



4-15-1997

Making Justice: Same-Sex Partnership in the Kowalski Case

Casey Charles
University of Montana

DOI: <https://doi.org/10.13023/DISCLOSURE.06.02>

Follow this and additional works at: <https://uknowledge.uky.edu/disclosure>



Part of the [English Language and Literature Commons](#)

This work is licensed under a [Creative Commons Attribution-Noncommercial 4.0 License](#).



Recommended Citation

Charles, Casey (1997) "Making Justice: Same-Sex Partnership in the Kowalski Case," *disClosure: A Journal of Social Theory*. Vol. 6 , Article 2.

DOI: <https://doi.org/10.13023/DISCLOSURE.06.02>

Available at: <https://uknowledge.uky.edu/disclosure/vol6/iss1/2>

This Article is brought to you for free and open access by the Social Theory at UKnowledge. It has been accepted for inclusion in *disClosure: A Journal of Social Theory* by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

JUST SPACE



Left AIDS activists block Wall St. demonstrating in front of Trinity Church, New York City. [photo: Chris Huestis]

© 1997, *disClosure*.
Committee on Social
Theory, University of
Kentucky, Lexington,
Kentucky.

Casey Charles is in
the Department of
English, University of
Montana.

Casey Charles
**Making Justice:
 Same-Sex Partnership
 in the Kowalski Case**

If you don't like the news, go out and make some of your own.

(Stephan Ponic, KSAN Radio, 1969)

... this recognition of our limitation and contingency, of the precarious and pragmatic construction of the universality of our values ... is the very condition for a democratic society. To reformulate the values of the Enlightenment in the direction of a radical historicism and to renounce its rationalistic epistemological and ontological foundations, then, is to expand the democratic potentialities of that tradition ...

(Laclau, 1990, 83)

From Aristotle to Rawls, theorists have traditionally associated the concept of justice with a transcendent ideal of fairness, equity, and reason.¹ Blindfolded, Justice sits on a raised dais holding her balanced scales, truths and judgments emanating from the oak-paneled chambers of her hallowed halls, architecturally, linguistically, and socially separated from a removed populace. Yet for radical democrats like Ernesto Laclau, the tendency to conceive and implement political values like justice within a framework that treats them as universal and immutable has dangerous socio-political consequences. Theorizing justice as an all-encompassing, immanent ideal obfuscates the socially and historically constructed nature of justice, undermining its status as an often arbitrary or contingent adjudication that is dependent upon a network of social forces. Em-

9|**disClosure**

reVisioning Justice

C. Charles | 10

phasis on such a metaphysical conception also perpetuates the idea that justice is immanent, self-evident, and transhistorical (see Goodrich 1987). These notions, in turn, tend to impede the implementation of justice within a pragmatic politics that recognizes it not as an elusive abstraction occasionally approximated by an arcane and insular web of political theorists, but as a malleable, historically-conditioned process that because of its "human and discursive" nature is socially constructable within a context, I will argue, as seemingly far removed from the public sphere as the bedroom, as the private predilection of romantic lovers.²

The Critical Legal Studies movement has done much to expose the cracks in the foundation of justice, the holes in her blindfold, the uneven weight of her scales (Unger 1986; Leonard 1995). Gilligan has exposed the gender bias of justice; Goodrich analyzed its rhetorical elitism; Sandel (1982), de Man (1979) and others shown how the limits of justice reside in its attempt to be all-encompassing when in fact it is dependent on particular emanations (Gilligan 1982; Okin 1989; Rhode 1989; Goodrich 1987; Sander 1982; deMan 1979; Weber 1992, 232-57). Even before the advent of postmodernism, the relationship of justice to its practical enactment—the law—had troubled scholars. While, by many accounts, the law is supposed to function as an objectified form of justice at work in the social order (Radbruch 1985), the vagaries of the legal code and its interpretation have led to Hobbes' famous formulation of the law as the will of the sovereign and Holmes' description of it as "what the courts will do" (Hobbes 1985; Holmes 1985). Tarnished by its implementation, the inherent fairness of justice often conflicts with the political and social agendas of those who have the power to determine what is and what is not fair.

The abstract and objective proportion of Aristotle's justice and the intuitive inherency of Rawl's fairness are further corroded by the invasive encroachment of morality into the arena of social and legal judgment. Justice is administered through a set of rules or laws that codify existing customs, religious beliefs, and individual predilections—subjective stances that often have little or nothing to do with a supposedly objective concept of fairness (Perelman 1980, 129). The case study that follows presents a particularly telling example of the dilemma justice faces when it is implemented by a court whose customary ignorance and moral disapproval of homosexuality leads to a failure to recognize the love between two women. But this crime that dare not speak its name—homosexuality—has suddenly in the late twentieth century begun to demand recognition, even in the face of

11 | Making Justice

resistance from the likes of a Chief Justice of the United States Supreme Court, who in 1986 cited "Judeo-Christian moral and ethical standards" to deny a fundamental right of homosexual sodomy in *Bowers v. Hardwick* (478 U.S. 186 [1986] C. J. Burger, concurring).³ Although more recently in *Romer v. Evans* (1996 U.S. Lexis 3245) Justice Kennedy relied on the equal protection clause of the Fourteenth Amendment to overturn a Colorado anti-gay rights initiative, federal and state legislatures, under the rhetoric of ethics and morality, are currently in the process of drafting and passing Defense of Marriage Acts that prevent the recognition of same-sex marriages, which the Hawaii Supreme Court has ruled are constitutionally mandated. Both sides of this struggle are no doubt convinced of the "justice" of their cause. The national debate over the fairness of a legal and social system of justice that has blindly criminalized and condemned homosexuals since its inception indicates just how historically conditioned and incommensurate our beloved virtue is.

If Justice must step down as a result of the exposure of her notorious selectivity throughout history, for theorists like Laclau, this deidealization is definitely a step in the right direction. This realization of the human and discursive nature of fairness empowers democratic subjects to demand recognition of their own versions of justice.⁴ That this public demand should occur as a result of the private love between two women seems at first blush to be the sensational stuff of made-for-t.v. movies; but the Sharon Kowalski case, which began in 1983 and came before the Court of Appeals of Minnesota for the third time in 1991, represents a remarkable series of events that demonstrate the social reality of one legal commentator's conclusion that the "prohibition on gay marriages may be the most significant form of discrimination on gay couples" (Fajer 1992). The Kowalski case is a *true story* in the most oxymoronic sense of that phrase, for it has produced a series of discursive representations—case law, newspaper articles, speeches, law review articles, and a book—that, I will argue, have harnessed the narrative power of social reality in order to create justice.⁵ Through the reiteration of the particulars of this singular story inside and outside the courtroom, a social text of justice emerges that demonstrates the viability of same-sex partnership and exposes the often arbitrary nature of legal justice (Weber 1992). The Kowalski case illustrates the democratic potentialities of a pragmatic approach to justice that employs the power of discourse itself—the telling of one's story—as a strategy for the reclamation of justice (Fajer 1992).

Although my principal concern will be the striking about-face that takes place between the official texts of justice—the Minnesota

C. Charles|12

Court of Appeals decisions in *In re Guardianship of Kowalski* 382 N.W.2d 861 (Minn.App 1986) and *In re Guardianship of Kowalski* 478 N.W.2d 490 (Minn.App 1991)—I am mindful of the need to present a statement of facts that will orient the reader to the *whole* story. Yet I am equally mindful that a recognition of the rhetorical and particular nature of justice makes it impossible to divorce the act of telling the Kowalski story from the presentation of a historical and pragmatic version of justice. In other words, there is no *whole* story that is not the *side* of a story, just as there is no statement of facts that is not also a *statement*—a qualitative assertion about the events related that is embedded in the selection of “facts” and the type of language used to describe them. Every law student learns that the statement of facts is the most important part of a legal brief. This lesson demonstrates not only the embeddedness of abstract justice in its particularized accounts, but also shows how justice inheres in the events that take place outside as well as inside the courtroom, in whose halls there exists “a socially institutionalised set of restrictions or limitations upon who may speak, how much may be said and upon what topic and in what contexts” (Goodrich 1987, 173). As I hope to demonstrate, the differences in the Minnesota Court of Appeals decisions of 1986 and 1991 court are telling, but what is even more telling is the deep description that is missing from each of those accounts. It is the untold story, in many ways the story of storytelling in the interim between appellate decisions, that embodies the methodology of this social reversal of justice. What follows is not a neutral account of the Kowalski case, for there can be no wholly objective statement of facts; yet this restatement will detail the discursive and human movement of this story in and outside the courts of justice.

1. Statement of facts

On November 13, 1983, 27-year-old Sharon Kowalski was hit by a drunk driver while returning her niece and nephew from St. Cloud to the Iron Range near Duluth; as a result, she was severely impaired both mentally and physically.⁶ At the time of the accident, Sharon and her partner, Karen Thompson, had lived together for almost four years, exchanged rings, and named each other as beneficiaries on their life insurance policies. They were living together in a house recently purchased by Karen. Neither had told their parents they were in a lesbian relationship.

6 When Karen arrived at the hospital, the staff in the intensive care unit refused to inform her of Sharon's status or to let her visit Sharon.

13|Making Justice

For hours they refused to tell Karen of her partner's prognosis. Most intensive care units allow only immediate relatives to visit, and only blood relatives or spouses are allowed to make decisions for comatose or incapacitated patients. Sharon's parents eventually arrived, and initially they stayed at the couple's home, allowing Karen to visit whenever she wished, but Mr. Kowalski began questioning why Karen was spending so much time at the hospital.

In January, 1984, upon the recommendation of a hospital psychologist, Karen wrote a letter to the Kowalskis disclosing that she and Sharon had been partners for four years. In March of 1984, Karen filed a petition in probate court to become Sharon's guardian. Donald Kowalski cross-petitioned, and in April the parties entered into a court-ratified settlement agreement:

The Court recognizes that Karen Thompson and Donald and Della Kowalski each have a significant relationship with the Ward, Sharon Kowalski, and finds each to be a suitable and qualified person to discharge the trust.

However, in light of the difficulties existing between them the Court is unwilling to appoint joint guardians. Therefore, the Petitioner, Karen Thompson, agrees to the appointment of Donald Kowalski as guardian with no recognition that he is the most suitable and best qualified among those available and willing to discharge the trust, but is willing to accept the Court's appointment of Donald Kowalski under certain conditions and restrictions in order to avoid a contested hearing in the matter, which might not be in Sharon's best interest and in order to make every effort to resolve the difficulties existing between them. (*In re Kowalski* 382 N.W.2d 861, 863)

Under the agreement, the Kowalskis and Karen Thompson were given equal access to medical records and equal visitation rights, though the day after the settlement, the Kowalskis, meeting Karen in Sharon's room, told her to leave. In June of 1984, the probate court decided to send Sharon to County Manor Nursing Home in Sartell, near St. Cloud. Karen spent hours each day visiting and working with Sharon, who by August was able to write, swallow, and even on occasion speak. The Kowalskis visited their daughter less frequently; they lived further away and there was considerable animosity between them and Karen.

In September of 1984, the Kowalskis obtained a court order to move Sharon to Park Point Manor Nursing Home in Duluth. Her condition deteriorated at this time and she did not do well on tests administered at the Polinsky Memorial Rehabilitation Center. Sharon

C. Charles|14

began to be evaluated by doctors hired by her personal injury attorney, Jack Fena, whom the Kowalskis had engaged. In hearings concerning the proper placement of Sharon, the Kowalskis filed affidavits claiming that Karen was "controlling" and had harassed Sharon about money.

In October, Karen began to consult disability organizations and civil rights groups. *The St. Cloud Daily Times* published an article on October 18 in which they describe Karen as "an assistant professor at St. Cloud State University (SCSU) who claims to have carried on a secret lesbian relationship with Kowalski for the past four years" (Thompson 1988, 80-83). Donald Kowalski was reported as saying there "was no way" his daughter had a lesbian relationship with Karen, and "he said he and his wife are worried that Thompson will sexually abuse their daughter if Thompson is allowed to continue visiting her." "(Karen Thompson) is about as sick as they come," Donald Kowalski stated in the article. Thompson told the reporter that the Kowalskis had called and asked her if she had "sexually abused our daughter today?" The *Daily Times* also reported Thompson as saying "In our minds, we're married and are devoted to each other for a lifetime," and stating that she would set a national precedent for homosexuals if she was appointed Karen's guardian. Thompson told the paper that the Kowalskis were condescending, pampering, and ashamed of their daughter, and, according to Karen's attorney, might be subliminally blocking Sharon's progress so she will never be able to communicate her feelings about Thompson.

In October, 1984, the Kowalskis filed for a temporary restraining order against Karen, while Thompson's attorneys petitioned for a second psychological evaluation of Sharon and the removal of Kowalski as guardian. The court issued a restraining order on November 1, prohibiting Thompson from disseminating the ward's medical records to the media, from bringing anyone with her to visit the ward, and from engaging in disruptive behavior at the nursing home. Sharon's day passes were also restricted. Donald Kowalski was also restrained from bringing visitors and disrupting the nursing home. The pending permanent injunction hearings and other motions were dropped by consent of the parties in December.

Meanwhile, Sharon was diagnosed with depression and her physical condition had deteriorated since her first residency at County Manor. Karen had videotaped her partner during her first series of recoveries and Sharon's condition had clearly regressed. According to Karen, Park Point was louder and less clean than County Manor, and Karen had to drive much farther to visit her. In January,

15|Making Justice

Sharon typed responses at St. Cloud Handicap Services, confirming that she was gay and that Karen was her lover (Thompson 1988, Chronology). A rally took place in Duluth, protesting the conditions of Park Point Manor Nursing Home.

Hearings on May 3 and May 9, 1985, gave rise to the first Court of Appeals decision. Donald moved to terminate Karen's visitation rights and to find her in contempt. Karen moved to remove Kowalski as guardian. The hearings featured testimony from a psychiatrist procured by Jack Fena, the personal injury attorney. Dr. Cowan claimed that Sharon became depressed after Thompson's visits. Some doctors concurred. Although in June, 1985, Sharon communicated to the Minnesota Civil Liberties Union interviewer that she was in a relationship with Karen, the court ruled on July 23, 1985, that Sharon "lacks sufficient understanding ... to make... responsible decisions" and that the "elimination of that conflict [between Don and Della Kowalski and Karen Thompson] and its adverse affect on the ward is in the best interest of the ward" (382 N.W.2d 861, 864). The trial court ordered the appointment of Donald Kowalski confirmed and continued but now without limitation or condition. Kowalski immediately terminated the visitation rights of Thompson, the MCLU, and disability groups; he then moved Sharon to another nursing home in Hibbing. Karen and the MCLU appealed the decision which was affirmed by Chief Judge Popovich in a decision handed down in March of 1986 (382 N.W.2d 861 (cert. denied 106 S.Ct. 1467)).

After the decision, the headlines of the *St. Cloud Daily Times* read "Lesbian Bitter Over Decision," and the article contained an allegation by Jack Fena that Thompson might be seeking guardianship for financial reasons since a settlement was pending on the civil lawsuit arising out of the accident. A letter to the editor reminded readers that Thompson, as guardian of Sharon's person, could not profit from her estate, and that Sharon had already incurred \$25,000 in attorney fees.

Karen continued to visit Sharon as a result of the temporary suspension of the judge's order pending appeal. During these visits, Sharon pleaded with Karen, typing, "Help me. Get me out of here" and "please take me home with you" (Thompson 1988, 162). On August 20, however, Dr. William Wilson suspended Karen's visiting privileges. In a letter to Fena, Wilson states: "it has come to my attention that Karen Thompson has been involved in bathing Sharon Kowalski behind a closed door for a prolonged period of time. It has also come to my attention that Ms. Thompson has alleged a sexual relationship with Sharon Kowalski that existed prior to the accident.

C. Charles|16

Based on this knowledge and my best medical judgment concerning Sharon and her welfare, I feel that visits by Karen Thompson at this time would expose Sharon Kowalski to a high risk of sexual abuse" (163). Nurses notes during this period, however, continued to show how responsive and alert Sharon was when Karen worked with her.

After Dr. Wilson's order went into effect, Karen would not see Sharon again for almost five years. She began to call disability action groups, gay organizations, and feminist activists. Her story was reported in the alternative presses: *The Advocate* (June, 1985), *The Washington Blade* (April, 1985), *Ms.* (Sept., 1985), *The Progressive* (July, 1986). Donations and letters of support came. Karen met an openly lesbian legislator, Karen Clark, when she spoke at a Take Back the Night march in Minneapolis sponsored by the Minnesota Human Rights Commission.

The second legal action that led to a published appellate court decision took place in December of 1985, when Karen brought a motion in district court to hold the guardian Donald Kowalski in contempt of court for failing to take into consideration the best interests and reliably expressed wishes of Sharon Kowalski regarding visitation. The motion asked for rights of further discovery, further testing of Sharon, and the removal of Jack Fena as attorney for the Kowalski guardianship because of conflict of interest with the personal injury suit. These motions were denied on January, 1986 and the denial of Thompson's appeal is reported in 392 N.W.2d 310.

Meanwhile, Jack Fena had contacted the university newspaper at St. Cloud State. The subsequent article quoted Fena as stating that Thompson was invading Sharon's right to privacy and injuring her psychologically by divulging their lesbian relationship. He claimed in the article that Thompson's motivations were purely monetary, seeking money from gay rights groups (Thompson 1988, 183-4). Similar articles appeared in the mainstream presses.

Karen began to fly to California and Boston to speak about the case. She was approached by the co-producers of the *Life and Times of Harvey Milk*. She began to write a book with Julie Andrzejewski, *Why Can't Sharon Come Home?*, published eventually in 1988. Free Sharon Kowalski groups began taking shape around the country. Karen was contacted by *60 Minutes*, *West 57th Street*, and *The Phil Donahue Show*, but none of these shows materialized when the Kowalskis refused to participate. She finally did appear on *The Sally Jesse Raphael Show* in St. Louis, but the one-half hour was shared with a transexual and the introduction took five minutes. But Karen continued to accept speaking engagements, for example, at the National Gay and

17|Making Justice

Lesbian Health Care Providers conference in Los Angeles and the Gay Pride Rally in June of 1987 (Thompson 1988, 196-9).

An article entitled "The Silent Ordeal" appeared in the Sunday edition of the *St. Paul Pioneer Press* also in June of 1987. "The Silent Ordeal" told the story of the Kowalskis who have "borne the emotional burden of their daughter's paralysis. Their savings, their peace of mind and their plans for a leisurely retirement all have been lost." The article describes the despair of the Kowalskis as they "dutifully" drive ten miles "week in and week out" to visit "their eerily silent daughter" who "lies trapped in her twisted body" (Thompson 1988, 203). The following month, the National Organization of Women (NOW) passed a resolution supporting Karen's case. In October, the National Committee to Free Sharon Kowalski was organized.

Legal action began again in September of 1987, when Karen's attorneys filed a request for a competency hearing for Sharon. After a hearing in November, the judge ruled in February of 1988 that Sharon should be tested. The parties continued to litigate the question of the place and identities of the testers. Finally, in May of 1988, Judge Robert Campbell ordered specialists at Miller-Dwan Medical Center to examine Sharon to determine her level of functioning and whether she could express her wishes on visitation. The doctors concluded that Sharon wished to see Karen and visitation rights were re-established in January of 1989.

The conclusions of these new tests together with the national prominence that the case had gained led to articles in the *Los Angeles Times* (Aug. 5, 1988), *New York Times* (Feb. 8, 1989), and *Washington Post* (Feb. 6, 1989). The case was attracting legal attention as well: *The Berkeley Women's Law Journal* and *Dayton Law Review* both published articles in which the Kowalski case was cited. Karen Thompson's own book appeared in 1988.

There were further developments in 1988. At the end of the year, Donald Kowalski notified the court that due to his own medical problems, he wished to remove himself as guardian. The civil suit was settled shortly before this announcement, awarding damages of \$330,000 dispersed as follows. \$119,000 in attorney's fees, \$125,000 for the State of Minnesota to offset medical assistance, \$65,000 to the Kowalskis, and the remaining amount, approximately \$80,000, was allotted to Sharon for her care. (A previous settlement had awarded \$330,000 to Sharon in trust for distribution to her after she was 50 in 2006.)

On August 7, 1989, Thompson filed a petition for appointment as successor guardian of Karen's person and estate, a petition whose

C. Charles|18

denial led to the most recent Minnesota Court of Appeals case in 1991. No competing petition was filed, and the court held a hearing on August 2, 1990. The court wished to conduct further evidentiary hearings on the unopposed petition and evidence was taken for the next several months. Karen Tomberlin, a friend of the Kowalskis, contacted Sharon's attorney and stated she would like to testify in opposition to Karen's guardianship and would be willing to be considered as an alternative guardian. The court heard testimony of 16 medical witnesses, including physicians, nurses, and therapists, who testified to the benefits of Thompson's relationship with Sharon. Three witnesses testified in opposition to Karen's petition: Debra Kowalski, Sharon's sister; Kathy Schroeder, a friend of Sharon and the family; and Tomberlin. None of these witnesses had medical training or were frequent visitors to Sharon. Sharon's parents did not attend the hearing.

On April 23, 1991, the trial court denied Thompson's petition and appointed Tomberlin as guardian without conducting a hearing about her qualifications. The ruling was appealed, by Karen, with amicus briefs filed by the Lambda Legal Defense Fund, the MCLU, and NOW. On December 17, 1991, Judge Davies, finding a clear abuse of discretion by the probate court, reversed the decision and remanded the case with instructions to grant Thompson's petition without specific restrictions other than the accommodation of visiting rights for Sharon's parents (478 N.W.2d 790).

Even after the case was remanded at the end of 1991, district court Judge Campbell avoided signing the guardianship order. Not until August of 1992 was Karen able to make arrangements to bring Sharon to her handicap-accessible home in Clearwater, Minnesota, where she and Karen now live with Karen's other partner, Patty Bressler. While Sharon still cannot use the left side of her body and suffers from short-term memory loss, her doctors report that she is "thriving" in her new home (Thompson 1995, 96-101).

2. Making Justice

Although the continuing jurisdiction of domestic relations courts over matters of custody and guardianship leads not infrequently to changing orders with changing circumstances, the Kowalski case nevertheless demonstrates a considerable reversal of outlook toward the competency of Sharon's lesbian lover to provide for her. Yet this reversal comes not from some pre-millennial revelation at the Minnesota Court of Appeals in 1991 about the inherent injustice of homophobia and heterosexism, but from a trial court tran-

19|Making Justice

script so overwhelmingly conclusive of Karen Thompson's dedication to and support of her lover—together with an absence of any substantial evidence of objection to Karen or alternative to her—that the appellate court was almost forced by that presentation of facts to support her claim. Justice is contained within the evidentiary case Karen has presented, but that embeddedness is not a measure of its assured recognition or its existence as a transhistorical universal. Against all seeming odds, the trial court ignored the sixteen medical witnesses (many of them independent), delayed judgment for almost two years, and then ruled against the justice of the petition. In many ways the indiscretions of the lower court are even more remarkable than the final award of guardianship to Karen by the Court of Appeals. Unquestionably the divergence of opinion between trial and appellate court in their determinations of justice is evidence of Laclau's insistence upon the irrational and arbitrary antagonism—the lack of reason—that inhabits social agency, including those that hold legal power (Laclau 1990, 4-5). But this radical critique of the arbiters of social justice is not an argument for nihilism; on the contrary, for Laclau this antagonism provides an opportunity for recognizing and capitalizing upon the malleability of justice, as the perseverant Thompson did.

Nor can Thompson's achievement of guardianship be accurately assessed as a victory for some notion of transcendent justice, some stride toward a utopian, hate-free world. Had Donald Kowalski not resigned as guardian, the probability of her having prevailed is unlikely. The chances of Sharon's sister or someone else claiming guardianship in the future are also uncertain. The "justice" Thompson has won, after almost ten years of struggle, has left her with a legal bill of \$125,000 and a partner severely injured by a random encounter with a drunk driver. Domestic partnership legislation protecting lesbian and gay lovers is not in place, even in Hawaii, where it has been ruled to be constitutionally required. But the historically contingent and unstable nature of Thompson's success does not detract from its power or its ramifications; rather it proves that the assumed justness of discrimination against homosexuals is not as fundamentally unshakable as Justice Burger would have led us to believe (*Bowers v. Hardwick* 1986). Thompson and Sharon's victory is evidence that justice is indeed shakable and there for the shaking by those with the stamina.

Thompson goes out and makes some justice of her own from the time that she decides to go public in 1984 after the removal of Sharon from County Manor. Her public activism in the pursuit of her rights

C. Charles|20

to a private domestic relation takes the form of telling her story, making her case—producing forms of representation that enter into the social arena of antagonism where identity, the law, and justice are ultimately forged. Those phone calls, letters, interviews, speeches, articles, and books function as agents in the production of equity. Her success is varied and her tactics often backfire as she is accused of sensationalizing her supposed affair for monetary and political gain, accused of damaging Sharon by outing her, but these accusations are not completely inaccurate. Political gain is exactly what Karen's demand for justice depends on, for without it, the political power of those who ignore, marginalize, and discredit gays and lesbians will go unchecked. Karen "outs" herself at the same time that she divulges her relationship to Sharon, and when she does come out, she faces the continued denial of a community that refuses to allow her to confront its open homophobia: her relation to Sharon is "alleged," fabricated for political gain, unfair to Sharon's reputation. Even when this crime dares speak its name, no one listens. When the *St. Paul Pioneer Press* and the *St. Cloud Daily Times* publish articles entitled "Lesbian Bitter Over Decision" and "The Silent Ordeal" in which Karen is depicted as a gold-digging political crackpot and the Kowalskis as Christian martyrs, Thompson finds herself answering charges of publicity-seeking and outing while she tells her story of a woman loving a woman on the *Sally Jesse Raphael Show*.

Ironically, Karen's attempt to publicize her lover's plight takes place within a social climate where the myth of the private or unpublicized is linked to notions of rationality, level-headedness, non-distortion, and, by implication, fairness. From the moment the *St. Cloud Daily Times* on October 14, 1984 suggests that Thompson is a political feminist on a crusade to set precedent for homosexuals at the expense of the defenseless Sharon, the announcement of Karen's lesbian love becomes equated with sensationalism, possessiveness, abuse, and even defamation. Jack Fena, the Kowalskis' attorney, capitalizes on the cultural taboo against telling the gay story when he threatens to sue Karen for slander, seeks a temporary restraining order against her for invasion of privacy, and uses Karen's publicity campaign as evidence of her disruption of Sharon's quietude. The probate court assimilates this notion of Karen's irrational and potentially actionable discourse by ruling that she is "overbearing," "disruptive," and invasive of Sharon's privacy (478 N.W.2d at 795). This rhetoric of privacy puts Thompson in a double-bind. On the one hand, Sharon's accident and subsequent disputes prove that privacy is precariously unsustainable and detrimental once a court needs evidence

21|Making Justice

of affinity to award custody. On the other hand, when Karen does come out, she faces the ideological ethos of privacy that the courts and media use as a tool to condemn her publicity campaign. Her situation shows not just that the personal is inevitably political, but that the political constructs and maintains a notion of the personal or private which privileges the propriety of not telling one's side of the story, not using discourse to demand one's own version of justice. By accusing Thompson of sensationalism and behavior that is potentially actionable as a tort, the courts and mainstream media protect their ignorance of homosexuality by condemning, marginalizing, and scandalizing its disclosure. This negation of public statements within the channels of public institutions is one of the primary ways those institutions preserve their versions of the truth by removing and denigrating other versions that enter the discursive marketplace.

Yet it is precisely Thompson's dogged process of naming, this re-iterative and emphatic insistence upon telling her account, that eventually forces a judicial accounting of the validity of her same-sex partnership. Karen's talks, rallies, meetings, and media appearances represent demands for recognition that are both "discursive," as Laclau notes, and sensational or "human": they evoke emotion and gain strength not primarily from an appeal to some illusory standard of objectivity, but from embracing the rhetorical and dramatic power of their narratives. In fact, the drama of Thompson's representational account is indivisible from its power as a tool for the reshaping of justice.

Karen's activism as a result of the decisions of the Minnesota Court of Appeals, her *cause celebre*, does not go unnoticed by the legal community, the Minnesota legislature, or the national media. Over a period of eight years, her own attorneys, the Minnesota Civil Liberties Union, the Lambda Legal Defense Fund, and the National Organization of Women file over twenty motions, including appeals before the Supreme Court of Minnesota and the Spureme Court of the United States in the first appellate decision. By the time of the 1991 Court of Appeals decision awarding Thompson guardianship, the stamp of Karen's extra-judicial activism is clearly detectable in the text of the court's opinion. The once overbearing and "troublesome" appellant has now become "highly cooperative and exceptionally attentive to what treatments and activities are in Sharon's best interest" (478 N.W.2d at 794). Karen emerges as a "forceful advocate for Sharon's rehabilitation," and the court finds no evidence to suggest that Sharon is "harmed or exploited by her attendance at public events," including gay and lesbian marches and the annual conference

disClosure

reVisioning Justice

C. Charles|22

of the National Organization of Women, where she received an award (478 N.W.2d at 796). Nor do the judges find a conflict of interest in Thompson's money-raising activities since all the money was raised in Sharon's name. Although the circumstances of the case had changed by 1991, especially in regard to the ward's improved capacity according to experts, the appellate court's opinion reflects a new respect for Sharon and Karen's activism, care, and sexual orientation, a respect no doubt influenced by the national attention Thompson had worked to gain outside the courtroom.

This publicity, whether within or outside the hallowed halls of justice, operates as a mechanism of power that draws attention to the legal and social vulnerability of lesbian and gay partners. If a theorist of sexuality and power like Foucault is correct when he argues that the deployment of sexuality operates by methods of power that are "irreducible" to "law," and embedded in techniques of "normalization," that the regulation of sexuality takes place beyond the state and its apparatus within a complex network of private regulations, discretionary decisions, and preferences, then Karen Thompson's concentration on the techniques of social representation serves as an example of how those techniques can influence the legal apparatus (Foucault 1980, 89-90). By perseverance and determination, she makes the benefits of her love known to her disabled partner, to the medical community, and to the community at large.

The Minnesota Court of Appeals' sudden recognition of the validity of lesbian partnership in 1991 stands in marked contrast to the opinions of the probate and appellate court up to that date. One of the principal strategies of the initial appellate court decision by Chief Judge Popovich in 1986 entails the rendering of Sharon legally incapable of making her own decisions or expressing her own wishes, thereby putting the court in control of her destiny. Minnesota law requires that the "best interest of the ward" should be the guiding principle in making the momentous decision of guardianship appointment, a determination creating a legal relation that makes the ward subject to greater external control over her life than if she were convicted of a crime.⁷ The ward's desire is an important factor in deducing that interest but only if the ward has sufficient capacity to form an intelligent preference (Minn.Stat. 525.551(5); 382 N.W.2d at 865). Affirming the lower court's holdings, Chief Judge Popovich rules that Sharon's inconsistent responses to questioning not only render her stated preference for Karen "unreliable" but also evidence her legal "incapacity." Sharon "is burdened with a child's mental capacity between four and six years of age," her "communication skills

23|Making Justice

are limited," and she may never improve, the court finds, upholding the probate court's decision and discounting conflicting testimony about Sharon's responsiveness. Once the ward is found to be incapacitated, the court as agent of the state gains the power to act as *parens patriae* in deciding the ward's best interest (382 N.W.2d at 863, 866). The court's arrogation of power over Sharon through the invocation of its latinate doctrine of state-as-parent illustrates what Goodrich calls the "alien linguistic practices," "the obscure, professionalized and impenetrable language" that the law uses to exercise its control (Goodrich 1987, 1).

The court's "dumbing down" of Sharon, the reduction of this 27-year-old woman to an unreliable 4-year-old child, de-sexualizes, de-humanizes, and effectively silences her for purposes of the court's decision. It also obviates the need to confront Sharon's lesbianism since, under this adjudication, she is legally too young to have a sexual preference, thereby supporting the court's continued ignoring of homosexuality. Once the court determines that the fatherland knows best, the adjudication of Sharon's interest becomes a matter of interpretation by a parental appellate court and thus contingent upon that court's construction of the evidence. Sharon's adjudicated status as a child gives the court the leverage it needs to assume her ties are stronger to her parents than to her "roommate" Karen. Not surprisingly "the unconditional parental love of Donald Kowalski," mirroring that of the paternal state, creates a legal presumption of qualification for guardian status which is "even stronger when the child has been incapacitated to a four-to-six-year-old mental ability" (382 N.W.2d at 865).

Once Sharon is effectively silenced through her infantilization, her ties to Karen become not only inconsequential but in fact dangerous. Although the court recognizes the four years of co-habitation, the ring exchange, and the life insurance policies, the relationship is still described as "uncertain" (382 N.W.2d 861, 863). The court cites testimony of a closed bank account and a sister's testimony that Sharon told her that Karen was "possessive" as evidence of this uncertainty rather than the reverse. Although the court notes that Karen "claims a lesbian relationship," the opinion notes that "Sharon never told her family of such a relationship or admitted it prior to the accident." Instead of taking judicial notice of the stigma attached to coming-out to the Kowalskis in the Iron Range, a working class area in Minnesota, the court uses Sharon's closeted status before the accident as evidence that she is not a lesbian. Sharon's testimony after the accident that she loves Karen is inconsistent and unreliable, and since she

C. Charles|24

is a child now anyway, her sexuality does not exist. Sharon's near fatal accident has dealt a lethal blow to her sexual identity; it has disabled her from both within and without. The adjudication of her incapacity demonstrates that there can be no closet without a room of one's own into which to emerge.

Karen, on the other hand, is characterized by the court as a "possessive" lesbian whose "disruptive behavior" and publicity-seeking dissemination of medical records to the media must be restrained. The Kowalskis' disruptions and hate of Karen is ignored by the court. Judge Popovich cites a presumption in favor of "family ties" in making its guardianship decision, a presumption that does not, of course, extend to same-sex partnership because for this court the alleged lesbian relationship is legally nonexistent (382 N.W.2d 861, 865).⁸ Constructing justice around the denial and denigration of homosexuality and false glorification of parental love, the appellate court affirms the decision of the probate judge based on the evidence from doctors that "the ward enters a detrimental, depressed state after Thompson's visits" (382 N.W.2d 861, 864). The subtle demonization of Karen as an aggressive lesbian whose domineering intrusion has psychologically injured the helpless Sharon is writ large throughout the court's opinion. The best interests of the ward are not what she wants because what she wants "upsets" her and "results in her depression." The court must protect Sharon from the feminist lesbian who is ruining her life and return this child to the bosom of her family, where the "strong confidential relationship" and "unconditional love" of the Kowalskis will shelter the ward (382 N.W.2d at 865).

In spite of the introduction of evidence that Sharon's depression occurred because she did not want Karen to leave and that Karen had devoted countless hours to her lover and made substantial rehabilitative strides with her, the court sees fit to uphold Kowalski's refusal to allow Karen any visitation at all. This decision comes not only from a failure to recognize the legitimacy of same-sex domestic partnership—the failure to tell its story—the insistence upon its silence, but also from the court's "ignorance" of Karen and Sharon's private love, which provides the opportunity to overlay its own story onto the case, the ideology of family values. The initial erasure of the homosexual couple in love by the avoidance of Sharon's closet is followed by a re-inscription of the homosexual as single lesbian feminist seeking to undermine the unconditional love of parent and child. The Kowalskis' age, their failure to take Sharon out of the nursing home on any occasion, their insistence that their daughter is a "severely brain-damaged" burden on their golden years constitute statements of

25|Making Justice

fact not part of the court's ideological narrative, nor even part of the story of justice that their statement of facts will acknowledge. The court's refusal to recognize the legitimacy of same-sex domestic partnership, no doubt for fear of its striking similitude to the sacrament of heterosexual marriage, not only renders Sharon and Karen's four-year co-habitation as ring-exchanging "roommates" weightless in the scales of justice but also, in fact, under the transformation of the shy, Bible-toting Karen into a feminazi, turns their partnership into a liability in the annals of the family law courtroom. Theirs is a discourse that effaces same-sex domestic partnership and turns homosexuality into loveless sexual abuse that foment depression and disrupts the social order epitomized by the nuclear family.

But the 1986 appellate court derives its ideological sense of justice not from the pre-ordained bedrock of Leviticus but from an evidentiary transcript that provides them with a statement of facts upon which it can hang its homophobic hat. The Kowalskis' attorney, Jack Fena, had engineered the removal of Sharon to a care facility removed from St. Cloud and provided the medical evidence necessary to find that Sharon's incapacity rendered her unreliable. The psychiatrist, Dr. Cowan, who testified to both Sharon's inconsistent responses and depression, was Fena's hired psychiatrist for the personal injury civil suit. (Fena had a vested interest in Sharon's non-recovery for purposes of that civil award, but the court found no conflict of interest in his serving as both attorney for the guardian and for Sharon in the civil suit (392 N.W.2d 311, 314). Cowan's conclusions were corroborated by the affidavit testimony of Dr. Steven Goff of the Polinsky Memorial Rehabilitation Center and Dr. Julie Moller, the physician at the nursing home. But the court neither discusses nor cites the considerable medical testimony to the contrary, including the evidence of Sharon's previous recovery at St. Cloud. Jack Fena was also able to build his case against Karen Thompson by seeking temporary restraining orders and supplying evidence of Karen's supposedly disruptive behavior over the conditions at the Park Point Nursing Home. Judge Popovich does not reach his decision in a complete ideological vacuum; he is able to locate a version of equity within the evidentiary transcript that is provided by the advocate for the Kowalskis. That transcript tells a story that silences Sharon, demonizes Karen, and re-instates the symbolic paternal script that father knows best.

The most recent Minnesota Court of Appeals decision in the Kowalski matter, handed down on December 17, 1991, finds a clear abuse of discretion by a trial court that has denied Karen Thompson's petition for guardianship after Donald Kowalski's withdrawal and ap-

pointed Karen Tomberlin guardian in her stead. Judge Davies reverses and remands the case with instructions to grant Thompson's petition without specific restrictions other than the accommodation of visiting rights for Sharon's parents (478 N.W.2d 790, 796). Thompson's petition to be successor guardian was filed on August 7, 1989, the law's year-and-a-half delay adding insult to the injury of a trial court's decision to award guardianship finally to Karen Tomberlin, a friend of the Kowalskis described by the lower court as a "neutral" third party needed to heal the wounds of a "family torn asunder into opposing camps" (478 N.W.2d at 794). Judge Davies is quick to point out the discrepancy between the trial court's adjudication and the testimony in the record. At the hearing Tomberlin testified that she was a friend of the Kowalskis and had a primary goal of moving Sharon as close as possible to her parents in the Iron Range, though she herself would be unable to take her in. Tomberlin rarely visited Sharon, but spoke with the Kowalskis on a weekly basis and was instrumental in securing the testimony of Debra Kowalski, Sharon's sister, against Thompson. Most importantly, the trial court presented no evidence of Tomberlin's qualifications for the job under Section 525.551(5) of the Minnesota Statutes, which requires consideration of the ward's preference and the degree of commitment of the proposed guardian. As the Court of Appeals notes, "Sharon's current treating physician testified that she had had no interaction with Tomberlin, and she was not asked to evaluate Tomberlin's knowledge of, or interaction, with Sharon" (478 N.W.2d at 795). Judge Davies finds that a review of the record shows that Tomberlin is neither an impartial mediator nor a qualified guardian, that the facts do not warrant the justice meted out by the trial court.

Behind the trial court's error in appointing Tomberlin, who rarely visited Sharon and who had not even formally petitioned the court for the successor position, was an obvious desire *not* to appoint Karen Thompson and to keep Sharon under the control of her family "torn asunder." The Court of Appeals counts the ways that the trial court "found fault" with Thompson, and each elicits a remarkable reversal in attitude (478 N.W.2d at 795-6). First the trial court "suggested that Thompson's statement to the family and to the media that she and Sharon are lesbians was an invasion of privacy, perhaps rising to the level of an actionable tort" (478 N.W.2d at 795). Secondly, the trial court took issue with Thompson taking Sharon to public events, including some gay and lesbian-oriented gatherings and other community events, reacting no doubt to Karen's extra-judicial strategy of making her own justice. Finally, the lower court found that

Thompson's solicitation of legal defense funds and testimony that she had been involved in other relationships since Sharon's accident "raised questions of conflicts of interest with Sharon's welfare" (478 N.W.2d at 795).

Although Judge Davies answers each of these claims in a careful way, as I shall discuss momentarily, the homophobia embedded in the lower court's findings deserve considerable pause. What does it say about a society that makes it civilly actionable for one person to announce the sexual orientation of another, to allow one person to collect damages for pain and suffering as a result of having her sexual orientation divulged? Putting aside the pragmatic recognition of homophobic antagonism in social reality, the trial court in this case is seeking to cast Thompson's action as a tort, as a civil wrong—tantamount to an assault or battery. Although bereft of all other rights, Sharon from the perspective of the probate court should be permitted to maintain her right to stay in the closet, to remain silent concerning something about which society, in a more honest venue, has promulgated the following rule: don't ask, don't tell. The golden silence of this suggested tort is, however, sufficiently telling. As Sedgwick has argued, "silence is rendered as pointed and performative as speech, in relations around the closet" (Sedgwick 1990, 4). The not coming out story, which the traditional venues of legal justice have a vested interest in maintaining, is a sub-genre in need of exposure.

The lower court casts the petitioner not only as a potential tortfeasor, but also as an exploiter of the helpless Sharon for political propaganda. Taking judicial notice that Sharon and Karen were featured guests at gay and lesbian rallies, the lower court chafes at the infringement on its power by Thompson's social activism, the public reporting of her case to the community. The court's five-year expulsion of Karen's visitation rights and endorsement of Donald Kowalski's guardianship have been in the "best interest" of Sharon as determined by a paternalistic panel of judges, but Karen's removal of her lover from an institution for an afternoon to attend a gay rally in her honor is judged exploitive. The threat of an adjudication of justice outside the venue of the courtroom leads the lower court to incorporate and attempt to condemn those extra-judicial promotions within the discourse of the common law of invasion of privacy. The influence of Thompson's justice-making is great enough to lead to its citation by a concerned probate court, demonstrating the power of her discursive accounting.

That influence also manifests itself in the lower court's first charge of conflict of interest. Thompson is not just an invader of pri-

C. Charles|28

vacy and publicity monger; she is also con-woman. She has marshalled the forces of LAMBDA Legal Defense Fund, the National Organization of Women (NOW), and the bleeding hearts of others for her own personal gain. Both of these organizations and the MCLU have also filed *amicus* briefs in the case, further evidencing the power Thompson has amassed outside the courtroom. At the August 2, 1990 hearing, the lower court judge must have faced seven lawyers arguing on behalf of Karen, sixteen witnesses testifying to her qualifications, and a courtroom no doubt full of the press. No wonder he took the case under submission for a year and a half, and then sought to find Thompson at fault for having such strength.

The second conflict of interest charge suggests that Thompson is promiscuous and, therefore, not devoted to her lover. As if her characterization as malefasant, exploitative, and avaricious were insufficient, the lower court must also charge her with sexual misconduct. Her admission of sexual activity with others during the seven years since Sharon's accident has rendered her undevoted to the woman she "alleges" to have had a relationship with before 1983. To justify its reasoning, the court must put Karen in a double bind: on the one hand, her relationship to Sharon must remain "unclear," "alleged," and a matter of "privacy"; on the other, Thompson is compelled to remain committed to this fantasmatic "affinity" (478 N.W.2d at 794).

The Court of Appeals' reply to these adjudications manifests the degree to which Thompson's representational pressure has effected a new attitude toward same-sex partnership. The invasion of privacy finding, akin to defamation, is obviated by the truth, as the statement of facts by Judge Davies makes clear: the nebulous four-year "roommate" designation of 1986 has turned into a "lesbian relationship" in which Karen and Sharon are "sharing a home in St. Cloud" (478 N.W.2d at 791). What becomes "unclear" for this Court of Appeals as opposed to the 1986 court is not the existence of a lesbian relationship but the "extent to which Sharon had publicly acknowledged her preference at the time of the accident" (478 N.W.2d 795). More importantly, Sharon's doctors and therapists have testified that Sharon had voluntarily come-out to them on more than one occasion and that Thompson's earlier revelation was "crucial for the doctors to understand who their patient was prior to the accident" (478 N.W.2d at 796). In 1986, Sharon's disability had rendered her desire to see Thompson as "irrelevant" because "inconsistent" and against her best interest. The medical justification for Karen's outing of herself and her lover was not part of the 1986 record. Although the ward had made further mental progress since the time of the accident, according to

29|Making Justice

Thompson there was ample evidence of Sharon's acknowledgment of their relationship in 1986. The earlier Court of Appeals had arguably exploited the issue of capacity to insure that the question of sexual preference remain irrelevant except in so far as it was fabricated by Thompson.

The 1991 Court of Appeals' decision lays the lower court's exploitation claim to rest by citing the testimony of Sharon's health care workers that she "had a great time" and interacted well with other people at these gay and lesbian events (478 N.W.2d at 796). The counter-testimony came from Debra Kowalski and Kathy Schroeder, a friend of Sharon's and the Kowalskis. They testified that they did not think Sharon would enjoy the events that were "gay and lesbian-oriented in nature." The court dismissed this hearsay because Debra and Kathy, unlike the health care workers, were never in attendance at the rallies to evaluate Sharon's reaction firsthand. The likelihood of the Kowalskis visiting a gay and lesbian rally with Sharon is small enough to make the court's comment almost comic in tone: "they're here; they're queer; get used to it."

Judge Davies also handily dismisses the conflict of interest claims by pointing to evidentiary findings, locating justice in the testimonial record of the lower court. All the money collected by Thompson was used to defray "the cost of years of litigation" and any extra was used to purchase extra equipment for Sharon—a voice machine, a motorized wheel chair, a hospital bed, a lift. In fact, Karen, who emerges in a rather heroic light in this court's opinion, has built a disabled-accessible home for Sharon in St. Cloud.

Thompson's sexual relations with others during Sharon's convalescence, gleaned from the testimony of one doctor in the record, is assessed an occurrence that "is not uncommon" for spouses of severely handicapped patients and not indicative of a level of continued "commitment to the injured person" (478 N.W.2d at 796). The court cites with approval Karen's testimony that any third person in her life must understand that she and Sharon are "a package deal" (478 N.W.2d at 496). Remember that the 1986 court had depicted Karen as a potentially abusive, bitter lesbian who was attempting to fabricate a relationship with Sharon for political and monetary gain, a position not unlike the trial court's stance in 1991. Besides the important fact that this transcript comes before a Court of Appeals made up of entirely different judges, the re-casting of Thompson as a stellar care-giver—the recognition of the justice of her claim—must be attributable in part to the uncommon strength of the petitioner's expert testimony. There was no testimony from the health care community

C. Charles|30

that could question Thompson's "interest or commitment" or her "ability to maintain a current understanding of the ward's or conservatee's physical and mental status and needs" within the meaning of Section 525.539(7) of the Minnesota Statutes. In 1986, the Kowalskis' personal injury attorney had marshalled his own expert testimony to throw both Sharon's and Thompson's reliability into doubt. The preference of the ward, which by statute is also a major factor in the decision of guardianship, becomes a major factor in Davies' decision. Though the trial court still insisted on Sharon's unreliability because of her inconsistency, the reviewing court finds that the medical testimony overwhelmingly shows that Sharon has proclaimed her desire to be with Karen. The silence of incapacity, adjudicated by the "discretion" of the family law judge, provided the lower court the opportunity to promulgate its homophobic ideology by rendering Sharon's sexuality both moot and mute. For Sharon, the finding of incapacity became the deadbolt on her closet.

While the 1991 transcript quite clearly shows that the Kowalskis had to some extent given up the fight and that Karen had amassed an arsenal of accounts on her behalf, the immersion of justice in the multiplication of representation—the reiteration of one's story—does not entirely explain the unusual outcome of this case. The divergence in 1991 between the lower court and the Court of Appeals reflects the depth of homophobic entrenchment in a social milieu that is facing new versions of equity in domestic relations. That the lower court was willing to face an almost certain reversal in order to prevent Thompson from becoming her partner's guardian reflects the polarization that exists over the justification of same-sex partnership and, more fundamentally, over the rights of gays and lesbians. Those rights are neither fundamental nor absolute; they are sustained within a human and discursive context that is enmeshed in a symbolic network of "sensational" narratives, reiterated accounts that shape the parameters of values like justice. These forms of discourse vie for prominence within historical settings that substantiate Laclau's claim to an antagonism within the social subject that cannot be occluded or subsumed under an illusion of moral authority.

The Court of Appeals concludes its opinion by chastising the lower court for its lack of respect for lesbian relationships:

All the medical testimony established that Sharon has the capacity reliably to express a preference in this case, and she has clearly chosen to return home with Thompson if possible. This choice is further supported by the fact that Thompson and Sharon are a family of affinity, which ought to be accorded

31|Making Justice

respect. (478 N.W.2d at 797)

The victory of this lesbian couple is both a human and discursive one: Karen's story of domestic love has led the court to recognize the affinity between homosexual and heterosexual notions of family. At this discursive moment, the irrational basis of the antagonism that underlies any phobia—its status as a projection of one's fear of loss of self-definition—is demonstrated by the court's use of the loaded term "family" to describe a lesbian relationship. "Family," after all, is a code word for heterosexism, and the suggestion that such a symbolic signifier could include the very homosexuality which it is often used to exclude, strikes at the heart of the repressed affinity behind insistent difference. That affinity, which is at a fundamental level a fear of lack of autonomy, produces and will continue to produce versions of justice that will include and exclude, respect and disrespect. These historical versions are changed when narratives like the Kowalski case produce a statement of facts that deconstructs the boundaries of equity and calls for a new version of justice, which must recognize the "truth" or validity of the Sharon Kowalski and Karen Thompson story. Thompson's persistent re-presentation of her dramatic narrative in venues legal and extra-legal exemplifies one way in which justice steps down and is shaped by those who demand it.

References

- Bowers v. Hardwick* 478 U.S. 186(1986).
- de Man, P. 1979. *Allegories of Reading*. New Haven: Yale.
- Fajer, M. A. 1992. "Can Two Real Men Eat Quiche Together?" *University of Miami Law Review* 46.
- Foucault, M. 1980. *The History of Sexuality: Volume 1, an Introduction*. pp. 89-90. New York: Vintage.
- Gilligan, C. 1982. *In a Different Voice: Psychological Theory and Women's Development*. Cambridge, Mass.: Harvard.
- Goodrich, P. 1987. *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis*. New York: St. Martin's.
- Hobbes, T. 1985. "Leviathan." in J. K. Feibleman *Justice, Law and Culture*. Boston: Martinus Nijoff.
- Holmes. 1985. "Collected Papers." in J. K. Feibleman *Justice, Law and Culture*. p. 173. Boston: Martinus Nijoff.

C. Charles|32

- Laclau, E. 1990. *New Reflections on the Revolution of Our Time*. London: Verso, 1990.
- Leonard, J. ed. 1995. *Legal Studies as Cultural Studies: A Reader in (Post)modern Critical Theory*. Albany: SUNY.
- Okin, S. M. 1989. *Justice, Gender and the Family*. New York: Basic Books.
- Perelman, C. 1980. *Justice, Law, and Argument: Essays on Moral and Legal Reasoning*. p. 29. Boston: D. Reidel.
- Radbruch, G. 1985. "Legal Philosophy." in J. K. Feibleman *Justice, Law and Culture*. pp. 174-5. Boston: Martinus Nijhoff.
- Rhode, D. L. 1989. *Justice and Gender*. Cambridge, Mass.: Harvard.
- Sandel, M. J. 1982. *Liberalism and the Limit of Justice*. Cambridge, England: Cambridge U. Press.
- Sedgwick, E. K. 1990. *Epistemology of the Closet*. Berkeley: U. of California.
- Thompson, K. 1988. *Why Can't Sharon Kowalski Come Home?* San Francisco: Spinsters, Aunt Lute.
- Unger, R. M. 1986. *The Critical Studies Reader*. Cambridge, Mass.: Harvard.
- Weber, S. 1992. *Deconstruction and the Possibility of Justice*. eds D. Cornell, M. Rosenfeld and D. G. Carlson. pp. 232-57 New York: Routledge.

Notes

¹ "Fairness," "equality," and "proportionality" are Aristotle's terms (*Nicomachean Ethics*, 1162b21, 31a10-24, and 1131b17 quoted in James Kern Feibleman, *Justice, Law and Culture* (Boston: Martinus Nijhoff, 1985) 174-5. Kant associates the highest form of justice with reason (Immanuel Kant, *The Philosophy of Law*, trans. W. Hastie (Edinburgh: T. and T. Clark, 1887)) 198, quoted in Wai Chee Dimock, *Residues of Justice: Literature, Law, Philosophy* (Berkeley: U. of California, 1996) 12. John Rawls' *A Theory of Justice* (Cambridge: Harvard, 1971) is based in large part on his notion of intuitive fairness. See also Rawls' "Justice as Fairness: Political not Metaphysical," in *Justice*, ed. Thomas Morawetz (New York: New York U., 1991) 3-32.

² Laclau states: "... the contingent and precarious nature of any objectivity has only become fully apparent with contemporary capitalism and its associated dislocatory effects which show the historicity of being, and that this recognition of the historicity of being—and thus of the purely human and dis-

33|Making Justice

cursive nature of truth—opens new possibilities for a radical politics" (1990, 4).

³ For those who oppose homosexuality, it is a matter of taste, custom, and individual predilection, like, Justice Scalia notes, eating "snails," wearing "fur," or hating "the Chicago Cubs," though by some strange logic it is also "morally wrong and socially harmful" (*Romer v. Evans* 3245 at 20, 15 [1996] J. Scalia, dissenting). For many lesbians and gay men, however, sexual orientation is not just a matter of moral choice but also determined by some combination of genetics and cultural forces (see the introduction to Eve Kosofsky Sedgwick's *Epistemology of the Closet* (Berkeley: U. of California, 1990).

⁴ The demand or struggle for recognition is Hegel's concept for the process by which concrete historical engagements bring together the subjective positions of citizens and the objective notion of absolute good. I use the phrase as it is developed in Fred Dallmayr's "Hermeneutics and the Rule of Law," *Deconstruction* 301-2, citing G. Hegel, *Philosophy of Right*, trans. T. Knox (1967).

⁵ A roughly chronological review of many of the publications that concerned the Kowalski case include "Gay Issue Clouds Fight For Custody," *St Cloud Daily Times* 18 October 1984; *The Washington Blade* 26 April 1985; *The Advocate* 25 June 1985: 13; "Lesbian Bitter Over Decision," *St Cloud Daily Times* 24 July 1985; Joanne Linsley, "A Right to Care," *Progressive* July 1986: 15.

The latter publicity preceded the two Court of Appeals decisions, *In re Kowalski* 382 N.W.2d 861 (Minn. Ct. App.), cert. denied 475 U.S. 1085 (1986) and *In re Kowalski* 392 N.W.2d 310 (Minn. Ct. App. 1986). My analysis concentrates on the first of these two cases.

Rhonda Rivera, "Queer Law: Sexual Orientation in the Mid-Eighties, Part II," 11 *U. of Dayton L. Rev.* 275, 327 (1986); "The Silent Ordeal," *St. Paul Pioneer Press* 7 July 1987; Betty Cuniberti, "Just Whose Life is It?" *Los Angeles Times* 5 August 1988: Part V, at 1, Column 1; Joyce Murdoch, "Fighting for Control of Loved One: Guardianship Dispute Pits Disabled Woman's Partner, Family," *Washington Post* 5 August 1988: A1; Nadine Brozan, "Gay Groups Are Rallied to Aid Two Women's Fight," *New York Times* 7 August 1988: sec. 1, at 13 or 26; Peter Johnson, "Disabled Minnesota Woman's Rights Focus of Twenty One Rallies," *USA Today* 8 August 1988: Sec.A at 3; Nancy R. Gibbs and Clare Mead Rosen, "Tragic Tug-Of-War," *Time* 132 (August 22, 1988): 71; Nancy Livingston, "A Bitter Love Triangle," *San Francisco Chronicle* 11 September 1988: Sec. Wor at 1; Patricia Holt, "Tragic Story Spurs Legal Challenge," *San Francisco Chronicle* 2 October 1988: 2; Karen Thompson, *Why Can't Sharon Kowalski Come Home?* (San Francisco: Spinsters, Aunt Lute, 1988) (my statement of facts relies on Thompson's account); Belinda Stradley, "Why Can't Sharon Kowalski come Home?" 4 *Berkeley Women's Law Journal* 166, 169 (1988-9).

C. Charles|34

Peter Freiberg, "Thompson Wins Early Round," *Advocate* 31 January 1989: 14; "Minnesota Woman Allowed to See Disabled Lover," *Washington Post* 6 February 1989: A18; Nadine Brozan, "Woman's Hospital Visit Marks Gay Rights Fight," *New York Times* 8 February 1989: A11 or D25; Rick Harding, "Thompson Visits Her Disabled Lover," *Advocate* 14 March 1989: 10; *Frontiers News Magazine* 29 December 1989: 33; Ruthan Robson and S. E. Valentin, "Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory," 63 *Temple L. Rev.* 511, 515 (1990); John Yewell, "After Tug of War Ends, Sharon Kowalski is Sure to be the Loser," *St. Paul Pioneer Press-Dispatch* 2 December 1990: A9; David Link, "The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples," 23 *Loyola L.A. Law Review* 1055, 1135 (1990).

The most recent Court of Appeals decision came down on December 17, 1991 (*In re Kowalski* 478 N.W.2d 790 [1991]). Nadine Brozan, "Two Sides Are Bypassed in Lesbian Case," *New York Times* 26 April 1991: A14 or A12; Nan Hunter, "Sexual Dissent and the Family," *Nation* 253 (October, 1991): 406, 408-10; "Rights Denied," *The Progressive* 55 (1991): 9; Tamara Lewin, "Disabled Woman's Lesbian Partner is Granted Right to Be Her Guardian," *New York Times* 18 December 1991: A17 or A26; Arthur S. Hayes and Wade Lambert, "Court Awards Guardianship of Disabled Woman to Lesbian Partner," *Wall Street Journal* 18 December 1991: B4 or B6; Dawn Schmitz, "Kowalski and Thompson Win!," *Gay Community News* 22 December 1991: 1;

Mark Hansen, "Gay-Rights Victory," *ABA Journal* 78 (1992): 22; "Thompson and Kowalski Win the Big One," *off our backs* 22 (1992): 9; Jennifer J. Robles, "A Family of Affinity," *Advocate* 6 October 1992: 44-47; Anne B. Goldstein, "Representing Lesbians," 1 *Texas Journal of Women and Law* 301 (1992); *Lesbians, Gay Men, and the Law*, ed. William B. Rubenstein (New York: New Press, 1993) 468-474; Ruthann Robson, "Resisting the Family: Repositioning Lesbians in Legal Theory," *Signs: Journal of Women in Culture and Society* 19 (1994): 975-996;

⁶ This statement draws from Thompson, *Why Can't*, the reported case law, and Fajer.

⁷ For the personal consequences of becoming subject to guardianship, see Winsor C. Schmidt, Jr., *Guardianship: Court of Last Resort for the Elderly and Disabled* (Durham: Carolina Academic 1995) 5-7.

⁸ See "The Tie That Binds," 23 *Loyola of L.A. Law Rev.* at 1134-8 for an important discussion of the Kowalski case.

