to limit, encompass or define 'jurisprudence'. Instead, I would see lesbian jurisprudence as part of an organic whole, co-existing with other jurisprudences: feminist jurisprudence, African-American jurisprudence, disability jurisprudence and all other types of jurisprudential approaches, including patriarchal jurisprudence shorn of its pretense to paradigmatic status. Thus, the process of jurisprudence would not be the process of the 'science' of law charting inexorable historical shifts from one paradigm to another. Jurisprudential theories would conflict in certain cases; alliances and coalescing concepts would be fluid. It might even be messy.

The difficulty of imagining organic relationships between various jurisprudences without reference to an ultimate paradigm to resolve conflicts demonstrates the inculcation of patriarchal jurisprudence. How would conflicts be resolved? Who would resolve them? How would/should resolutions be enforced? Such questions plague.

Perhaps by an example of a set of organic relationships operating within (some) patriarchal jurisprudential principles, we can derive a clue of how lesbian jurisprudence could operate as nonparadigmatic. Maria Costaro-Stein is a jurisprudential friend of mine. She is sixty-two years-old, has a speech impediment, and environmental allergies, especially to perfume and cigarette smoke. She identifies as a lesbian, although she is celibate. Her former lesbian lovers include a prostitute, a literature professor, and a silversmith. She was married for three years when she was thirty-four to thirty-seven years-old. She gave birth to two children, one male and one female, one before her marriage and one after. One of her children identifies racially as Afro-American; the other as white. Maria's own mother was Catholic-Cuban; her father was unknown; her step-father, with whom she lived from birth until age thirteen, was Russian-Jewish. Maria worked as a secretary in a legal services office for twenty years; she preferred service work to impact work. She now lives in a medium-size town in Arizona and works on a committee to preserve aboriginal land in Australia. Maria does tarot cards at least once a day. Maria is coach of the local university's lesbian bowling team.

Maria does not view the world with reference to any single paradigmatic scheme. She is a principled person. She responds to

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jurisprudence has adopted the patriarchal paradigmatic method (trap?) by positing that gender explains all else. See MacKinnon, *supra* note 1.

stimuli or conflict without a predetermined hierarchy or hegemonic scheme. Imagine that Maria—a jurisprudential organic hypothesis—is confronted with a patriarchal jurisprudential conflict. Imagine that Maria is meeting a friend for lunch next Monday and must choose between the only two restaurants open for lunch on Mondays in this medium-size Arizona town: Plaintiff's Paradise or Defendant's Den. Maria will make her choice based upon reference to her various identities. Suppose Plaintiff's Paradise has no female, not to mention lesbian, waitpersons. Suppose Defendant's Den hires racial minorities only in the less remunerative positions. Suppose Plaintiff's Paradise allows smoking. Suppose Defendant's Den uses spices exploited from Australian aboriginal lands. A Maria constrained by patriarchal jurisprudential principles will choose either restaurant with reference to her various identities and will act as an organic whole. This Maria is not unlike judges who choose between differing principles or theories in deciding controversies between plaintiffs and defendants. However, imagine a Maria who was a jurisprudential free agent: imagine a Maria who could choose neither restaurant; a Maria who could go to another town or could cook at home. Imagine a Maria whose choices were between two wonderful restaurants, to both of which she wanted to take her friend. Imagine a jurisprudence that is not patriarchal. Imagine a lesbian jurisprudence.

### Imagining Lesbian Jurisprudence

By defining lesbian jurisprudence by reference to what it is not, some clues arise as to what it is—or what it might be. Lesbian jurisprudence is not a critique of feminist jurisprudence or a plea to be included within feminist jurisprudential discourse because such discourse usually relates to women vis-a-vis men. Instead, lesbian jurisprudence is envisioned as a jurisprudence concerned with lesbians, lesbian issues and problems that affect lesbians. Lesbian jurisprudence is not a paradigm that seeks to prescribe or explain all legal analysis in all cases. Instead, lesbian jurisprudence is envisioned as a jurisprudence set in an organic context. From the exclusions, a hypothetical possibility is developed: lesbian jurisprudence is a jurisprudence which takes as its subject lesbians, lesbian issues, and problems that affect lesbians, and lesbian jurisprudence is set within an organic context, coexisting with other jurisprudences. In order to give imaginative content to the question what is lesbian jurisprudence, an exploration of mythical metaphors and futuristic conceptions is helpful.

### Mythical Metaphors

Present conceptions of law and justice retain mythic elements. The western patriarchal symbol of law often is embodied ironically as a woman: Lady Justice is blindfolded and holds the scales. Lesbian jurisprudence also might profit from sifting through mythical heritages for an appropriate symbol. Such a sifting has occurred in works by lesbian theorists. For example, in *Lesbian Peoples: Material for a Dictionary*, Monique Wittig and Sande Zeig explain:

The single law of the amazons was "do not steal, nor beg." The companion lovers of the Glorious Age maintain the same "abysmal contempt" for statutory law as the ancient amazons. Some have adopted "do not beg" as a major suggestion. At the end of the Concrete Age, many small groups of companion lovers intensively practiced as a major suggestion "do not beg, but steal."<sup>38</sup>

Another example occurs in Mary Daly and Jane Caputi's *Webster's First New Intergalactic Wickedary of the English Language*<sup>39</sup> which relegates the term "law"<sup>40</sup> to the patriarchy and replaces "justice" with "nemesis."<sup>41</sup> The idea of nemesis was earlier developed in Daly's *Pure Lust*. In her ineffable style, Daly writes:

As Goddess of divine retribution, the Nemesis within Pyrosophical women wills to act/live the verb which is the root of her Name: *nemein*, meaning to deal out, to dispense retribution. Unlike "justice," which is depicted as a woman blindfolded and holding a sword and scales, Nemesis has her eyes opened and uncovered—especially her Third Eye. Moreover, she is concerned less with "retribution," in the sense of external meting out of rewards and punishments, than with an internal judgment that sets in motion a kind of psychic alignment of energy patterns. Nemesis, thus named, is hardly irrelevant mysticism.<sup>42</sup> The new psychic alignment of gynergy patterns associated with Nemesis is not merely rectifying of a situation which the term *unjust* could adequately describe.

38. Monique Wittig & Sande Zeig, *Lesbian Peoples: Material for a Dictionary* 95-6 (1976) [hereinafter *Lesbian Peoples*].

39. Conjured by Mary Daly in *Cahoots* with Jane Caputi *Webster's First New Intergalactic Wickedary of the English Language* (1987).

Although not specifically named lesbian, Daly and Caputi's work certainly evinces a lesbian consciousness. The *Wickedary* includes a definition of lesbian as "a Woman-Loving woman; a woman who has broken the Terrible Taboo against Woman-Touching women on *all* levels; Woman-identified woman: one who has rejected false loyalties to men in every sphere." *Id.* at 78 (emphasis in original).

40. Law is relegated to the "laws of lechery," the laws of the Lecherous State. *Id.* at 207.

41. *Id.* at 84 (defining nemesis as "[v]irtue beyond justice"). The *Wickedary* does not contain an independent entry for justice.

42. *Id.* at 275 (footnote added).

Nemesis is Passionate Spinning/Spiraling of new/ancient forms and connections of gynergy. It is an E-motional habit acquired/required in the Pyrospheres. It demands Shrewd as well as Fiery judgment and is therefore a Nag-Gnostic/Pyrognostic Virtue. Nemesis is a habit built up by inspired acts of Righteous Fury, which move the victims of gynocidal oppression into Pyrospheric changes unheard of in patriarchal lore.<sup>43</sup>

....

Unlike blindfolded, static patriarchal "justice," a woman inspired by Nemesis sharpens her senses, sharpens her Labrys. As her axe, this can cut back barriers. As her wings, it carries her on the wind. Better than a broom, it carries her beyond the foreground fortresses.

Nemesis is not about casuistry, nor about cautiously measured rewards and punishments. It is about flying through the badlands, badtimes. It is about creating new cacophony, new concord, countering destruction with creation.<sup>44</sup>

Mary Daly's notion of nemesis might be a metaphor on which to ground notions of lesbian jurisprudence. Nemesis creates its context as it moves within its context.<sup>45</sup> Certainly lesbian jurisprudence must do the same. Coupled with the anarchic definition contained in *Lesbian Peoples*,<sup>46</sup> the notion of nemesis as the foundation of lesbian jurisprudence would result in a law very different from the law produced by patriarchal jurisprudence.

A conception related to Daly's nemesis—but in some sense rejected by it—is that of another Greek goddess, Dike. Dike, a name many lesbians might claim, is often called the goddess of justice, but she is typically not pictured blindfolded.<sup>47</sup> She is situated as one of the three Horae (hours or seasons) and is attributed with producing order both in nature and society.<sup>48</sup> As described by lesbian writer, philosopher and mythologist Judy Grahn, Dike's social function was to keep a natural balance; her name means "the path."<sup>49</sup> But as characterized by Grahn, Dike is neither passive nor serene:

Dike was a storm goddess. In times when men were challenging the old woman-oriented traditions, Dike was a warrior/

43. *Id.* at 277 (footnote added).

44. *Id.* at 279-80 (footnote added).

45. *Id.* at 278.

46. See *Lesbian Peoples*, *supra* note 38.

47. See, e.g., U.S. Work Projects and Administration, 1938 Project, *The Legal Status of Women From 2250 B.C.*, vol. I. (a typewritten compilation of Codes by the Iowa WPA, Division of Women's and professional Projects, Dike is pictured unblindfolded. The picture can be found on the second page after the cover page of Part VI, The Romans, between pp. 243-44).

48. See J.E. Zimmerman, *Dictionary of Classical Mythology* 85 (1964).

49. Judy Grahn, *Another Mother Tongue* 47 (1984).

avenger against those who broke the old traditions. She is called "Natural Justice," and her close companion (lover) is Aletheia, "Truth." Dike is depicted riding in a cart holding scales of justice and a measuring rod. At her feet is a wheel of time, and she is called "she from whom none may run away."<sup>50</sup>

Grahn is not the only lesbian theorist to claim Dike as an appropriate symbol.<sup>51</sup> Figures such as Dike and Nemesis, which can be extracted from the Greek and Roman patriarchal pantheons, are useful in conceptualizing possible foundations for a lesbian jurisprudence. Yet we should not be uncritical in accepting exclusively Western archetypes.<sup>52</sup> Further—and extremely importantly—we must examine many traditions when seeking possible embodiments for lesbian jurisprudence.

For example, in the Orisha,<sup>53</sup> there is Oya, another storm goddess. Oya is less about "balance,"<sup>54</sup> than about "transformation." She is complex, contextual and clever:

In the goddess Oya, animal wisdom and ancestral representation coalesce. It is not only in masquerade form that she links us to an invisible continuum. Her most intimate habitat is the ancient part of the human brain that programs communal behavior grounded in an ancestral learning. . . . For humans to be conscious in ways that other animals are not of the fundamental rhythms of living could be to enhance rather

50. *Id.* (footnote omitted).

51. For example, Nett Hart in *Spirited Lesbians: Lesbian Desire as Social Action*, states:

Justice is Dike, Eurydice or Universal Dike. Dike/Tao is the path, the way of balance, the natural order of things. The justice of Dike, of dykes, is encompassing all participants, taking into account the whole in balance rather than a remedy for the particular affront. Everything is in motion, cycling, turning, changing . . . Justice is its own reward.

The justice of Dike is restorative. . . . The justice of Dike is balance. It is not the assumption of rights but of respect.

Hart, *supra* note 34, at 57.

52. For example, excluding "revenge" from "justice" should be examined, not assumed. For an excellent discussion of the historical and theoretical relationships between these two ideas, see generally Susan Jacoby, *Wild Justice: The Evolution of Revenge* (1983).

53. The Orisha are the divine personifications of the Yoruba peoples of Western Nigeria. There are close to six hundred Orisha, major and local. Many of the names and rituals of the Orisha flourish in religions practiced in Cuba, Brazil, Haiti, Grenada, and the United States. Andre Lourde, *The Black Unicorn* 120 (1978).

The word Orisha means "head-calabash." Calabashes are hard-shelled fruit that are used as containers for water, food, and sacred substances. The analogy reflects the insight that "[o]ur heads, like calabashes, contain a modicum of sacred substance, shared with Orisha, whose portions are plenitude." Judith Gleason, *OYA: In Praise of the Goddess* 7 (1987).

54. "The Yoruba oracle, known as Ifa, is a sort of [sic] regulatory agency created to foster a balance of forces in society. . . . The worshipers of a particular god or goddess [e.g., Oya], by contrast, shamelessly extol his or her powers." *Id.* at 2.

than to belittle their significance. It could mean infusing, ordering, and elaborating them with wisdom and beauty. . . .

When it comes to territoriality, Oya is mistress of plurality of boundaries, whose stress she magnifies as she crosses and recrosses them. . . . She defends her children. When it comes to establishing social hierarchies, it is she who empowers the Iyalode and who assists women to take other titles as well; and she reigns as queen across the water, in an island midriver. She is also . . . sexy custodian of the matingmat. On the other hand, . . . she is responsible for the imprinting of correct ritual behavior. . . . It all depends on context.

Yet all these leadership roles are but the other face of her disruptive turbulence. Finding a channel, she flows. Blocked, she floods. Denied recognition, she rips. And occasionally she'll go wild anyhow without provocation, to keep us from dozing off.<sup>55</sup>

Oya as a metaphor for lesbian jurisprudence takes chaos and chance and communication between species as valid precepts. Kali, a Hindi goddess often depicted as a wild dancer, is another suggestion that serenity may not be the ultimate good.<sup>56</sup> Even the Buddhist deity Kuan-Yin, most often analogized to the Christian Mary, is known for her furious passion as well as for her compassion.<sup>57</sup> Choosing one—or more—of these symbols has consequences for the question of lesbian jurisprudence.

### *Futuristic Conceptions*

We are not limited to sifting through our global past for appropriate symbols. We also can eschew goddesses for cyborgs and broaden our interspecies communication to include machines<sup>58</sup> as

55. *Id.* at 254-55.

56. See, e.g., Patricia Monaghan, *The Book of Goddesses and Heroines* 164-66 (1981).

57. "It was said that Kuan-Yin was so concerned for humanity that, upon receiving enlightenment, she chose to retain human form rather than transcending it as pure energy." *Id.* at 169.

58. As socialist-feminist Donna Haraway has developed the myth of the cyborg:

From one perspective, a cyborg world is about the final imposition of a grid of control on the planet, about the final abstraction embodied in a Star War apocalypse waged in the name of defense, about the final appropriation of women's bodies in a masculinist orgy of war. From another perspective, a cyborg world might be about lived social and bodily realities in which people are not afraid of their joint kinship with animals and machines, not afraid of permanently partial identities and contradictory standpoints. The political struggle is to see from both perspectives at once because each reveals both dominations and possibilities unimaginable from the other vantage point. Single vision produces worse illusions than double vision, or many-headed monsters. Cyborg unities are monstrous and illegitimate; in our present political circumstances, we could hardly hope for more potent myths for resistance and recoupling.



we cast into the future for clues to the question that is lesbian jurisprudence. Perhaps ironically, but also quite understandably, some of the most creatively concrete imaginings of lesbian jurisprudence occur in lesbian science fiction or other visionary novels, often referred to as fantasy.<sup>59</sup> Not always utopian in stance, such novels imagine societies which might evidence lesbian jurisprudential concepts. The act of *imagining* lesbian jurisprudential principles in the context of the art of fiction should not be confused with the act of *advancing* such jurisprudential principles. Nevertheless, in the same manner in which Plato's Dialogues, especially the *Republic* are useful in discerning ideas of patriarchal jurisprudence, science fiction and imaginary fiction are useful to discerning possible notions of lesbian jurisprudence. Some of this fiction is feminist, some of it describes all-female worlds and some of it is consciously lesbian. "Science fiction expresses the tension between the possible and the impossible," according to lesbian science fiction writer Joanna Russ.<sup>60</sup> An exploration of this tension can provide constructive suggestions for lesbian jurisprudence.

In many fictional all-women societies, law or legal principles are superfluous. In Joanna Russ's fictional community, "Whileaway," for example, the early education of the girl-children is heavily practical: "how to get along without machines, law, transportation, physical theory and so on."<sup>61</sup> In other lesbian societies, law or legal systems remain unmentioned, but there are constant meetings in which decisions seem to be made by consensus<sup>62</sup>

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Donna Haraway, *A Manifesto for Cyborgs: Science, Technology and Socialist Feminism in the 1980's*, *Socialist Rev.*, Mar.-Apr. 1985, at 65, 72 (footnote omitted).

59. Unfortunately, I am not an avid science fiction reader. I have therefore appreciated the assistance of Susanna Sturgis and Sarah Valentine. I have also appreciated the insights contained in critical works on science fictions including Sarah Lefanu's recent book, *In the Chink of the World Machine*, and two essays, Sally Miller Gearhart *Future Visions: Today's Politics: Feminist Utopias in Review*, in *Women in Search of Utopia* 296 (Ruby Rohrlich & Elaine Hoffman Baruch eds. 1984) [hereinafter *Utopia*] (writing about eleven feminist utopian novels, including her own *The Wanderground*, Gearhart considers the created societies in terms of collective processes, lesbian separatism, sources of violence, use of technology and nature and racism), and lesbian critic Tucker Farley's essay, *Realities and Fictions: Lesbian Visions of Utopia*, in *Utopia, supra*, at 233 (writing about lesbian versions of utopia in which she discusses lesbian identity, lesbian language, culture, victimization and racism).

60. Lefanu, *supra* note 59, at 22 (quoting Joanna Russ).

61. Joanna Russ, *The Female Man* 50 (1975).

62. See, e.g., Joan Slonczewski, *A Door Into Ocean* (1986). The women who have self-named (an activity which marks them as adults) gather to make decisions in a consensual manner:

Merwen half rose, stifling a cry in her throat. No—Yinerva must not walk out now, though it was her right to abstain rather than block the will of the Gathering. Now, of all times, the Gathering must stand together. A victory without Yinerva was hollow indeed.

or by a consensus which allows individual action.<sup>63</sup> At times, the efficacy of such meetings is assisted immeasurably by the women's abilities in telepathy.<sup>64</sup> The lesbians' nonlegalism is often contrasted to the legalism of other 'patriarchal' systems.<sup>65</sup> Even where the lesbians have developed a legal "code," any attempt to explain the 'legal system' to an outsider emphasizes the fluidity of the women.<sup>66</sup> To the extent that all-women societies in science fic-

*Id.* at 81.

63. See, e.g., Rochelle Singer, *The Demeter Flower* (1980). Some of the conflict in this novel concerns the desire by some of the women to leave the village of "Demeter" and begin a new settlement. There is great disagreement about the wisdom of this idea, but individuals make decisions about whether or not they will leave or stay on an individual basis.

64. For example, in Sally Miller Gearhart's classic *The Wanderground*, the women join together in gatherstretch:

Drawing her own presence to the center of the gatherstretch, Li, from the Kochlias Three-Fold, brought the question before them. Li did not address an audience but instead herself became a hearer as she wove back and forth in her memory between narrative and reflection, description and evaluation, attempting to throw open to all the women the information that had come to the Long Dozen and the work in thinking the Dozen had done with the knowledge. . . .

Sally Miller Gearhart, *The Wanderground* 125 (1979).

65. For example, in Sandi Hall's novel, "Book One of the Cosmic Botanists Trilogy," *The Wingwomen of Hera* (1987), there are two planets which orbit around the two suns they share. Hera, the lesbian planet, is lush and populated by multi-racial (wingers and finners) and single-gendered creatures who intermingle among themselves and explore the universe. Maladar, the patriarchal planet, is a "bone-chilling no-fun planet" half-covered with ice and populated by men and women who require travel passes to traverse their world containing both drugs and prostitution. The problem on Hera is an encroaching disease. The problem on Maladar is the birth of a female child as Newchild and future Guider.

Hera's legal and political system is hierarchal, biologically based, but effortless:

A Leader emerged from each doublesun's brood only once every seven or so times. Though each Heran's abilities were regarded with equal respect, the sheer rarity of the Leaders and their role in the complex technique of Stargoining gave them a place in Hera's society that, though never spoken, was acknowledged as special. Somehow, Leaders found themselves with exceptionally spacious quarters, consistently choice foods and prominent places at all entertainments and rituals, including Crossover. Everyone realized their uniqueness. And among the Creators, the possibility of merging with a Leader was the most highly desirable of all. . . . Her thoughts moved swiftly. It was fortunate that the Elders lived a segregated life, due to the immense responsibilities they had. No law or rule bound them to keep to their aeries, but their work, the language and knowledge of it, kept them voluntarily apart.

*Id.* at 45-6, 56.

Maladar's legal system is much more obdurate. The law adhered to by all of Maladar are the pronouncements of the Guider, historically a faceless and unknown man biologically chosen, who lives separately from the people to insure his objectivity. Thus, Hera is depicted as more communal and intuitive, without need for law, and Maladar is pictured as more rigid and rational, requiring questions and answers to problems.

66. See, e.g., Katherine Forrest, *Daughters of a Coral Dawn* (1984). An earth-woman who finds herself on the lesbian inhabited planet "Maternas" narrates:

tion are rigid, they seem to be so as a survivalist reaction to threatening patriarchies.<sup>67</sup> Conventional lesbian science fiction presumes that "left to themselves," lesbians prefer nonlegalistic societies. There is an essentialist underpinning to this conclusion (just as there are biological bases to some of the imagined hierarchies),<sup>68</sup> but there are also indications in the novels that attitudes toward law are socially constructed and thus situational and mutable.<sup>69</sup>

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"But there must be problems to be solved, disagreements," I protested, vividly recalling the rancorous parting of my own parents, finally adjudicated by binding decree of the marital arbiters.

"We have no concerns here about property," she said, "and our children are little damaged by our partings."

*Id.* at 148.

"What form of government do you have?" I inquired as we walked toward this structure.

She answered first with a chuckle; then said, "Very little. We believe each of us is the best judge of her own interests. We place highest value on self-reliance, privacy, respect for each other, and instinctively we oppose authority, uniformity, any kind of fixity. . . ."

. . . .  
 "Since you don't have formal government, you must have laws, surely?"

"We have a Central Code and a yearly vote to determine if any part of it needs to be changed, and—"

I halted before a huge painting. . . .

Disconcerted, I walked on, and blurted the first question that came to mind: "Do you have courts? There must be criminal acts here, even occasionally."

"We have occasional . . . errors in judgment or deed—which need to be atoned for. Then we have an informal tribunal composed of six, chosen by lot to decide the nature of the atonement."

. . . .  
 She said quietly, "We have no equivalent of divorce arbiters or courts. We recognize no contract between two people arising from passion or sentiment. And most disputes are caused by property considerations, and we have no property here, no bequeathing of it."

*Id.* at 161-63 (three dot ellipses in original).

67. See, e.g., Pamela Sargent, *The Shore of Women* (1988). This novel "describes an all-women society (men are banished at age five beyond the walls) with rather draconian laws/ethics, mostly motivated by the desire to maintain unity and avoid the (man-made) holocaust that nearly destroyed the world many centuries before." Letter from Susanna Sturgis (October 12, 1989) (on file with author). See also Susanna Sturgis, Book Review, Aug. 1989, (reviewing Pamela Sargent, *The Shore of Women* (1988)).

68. See, e.g., Hall, *supra* note 65 (elders) The women are all related and have extraordinary abilities, confirmation of their "leader's" status is predicated on her emerald eyes which are identical to those of the original mother. More common is the device of associating age with leadership.

69. A comparison of two heterosexual women that visit the lesbian societies (involuntarily and with at least one male) is instructive. In *Daughters of a Coral Dawn*, the woman realizes that she has been oppressed by her male co-workers and leaves them, joining the lesbian society and falling in love with the leader. Forrest, *supra* note 66. In *The Demeter Flower*, Donna arrives with her oppressive husband (the man who bought her from her father), but she remains loyal to him, uncom-

*Consequences for the Question of Lesbian Jurisprudence*

There are important conclusions to be drawn from explorations of the mythic past and the fantastic future. The mythic past assists us in giving imaginative content to the question that is lesbian jurisprudence. Choosing symbols, however, is not merely an imaginative task with no material consequences. The selection of symbols is not the selection of meaningless mascots. To choose measuring rods and scales as the hallmarks of lesbian jurisprudence has certain consequences; we commit ourselves to making judgments against a predetermined artifact (the measuring rod) and to balancing two sides when considering issues (the scale). The manner in which such symbols have operated in patriarchal jurisprudence is obvious in the implementation of a judicial system: the facts of each case are judged in relation to precedent and cases must have at least two sides in order to be justiciable. If we are considering creating lesbian jurisprudence, we must decide whether we want to emulate this *modus operandi*. For we also have the power to choose symbols which are avenging, chaotic, communal, animalistic, or contradictory; ones who "cut back barriers" or ones who "magnify the stresses of boundaries by crossing and recrossing."

The fantastic future assists us in conceptualizing possible properties of a lesbian jurisprudence. One startling conclusion evident in lesbian science fiction is the notion that law is not central—it is de-centered. The strategy of de-centering is a postmodern one, and it also occurs as a jurisprudential strategy in a postmodern feminist jurisprudential text by Carol Smart. Smart suggests that there is "a double trap—that of the 'androcentric standard' and that of continuing to fetishize law."<sup>70</sup> The first trap is far simpler to escape from a lesbian jurisprudential standpoint: androcentrism is replaced by gynocentrism, a fairly simple task conceptually if not practically.<sup>71</sup> The second trap Smart names causes more conceptual difficulty. Can a philosophy have as its premise that its own subject matter is marginal? A practical problem—or perhaps a failure of imagination and nerve—is that the

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municative with the lesbians, and blames the lesbians for his death. Singer, *supra* note 63.

Another example of nonessentialism is the creation of the "gentles," men who have abandoned patriarchy. The female characters in this novel, however, disagree concerning the extent to which males can forsake their violent habits. Gearhart, *supra* note 64.

70. Carol Smart, *Feminism and the Power of the State* 68 (1989).

71. The replacement of androcentrism by gynocentrism is also easier from a lesbian jurisprudential standpoint than from a feminist jurisprudential standpoint.

very lesbians who are in the best position to argue for a decentrist position of law are the least likely to so argue.<sup>72</sup> It seems a bit strange to say that "I am a lawyer (or law student or law teacher or philosopher of law)" and my philosophy of law is that law is not very important, and probably does not even merit much discussion, let alone a branch of philosophy.

But in the work of one lesbian philosopher (whose field is ethics and not jurisprudence), law is not only de-centered, but seemingly obliterated. Sarah Lucia Hoagland rejects "justice" as a concept that "exists to sort out competing claims within a system that has as its axis dominance and subordination."<sup>73</sup> Hoagland argues that the notion of justice is antithetical to lesbianism:

While we don't have a formal system of lesbian justice, we tend to be attracted by the idea of such a system. We tend to feel that without a system of justice, mean and nasty lesbians will go around intimidating others. And that may happen at times. But under full-blown legal systems, intimidation still happens. What we forget is that a state can do exactly the same things as mean and nasty individuals; only when the state does them, they're called "legal". . . .

We already have the ingredients we need to interact: our psychic faculty, intuition, dreams, imagination, humor, emotions, playfulness, and reasoning. We need to develop these abilities. And at times things just don't work out. But if in our relationships we cannot create an environment in which integrity flourishes, even though at times harm also occurs—or at least if when things go sour, we can't keep them from progressing to inexcusable limits—no institution and no system of justice ever will.<sup>74</sup>

Yet while Hoagland's argument may be a rejection of a patriarchal justice and may even be a rejection of Dike's "balancing justice,"<sup>75</sup>

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72. I recognize that many lesbians, myself included, became lawyers in order to "help" others—lesbians and nonlesbians. I recognize that many lesbians, myself included, saw law as a chance to elevate one's self to economic "security" even absent "financially secure" class backgrounds or the "opportunity" to "marry up." I recognize that many lesbians, myself included, have spent enormous amounts of time (never to be regained) and money (much of which we continue to pay back with interest) in order to be admitted to the legal profession. I do not intend to diminish these facts, or to imply that lesbian lawyers act predominantly in their own self interest. What I am saying, however, is that for lesbian lawyers, part of their self-conception is tethered to the law.

73. Sarah Hoagland, *Lesbian Ethics* 264 (1988).

74. *Id.* at 267.

75. This rejection of justice has been criticized by another lesbian thinker:

Sarah Hoagland is critical of the concept of justice. In tracing the history of justice she says, "The old testament 'an eye for an eye and a tooth for a tooth' and Solomon willing to cut a baby in half to determine the mother was about the extent of the biblical concept of justice."

This seems entirely too simplistic, and an "injustice" to Jewish

it is less a rejection of a lesbian jurisprudence. Hoagland's notion of a lesbian jurisprudence might take as its symbol Oya. Part of the problem, as always, is defining what law is.

Throughout this discussion, I have assumed that any imagined lesbian jurisprudence would not be primarily concerned with the imposition of rules and regulations. Also implicit has been that lesbian jurisprudence would be concerned with collective decision-making and collective actions. Ethics is about the process of individual choices; jurisprudence is about the process of collective choices. This collectivity is comprised of individuals and thus causes ethics and jurisprudence to intersect. Thus, when imagining lesbian jurisprudence, works of ethics, such as that of Hoagland's, have special importance.

Jurisprudence and ethics are concerned with methodology as well as results. Thus, epistemological concerns also must be addressed. A text which has much to contribute to any imagining of possible methodologies of lesbian jurisprudence is Joyce Trebilcot's recent article, *Dyke Methods or Principles for the Discovery/Creation of the Withstanding*.<sup>76</sup> Trebilcot's task is to articulate the values she desires her work to embody, and she derives three principles: speaking only for herself, not attempting to have others accept her beliefs, and not accepting any absolutes. These principles, if accepted, certainly would influence the methodology of lesbian jurisprudence as well as impacting outcomes. There would be no speaking for the positions of others, no professional 'advocates': each woman would represent her own views. There would be no advocacy, "any intent to persuade is an act of violence."<sup>77</sup> There could be no statutes, no rules or regulations, no "givens." Can this be imagined?

I am suggesting that we begin imagining a lesbian jurisprudence. Imagine a lesbian jurisprudence that takes as one of its principles nonpersuasion. Imagine a lesbian jurisprudence that

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history, which has always included concerns about justice, both in the bible and elsewhere. Even these two examples are not adequately addressed in Sarah Hoagland's treatment of them. The "eye for an eye" paradigm was actually a reform over existing contemporary forms of punishment, which called for death for stealing, and other extremes. And the judgement of Solomon story demonstrates a woman's emotional logic sense in the face of male rational violence.

Sarah Hoagland says that, "[j]ustice ultimately is tied to punishment." I think of justice as having to do with restoring balance, restitution, remedy, and stopping injustice.

Barbara Ruth, *Taking Our Lives Seriously*, 38 *Sinister Wisdom* 121, 128 (1989) (reviewing Sarah Hoagland, *Lesbian Ethics* (1988)).

76. *Hypatia*, Summer 1988, at 9.

77. *Id.* at 1 n.\* (quoting Sally Miller Gearhart, *The Womanization of Rhetoric*, 2 *Women's Studies Int'l Q.* 195-201 (1979)).

takes as its metaphor Oya. Imagine a lesbian jurisprudence that does not place itself at the center of the universe. Or imagine another lesbian jurisprudence. And another.

### Realizing Lesbian Jurisprudence

Theories suggest practice, and to the extent that any imagined lesbian jurisprudence is impractical, it is invalidated. A lesbian jurisprudence that takes as principles nonadvocacy and nonpersuasion is not easily implemented by a lesbian attorney arguing to a federal judge about the unconstitutionality of her lesbian client's dismissal from the army. A lesbian jurisprudence that values Oya's "going wild without provocation" is a lesbian jurisprudence that might refuse to hold a lesbian batterer accountable for her actions. A lesbian jurisprudence that does not conceptualize itself as important is a lesbian jurisprudence easily discouraged from its task. Is that a lesbian jurisprudence worth imagining?

The first concern is perhaps the most easily answered. If lesbian jurisprudence does not insist upon paradigmatic status,<sup>78</sup> then it does not aspire to apply its principles in every situation. Trebilcot's article stresses that the principles "are not intended to be used in situations that are predominantly patriarchal, that is, when getting something from men is at stake . . ."<sup>79</sup> Thus, what the imagined lesbian jurisprudence seems to imply is a contextual jurisprudence. Lesbian jurisprudential theory does not demand slavish implementation. Even if we imagined lesbian jurisprudence to embody a principle that "persuasion is violence," I think, lesbian jurisprudence would countenance such persuasion in a nonlesbian jurisprudential forum.

Such a solution necessarily implicates the concern of lesbian separatism, an issue not as easily addressed as the question of a methodology of argument in federal court. Separatism is a viable solution which has many thoughtful proponents.<sup>80</sup> Nevertheless, I propose the more jurisprudential model of 'sovereignty' rather than separatism for explaining possible imaginings of lesbian jurisprudence. One analogy that might be helpful in explaining the

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78. See *supra* notes 35-38 and accompanying text.

79. Trebilcot, *supra* note 76, at 3.

Of course there are situations—heteropatriarchal situations—in which it is appropriate for me to attempt to change what others believe. Persuasion is appropriate when it is the best means for getting resources for wimmin (including myself) from people with patriarchal power—for example, in the context of a job or of political work that confronts patriarchal institutions.

*Id.* at 8.

80. See *supra* note 27.

concept of sovereignty is that of the American Indian legal systems. They include tribal laws, courts and judges, recognized by American jurists.<sup>81</sup> Indian tribal sovereignty is considered to be both pre-constitutional and extra-constitutional. It is based on an inherent notion of sovereignty, not on powers conferred by the federal government.<sup>82</sup> While "Lesbian Nation"<sup>83</sup> lacks both the recent history of sovereignty demonstrated by treaties and explicit territories evinced by reservations, some of the same principles of inherent sovereignty might provide an appropriate model. The existence of Native sovereignty stands for the principle—if not always the reality—that there can be more than one jurisprudential system.

Beyond the illusion of assimilation, legal theorists of color are developing the idea of "multiple consciousness as jurisprudential method." Mari Matsuda notes that women of color often employ multiple consciousness as jurisprudential method and provides this example:

There are times to stand outside the courtroom and say "this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom." There are times to stand inside the courtroom and say "this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood." Sometimes, as Angela Davis did, there is a need to make both speeches in one day. Is that crazy? Inconsistent? Not to Professor Davis. . . . [Her] decision to use a dualist approach to a repressive legal system may well have saved her life.<sup>84</sup>

Like Angela Davis, many people move freely between "multiple consciousness, multiple voice, double-voicedness—the shifting consciousness that is the daily experience of people of color and of women."<sup>85</sup> This shifting occurs informally, as well as more formally as in the instance of a Navaho woman who might utilize

81. See generally Samuel Brackel, *American Indian Tribal Courts: The Costs of Separate Justice* (1978); Vine Deloria Jr. & Clifford Lytle, *American Indians, American Justice* (1983); Vine Deloria Jr. & Clifford Lytle, *The Nations Within* (1984); Kirke Kickingbird, Alexander Tallchief-Skibine & Lynn Kickingbird, *Indian Jurisdiction* (1983); Charles Wilkinson, *American Indians, Time, and the Law* (1987).

82. See Charles Wilkinson, *supra* note 81, at 61-63. (discussing *United States v. Wheeler*, 435 U.S. 313 (1978), and its progeny).

83. This phrase is Jill Johnston's. Jill Johnston, *Lesbian Nation: The Feminist Solution* (1974). The image of tribe is often used among lesbian and gay men as a source of identity; lesbians and gay men are sometimes referred to as "members of the tribe."

84. Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *Women's Rts. L. Rep.* 7, 8 (1989).

85. Pat Williams, *Response to Mari Matsuda*, 11 *Women's Rts. L. Rep.* 11, 11 (1989).



either the tribal courts or the federal courts,<sup>86</sup> or state courts. Similarly, a lesbian might utilize either a lesbian jurisprudential construct or a patriarchal one, depending on the circumstances. In certain circumstances, the choice between lesbian jurisprudential methodologies and patriarchal ones might be obvious. For example, it is rather senseless to summon the army that has dishonorably discharged a lesbian because of her lesbianism to a lesbian 'tribunal' employing lesbian methodologies: the army will dishonor the lesbian jurisprudential system as it has dishonored the lesbian. I would also propose that lesbian relationship disagreements be settled with reference to lesbian jurisprudential concepts rather than patriarchal ones. A lesbian jurisprudential construct would, of course, recognize such relationships and treat them seriously, a result not assured in the patriarchal jurisprudential system. Perhaps more importantly, however, is the possibility of imagining a lesbian jurisprudence in such contexts: how do we want it to be, really? This pragmatic application of the question that is lesbian jurisprudence is beginning to be addressed in the context of dissolving couple relationships. Should it be mediation?<sup>87</sup> Should it be 'relationship contracts'?<sup>88</sup> To what extent does a lesbian jurisprudence adopt, alter, or abandon the conventions of patriarchal jurisprudence? How should a lesbian jurisprudence respond to differences of race and ethnicity, to class and age, to differences in physical, mental, and spiritual realms? How do we want it to be, really? The pragmatics of a lesbian jurisprudence might be forged first in the hot aftertaste of lesbian desire.

Between the army and former lovers are ranges of situations that station themselves less obviously in either patriarchal jurisprudence or lesbian jurisprudence. One such situation, lesbian battering, raises the specter of the choice of appropriate metaphor. If we reject balance as metaphor and choose instead Nemesis or Oya,

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86. Of course, this does not mean that she—nor the lesbian—is assured her desired result. See Catherine MacKinnon, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, in Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 63 (1987).

87. See Bonnie J. Englehardt & Katherine Triantafillou, *Mediation For Lesbians*, in *Lesbian Psychologies: Explorations & Challenges* 327 (Boston Lesbian Psychologies Collective eds. 1987) (An informative dialogue between a social worker/therapist and an attorney about their multi-disciplinary approach to mediating disputes in lesbian personal and business relationships).

88. See, e.g., Ruthann Robson & Sarah Valentine, *Lov(h)ers: Lesbians as Intimate Partners, to be published in* 63 *Temp. L.Q.* \_\_\_\_ (1990); see also Lenore Weitzman, *Legal Regulation of Marriage: Tradition and Change—A Proposal for Individual Contracts and Contracts in Lieu of Marriage*, 62 *Calif. L. Rev.* 1169 (1974) (arguing for the validity of (heterosexual) contracts inside and in lieu of marriage and providing sample contracts); Hayden Curry and Dennis Clifford, *Legal Guide for Lesbian and Gay Couples* 2:27 (Robin Leonard 5th ed. 1989).

does this mean lesbian jurisprudence would honor the one who "sharpens her labrys" on the stone of her lover or who "rips" when denied recognition? Or would such a metaphor mean, conversely, that a lesbian batterer would be subject to retributive violence from the lesbian jurisprudence of which she is a part? Some of the solution is adjusting the ascription of literalness to chosen metaphors of lesbian jurisprudence. Another task is confrontation of both the external (patriarchal) and internal (lesbian) problems that confront both living lesbians and lesbianism as theory, and decide in what ways a lesbian jurisprudence should concern itself with these problems. To have as a tenet of lesbian jurisprudence that intra-lesbian matters should be solved with reference to lesbian jurisprudential precepts is fine, *if* those precepts adequately address those intra-lesbian problems. In the matter of lesbian battering, we need to agitate not only for change within patriarchal jurisprudential forums to allow lesbians access to patriarchal protection in the form of restraining orders against "non-married" lovers, but also to consciously address lesbian battering as a lesbian jurisprudential process. There might even come a time when there is a lesbian jurisprudential device sufficient to deal with—(and idealistically, to prevent) horizontal violence between lesbians.<sup>89</sup>

Assuming even the most ideal situation, however, as long as lesbians interact with nonlesbians the issue of the applicability of lesbian jurisprudence remains a vexatious one. In some senses, the issue is one of "jurisdiction," and any time there are concurrent claims to sovereignty, there are jurisdictional disputes.<sup>90</sup> Returning to the lesbian bowling team trying to obtain funding from a university,<sup>91</sup> to what extent should the bowling team advocate (practice the violence of persuasion) to obtain its desired funding? Under Trebilcot's theory, advocacy is fine in the context of attempting to obtain a benefit for lesbians. Yet, deeper questions remain unresolved. To what extent should the lesbian bowling team implement its ideas of lesbian jurisprudence in a nonjurispruden-

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89. For further discussion of the phenomenon of violence between lesbians and its implications for the question of lesbian jurisprudence, see Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law & Lesbian Legal Theory, to be published in 20 Golden Gate U.L. Rev.* \_\_\_\_ (1990).

90. Again using the Indian Nations as an analogy, much of the United States Supreme Court doctrinal analysis has been devoted to issues of conflicting claims to jurisdiction. See, e.g., *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138 (1984); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Montana v. United States*, 450 U.S. 544 (1981). Additionally, questions of jurisdiction arise between states and between states and the federal government.

91. See *supra* notes 31-32 and accompanying text.

tial context? There are important questions of methodology, such as the content and degree of that persuasion. Should the lesbian bowling team argue, as suggested earlier, that it not be measured against any other teams? Even if this means losing its funding? Such questions, in turn, raise even loftier issues such as the implications for a lesbian jurisprudence that abandons its own principles once it is outside its own territories, and the implications for a lesbian jurisprudence that advances its principles in indifferent and perhaps even hostile forums.

As we begin to puzzle theories to address such inquiries, we develop a lesbian jurisprudence. We need to ask nothing less than what principles, metaphors, and goals we would like to have embodied in a lesbian jurisprudence and in what shapes and places we would like that body of lesbian jurisprudence to appear. Obviously, this is a very important task.

Yet we also need to imagine a lesbian jurisprudence that takes as a serious possibility the idea that it might not be central. Not being central does not equal not being important. If we 'personalize' lesbian jurisprudence, we can apply this insight meant for individual lesbians:

Many of us find ourselves taking it for granted that we need boards of directors, presidents, elections and stars; that the world is divided into the famous (or rich, or powerful, or beautiful), the aspiring to be famous and those who pretend they don't care; that some of us are more "evolved" than others which confers upon us a higher place in the spiritual order; that some occupations are more deserving of respect than others.<sup>92</sup>

Jurisprudence, shed of its patriarchal pretensions and living in a web of lesbian philosophies, may not be "more deserving of respect" than other philosophies. But it would also not be deserving of less. Lesbian jurisprudence is a question worth posing. Worth imagining. Worth realizing.

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92. Dykewomon, *supra* note 14, at 33.