WHAT DO LESBIANS DO?
MOTHERHOOD IDEOLOGY, LESBIAN MOTHERS AND FAMILY LAW

by

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Abstract

This thesis explores the application of ideologies of motherhood in the context of family law. The approach taken is to work from the 'margins' of motherhood, using the experience of lesbian mothers as a focal point, in order to explore the 'centre' of dominant discourse and ideologies of motherhood.

Case law from Australia, Canada, the UK and the USA over the past 20 years is examined. These cases are used to explore the ways in which lesbian mothers are characterised as 'bad mothers', in order to ask what these configurations illuminate about the requirements of 'good' mothering. The cases used were primarily child custody decisions involving divorcing parents, but are supplemented with some welfare and adoption cases. The picture, or story, of lesbian mothers which emerges from the judgments is one of fear and horror - a mixture of claiming the foreignness of lesbians at the same time that 'common sense' assumptions about lesbian mothers abound. This 'story' is contextualised in the thesis with a discussion of the characterisation of lesbians in popular culture in the past 70 years, along with formulaic 'types' and narratives, and their presence in and parallels with the legal judgments are then explored.

In part, this thesis asserts that rights based discourse has been unsuccessful in engaging the judiciary to any positive end for lesbian mothers in family law. A framework of mother archetypes is used in order to delve beneath the surface level of the judgments to deeper linking themes. These include such themes as requirements of maternal altruism and lack of agency, fear of maternal animality and fear of male dispensability in child rearing. All of these themes find links in feminist work on motherhood ideology in other contexts, and these commonalities are discussed in the conclusion.
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Thanks to the lesbian mothers whose lives became 'cases' because they didn't give up.
Introduction

'Lesbian is the word, the label, the condition that holds women in line. When a woman hears this word tossed her way, she knows...she has crossed that terrible boundary of her sex role. She recoils, she protests, she reshapes her actions to gain approval.'

Radicalesbians, 1972

'[motherhood] establish[es] woman's credentials as women.'

Ann Phoenix and Anne Woollett, 1991

'Lesbians are not women'

Monique Wittig, 1991

Aims

The central question I wish to ask in this thesis is what does lesbian motherhood, in the way it is constructed by law and culture, reveal about ideologies of motherhood in family law, as well as about familial ideologies more generally. Lesbian perspectives on and experience of motherhood are routinely silenced and excluded from dominant discourse and moreover may be marginalised even within critical discourses, such as feminist and lesbian and gay legal theory.

My argument is that the outsider position, or 'other' of lesbian mother may be capable of illuminating far more than its own partially constructed account of Motherhood as ideology. The premise of this argument is that theory from a position which is marginal has the potential to illuminate that which is dominant and thus creates and perpetuates marginality.¹ Patricia Matsuda "Looking to the bottom: Critical legal studies and reparations" (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 323 arguing for the distinctiveness of perspectives from subordinated minorities.

Cain argues that a marginalised position allows a view of both marginality and dominance. Cain writes that a marginal position, 'enables me to see two versions of reality. The dominant reality, which I experience as 'theirs', includes the following: lesbians are not mothers, all women are dominated by men, male relationships are valuable and female relationships are not, lesbian is a dirty word, lesbians are sick, women who live alone desire men, women who live together desire men, no one knows a lesbian, lesbians don't have families...lesbians are sex... By contrast, the reality that I live, the reality that I call 'mine', includes the following: some mothers are lesbian, many women are lesbian...lesbians are born in families, lesbians are family...lesbians are brave.\(^2\)

In my argument, the marginalised experience of lesbian mothers in the family law system can speak not only for itself, but for what placed it where it is - the process of marginalisation - whereas what is central very rarely recognises its own dominance.

Further, the ways in which lesbian motherhood has been treated as virulently threatening but simultaneously silenced by legal discourse offers the potential to theorise the non-articulated threat and punishment of other oppressed groups/categories of mother. In my analysis of the case law concerning lesbian mothers in Chapters 2, 3 and 5, judicial attitudes were often revealed more fully by judicial slips of the tongue than by reasoned argument.\(^3\) For instance,

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\(^2\)P. Cain, "Feminist jurisprudence: grounding the theories" (1989) 4(2) Berkeley Women's Law Journal 191 at 415. This is not to suggest that I agree with Cain in her adoption of 'standpoint theory', whereby the identity of the theorist authorises the theory as an authentic expression of a group or class perspective (eg. 'lesbian theory' is a distinct brand of theory, done by lesbians). There are numerous problems, both with standpoint theory in itself and in any claims to lesbianism as a distinctive and holistic identity class. See respectively, M. Kline 'Women's Oppression and Racism: Critique of the "Feminist Standpoint"' (1989) 5 Socialist Studies 39 and M. Eaton, "At the Intersection of Gender and Sexual Orientation: Towards Lesbian Jurisprudence" unpublished draft. Rather, this thesis advocates an exploration of dominant ideologies of motherhood from the focal point of the experience of a marginalised class (lesbians). This theory works on the understanding that this is a neglected perspective which has much to contribute, but is not necessarily the only or authoritative marginal perspective, and need not be engaged in solely by lesbians. The necessity of such a 'bottom up' approach to theorising is explored more fully in the latter half of Chapter 1.

\(^3\)See eg Chapter 2 'We know who you are' section.
the scrutiny of maternal sexuality often became apparent through subtext, the choice of certain words, or the absence of others. Moreover, under close examination, sexuality was itself often emblematic of other issues - such as maternal selfishness and maternal animality. These issues were not addressed directly in the judgments, they existed as a silent presence and arose through an examination of the symbolic. In the conclusion of this thesis I argue that similar themes exist in work on mothers from other marginalised groups, such as Native Canadian and African American mothers.

Methodology

The countries

I chose to study child custody cases involving a lesbian mother from Australia, Canada, the United Kingdom and the United States. This selection was in part due to a belief that, despite differences between the counties in legal and cultural terms, the similarities in such areas outweighed the differences, and partly because the small number of cases available in any given country made them unsatisfactory as a site from which to generalise about 'lesbian mothers and family law'.

The legal basis upon which I lay my claim of similarity is that all of the countries in the study evolved from an Anglo-European legal model and in the area of child custody in family law all underwent the transition from paternal right to a limited maternal preference to the 'child's

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4For this reason cases from Quebec in Canada were excluded as, although the welfare principle is present, the system itself is based upon the French civil law tradition and so arguably not able to fall within the comfortable umbrella of many other generalisations about the legal and cultural bases of English speaking common law countries.
best interests' or 'welfare principle' in current use. Each country in the study has enshrined in statute that the best interests, or welfare of the child is to be the 'paramount' or determining consideration in deciding custody of the child. The United States is the one country in which jurisdiction over child custody is exclusively state based rather than federal, and this country is therefore arguably the most 'different' from others in the study. Some US states have factors enshrined in their legislation which temper or alter the application of the welfare principle in a manner contrary to the discretionary application of the principle in other jurisdictions. For instance, some US states have a 'primary caregiver' presumption, meaning that in assessing the child's best interests more weight is to be given to the parent who was primarily responsible for day to day care of the child prior to separation (although arguably not enforced as it was intended). Some states, such as Missouri, alter the test to one of parental unfitness rather than child's best interest if the applicant for custody is a third party (such as a grandparent). A reading of the available case law also reveals that courts in various US states

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6In Australia The Family Law Act 1975 (Cth) contains this principle in s 64(1)(a). Prior to 1986 this federal statute covered only children born into a marriage and the custody of ex-nuptial children was dealt with by state legislation using the same principle (but somewhat different procedures). Since 1990 the Family Court deals with the custody of all children, except those born out of marriage in one state (Western Australia). In Canada the Divorce Act, R.S.C 1985 (2nd Supp.), embodies this principle in C.3. This federal statute covers only children of parents who are pending or post divorce. The custody of the children of unmarried parents is dealt with by provincial statutes which differ in wording but all utilise the same statutory criteria of the best interests of the child (with the exception of the Northwest territories where the welfare of the child in conjunction with the conduct and wishes of the parents is the standard). In the UK the Guardianship of Minors Act 1971 contains the welfare principle in s 1, and is administered in conjunction with the Matrimonial Causes Act 1973 in a federal system that covers both nuptial and ex nuptial children. In the USA the custody of all children is decided according to state legislation, all of which contain the child's best interests principle, although some are tempered by other considerations which will be discussed in the text to follow.


8Although a good case could be made that this test is still applied as though it were a child's best interests test with a presumption against the lesbian mother: see USA: White v Thompson 569 So. 2d 1181 (Miss. 1990) (dissent).
have adopted common law presumptions, such as a custodial parent's 'illicit' sexual conduct being prima facie against the child's best interests without any need of proof (Arkansas) and that a 'non homosexual' custodial parent is always in the child's best interests (Missouri).

Initially such a system appears widely different to that used in Australia, Canada and the UK. In fact, I contend that the differences are not so great as they first appear. In the UK there has also been enshrined as a matter of law, a preference for a heterosexual parent over a homosexual parent, although it was done in a Court of Appeal decision which obfuscated its ratio decedendi with a variety of other considerations. Although Australia and Canada have steadfastly refuted presumptions or findings in law regarding homosexual mothers or fathers as a class and continually reiterated a rhetoric of neutrality they have also tended to fall back upon handy check lists and generalisations about homosexual parents and inquiries have revolved very much around the premise of a homosexual parent disproving harm. In short, the American courts do more bluntly, and to a larger degree, what the courts in the other countries studied do likewise. Analysis of case law in Chapters 2, 3 and 5 will make clear these similarities.

My original sense that American case law would differ from the other countries in the study due to a heavy reliance upon the US Constitution and the prevalence of 'rights talk' in the USA was soon disproved. As I show in Chapter 3, constitutional arguments were universally

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9See UK: C v C (Custody: Appeal) [1991] 1 Fam LR 223 (C.A).

10See Chapter 3 'Just one factor among many' section.

11See Australia: L. and L (1983) FLC 91-353, an 8 point check list, (applied in the gay father case In the marriage of Doyle (1992) 15 Fam LR 274) and a discussion of presumptions of harm and inherent homophobia in the first four of those 'points': J. Millbank, "Lesbian Mothers, Gay Fathers: Sameness and difference" (1992) 2 Australian Gay and Lesbian Law Journal 21. In Canada see a five point check list from a prior gay father case applied to the lesbian mother in Re Barkely and Barkely (1980) 108 D.L.R (3d) 613 (Ont.).
excluded from the 'private' arena of family law and rights claims were overwhelmingly met with disfavour as doing violence to the welfare principle.\textsuperscript{12}

In terms of cultural similarities, I argue in Chapter 4 that all of the countries in the study are part of an increasingly homogenised 'Western culture', with a strong flow of cultural products across national borders. This is particularly so in the sense that American popular culture is consumed in vast quantities by the other three countries in the study. Hence, although I utilise cultural products from all of the four counties to illustrate my arguments about representation, American popular culture is the focus.

The cases

The pool of cases under discussion cover a 20 year period from 1975 to 1994. Both reported and unreported cases were included (from published case reports and from electronic retrieval services, such as Quicklaw and Lexis respectively)\textsuperscript{13} and number 82 in total. Differences in jurisdiction and in era did exist, but were not significant in my opinion. The range of decisions and/or discourse favourable to lesbian mothers, for instance, was not 'better' as a whole in the 1990s compared to the 1970s, as case analysis in Chapter 5 will make plain. A common perception of 'progress' over time leads to the suggestion that things must be better now for lesbian mothers.\textsuperscript{14} I have aimed to undermine this notion by always noting the date of cases mentioned; the most virulently anti-lesbian of which are often uncomfortably recent. Where

\textsuperscript{12}See Chapter 3 'Equality and freedom: the offensiveness of rights' section.

\textsuperscript{13}Although electronic databases can be considered a form of 'reporting' in themselves in that they present the information to a public and selectively choose which cases to include in the database. All unreported Canadian cases were retrieved from Quicklaw, while unreported English, American and Australian decisions were retrieved from Lexis.

differences in cases across jurisdictions appeared, these have been usually noted in the text. Example of such differences include: the fact that available US cases are all appellate decisions (whereas they are mixed between trial and appellate decisions everywhere else), the lesser use of court appointed assessors such as psychologists and social workers in the US system, and a continuing acceptability in some US jurisdictions of placing restrictive conditions on custody awards to lesbian mothers.

The focus of the study was traditional child custody cases, meaning those in which a biological mother and father were in contest for the custody of a child.\textsuperscript{15} Thus lesbian biological mother

versus lesbian co-mother cases were excluded from consideration, as were lesbian biological/co-mother versus sperm donor cases. This decision rested on the basis that heterosexual mothers who 'became' lesbian and left the husband/traditional family form would provoke the most intense anxiety about motherhood and the family, and would thus be most revealing of the ways in which motherhood and familial ideologies permeate Western legal thought.

However, I have also included in the discussion cases involving a lesbian mother and a third party\(^\text{16}\) (such as grandparents), where a lesbian mother has been contesting a welfare seizure of her child,\(^\text{17}\) or an adoption of her child.\(^\text{18}\) In addition I have noted more tangential cases, such as those where a lesbian had applied to adopt a child from a third party\(^\text{19}\) or from the State,\(^\text{20}\) and a case in which a girl who was a minor approached the court for a sex change.\(^\text{21}\) I have also discussed cases where a mother has denied being lesbian and been believed\(^\text{22}\) or where the mother is an 'ex lesbian' in that she is not in a lesbian relationship and claims that her

\(^\text{16}\)These cases are as follows: Australia: Jarman v Lloyd and Ors (1982) 8 Fam LR 878 (this case is unique in that the lesbian mother joined her own mother’s application for custody against the father, and desired custody herself only if the grandmother was unsuccessful); USA: Bezio v Patenaude 410 N.E 2d 1207 (Mass. 1980), Townend v Townend 1 FLR (BNA) 2830 (Ohio 1975), White v Thompson 569 So. 2d 1181 (Miss. 1990).


\(^\text{21}\)Australia: Re A (1993) FLC 92-402.

orientation has changed and is believed by the court. These less standard cases have all been useful in tracing discourse regarding lesbian mothers (as selfish or savage, for instance), and many commonalities have run through these cases and the more 'traditional' child custody disputes. For this reason such cases have been fully incorporated into the discussion, with usually only a note that they are different in source. They were not, however, included in calculating lesbian mothers' chances of 'success' in Chapter 5.

Although I rely heavily upon case law in this work, I wish to stress that the case law as I examine it is a story, not a truth, legal or otherwise. I agree with Annamay Sheppard who wrote in her study of child custody cases involving lesbian mothers in the USA,

'...the texture of evidence as a whole is frequently obscured by the trial court's selective recitation and will almost certainly be lost in the truncated recitation of a reviewing court. Analysis through the milk glass of a written decision must, therefore, by definition, be less than fully revelatory.'

The judgments in my opinion do not in any way reflect the 'truth' of the lives they purport to represent (for instance that many lesbian mothers are selfish nymphomaniacs with sloppy houses) but neither can they be proven 'false' by reference to some external source (we haven't see these houses or dated these women, so how would we know?) The judgments are written by people, mostly men, in positions where they form views of the 'other' of lesbian mothers, to whom they (generally) are 'foreign' and yet have authority over (both culturally

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24 Begging the conclusion that lesbian versus lesbian cases would also be very useful, of course, but for reasons of economy I still choose at this stage to exclude them. Moreover such cases have only emerged in recent years and are available only from the USA.

and legally speaking). Interpretation and representation in such a context must be read as even more thoroughly suspect than usual. Tzvetan Todorov illustrates 'the discovery *self* makes of the *other*' in his book on the conquest and colonisation of the Americas.\(^{26}\) In one example, Columbus, confronted with the foreignness of the native 'other'/s continually interpreted the speech and actions of all whom he encountered as adhering to his own belief systems, to the extent that he convinced himself that they must understand and speak Spanish in the face of all misunderstanding.\(^{27}\) The records of Columbus' travels are to Todorov fascinating for what they reveal, not about Native Americans, but about the Spanish conquistadors - the question of truth is entirely incidental, and largely unprovable in any case. Likewise, I believe that this study reveals much about the process of judgment and those judging, but little if anything about the objects of their attention, lesbians and their experiences of mothering.

*Theory*

This thesis proposes that the example of lesbian mothers can be used to illuminate ideologies of motherhood in law and culture. In essence, legal judgments reflect (and contribute to) popular mythology about lesbians - for instance as castrating, sadistic, sterile and unstable individuals. My argument is that lesbians are fundamentally viewed as UN-mother, and an examination of judgments regarding lesbian mothers, by exposing what UN-mother is, holds the potential to shed much light on what Real Mothers are meant to be in ideological terms.


\(^{27}\) Although lesbians are arguably less foreign and more internal to culture than in this example, the extent of their 'other'ness should not be underestimated as Chapter 4 will make clear. For example, a continued conflation of lesbians and monsters such as vampires in film is prevalent. Moreover the apparent farfetchedness of the foreign language analogy is undercut by recent articles on lesbians in the popular press which actually do contain 'translations' of lesbian words and 'types' for the common reader: see note 363.
The best example of how pervasive and total the opposition of 'lesbian' and 'mother' is in Western culture is the Canadian adoption case of Adams v Woodbury (1986). In that case, Annette Adams had given birth to a daughter at the age of 17, as a result of a relationship with the child's father, which had already ended. Annette's parents had urged her to have an abortion, or failing that, adopt the child out, but she refused and raised the child for three years alone, facing considerable financial and emotional obstacles. In the judges' words,

'The turmoil and difficulties faced by Miss Adams were compounded by the fact that she discovered that she was homosexual...and her discovery that she was a lesbian caused her to seriously consider whether to raise the child or whether it was in the child's best interest to be put up for adoption' (Lamperson, L.J.S.C at 4-5).

At this point, the mother's family put considerable pressure on her to relinquish the child, to the extent of hiring a lawyer and seeking placements for the child. The child was placed with Mrs and Mr Woodbury by the mother, although formal consents were never executed. After one year, Annette Adams had sought out therapy, decided there was nothing wrong in lesbians raising children, and tried to regain custody. She was refused access and applied to the court for custody (Mrs and Mr Woodbury in turn applied for a formal adoption order dispensing with the mother's consent). The court found that the mother's turbulence, 'problems with her sexuality' and the unlikelihood of her current relationship being permanent did not compare well with the 'normal and stable' home offered by the Woodbury's, and granted an adoption order in their favour (at 17). What is most striking upon reading this case, is the way in which every party concerned, including the mother, proceeded from the assumption that lesbianism and motherhood were antithetical. Only the mother ever seriously questioned or wavered from this view.
This is not to say that lesbian mothers lose every case to which they are party. In fact, chances of success for lesbian mothers vary considerably across jurisdictions. As Carol Smart argues,

'It is not that women can never 'win' individual cases, that is not the point. Rather, it is the ways in which law seeks to regulate women's bodies - whether liberally or putatively - and to reproduce specific, negative iconographies of female bodies which need to be challenged.'

This thesis will treat the process by which decisions come to be made as equally or more important than the decisions themselves. It is the discourse used in the cases and the ways in which lesbians are configured as dangerous or bad mothers which will be the focus of examination. In some cases the mother may be held to be an exception and granted custody, and in such cases the process by which exceptionality is created is also illuminating of the 'rule' to which exception is found.

The fact that only a small number of any family law disputes are actually litigated, does not, in my view, diminish the importance of the material and the usefulness of making the reports of litigation a focus of inquiry. Shelley Gavigan argues that courts are of paramount concern because they restate rules and legitimate relations, supporting and shaping ideas in various ways, such that 'courts are primarily ideological rather than instrumental or coercive institutions' and have enormous impact upon social relations. Even in a strictly legal realm,

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28See note 373.


30Usually estimated at between 5% and 10%: see P. MacDonald, *Settling Up: Property Income and Distribution on Divorce in Australia* (Melbourne: AIFS, 1986) at 45. However the number of lesbian mothers who go through litigation may be higher than that of heterosexual mothers. Ellen Lewin notes in her comparative study of single lesbian and heterosexual mothers that while 24% of heterosexual mothers had experienced or been threatened with a custody action, 41% of lesbian had. See E. Lewin, *Lesbian Mothers: Accounts of gender in American Culture* (Ithaca: Cornell University Press, 1993) at 163.

one reported case unfavourable to the lesbian mother and/or to lesbian mothering generally can
mean that dozens or hundreds of lesbian mothers seeking advice will be counselled to settle.

In discussing lesbian mother cases, I will use an archetypal framework to examine the
elements of myth, fear and fantasy present in each story and the way in which it is told.
Family law cases, particularly those involving a mother who is a lesbian, are ripe for an
archetypal analysis for a number of reasons. Mother is a powerful (albeit ambiguous) symbol,
perhaps one of the most universal and primal. The continuing invisibility of lesbians in
public life, and the dearth of imagery representing lesbians from a lesbian-centred or positive
viewpoint means that lesbians continue to exist most powerfully in the common mind as
fantasy figures, symbolic of fear or desire. Family law judgments themselves are rich with
archetype - they contain a stylised story - often told only with the initials of those involved,
and at an appeal level retold by a judge who has not even seen the people who are the subject
of the tale, so that each person is further reduced to symbol, such as "J.A", "the Wife" or
"Mother" and "B.A", "Husband" or "Father", with children "S", "K" and "L".

It is my contention that the judgments in question can be readily analysed in terms of a
formulaic narrative, and I draw parallels in later chapters between the ideological effects of
representations of lesbians in popular cultural and in family law judgments. Representations of
lesbians in popular culture fall into a few 'types' and the plot structure across various media
and genre are remarkably consistent. The legal judgments studied, despite differences in

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32 For an article about motherhood and the symbolic see M. Fineman, "The Neutered Mother" (1992) 46(3)
University of Miami Law Review 653.

33 The recent primarily North American trend known as 'lesbian chic' will be discussed in detail in Chapter 4.

34 In Julia Brophy's words, 'beliefs and attitudes towards lesbians are determined by elements of fantasy and
anxiety': J. Brophy, "New families, judicial decision making and children's welfare"(1992) 5 Canadian Journal
of Women and the Law 484 at 489 n 11.
jurisdiction, country and time, also follow a stylised pattern. That is, they open with when (though usually not where) the Mother and Father were born, where and when the Mother and Father met, when married, when the children were born and what gender they are, when and why the Mother and Father separated and applied for a final divorce. The story then turns to where the children have been living since the separation and the nature of the order sought by each party. An equally stylised description follows of Mother and Father, accommodations (No. of rooms, cleanliness) and parenting abilities ('affectionate', 'authoritarian'), mention of evidence brought by other witnesses, counsellors etc, discussion of which evidence is to be preferred when it is in conflict, a brief summary of who is the preferable custodial parent and then an order. The attention given to each of these factors varies, but the structure of the judgments remains constant - which, when judgments are read en masse appear as a consequence to exhibit an almost folkloric adherence to symbol and style.

A related point is the ways in which the judges themselves use language which reflects their own sense of these events being a 'story', somewhat removed from reality, although this is most common in welfare rather than family law cases. For example, cases I examined contained references to the mother's life being a 'great soap opera', the mother 'lurch[ing] from one crisis to another' and the 'sad story' of the mother's life including 'episodes' of violence with various men 'on the scene.' Anne Goldstein argues that, 'Litigation is a story telling contest.' I take this argument one step further, positing both the process and the result

36Canada: Children's Aid Society, 1986, 6.
37UK: Re A, 1979, 4, 4, 10, 5, 10.
38A. Goldstein, "Representing lesbians" (1992) 1 Texas Journal of Women and the Law 301 at 301.
as stories. The question can then be asked, when one looks at the homogeneity of what is being said: why this story? What does it mean?

There are several theoretical bases for this work. I use a concept of ideology, which was developed as a Marxist analytical tool, in conjunction with concepts of archetype and the unconscious, which originated in psychoanalytic theory. In addition I discuss narrative from a largely feminist and occasionally post-modern perspective.

While diverse, these approaches are not necessarily disjunctive. Theories of the unconscious, narrative and ideology are integrated in some feminist perspectives on motherhood. Ideology as a conceptual tool in conjunction with notions of the unconscious has much to offer. Ideology provides a framework from which it is possible to examine the functions of various representations of lesbians, discourse and decisions about lesbian mothers. Ideological analysis provides a way to inquire into the systemic meaning of the case law - to look for a 'big picture' by asking what it is that lesbian mothers mean to dominant conceptions of motherhood and 'the family'. Chapter 5 explores how conceptions of lesbian mothers threaten dominant ideas about motherhood. Chapter 6 explores how the very same conceptions of lesbian mothers actually contribute to and support dominant ideas about motherhood and family.

Psychoanalytic notions of the 'unconscious' are very useful in this endeavour. Various aspects of an ideological system may often be in opposition, as Chapters 5 and 6 will show.

39Roger Cotterell provides a list of the elements of ideology. These are:
1. It appears to be 'common sense', obvious and natural and hence not requiring specific justification. It provides a basic structure of perceptions and beliefs in relation to which experience is interpreted.
2. The structure of beliefs and perceptions tends to assert its own completeness and timeliness.
3. This claim to completeness and self-sufficiency is maintained by emotional commitments which may justify selective consideration of empirical evidence (cited by Gavigan in Bayefsky, supra n 31).

Moreover, discourse about lesbian mothers and decisions in case law may in fact be contradictory. Psychoanalytic theory allows one to examine the 'big picture' of motherhood and familial ideology without losing sight of some of the very personal fears that may lie within them. Much legal decision making, and child custody decisions in particular, involve a highly discretionary system necessitating personal judgment as to which parent will best fulfill a child's interests. The fears and fantasises of the judiciary as individuals must, therefore, be taken into account in addition to the ideological effects their decision eventually have. The blending of ideological and psychoanalytic theoretical approaches allows the exploration of the personal and the political elements of judicial decision making. Chapter 2, for example, highlights the extent to which judges may be engaged in the process known as 'projection' - whereby one's own concerns are seen as a problem manifested by someone else.

Chapter 4 illustrates the extent to which lesbians and lesbian relationships have been pathologised through medical discourse and popular cultural representations. Many cultural representations of lesbians, also found in legal judgments explored in Chapters 2 and 5 (for example, lesbians as manhating) originate loosely from a Freudian psychoanalytic framework. Directing feminist psychoanalytic theory at judges provides a way of 'returning the gaze' and actively problematising the grounds upon which judges judge.

Archetype is useful as a way of structuring such an inquiry to hold in mind both the individual mother in the case at hand and the symbolic 'Mother', and to examine the process by which they are continually (consciously and unconsciously) compared.

Ideology as a theoretical basis can be used in such a manner as to actively incorporate notions of archetype and the unconscious. Slavoj Zizek writes,
...ideology is not a dreamlike illusion that we build to escape the insupportable reality; in its basic dimension it is a fantasy-construction which serves as a support for our 'reality' itself: an 'illusion' which structures our effective, real social relations and thereby masks some insupportable, real, impossible kernel (conceptualised by Ernesto Laclau and Chantal Mouffe as 'antagonism': a traumatic social division which cannot be symbolised). The function of ideology is not to offer us a point of escape from our reality but to offer us the social reality itself as an escape from some real traumatic kernel.41

The 'traumatic kernels' which this thesis posits are the dispensability of men from child rearing and 'family' life, the fragility of the heterosexual nuclear family, the fluidity of sexual categories and therefore of belief systems in themselves - themes which will be explored in Chapter 6. This is not to suggest that 'false consciousness' is alive and well and that under the 'illusions' I explore there exist 'truths' to be excavated. What I draw from the quote above and illustrate in Chapter 6 is that the less an ideological system can believe its claims to truth (as, for example, when familial ideology is faced with the fact that more people are living outside of heterosexual nuclear families), the more vociferous it becomes in making its claims to truth (eg 'family values') and the more it buttresses itself with weaponry to ensure its truth (eg revoking anti-discrimination laws to protect lesbians and gays).

Another point which must be raised as a matter of methodology is the erasure of bisexuality. Nowhere does this thesis address bisexuality directly in that the subjects of discussion and inquiry are 'lesbian mothers' - a category which appears to posit a unitary and unproblematic lesbian identity. Yet there are endless variations in lesbian identity and boundless discussions about it in lesbian, bisexual and 'queer' literature. I use 'lesbian' as a conscious choice, aware of its perils. The reason is that it exists as a unitary category to someone, to those outside of it, the judiciary, and it is they who are the focus of this work.

41Quoted in T. Murray, Like a Film: Ideological Fantasy on Screen, Camera and Canvas (London: Routledge, 1993) at 5.
In every so-called lesbian mother case at issue in this thesis, the mother is arguably bisexual - in that she was in a sexual relationship with a man, to a greater or lesser degree of satisfaction, for some years before 'becoming' lesbian (beginning lesbian relationship/s or admitting lesbian attractions). Yet in all of the cases I studied lesbianism as an identity was seen to subsume the mother's heterosexual or bisexual identity. Sometimes this was due to the mother identifying herself as lesbian, but more often the existence of a lesbian relationship was held sufficient to 'make' her a lesbian, even if she identified herself to the court as bisexual. In instances where judges did pay heed to the fact that the mother had heterosexual relationships in the past (something I would have thought hard to ignore under the circumstances, but remarkably rare), or the possibility of relationships with men in the future, this was always by way of saying that the mother could 'return' to heterosexuality, not that she was bisexual all along. Thus it was the mother's lesbianism or lack of it that was vital, defined in the binary terms of presence or absence, and bisexuality as a meaningful category of identity was therefore erased completely. However fear of bisexuality, or of a fluid sexual identity ('becoming lesbian', 'returning' to heterosexuality) underlay a great deal of the horror in these cases and contributed largely to a sense of the lesbian mother as abject - to be explored in Chapter 6. In this way, bisexuality is an unspoken premise and presence in much of what will follow.

**Structure**

In Chapter One I examine both feminist and lesbian and gay critical discourses on lesbian motherhood and argue that neither have adequately accounted for the experience of lesbian

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42I do not enter into the 'Did god give us this gift, or is it of our own making?' debate in this thesis, proceeding personally from the assumption that one should not look gift horses in the mouth, and theoretically from the basis that whether or not judges believe sexual orientation to be innate, the mothers in question are viewed very much as making choices to act upon it. See later arguments about maternal agency based upon the case law in Chapter 3 'Equality and freedom: the offensiveness of rights' section and in Chapter 6 'Motherhood as a denial of agency' section.
mothers in law within their own theoretical frameworks. However, I contend that there is the potential for feminist theory to do so, through recent work on motherhood and familial ideology which centres lesbians and integrates insights achieved through this. In Chapter Two I illustrate how lesbian mothers are perceived as odd and 'other' in traditional legal discourse, including text books and cases (commonly referred to as 'secondary' and 'primary' sources of law). In my argument, these sources simultaneously make claims that lesbian mothers do not 'exist' in the world known to them, and yet to 'know' who and what exactly lesbian mothers are without needing to ever credit what lesbians themselves say in these instances.

Chapter 3 aims to illustrate through the case law the centrality of lesbianism to child custody cases involving lesbian mothers, and the inability of reasoned, rational or rights-based accounts to make sense of lesbian mother cases - which are riddled with incoherence and contradiction. Chapter 4 explores the representation of lesbians in popular culture in some depth, outlining the existence of pervasive 'types' and themes concerning lesbians, the presence of which are then traced through the judgments in Chapter 5. Chapter 5 argues that the use of Mother archetypes as a way of structuring inquiry is perhaps capable of capturing some of the more hidden elements of motherhood ideology in family law judgments. Detailed case analysis in that chapter therefore follows a framework of archetypes. Chapter 6 draws on the parallel between the configuration of lesbians in the two preceding chapters to argue for the ideological 'necessity' of lesbian mothers to the family law system. In conclusion, I outline some of the similarities which this work finds with other feminist work on motherhood ideology, particularly with those on the margins.
CHAPTER 1: Existing theoretical accounts of lesbian motherhood

Existing theoretical approaches to lesbian motherhood can be divided into roughly two camps - lesbian and gay theory and feminist theory. Although there are some overlaps in these approaches and a small number of lesbian/feminist writers straddle both camps, there are distinct and identifiable strands of thought in each. Moreover, the self-referential quality of work in both areas means that each group merits separate categorisation.

Both of these theoretical approaches to lesbian motherhood tend to construct lesbianism as 'partial' - both in the sense of being limited and in the sense of being biased - and 'other' while purporting to cover it under a generic, such as 'non-ideal mothers', 'non traditional families' or 'homosexual parents'. An example of partiality is when the category of "lesbian mother" is presumed to say much about "lesbian" but little or nothing about "mother".

In essence, lesbian and gay theories centre the category of 'homosexual', a non-gendered subject in the highly gendered field of family law, who as a 'homosexual parent' experiences unjustified 'discrimination' from the homophobic and/or heterosexist legal system. Feminist theories centre the category of 'mother', a presumably heterosexual subject in the heterosexed field of family law (as all of the participants are present due to a prior heterosexual relationship) who is constructed through gendered structures and ideologies. Needless to say, there is much talking at cross purposes, and lesbian mothers, lesbian concerns and the specificity of lesbian experience are often lost or overlooked entirely. These existing

43 I use the collapsed word structure to signify where lesbians and gay men are regarded as a homogenous group with identical characteristics and interests. In such cases it is false to use the term 'lesbians and gay men' as if reflecting diversity where the author is more likely simply replacing the old fashioned word 'homosexual' with more current and acceptable jargon. The authors referred to are all supportive of lesbian and gay parenting, to a greater or lesser extent. Theoretical treatment of lesbian motherhood from traditional legal perspectives is considered in Chapter 2.

44 I refer in particular to the work of Katherine Arnup, Susan Boyd, Nancy Polikoff and Ruthann Robson.
theoretical approaches to lesbian motherhood frequently de-centre lesbians, sometimes silencing lesbian issues, marginalising the connection of lesbian-as-mother or severing lesbian mothers from theories of 'motherhood' and thus obscure possible insights into motherhood ideology.

At the conclusion of this review, I will argue that feminist theory nevertheless has the potential to account for lesbian motherhood within ideologies of motherhood and that a number of recent feminist writings have done so. To do this, analysis of lesbian mothers must be thorough and central. If lesbian mothers are centred within a feminist framework, and their experience and concerns are examined in a detailed manner, it may be possible to find parallels with the treatment of other marginalised mothers within the family law system. Effectively, I propose an 'outside in' or 'bottom up' approach to motherhood ideology, starting from the margins and moving from there to connect with other margins and illuminate the centre - dominant ideologies of motherhood.

I: Lesbian and gay commentaries

'Gender neutrality is the paradigmatic expression of the values and norms of the dominant legal concept of equality which... precludes the consideration of Mother as something different or distinct from father. In legal texts, statutes and cases, Mother is collapsed into the legal category of 'Parent' and is suppressed. However, Mother has only disappeared rhetorically. In social and extra-legal institutions that embody cultural expectations - idealized and practical - Mother continues to exist and function.'  

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45 Presuming that, likewise, such groups are also centred and the focus of detailed analysis from which comparisons can be drawn.

46 Fineman, supra n 32, at 660.
Homosexual parents

Virtually all writing on gays and lesbians in family law utilises a category of the 'homosexual parent' - either implicitly or explicitly treating the issues facing mothers and fathers as identical. This discourse creates a gender neutral subject; the parent who is homosexual. Thus, while purporting to theorise sexuality, an un-sexed subject is centred, making 'homosexuality', 'a kind of male-and-female sexuality - often severing [lesbians] from an analysis of ideologies surrounding female sexuality and motherhood.'

Gender neutral discourse undermines gender issues such as the role of (lesbian) mothers as the primary caregivers of children and papers over the fact that lesbians and gays may be making claims to custody upon very different grounds (eg caregiver versus paternal right).

I have argued elsewhere that:

'The use of the generic is in itself a gender issue, as more often than not the generic also signifies the male, and so literature claiming to discuss general experience in fact masks female experience or presents the male as the general. A generic allows for a discourse of homogeneity at once confusing and exclusionary...'

This confusion arises in numerous ways. The male form may be used as a generic (as in "gay parent", "gays"), or as both the male form and the generic within a single work. The

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47 Millbank, supra n 11, at 27.

48 Ibid.

generic form may be used as the male (as in "homosexual or lesbian")\textsuperscript{51} and a purported generic may implicitly refer to male experience (as in "homosexuals as a class" being at high risk of HIV infection or perceived as promiscuous).\textsuperscript{52} Who is being discussed and what interests are at stake are smudged over by a language which is over-inclusive and obfuscatory. Most particularly, it creates a surface from which it is impossible to identify that lesbian and gay interests may not only be different but actually be in conflict.

I have argued in earlier work that the implicit masculinism in purportedly gender neutral accounts of lesbian and gay custody disputes was highlighted when the parents in dispute were both homosexual.\textsuperscript{53} I now believe that such situations provide the context for perhaps the most explicit examples of male-centredness in the current lesbian and gay discourse.

Three such examples exist, two being family law cases with divorced parties and one being a sperm donor suit.\textsuperscript{54} In discussing the Australian family law case of Shepherd\textsuperscript{55} Margaret

\textsuperscript{50}See eg C. Costello, "Legitimate bonds and unnatural unions: Race, sexual orientation, and control of the American family" (1992) \textit{Harvard Women's Law Journal} 79 where she uses 'bisexual, lesbian and gay' frequently, and then reverts to 'gay families' as an inclusive term, eg at 151, 165.


\textsuperscript{52}See eg Fajer, supra n 49, at 559; D. Bradley, "Homosexuality and Child Custody in English law" (1987) \textit{International Journal of Law and the Family} 155, at 157, 166. Robert Beargie, after discussing numerous lesbian mothers and a few gay fathers under the generic "the homosexual parent" then refers to the client as "he" and to "his" child: Beargie, supra n 51, at 78, 79, 85.

\textsuperscript{53}Millbank supra n 11, at 28.

\textsuperscript{54}There is a further lesbian mother and gay father family law case, being the Canadian matter Robertson v Geisinger (1991) R.F.L (3d) 261 (Sask. Q.B) but as there is no commentary available on it, I have omitted it from this part of the discussion. Interestingly, in that case, the judge fairly much ignored the issue of sexual orientation, as neither party raised it and both were homosexual, so he effectively regarded it as 'neutral'.

\textsuperscript{55}(1979) FLC 90-729.
Bateman classifies the dispute as a gay father case, despite the fact that the mother had previously been in a lesbian relationship.\textsuperscript{56} When reporting on a US contest between a gay sperm donor and a lesbian co-mother couple Arthur Leonard titled his article "Judge denies parental standing to gay sperm donor" and discussed the case largely from the perspective of the donor.\textsuperscript{57}

Particularly striking is David Bradley's discussion of the UK family law case of Walker.\textsuperscript{58} In that case, the father had previously been in a gay relationship but he was no longer in one at the time of trial and he did not identify as gay, whereas the mother identified as lesbian and lived with her lover. Despite this, Bradley classified this as a gay rather than a lesbian case and centred his discussion upon the situation of the father. Bradley stated that the case was 'difficult to evaluate...because of the minimal attention given to male homosexuality' and added that, 'The case is also complicated by the fact that the mother of the child whose custody was in dispute was living with a lesbian partner.'\textsuperscript{59} The woman is characterised as the \textit{mother of the child} here, with lesbianism only a secondary attribute, a \textit{complication} no less. In this case, it is as though the field of 'homosexual' has been covered by the father and so the mother cannot be characterised likewise, she must be something else: a mother. This construct is all the more remarkable when contrasted with the absence of recognition of lesbians as

\textsuperscript{56}M. Bateman, "Lesbians, Gays and Child Custody: an Australian legal history" (1992) 1 Australian Gay and Lesbian Law Journal 46. This was in issue at the time of trial, but the mother had left the relationship and took a homophobic stance against the father, so it is reasonable to see her as 'non-lesbian' in this instance - although the court may have had lingering doubts.

\textsuperscript{57}Leonard suggests that although some may see the judgment as a victory for lesbian families the decision 'may actually appear conservative' by denying 'different kind of parental relationships.': A. Leonard, "Judge denies Parental standing to gay sperm donor" May 1993 Lesbian/Gay Law Notes 33.

\textsuperscript{58}Unreported, English Ct Appeal 17 June 1980 before Ormrod and Brandon LIJ.

\textsuperscript{59}Bradley, supra n 52, at 176.
mothers in most other lesbian and gay work. Implicit in such characterisation of the issues is that lesbians are 'homosexual' when their interests reflect those of gay men, but they are 'mothers' when identified with heterosexual women or a maternal preference and/or are at odds with gay men.

**The right answer: liberalism and positivism**

Many works by lesbian and gay writers tend to follow a very similar pattern. Articles begin with a close examination of (usually American) cases and identification of legal trends in the cases - such as the per se, intermediate and nexus approaches used by judges in determining whether a mother's lesbianism is anathema to the child's best interests. Writers frequently identify factors in the case law which have been used against lesbian mothers - such as presumptions that the children will grow up lesbian or gay, the children will be traumatised or abused by the presence of a female lover in the house, the children will be subjected to peer trauma etc - and argue strenuously that such assumptions and stereotypes are untrue. Discussing stereotypes in the media, Richard Dyer remarks,

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60Ruthann Robson, although recognising gender through her focus upon lesbians in her work, has also assumed that lesbian motherhood has little to contribute to a discourse on ideologies of motherhood in the sense that she severs her analysis from a feminist framework. Arguably, this has been in an attempt to centre lesbian concerns and speak to a lesbian audience, but this contributes in a sense to the notion that lesbian motherhood speaks only to lesbians - and has no relevance to a critique of motherhood.

61See discussion of Darryl Wishard in the later section 'Disadvantaged Dads'.

62The per se approach being that lesbians are in and of themselves harmful to children, the intermediate approach presumes a harm which the lesbian mother may rebut with evidence and the nexus approach requires that evidence be brought to show that the mother's lesbianism has harmed or will harm the child before it is held to be a negative factor. These may also be described as irrebuttable presumption, rebuttable presumption and nexus test. In practice the much favoured nexus test may easily be transformed into a presumption of harm test, for example if the father simply raises the possibility of the children being stigmatised as a result of the mother's lesbianism (known as the 'peer trauma' argument).
'Righteous dismissal does not make the stereotypes go away and tends to prevent us from understanding just what stereotypes are, how they function, ideologically and aesthetically, and why they are so resilient in the face of our rejection of them. In addition, there is the real problem as to just what we would put in their place.'

The 'solution' offered in many lesbian and gay legal arguments is that the 'truth' about lesbian and gay parents (whatever this may be) should be shown to the courts, and judges be impelled to apply 'correct' or 'unbiased' standards in custody determinations. Much analysis of the problems facing lesbian and gay parents is deeply entrenched in a liberal human rights framework, and rests on the implicit assumption that if only discriminatory attitudes are shown to be unjust and the 'right' standard were applied, equality would be assured for lesbians and gay men.

The great faith in legal institutions and the persuasiveness of liberal arguments is evidenced by a plethora of legal articles which laboriously outline assumptions and factors which have been used against lesbians and gay men and bring forth evidence to show each and every one of these to be untrue. For example, Wendy Gross writes that judges 'fears' about lesbian mothers are 'based on a combination of lack of facts and inherent prejudice' so that it is 'absolutely crucial' to 'educate' them with the 'truth.' Katherine Arnup argues that within such a framework,

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64 See eg M. Clemens, "In the best interests of the child and the lesbian mother: a proposal for legislative change in New York" (1984) 48 Alberta Law Review 1021; D. Rosenblum, "Custody Rights of Gay and Lesbian Parents" (1991) 36 Villanova Law Review 1655; Dooley, supra n 49; Millbank, supra n 11; Sheppard, supra n 25; W. Gross, "Judging the Best Interests of the Child: Child Custody and the Homosexual Parent" (1986) Canadian Journal of Women and the Law 505; Notes, "Custody Denials to Parents in Same Sex Relationships: An Equal Protection Analysis" (1989) Harvard Law Review 617 (hereinafter referred to as 'Notes'); Beargie, supra n 51; Bradley, supra n 52, Fajer, supra n 49. Marc Fajer actually contends that advocates should emphasise to the courts that lesbians and gays are very similar to, if not identical with, heterosexual partnerships and families so that judges will empathise and be less discriminatory.

65 Gross, supra n 64, at 520, 529.
judges are perceived to be reasonable arbiters, willing to change their attitudes and rulings when they are shown to be discriminatory.66

When it is noted that many of the myths have been consistently exploded for the past fifteen years or more, and cited continually in law journals and case briefs since that time, yet still appear regularly as issues and are often weighed against lesbians and gays in recent custody cases, such faith in the powers of persuasion appears somewhat naive.67

Likewise, there is a strong thread of liberal positivism in lesbian and gay analysis which focuses upon the 'correct' standard or application of the welfare principle to achieve equality or non-discriminatory decisions for lesbian mothers and gay fathers. Some theorists argue for 'equal protection' through avenues such as constitutional challenges and legislation.68 Many theorists also rely upon the notion that the welfare principle is being applied 'incorrectly' and argue that it should be refined or altered to reflect the 'nexus test' to diminish or eradicate discriminatory judgments.69 Rosenblum provides the paradigmatic example of this analysis when he says:


67See eg the search for 'common knowledge' about lesbians discussed in Chapter 2 'Case law: We know who you are' section, and the repeated disregard of evidence (eg that children won't grow up homosexual) discussed in Chapter 3 'A nexus test? the irrelevance of evidence' section.

68See eg Dooley, supra n 49; Notes, supra n 64; Fajer, supra n 49; Sheppard, supra n 25, Gross, supra n 64, M. Leopold and K. King, "Compulsory Heterosexuality, Lesbians, and the Law: The Case for Constitutional Protection" (1985) Canadian Journal of Women and the Law 163; Bateman supra n 56. Although coming from a legal framework in which human rights are not constitutionally guaranteed, Bateman nonetheless posits that a Bill of Rights for Australia outlawing sexual orientation discrimination would lead to the 'proper' interpretation of the welfare principle by excluding unfounded fear and prejudices from consideration.

69See eg Bateman, supra n 56; Gross, supra n 64; Clemens, supra n 64; Brantner, supra n 49; Rosenblum, supra n 64; Dooley, supra n 49; Beargie, supra n 51.
'The most logical standard adopted by the courts is the 'nexus' test whereby a parent's homosexuality is not a consideration in granting or denying custody unless there is a proven connection between the parent's homosexuality and a detrimental effect on the children. This approach is the most direct application of the traditional 'best interest of the child' standard, because it does not create an inference that a parent's homosexuality itself has a detrimental impact on the child's upbringing. As a result, the parental fitness of each person can be properly examined to determine which home environment is best, and the determination can be free from unfounded fears, misconceptions and prejudices about homosexual parenting.'

This complete faith in tinkering about with the mechanics of the test to ensure the 'proper' interpretation of the child welfare principle is positivist in the extreme as it presumes at a fundamental level that the rule alone is capable of determining the result. The role of archetype and ideology are disregarded entirely, and the possibility that the unconscious or cultural hegemony might still influence value judgments is left unexamined.

This theoretical framework is also strongly liberal in that there is presumed to be a neutral and value free manner of making fair decisions. There is such thing as a 'best' home and a right result. The possibility of a flawed principle (best interests of the child) or that a system which attempts to judge the interests of children or the capabilities of parents under any principle is impossible to operate "fairly" to gain a "correct" result is never canvassed.

In the above quote from Rosenblum, law is central and its inherent justice is unquestioned as all faith for change is placed in this avenue. Legal positivism is revealed by such a 'rule focused' analysis, and moreover, law itself is valorised by proposals that a rule change will bring about a fair result.

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70Rosenblum, *supra* n 64, at 1687.
Although the methods by which this reliance upon a liberal-positivist framework and utilisation of rights discourse marginalises mothers and the interests of women is not immediately apparent, such an analysis is antithetical to feminist approaches to law for a number of reasons. It is through an examination of the non-reference to feminist works and scholarship of concern to women in lesbian and gay work that this becomes clearer.

Notably, feminist legal theorists have strenuously contested law's own account of itself as neutral and value free, or even as capable of those things. Feminist theorists have also explored at length the place of ideology in constructing the legal subject and informing legal rules and standards in arenas such as family law. Yet, as has been shown, both of these insights are omitted entirely in lesbian and gay work in the area of family law. Moreover, feminist initiatives generated or contributed to most of the modern day elements of family law - such as the best interest principle and no fault divorce, and feminists are now evaluating these 'rule changes' with some ambivalence as to their success. Surely, if lesbian and gay theorists wish for change, there are lessons to be learned by examining the changes which have already taken place. Yet the frame of reference for much lesbian and gay work is 'human rights' and 'anti-discrimination' theory. The inability of a rights-based framework to grapple with welfare principles inherent in family law disputes has been noted by feminist writers, and is


73See generally the collection of work in Smart and Sevenhuijsen, supra n 5.

74Brophy, supra n 34, at 496, Smart, supra n 29, at 153-157, Smart in Smart and Sevenhuijsen, supra n 5, argues that in the UK rights claims have 'become synonymous with selfishness' at 23.
illustrated with devastating clarity in American cases where constitutional arguments for lesbian mothers based on equal protection, privacy and freedom of association have been universally rejected.75

Other issues of concern to women are also conspicuous by their absence. For example numerous feminists have explored the 'potentialities and perils'76 of a primary caregiver presumption as a tool to improve the situation of mothers - including lesbian mothers - in custody disputes, yet there is no mention of this concept anywhere in the lesbianandgay literature. Lesbian mothers are gay inasmuch as they are part of a lesbianandgay framework, with interests which are conflated with those of gay fathers. Lesbians are rarely women or mothers within a gayandlesbian theoretical frame of reference - an astonishing reflection of 'the dominant heterosexual culture'77 which also constructs lesbians and mothers as antithetical, for very different reasons.

*Gender as a legal trick, men as downtrodden & Father's rights*

When gender is acknowledged as an issue by lesbianandgay commentators, it is usually for one of two purposes: either so that an argument can be made that sexual orientation discrimination is a form of sex discrimination in an attempt to garner legal protection, or to argue that gay fathers face more disadvantage than lesbian mothers. Gender is thus invoked as a piggy-back ride to equality or as a way of making men the subjects of sexism. In either case, the interests and perspectives of lesbians are excluded or re-written to serve masculinist interests.

75See Chapter 3, 'Equality and freedom: the offensiveness of rights' section.


77Bateman, *supra* n 56, at 92.
Gender as a piggy-back to protection

Some commentators, notably Americans reasoning through US Constitutional law principles, argue that family law decisions (among others) continue to disadvantage lesbians and gay men because there are insufficient grounds to challenge them under equal protection laws. Sexual orientation as a classification is subject to 'ordinary scrutiny', and so many anti-lesbian and gay measures are upheld by the Constitution. As gender is subject to 'intermediate scrutiny', the argument is that if sexual orientation discrimination were classified as a gender-based disadvantage, it would have a greater chance of being struck down.78

This position is masculinist because sexual orientation discrimination is theorised as a gender-based classification, with little or no regard to the different situations of lesbians and gay men as mothers and fathers, women and men. Gender becomes an abstract method, not a concrete meaning - as female and male interests are still conflated and assumed to match: we are all in this thing together and this gender trick will get us all out of it together. What is needed is "equal treatment" for homosexuals and heterosexuals. Women have no commonality in this framework. Mothers, whether heterosexual or lesbian, are not considered as a category or as possessing any commonalities.

Furthermore, the woeful record of formal legal tools such as 'intermediate scrutiny' under Constitutional law in achieving change for women is generally ignored, or only briefly touched upon, giving the impression that "Women" as a class are relatively well off (or 'equal' to Men

78See eg Fajer, supra n 49; Dooley, supra n 49; Notes, supra n 64.
as a class) and creating space for masculinist gay-rights claims such as will be discussed in the next section.  

_Disadvantaged Dads_

On occasion, gender is recognised insofar as it is used to argue the greater disadvantage of gay fathers in relation to lesbian mothers. American commentator, Darryl Wishard is unique in that he openly focuses upon gay fathers as the subject of inquiry, rather than lesbian mothers or homosexual parents. He argues that gay fathers must face the "double disadvantage" of a preference for mothers in the courts, as well as judicial homophobia. In Wishard's analysis, sexism and homophobia are the burden of gay men, not lesbians - who as mothers and non-criminalised subjects of the law are at a 'sexist' advantage.

The problem with such analysis is that it masks a myriad of issues facing lesbians - such as poverty and violence at the hands of ex-husbands. Not least of all, Wishard's analysis

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81Such a claim is subject to dispute also: see R. Robson, _Lesbian (Out)law: Survival under the Rule of Law_ (New York: Firebrand Books, 1992), Chp 2 and 3 for discussion of criminalisation of lesbianism in Anglo-European history and in the USA to date.

82For recent figures of custodial mothers and poverty see M. Bailey and N. Bala, "Canada: Abortion, Divorce and Poverty and Recognition of non-traditional Families" (1991) 32 _Journal of Family Law_ 279; MacDonald _supra_ n 30.

83Current research suggests that lesbians are far more likely to experience violence from male ex-partners and family members than from a stranger: Fajer, _supra_ n 49, 629. Two English commentators have noted the high levels of violence and animosity in family law matters due to the father's reactions to the mother's lesbianism: M. Steel, _Lesbian Mothers, Custody Disputes and Court Welfare Reports_ (Norwich: Social Work Monographs, No 94, 1990) at 36; A. Bradney, "Children Need Fathers?" (1986) 16 _Family Law_ 351. For a discussion of Australian and Canadian cases where lesbian mothers were subjected to violence see Millbank, _supra_ n 11, at 36-38.
annihilates lesbians by presuming that a maternal preference exists and advantages lesbians despite all evidence to the contrary.\textsuperscript{84}

This approach reflects a profoundly phallocentric bias, which is particularly evident in some of the 'father's rights' discourse used. For instance, 'The process of challenging history is a difficult one, yet every time a father gains custody of his child, he has successfully challenged the century-old preference for awarding custody to the mother'.\textsuperscript{85} Wishard's analysis relies upon an assertion of right based upon biological paternity rather than any caregiving when asserting paternal right over the child: a father simply \textit{IS}, whereas a mother \textit{DOES},\textsuperscript{86} and yet

\textsuperscript{84}There is a great weight of opinion that the majority of custodial parents are women due to consensual agreements between parents rather than 'maternal preference' see R. Graycar "Equal Rights Versus Fathers' Rights: The Child Custody Debate in Australia" in Smart and Sevenhuijsen, 1989; Boyd, 1991 \textit{supra} n 76. Notably, lesbians were frequently disbarred from the ambit of the preference while it was briefly in existence, due to their 'unfitness' see Robson, \textit{supra} n 81, at 130; Graycar and Morgan, \textit{supra} n 79, at 251.

\textsuperscript{85}Wishard, \textit{supra} n 85, at 407. This sounds alarmingly similar to the rhetoric employed by antifeminist "men's rights" groups such as "Families need fathers" in the UK and "Fathers without rights" in Australia. See J. Brophy "Child Care and the Growth of Power: The Status of Mothers in Child Custody Disputes" in Smart and Brophy, 1985, Graycar, \textit{supra} n 84, at 158; and Section II of S. Crean, \textit{In the Name of the Fathers: The Story Behind Child Custody} (Toronto: Amanita, 1988), for greater discussion of the agenda and rhetoric of such groups in the UK, Australia and Canada respectively. Interestingly, the anacronym for one of the major Canadian Groups, FACTS, highlights the masculinist claim to objectivity, while the full name (Fathers and Children, Their Society) is unabashed about placing fathers as the central social subject, with children a proprietorial add-on.

\textsuperscript{86}Or, in Carol Smart's recent formulation, mothers \textit{care for} whereas fathers \textit{care about} - and caring about is valued equally or more than caring for: see C. Smart, "The Legal and Moral Ordering of Child Custody" (1991) 18(4) \textit{Journal of Law and Society} 485.
both should be treated equally. This position is antithetical to feminist discourse and mother-centred interests.

Australian commentator Margaret Bateman uses gender neutral discourse throughout her work, but differentiates on the basis of gender when discussing a case where a gay father was also HIV positive. Bateman posits that the father's HIV status and his homosexuality were a combined burden which caused him to be unjustly denied access to the child. Interestingly, Bateman does not note a number of factors which distinguish the case from the somewhat more 'successful' lesbian cases she examined prior to it: notably that the father had ceased to exercise consensually arranged access for some time and was now seeking to reinstate it, and that the child did not even remember his father. Of further interest is the fact that in contrast to the lesbian cases, where Bateman referred to "the child" or the children and "their mother", in this case she refers to the judge denying access to "his child" (as does Wishard in his discussion of fathers in the USA) - thus using language expressive of paternal right.

II: Feminist theoretical accounts

"If feminist legal theory is derived from a feminist method uniformed by critical lesbian experience, the theory will be incomplete. Lesbian experience is essential to the formation of..."
This section discusses both legal and non-legal feminist theoretical work on motherhood and is divided into those which exclude lesbians and those which include but may still marginalise lesbians.

In marked contrast to lesbian and gay legal writing which is very much structured around commentaries of litigation and reported judgments, very few feminist legal theorists discuss any case law, or if they do it is usually only one or two cases at a time.

Some feminist work on motherhood fails to address lesbians at all, even in passing. Other work notes lesbians only as a passing footnote, often as an exception to a more general rule. These approaches will be discussed together as the invisible and not quite invisible approaches - as they marginalise lesbians by either complete exclusion or an implied exclusion. Implied exclusion occurs where lesbian mothers are noted in such a way as to suggest that they have little or nothing in common with other/real/most mothers.

Specific attention to lesbian motherhood by feminist writers tends to fall into the categorisation of lesbians as 'non-ideal' or 'different' mothers within motherhood ideology. Lesbians are noted as a challenge to traditional ideologies of motherhood - often along with other 'non ideal' or marginal groups such as working mothers and Black mothers - but are not integrated into an analysis of how exactly lesbian mothers challenge these ideals, and what commonalities they have with other 'different' mothers. When lesbian mothers are noted as presenting any one issue, it is most frequently framed in terms of a challenge to the ideological prescript of asexual motherhood. In this area there is often more of an attempt to integrate issues of lesbian
sexuality into a continuum of analysis including heterosexual mothers and to make a 'point' about motherhood generally. However, in doing this, the specificity of lesbian experience can sometimes be overlooked by writers who are eager to find similarity.

In this way I will critique feminist approaches in the following section on motherhood ideology both for failing to connect lesbians to analysis of motherhood and also, paradoxically, for connecting lesbians to the fringes of work on motherhood with a haste which denies examination of difference.

I will then note a small number of feminist, primarily lesbian feminist writers who have focused upon lesbian mothers in such a way as to centre lesbians without severing them from an analysis of motherhood ideology. Such an approach forms the basis for my own work, which utilises mother archetypes to examine family law cases concerning lesbian mother in an attempt to find thematic links between what constitutes a 'bad mother' in law and culture.

(i) Exclusion

Invisible lesbians

Much feminist work on motherhood and families or family law overlooks lesbians altogether. In a recent edition of a collection of feminist writing on motherhood ideology, Ann Phoenix and Anne Woollett preface the book with the statement, 'Analysis of the situations in which motherhood is not considered appropriate throws light on ideas which, because they are seen as normal and natural, are rarely articulated.' 90 They then go on to introduce chapters on

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young mothers, old mothers, working mothers and infertile mothers - all implicitly heterosexual. Likewise, a collection of works on motherhood ideologies and practices edited by Arnup, Levesque and Pearson contained no indexation of 'lesbian' and only a passing mention to non-recognition of lesbian couples seeking access to sperm in a chapter on reproductive technologies.

In feminist cultural studies texts, often largely concerned with representations of motherhood and fatherhood, there has also been a resounding silence. Anne Friedberg does not index lesbians or mention them anywhere in the text of her book on cinema nor does Elizabeth Traube's work on gender and identity or Constance Penley's on film and feminism. This omission is particularly glaring in Traube's discussion of 'Family in conservative politics', where lesbianism has arguably always been targeted as a terrible evil causing or arising from activities such as feminism and abortion.

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91Fleeting references are made in opening and closing chapters to 'different mothers', such as black mothers and lesbians - a genuflection which reinforces rather than alters the sense that the substantive chapters are about white heterosexuals. These references will be discussed later in this chapter.


96See Costello, supra n 50, esp. at 130.
In the legal arena, Kristine Roszack's article on 'single motherhood by choice' proceeds without ever mentioning lesbians as does Alison Diduck in 'Legislating ideologies of motherhood'. In her book on feminist jurisprudence, Ngaire Naffine gives no indexation for 'lesbian' and consideration of lesbian mothers is entirely absent from a section of the chapter "Keeping Women in their place" entitled "Enshrining motherhood". Carol Smart, in her book of feminist jurisprudence, does refer to lesbians twice, but not in the context of motherhood and family law issues. Such silences reflects dominant cultural attitudes that lesbians do not exist, or when they do exist, do not do so as mothers.

Not quite invisible

There are numerous instances where lesbians are not completely overlooked, but neither are they discussed in a detailed or intricate way, or integrated into the main body of analysis. In cultural studies texts on gender, Tania Modleski makes only a single passing reference to lesbians, as does Janet Thurmin. It is also interesting to note context, as in Thurmin's book the sole reference to lesbians is placed not in 'Love and marriage' or 'Sexuality', which are thus characterised as implicitly heterosexual, but in a section on 'The Women's movement'. Likewise, in E. Ann Kaplan's book on motherhood and representation, lesbian

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99Naffine, supra n 71.

100Once as a contrast to phallic sexuality and once to highlight that "different" women such as lesbians and black women might not find consciousness raising a helpful framework: Smart, *supra* n 29, at 28, 75.

101To argue against a notion of heterosexual privilege and suggest that lesbians have greater freedom from male oppression than do straight women, although added peril. T. Modleski, *Feminism Without Women: Culture and Criticism in a 'Postfeminist' Age* (New York: Routledge, 1991) at 13.

mothers are a two paragraph addition at the very end of her work, with no integration of her earlier points. A certain lack of attention to lesbian issues and the continuing experience of homophobia is also indicated by the opening remark that feminism in the 1970s 'legitimized lesbianism'.\textsuperscript{103}

Feminist legal writing on motherhood frequently does acknowledge that lesbians were not advantaged under the maternal preference doctrine, which excluded lesbians (and other 'sexual' women) under the 'unfitness' exception.\textsuperscript{104} This is usually made as a general point about 'sexual mothers', including adulterous heterosexual mothers - a point which will be taken up in the following section.

Occasionally lesbian mothers are referred to in feminist legal work under the ambit of 'non-traditional families' or 'unorthodox households'; meaning lesbian and gay and/or unmarried couples.\textsuperscript{105} Ruthann Robson argues that lesbians are categorised as 'lesbians and their men' by feminist writers and thus theorised as not-women. She remarks,

'Astonishing in a discipline that dissects gender in every other aspect of life is the absence of a gendered perspective regarding sexual orientation.'\textsuperscript{106}

\textsuperscript{103}See Kaplan, \textit{supra} n 40, 193. Also this section contains errors of fact, as she claims that 'the issue of the lesbian mother' has been avoided by cinema and names two films - one of which portrays a lesbian mother.

\textsuperscript{104}See eg Graycar and Morgan, \textit{supra} n 79, at 251; Sack, \textit{supra} n 7, at 321; Graycar in Smart and Sevenhuijsen, \textit{supra} n 84, at 164. Although some feminist legal theorists do not mention lesbians in this context: see Naffine, \textit{supra} n 71, Sandberg in Smart and Sevenhuijsen, \textit{supra} n 5.


\textsuperscript{106}Robson, \textit{supra} n 81, at 22.
Cultural studies writers have followed this path also, for example referring to the need for 'gay/lesbian discourses on motherhood.' In this way, lesbians are severed effectively from motherhood and placed in the ungendered basket of 'different families.' This could be due to an uncritical reflection of lesbian and gay work which de-genders the 'homosexual parent.' If so, it suggests a dutiful copy book approach rather than serious theoretical consideration of lesbian issues. Moreover, uncritical acceptance of lesbian and gay discourse, because of the masculinist claims inherent in some of it, can lead to the paradoxical outcome that feminist writers end up championing a male position. For example, Katherine O'Donovan ironically reflects the masculinist gay dad 'double oppression' position of Darryl Wishard discussed earlier, when she writes,

'Law has not criminalised lesbian sexual activity as such; nor has the lesbian emerged as a stigmatised identity in a manner similar to the male homosexual.'

O'Donovan's use of terms such as 'the lesbian' and 'the male homosexual' also suggest a unitary identity in a manner unsettlingly similar to mainstream legal work and mass culture, which regard lesbians as an homogenous class.

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107 See eg Kaplan, supra n 40, at xiii.

108 See 'Homosexual parent' section, earlier in this chapter. For an early example of this see C. Boyle, "Custody, Adoption and the Homosexual Parent" (1976) 23 Reports of Family Law 129.

109 See 'Disadvantaged Dads' section, earlier in this chapter.

110 In cultural studies this is also notable, for example where feminist writers focus upon exclusively male issues in discussions on homosexuality. See Traube, supra n 94 and Penley, supra n 95.

111 O'Donovan, supra n 105, at 84.

112 See Chapters 2 and 4 for detailed analysis of such homogenisation.
(ii) Inclusion: Ideologies of motherhood and the bad mother bundle

Feminist work on ideologies of motherhood frequently notes lesbian mothers as one group of mothers who are placed as 'different' and disadvantaged by the ideals which dominant ideologies of motherhood propagate. Ironically, feminist work on such dominant ideologies can actually serve to reinforce them, by marginalising the 'different mothers' in the same manner. This can be effected, for example, by placing the dominant ideology constantly at the centre of discussion as something which 'affects us all', and then discussing those who are most marginalised by it in the margins (footnotes) of the work. For example, E. Ann Kaplan writes in the introduction to her work on ideologies of motherhood in film,

'...I decided deliberately to limit this study to what I call the 'Master' Motherhood Discourse as it has worked to position white, middle class women as subjects in specific ways... Understanding this prevalent or 'dominant' discourse is crucial even for groups that the dominant marginalize (eg. Black, Jewish, Hispanic and other American ethnic groups, the various working classes, the poor and the homeless, the non-traditional family where the stepmother, the adoptive mother, or surrogate may be central; or where homosexual couples are raising children and so on.) A study could be made of mother images in the subcultures of each of these groups...but such a study could benefit from knowledge of how the dominant paradigm, oppressive for the minority group, came into being, how its very presence constructs (as part of its ideology) other groups as 'marginalized.'"113

This is all well and good and very true, until one asks who is speaking to whom and on whose behalf? Within this paradigm, the dominant speaks to the margins, but the margins speak only to themselves ('subcultures'), thereby actually reflecting by its 'top down' approach, the dominance it seeks to critique.114 It also means that the specificity of the viewpoint of those at

113Kaplan, supra n 40, at 8-9.

114Judith Butler argues in her elegant but wordy fashion, 'The theories of feminist identity that elaborate predicates of color, sexuality, ethnicity, class and able-bodiedness invariably close with an embarrassed 'etc.' at the end of the list. Through this horizontal trajectory of adjectives, these positions strive to encompass a situated
the margins remains absent from the critique of dominance - surely a wasted resource. In her work on motherhood ideology, Susan Boyd writes,

'For those of us whose experience seems further away from the [dominant] ideology it may, then, be easier to develop discourses which counter that ideology.'

This suggests a 'bottom up' approach to examining motherhood ideology, beginning from the margins and moving inwards, a point which will be explored towards the end of this chapter.

There are numerous other problems with a focus upon dominant ideologies and utilising a catch-all of 'different' families which exists in much feminist work on motherhood. Such an approach offers little or no analysis of how these 'differences' impact, either upon those within marginal groups themselves or upon dominant ideologies of motherhood.

Commonalities between those in the margins are continually assumed or implied as all those in the margins are mentioned together, for example in comments that 'lesbians, Black women, and adulterous women' are further disadvantaged by motherhood ideology. Commonality can also be implied by contextualisation, for example, by placing cases or analysis of lesbian mothers and adulterous or working mothers side by side in a text book section regarding mothers' conduct and child custody determinations. Such suggestions of commonality, whether

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subject, but invariably fail to be complete. This failure, however, is instructive: what political impetus is to be derived from the exasperated 'etc.' that so often occurs at the end of such lines? This is a sign of exhaustion as well as the illimitable process of signification itself. It is the supplement, the excess that necessarily accompanies any effort to posit identity once and for all.' See J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (London: Routledge, 1990) at 143.


116See eg Phoenix and Wollett, *supra* n 90, at 22, 227.
they be express or implicit are rarely explored, and it is this issue which I will discuss in some detail in this section.

Lesbians and, and and....The 'top down' bedfellows

Lesbian mothers may be mentioned along with black mothers - as in 'lesbians and black women' but there is often no examination of exactly what lesbians and black women would have as commonalities or the ways in which they challenge the 'norm'. Likewise lesbians can be linked with working mothers, in the sense that both groups traverse traditional expectations of motherhood, and may be characterised by the judiciary as selfish. The specificity of lesbian experience can be lost here, for instance the ways in which lesbian mothers are construed as fundamentally sexual creatures (with concomitant punishments, such as a partner being barred from the house or from the children's presence by judges). This is not to suggest that no similarities exist, merely that they need further exploration.

Lesbians may also be grouped with 'single mothers' as a challenge to the 'norm' - with the assumed commonality that the children will be fatherless. Yet lesbian mothers in this situation may be perceived quite differently. Single (heterosexual) mothers and lesbian mothers pose a quite different threat to the traditional ideal of father-as-head-of-the-family, not least of all because single heterosexual mothers may later partner with a man, or be presumed to be

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117See eg Smart, supra n 29, at 75.
118See eg Boyd in Smart and Sevenhuijsen, supra n 5, Graycar and Morgan, supra n 79, Chp 10.
119In fact, Carrie Costello argues that there are many parallels between the perception and treatment of lesbians and gays and African Americans in the USA in a lengthy article, to be discussed later in this chapter.
willing to do so. Moreover, heterosexual re-partnering may be seen as 'rebuilding the family', whereas a lesbian partnership is construed as anti-family. 

Lesbian mothers are often categorised as mothers who are 'bad' because of a specifically sexual transgression, and are discussed or contextualised along with 'adulterous', or 'promiscuous' mothers. Although recognising commonalities in challenges to ideologies of mothers as asexual and (paradoxically) engaged in the monogamous nurturance/sexual service of fathers, these threads, as in the earlier groupings, are generally unexplored in any depth.

Equating lesbian and (heterosexual) adulterous mothers in a theoretical stance also poses a number of problems, as the specificity of lesbian experience and archetypes of lesbians are overlooked. Within this structure, lesbians are theorised as an absence of conformity; they, like adulterous wives, are outside the bounds of monogamous marriage. But while an adulterous wife may have been a 'bad' wife to her husband, she may be a 'better' wife to the next one; whereas a lesbian mother has embraced something entirely new - lesbianism. She may be perceived as a different 'type' of person now, no longer capable of being good wife-and-mother material, or even no longer truly a woman at all.

121See I. Thery, "The Interests of the Child' and the Regulation of the Post-divorce Family' in Smart and Sevenhuijsen, 1989, 78.

122See Costello, supra n 50, at 138.


124Julia Brophy argues that 'attitudes towards lesbians are determined by elements of fantasy and anxiety. Thus once a mother is identified in terms of sexual preference that label becomes the central core of her identity..'. Brophy, supra n 34, at 489.

125See Chapter 4 for a discussion of depictions of lesbians in medical discourse and in popular culture, most of which incorporate the idea that lesbianism is a form of masculinity.
Lesbian sex is adulterous sex and more. Lesbian sex is sex but not sex,\textsuperscript{126} as lesbians are constructed paradoxically as both all and un-sexual beings.\textsuperscript{127} Lesbian sexuality is also closely associated with deviance and disease. For instance, as a matrimonial offence in Canada, lesbianism was originally omitted entirely and later categorised not as adultery but as a deviant act, along with bestiality.\textsuperscript{128} In the context of rape law, Carol Smart has argued that the phallus is constructed as universally pleasurable and women who contest this account, or gain pleasure in ways outside of men's understanding, render themselves irrational and are pathologised.\textsuperscript{129} Applying this argument to family law, lesbian mothers are rendered unstable and sick in a manner which does not apply to (heterosexual) adulterous mothers.\textsuperscript{130}

In characterising lesbians solely as sexual beings or as non conforming in some way which matches with analysis of another group, the constellation of multiple dimensions of the lesbian threat/lesbian archetype are overlooked. For example the commonly posed fear of judges that the children will grow up lesbian or gay, despite all evidence to the contrary, and frequent uses of military and Christian metaphors to describe lesbian lifestyles ("militant", "proselytising", "evangelical") indicate a terror of female power to mould children, and the possibility of a female-led rebellion against the rule of the father. In essence, lesbian mothers


\textsuperscript{127}For elaborations on this strand of thought see eg: Fajer, supra n 49, at 514; Goldstein, supra n 38, at 302; Brophy, supra n 34, at 489. Also see my argument on this point in Chapter 5 'Not real sex' section.

\textsuperscript{128}See Arnup, supra n 66, at 21.

\textsuperscript{129}See Smart, supra n 29, at 27, 28.

\textsuperscript{130}See Chapter 5, 'Sexual, sick and troubled' section.
raise and make real the spectre of male dispensability in child raising/family life\textsuperscript{131} in a way that 'working mothers' and other 'non-conforming' or 'unfeminine' women simply do not.

\textit{Lesbians as a central, detailed example, and by extension...}

Top-down analysis and hasty connections are not universally the case in feminist work on motherhood ideology. Some feminist legal theorists have endeavoured to focus upon lesbian mothers in detail, and then to draw some of their insights back into a discussion of motherhood ideology.

Katherine Arnup, while focussing primarily upon lesbians, rather than motherhood ideology, does not sever lesbian mothers from an analysis either of lesbians or of motherhood. Arnup places a discussion of a number of reported Canadian cases involving lesbian mothers within an historical context of legal treatment of lesbians (in criminal law and in divorce law) \textit{and} within the shifting terrain of family law's treatment of mothers (paternal right to maternal preference to child's best interests).\textsuperscript{132} Thus, Arnup lays important groundwork in connecting lesbian mothers to both discourses, as female 'homosexual' subjects and as mothers.

Interestingly, towards the conclusion of her piece, Arnup argues that there is 'a sharp distinction...between women whose lesbianism presents no fundamental challenge to the system' and those whose lesbianism 'represents a fundamental and ongoing challenge to the structures of heterosexuality and the nuclear family'.\textsuperscript{133} She predicts that family law cases

\begin{itemize}
\item \textsuperscript{131}Such fears are exhibited by far-right and fathers' rights discourse which frequently exhort not only that \textit{children} need fathers, but that \textit{families} (\textit{i.e.} wives and children) need them. The name of the UK father's rights group 'Families Need Fathers' crystallises this fear beautifully.
\item \textsuperscript{132}Arnup, \textit{supra} n 66.
\item \textsuperscript{133}\textit{Ibid} at 31, 32.
\end{itemize}
involving lesbian mothers will increasingly focus upon the mother’s political views and activities rather than sexual orientation. I believe that such compartmentalisation, while certainly a reflection of the way many lesbians see themselves (for example as just ‘normal mothers’ or ‘non political’), and an attempt to provide a nuanced, non-monolithic account of lesbian mothers, disallows the possibility that to the outsider we are all ‘tarred by the same brush’ to some extent and seen to threaten both the hetero-nuclear family form and the healthy development of children. However compliantly lesbian mothers may be able to socialise children to serve the needs of ‘patriarchal capitalism’, they have created an alternative to the hetero-nuclear family and rigid gender roles by their very existence, whether or not they put on a good show of femininity for the courts.

Julia Brophy is one of few theorists to integrate an analysis of lesbian sexuality in family law disputes into a discussion of sexuality in motherhood ideology. Brophy is remarkable in that she begins with lesbians as a paradigmatic example of active female sexuality, not an exception, and thereby uses the margins to illuminate that which is dominant. While noting that some issues facing lesbians are lesbian-specific, Brophy argues that the treatment of lesbian mothers has ‘clear implications for all mothers involved in disputes over the custody of children’ because they ‘exemplify the way in which motherhood is perceived as an asexual role’. In her work, Julia Brophy argues that judicial scrutiny and punishment of any transgressive female sexuality has enforced an ideal of motherhood by using the welfare principle in such a way as to simultaneously effect and obscure this end.

134 Brophy in Smart and Brophy, supra n 85.

135 Ibid, at 99.
Brophy also touches upon familial ideology, noting early English cases which stated that a 'good mother' must also be a 'good wife' and arguing that while such remarks may have disappeared from written judgments, the attitude that good mothering must take place within a traditional family form, has not.

Susan Boyd, and Didi Herman and Davina Cooper have all engaged in work about familial ideology which has centred lesbians, and used lesbian experience as paradigmatic. Susan Boyd has utilised an English Court of Appeal case regarding a lesbian mother as a focus from which to discuss both familial ideology (what makes a normal family normal?) as well as the role of ideology in law.

More recently, Susan Boyd and Katherine Arnup have focussed upon a US case in which lesbian mothers and a gay sperm donor were in contest over access and paternal rights. This contest provided a framework from which to discuss strategic issues for lesbian and gays in claims of 'family' (including what exactly provides an 'alternative', two mothers in a homonuclear family, or a gay father-by-virtue-of biology) in addition to questions of paternal right and caregiving in familial ideology more generally. Lesbian experience in such work is thus a case in point which can be used to illuminate wider discourses, proving that it is possible to centre lesbian concerns without severing them from others.

136 Ibid, at 102.

137 Boyd, supra n 51.

Herman and Cooper discuss familial ideology in terms of social and political action in the UK with a conservative government 'legislat ing heterosexuality' within a five year period.\textsuperscript{139} They focus upon three areas, lesbian access to insemination services, lesbian and gay access to fostering children, and a ban restricting local councils from producing materials positive to lesbian and gay 'pretended family life'. Herman and Cooper examine both the genesis and effects of the legislation in question, contextualising it in terms of media and political reports which frame a discussion of conservative and liberal ideologies of the family.

Familial ideology is also a focus of an article by Carrie Costello.\textsuperscript{140} Costello is unique (as far as my reading reveals) in that she engages in a detailed examination and comparison of race and sexual orientation in the construction of family. Costello uses both historical and contemporary parallels between legal and social attacks upon lesbians and gays and African Americans to argue that maintenance of a particular family form is integral to cultural dominance in the USA. For example, she notes that both black people and lesbians and gays have been defined as sexually debased, and are thus sexually suspect (black men as rapists of white women, gays and lesbians as child abusers) - allowing justification for a denial of rights, violence and denigration of family forms.\textsuperscript{141}

What links all of the above works is the way in which not only are lesbians centred in the discussion, but the experience and perspective of lesbians is regarded as relevant to other, broader theoretical concerns. Lesbians are not assumed to be of relevance only to lesbians. Nor is lesbian experience generalised without explanation or exploration.


\textsuperscript{140}Costello, supra n 50.

\textsuperscript{141}Ibid at 85, 134-5.
This chapter has aimed to illustrate how lesbians as mothers are marginalised from both lesbian and gay and feminist discourses on family law. Lesbian and gay approaches often tend to lose sight of gender considerations and overlook feminist insights. Feminist approaches have often lost sight of sexuality, overlooking lesbian experience or severing it from an analysis of motherhood ideology. Questions such as in what ways and for what reasons lesbian, working and adulterous mothers are constructed by law and society as being bad-mother or un-mother are generally left unasked and unanswered.

This is not to say that theories and experiences of each group cannot speak to each other, or that all of the issues are separate and severable. Rather, my critique of feminist theories in this area rests upon the argument that the genuineness of commonalities cannot be built upon until differences are recognised and explored fully. The work of exploring difference and building upon commonalities by focusing upon those at the margins has begun, and is detailed in the final portion of this chapter. This thesis aims to build upon that work within such a 'bottom up' framework. This thesis aims to centre the experience of lesbian mothers in family law and examine it in detail in an attempt to illuminate the boundaries of motherhood ideology.
CHAPTER 2: Not seeing is disbelieving

The previous chapter discussed the theoretical placement and treatment of lesbian mothers in two strands of legal literature, feminist and lesbian and gay. These strands of thought are, however, comparatively recent in legal theory, and it is fair to say that despite their proliferation, they are still regarded as marginal by the mainstream legal establishment - of which the judiciary is the pinnacle. By way of example, of the hundreds of legal and non-legal (eg psychiatric/sociological) materials available on lesbian and gay parenting, there are only six cases (which cite a total of five articles) in the pool of more than 80 cases under investigation where a judge cited such material.

This chapter will examine the representation of lesbian mothers in mainstream or 'traditional' legal materials, a portrayal which is marked either by complete absence or 'otherness'; emphasising a sense of lesbian mothers as non-existent or great oddities. Case law reflects this configuration, as judgments affirm either explicitly or implicitly the rarity and aberrance of

142 Regina Graycar and Jenny Morgan note that the topic 'Feminist jurisprudence' was not added to the Index to legal periodicals list of subject headings until 1988: Graycar and Morgan, supra, 2. Likewise most gay and lesbian literature has arisen in the 1980's - for example Sexual Orientation and the Law, a US looseleaf publication edited by Roberta Achtenberg, had its genesis in 1985.


144 Aust: L and L, 1983, Baker J cites Richard Green's 1978 article regarding the sexual orientation of children of homosexuals published in a psychiatry journal, and a 1982 journalistic article on homosexual parents published in a psychology magazine (although not in the pool of cases under consideration, it should also be noted that the Australian gay father case, Doyle, 1993 cited a 1988 US legal article by Robert Beargie); USA: Blew v Verta, 1992, Beck, J cites Nancy Polikoff's 1990 legal article "This Child does have Two Mothers" in addition to footnoting a range of psychological literature affirming that lesbians and gay men have 'normal' children, D.H v J.H, 1981, cites a 1979 article by R. Rivera, 'The legal position of homosexuals', in the case of Black, 1988 Crawford, J cites Dailey, 1981, citing S v S, 1980, which cites a 1980 article from the Journal of the National Association of Social Workers entitled 'Children of Lesbians: their Point of View.' It should further be noted that three of these five cases cite the same article as proof that the children of lesbians are ostracised, thereby justifying a decision against custody for the mother: USA: Black, 1988, Dailey, 1981, S v S, 1980. Of the four American cases, only Blew decided in the mother's favour, and this was only with regards to access.
lesbian motherhood. This is illustrated explicitly by cases which state that lesbianism is very unusual/abnormal, in addition to those cases where it is implicit, such as where judges express a great reluctance to believe that the mother in question actually is a lesbian.

Once the hegemonic notion of lesbianism as a great rarity in legal circles is established, I will then note a number of cases where judges nonetheless feel able to draw upon 'common sense' knowledge about lesbians and lesbian relationships (eg as unstable or consumed by role plays) in coming to their decisions. By illustrating this paradox - lesbians are terribly rare and yet their traits are common knowledge - I hope to establish the utility, indeed, the requirement of studying popular culture to understand the ways in which lesbian mothers are 'seen' in family law matters.

I: Standard legal materials: Matters most queer

Standard legal materials encompass textbooks, casebooks and commentaries published by companies such as CCH, the Law Book Co and Butterworths, for use by students and practitioners in the field of family law, in addition to publicly available law reform papers on the topic of child custody. To enable the profession to do itself most credit, and because most published cases have been available for approximately the past 15 years, I have selected only texts published in the past decade. There is a considerable range of treatment of lesbians and lesbian mothers, the one common thread being that gender is never regarded as a variable. In this way, standard legal materials are similar to lesbian and gay theoretical accounts in that the un-sexed 'homosexual parent' is the subject of inquiry.145

Omission

Some texts simply omit any reference to lesbian mothers at all, in the body, footnotes or indexation of the work. In more recent years, this approach appears to have been most commonly the province of works from the United Kingdom.\textsuperscript{146} A startling recent example is a text entitled \textit{Families Outside Marriage}, which contains no indexation of lesbians (or gay men) and proceeds in the text with the unshakeable assumption that all of the 'unmarried partners' are of necessity heterosexual.\textsuperscript{147} The relative scarcity of reported cases regarding lesbian mothers in the UK may go some way towards explaining this tendency to completely overlook them; there are, however, detailed commentaries of unreported and reported English cases available.\textsuperscript{148}

Some English texts have one case or footnote a case which involves a lesbian mother by way of discussing something else, such as choosing between 'undesirable' parents, or the benefits of court ordered supervision when a parent is of dubious character.\textsuperscript{149} In this way they perpetuate implicit assumptions about lesbian mothers (they are bad and undesirable custodians of children) while not actually commenting upon the situation of lesbian mothers or case law in relation to lesbian mothers.


\textsuperscript{147}J. Priest, \textit{Families Outside Marriage} (Bristol: Family Law, 1990).


No comment

Numerous materials mention 'sexual orientation' or 'homosexuality' of a parent as a factor that must be taken into account and may weigh against a parent, perhaps noting a single case, but offer no discussion or analysis. This 'dutiful footnote' approach appears to be one of the most common.  

Likewise, perhaps reflecting the 'objective commentary' style of standard legal materials, other works simply list available reported cases in the jurisdiction in question, or extract a single case with no analysis surrounding it. The implications of such a style are twofold. If the case or cases at hand contain pathologising or derogatory characterisations of lesbian mothers, or suggest that lesbians as a whole are to be viewed as dangerous to children, the lack of comment to the contrary effectively implies that such mothers deserve what they get. If the case or cases are positive to the lesbian mother, or relatively unproblematic in their characterisation of lesbian motherhood (at least in extracted form) an implication then arises that all is well and lesbian mothers no longer face any problems in the family law system.

Where comment exists it is often brief, and may be either a simple statement that the parent's sexuality continues to influence decision makers, or to the contrary that such an approach has declined in recent years.  

For example, a Canadian text by Kronby in 1986 contains but one

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throwaway reference to lesbians, under the heading "Effects of Adultery" where he claims without substantiation that,

'The courts no longer assume that an unfaithful wife is an unfit mother. For that matter, homosexuality, as such, is not a reason to refuse custody.'\textsuperscript{152}

A small number of commentators take a liberal position that discrimination does exist and is unjust, usually adding that a 'nexus approach' should be followed. This stance mirrors, but does not refer to, the work of lesbian and gay theorists discussed in Chapter 1.\textsuperscript{153}

\textit{Lesbianism as fault or flaw}

The most pervasive sense of lesbianism as aberrant or dangerous is created by context rather than comment in standard legal works. The placement of the cases is instructive; they are virtually always in or directly following a section on 'martial misconduct', such as adultery and, more alarmingly, abusive/aberrant 'conduct' such as alcoholism, violence and child abuse.\textsuperscript{154} Lesbianism may also be discussed either with or in direct proximity to, transexuality or mental illness.\textsuperscript{155}

Anthony Dickey provides a useful illustration of this phenomenon, where he claims that the courts no longer make 'presumptions' about parental fitness, listing examples, 'a person who


\textsuperscript{154}See eg Canada: Bala and Miklas, \textit{supra} n 151, "Martial misconduct and homosexuality", at 28.

\textsuperscript{155}See eg UK: O'Donovan, \textit{supra} n 105, at 84; Australia: Finlay and Bailey-Harris, \textit{supra} n 151, at 231; Katter, \textit{supra} n 145, heading "Homosexuality and transexuality", at 19.
is mentally ill, or is a male or female homosexual or is a transexual'.\textsuperscript{156} Later in the same work within the section "Misconduct by a party" Dickey writes,

'\textit{In considering the relevance of sexual immorality, and also sexual and social deviance, to guardianship and custody proceedings, courts attempt to be tolerant....}'\textsuperscript{157}

These are the only indexed references to homosexual parents in his weighty book, and they are then directly followed by a discussion of child abduction and child sexual abuse.

Another example of contextualisation is in Bates' 1987 text, where he twice refers at some length to the little known Australian case of Kitchener, 1977, a case only reported in that country in summary. The case involved a mother whose lesbian partner was violent, and is discussed by Bates both in the custody section and also in a section of the book on violence, where it is preceded by the statement, 'It should not be forgotten that problems which attach to relationships and custody disputes generally, are not absent from homosexual relationships'.\textsuperscript{158} Considering the proportion of cases involving lesbian mothers where the mother was subjected to violence at the hands of the father, it is interesting that it is the element of intra-lesbian violence that Bates should choose to emphasise.\textsuperscript{159}

Cases involving a lesbian mother do not appear in the texts as examples of child support issues, or of the difficulties of negotiating access when the custodial and non-custodial parent's

\textsuperscript{156}Dickey, \textit{supra} n 150, at 353.

\textsuperscript{157}\textit{Ibid} at 364.

\textsuperscript{158}Bates, \textit{supra} n 151, at 264.

\textsuperscript{159}For a discussion of violence against lesbian mothers and the way it is recorded in cases, see Millbank, \textit{supra} n 11.
lifestyles are widely different, or as examples of the likelihood of women being subjected to violence when leaving a male partner, or as examples of anything else at all really. In a few instances, lesbians appear in family law texts in the section of the text on 'opposite sex' requirements for marriage. In these cases, lesbian appear as cross dressers who are not permitted to marry as a matter of statutory construction. Such a characterisation again emphasises freakishness, in the sense that there is no explanation for the women's behaviour (such as the difficulty of women obtaining employment historically, or of living together as two women in a rural area). Lesbians are just there in the text, presented au natural (case only, no commentary), as women who wanted to be men, or rather as women who wanted to be together in a masculine-feminine role play with one of them 'as' the man.

Lesbians are discussed in standard legal materials in such a context that they are either invisible or more commonly, marginalised as at fault, ill, freakish or abusive. Lesbians are 'like' heterosexual mothers, or fathers, only insomuch as they do damaging things to each other or their children, usually simply by virtue of being lesbian, which is, implicitly, their 'misconduct' or 'immorality'.

II: Case law: expressions of oddity

Judges do not generally say that this is the first lesbian they have ever seen, although in the UK case of Re P, 1983, Sir John Arnold P states twice that he has 'no evidence or experience' regarding the children of lesbian mothers (at 4). There are, however, a number of cases where the judge explicitly characterises lesbian mothers/households as 'unusual', 'irregular', 'abnormal' or 'strange'. Usually the judge will go to some length to distance her/himself

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160See eg Hovius, supra n 150, Chp 2.

from the value judgment inherent in such statements by claiming that this is what the child 'must' or 'will' feel, or this is how the 'community' views lesbianism.\textsuperscript{162} Cases that assume, absent any evidence, that there will be community disapprobation and teasing of the child by her/his peers, likewise reflect a view of lesbianism as not only stigmatised (which is somewhat justified) but also as very rare. For instance the possibility of one or more of the child's friends having a lesbian mother is completely excluded by such logic.

Perhaps the most striking affirmation of the unlikelihood/extreme rarity of lesbianism and motherhood co-existing is in cases where the judge refused to believe that the mother was lesbian, sometimes in the face of overwhelming evidence. In the UK case of \textit{Re S}, 1993, the trial judge held that a letter from the mother to the father indicating that she was having a lesbian relationship was to 'taunt' him and characterised it as a 'cry for help' to the father (at 3). In the UK case \textit{Re M}, 1993 and the Australian case, \textit{Harvey and Creswell}, 1988, the father alleged that the mother had been involved in lesbian relationships prior to her relationship with him. In \textit{Re M}, the trial judge emphasised the mother's calmness, sensitivity and devotion to her children and believed the mother's denial, adding that even were it true it was in the past, so 'Lesbianism is irrelevant as an issue in this case and in fact the mother presents as a firm but very feminine person' (at 3, 4).\textsuperscript{163} Femininity apparently ruling out lesbianism. Likewise in \textit{Harvey}, the Federal Court emphasised the maturity and devotion of the mother before noting the allegations towards the very end of the judgment, adding that the trial judge did not discuss them as they were of little importance, being well in the past and not reflective of the mother's present character (at 12, 13).

\textsuperscript{162}See eg UK: \textit{Eveson}, 1980.

\textsuperscript{163}For this decision, including a remark about the husband's extreme homophobia, the judge was subject to an appeal on the grounds of bias, possibly including allusions to her own sexuality. See \textit{Re M (Judicial continuity)} [1993] 1 FLR 903 (C.A).
In two Canadian cases where the father alleged that the mother was lesbian, the judge decided to conditionally believe the mother or to make no finding on the matter at all, leaving the issue curiously vague and undecided. This equivocation is so pointed as to bear repeating. In Tomanec, 1993, Noble, J writes,

'The mother's ultimate departure from the home was preceded by the father coming upon the mother in circumstances which he perceived to be proof of a lesbian relationship between the mother and her friend, Gayle Shelleau. The circumstances are equivocal and I accept the evidence of the mother and the witness Shelleau that at the time no such relationship existed' [Noble, J then says this is only relevant to explain the father's later aggression and continues] 'There is no evidence that the sexual preference of the mother has in any way itself been such to detrimentally impact upon the emotional or psychological fabric of either child' (at 13 - 14).

What the 'circumstances' were, or what indeed the mother's sexual preference was or is, are left unstated. Likewise, in Seselja, 1994, the father and the Official Guardian were concerned about the mother's relationship with a 'friend' who she met in a bar and who more or less lived with her and slept in her bed. The judge quoted the report of the Official Guardian which read,

'It should be noted, that it is not the nature of Mrs Seselja's relationship with Ms Mohammed that is of concern, but rather the confusion that the children are experiencing as a result of this issue. Ryan, in particular is feeling angry and rejected by his mother, as well as uncomfortable with the present arrangements' (at 11).

The mother answered by saying that the children were only asking questions because the father had told the children that she was a lesbian. The truth or falsity of the claim was repeatedly sidestepped, as the Guardian claimed it was the 'role' of the other woman rather than the 'nature' of the relationship which was at issue, and the judge made no direct mention or finding on the matter at all.
A dazzling episode of disbelief occurred in the 1988 US case of S.L.H v D.B.H, where the father claimed that the mother was having a lesbian relationship, which she and her alleged lover denied. The father then testified that he had seen the women engage in sexual acts, and that the mother had admitted a relationship to him. In addition an ex-boyfriend of the mother's testified that she had admitted being a lesbian to him, and produced a letter by the mother which stated that her relationship with him had ended due to her relationship with the woman in question. Nevertheless, the trial judge believed the mother, holding that although a lesbian relationship 'may be inferred from the letter', it was not conclusive or unequivocal, and this decision was upheld on appeal. Interestingly, one of the main, if not the only, reason given by the trial judge for believing the mother over the father was statements by both the father and ex-boyfriend that they had been having 'normal sexual relations' (by which I presume is meant heterosexual intercourse) with the mother at the time of the alleged lesbian acts and admissions. Such a judgement was commended as credible by the appeal court. Likewise in the 1991 UK case, B v B, the trial judge believed that the mother had not begun her lesbian relationship until after leaving the husband, despite considerable testimony and circumstantial evidence to the contrary, because,

'I have the father's evidence that there was sexual intercourse between himself and his wife until 2 or 3 days before the wife left him, and on that evidence I am prepared to hold that this lesbian relationship only commenced after the mother left the father' (Callum, J at 6-7).

Thus, lesbianism is equated with a clear, visible and unequivocal rejection of men and most particularly heterosexual intercourse. There is no possibility of bisexuality, or of a continuum

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164 45 S.W 2d 850 (Mo. App, 1988). It is possible is that the judge did not believe the mother but wanted to give her custody nonetheless and knew that if he had held she was lesbian, would have been fairly much obliged, under common law in higher courts of that state (eg N.K.M v L.E.M, 1980), to decide against custody to the mother.
of change in the mother's sexuality. Rather, one must be one or the other, and that difference must be visibly marked, an issue I will address in the following chapter on cultural representation. On this point, B v B and S.L.H v D.B.H contain elements of judicial notice, as their reasons for disbelieving a lesbian relationship are premised upon an unstated understanding of lesbian sexuality as exclusive.

In other cases the judge originally believed the mother's denials of lesbianism, until the father brought new evidence, or appealed.165 The cumulative effect of all of these cases is to suggest that lesbianism is a grave and uncommon situation, only to be believed of mothers, especially good, caring, feminine mothers, if there is no other option.

III: Case law: we know who you are

Although judges may claim or imply the rarity of lesbianism, they nevertheless find themselves able to take judicial notice of aspects of lesbian life, more often phrased as 'common sense' knowledge rather than observation. The UK case of Re P, 1983, is illuminating in this area, as it contains both such aspects on the face of the record. As noted above, Arnold, J claims to have 'no evidence or experience' of lesbians at page 4 but by page 5 is confidently making predictions as to peer trauma,

'One does not have to be a psychiatrist to appreciate that a lesbian household would quite likely be the subject of embarrassing conduct and comment, particularly among the child's friends, and this is a disadvantage...'  

'Common sense' assumptions about the likelihood of children being subjected to peer trauma or growing up lesbian/gay are littered throughout judgments. Judicial assumptions more particularly about the 'nature' or lesbians and lesbian relationships are also present in a less explicit manner. Such assumptions include: lesbian relationships are unstable, lesbians are emotionally unstable, or immature, or confused, lesbian relationships necessitate power imbalances or role playing and lesbians sexually abuse, or are attracted to, children. Each of these matters will be discussed in turn to illustrate the process of 'projection' on the part of the judges, whereby characteristics are attributed to the parties without any seeming reason to do so - a process which reveals much about the unconscious beliefs and fears of the judges who are attributing them.

**Lesbian relationships are unstable**

Judgments frequently make the claim that lesbian relationships are inherently unstable. At the extreme this assumption may even be explicitly stated as a finding of fact about which judicial notice can be taken. For example in the UK 1983 case, *Re D*, Sir Roger Ormrod stated,

'Experience shows, just as in the case that took place, that homosexual relationships do tend to be even more unstable than heterosexual relations...' (at 3).

Likewise the trial judge in *S.N.E v R.L.B*, (USA, 1985, 879) made a finding of fact that the mother's lesbian relationship would most likely be less stable than the father's recent marriage based on the assumption that homosexual relationships are of short duration. This finding was, however, overturned by the appeal court.

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166See Chapter 3 'A nexus test? the irrelevance of evidence' section.
The assumption of instability is generally less explicit, and less likely to be expressed in the abstract. It may be implied, for instance, in orders that the mother's partner, 'or any other homosexual' or 'any other lover' with whom she may have a relationship be barred from the presence of the children. More usually it is expressed through a laborious examination of how many female sexual partners the mother has had, a common thread of inquiry and even a major focus of numerous cases. The number of the mother's lovers was sometimes contested by the father, leading to cross-examination and necessitating a finding of fact on the matter, for example in Cartwright, (Aust, 1977, 76,596). Even when not contested, the mother was sometimes subjected to cross examination about her relationships, which was then recorded at length in the judgment, for example in Collins (USA, 1988, 11-12) where one appeal judge quoted testimony as to lovers named by the questioner as 'number two' and 'number three' and so on (of a possible four), to illustrate instability.

There was also frequent inquiry into how many female sexual partners the mother's current partner had been involved with, particularly when the mother had only one relationship with a woman, and so could not be accused of instability on that ground. This focus betrays an active search for a 'factor' such as instability, rather than it merely existing on the face of the evidence.

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The combination of the mother's and her partner's relationships was then frequently used to determine that the current relationship between the mother and her partner could not possibly be stable. Such a finding was sometimes in the face of evidence that the relationship between the women was indeed of longstanding, and regarded by the parties and expert witnesses as stable, for instance in P.C and P.R (Aust, 1979) where McCall, J flatly refused to believe the evidence and ignored the fact that the relationship had already lasted two years: 'I am by no means convinced that this relationship is as stable and has the degree of permanence that was alleged' (at 78, 608). He further stated that,

'I do not believe, in view of her past history, that the relationship with the wife will even be a lasting one' (at 78, 609).

The 'past history' was two other lesbian relationships - which lasted four and five years respectively. Notably, the mother's marriage in that case had lasted only four years. Even if the mother had not yet been engaged in a lesbian relationship, the court expressed fear that a future relationship would not be stable or long lasting.171

The marked attention to the in/stability of lesbian relationships is highlighted by the fact that mothers' relationships with men prior to, or even following, the marriage are never in issue. Moreover, the number of relationships in which the father has engaged is very rarely noted, and his current partner's sexual history is completely absent from consideration.172

Having shown that judges (and quite possibly counsel for the fathers) actively look for evidence of instability of the lesbian relationship, and indeed see evidence where others might

171See Canada: S v S, 1992, 43, 44, 47.

172For more detailed discussion of these issues in the cases see Chapter 3.
not, one must then ask the question: Why? A possible explanation is that the individual lesbian relationship in this instance has done what homosexual relationships are said and feared to do in general: destabilise the traditional family.\textsuperscript{173} Nowhere could this be more explicit than where the mother has left the father for the present lesbian relationship. That relationship, then, is seen as an agent of destabilisation, it is the visible cause of the rupture of the normal family, now in pieces and at war in the courtroom. Within this setting, the narrative of the family breakdown, the function of a lesbian relationship is rupture. It destroys, it does not create, it tears asunder rather than bringing together (in the way, for example, the grandparents are seen as gelling families together, regardless of their roles in the actual proceedings).\textsuperscript{174} Once the lesbian relationship is seen in this way, as causing or even symbolising destabilisation, it is very easy to presume it must therefore be unstable in itself.

\textit{Lesbians are unstable}

Lesbians, in and of themselves, were also found to be unstable in the judgments. Instability was extrapolated from many external factors, such as changing employment or moving house, and then connected to the mother's inherent instability. Take for example, the unsupported finding of the trial judge quoted by the appeal court in \textit{Bezaire} (Canada, 1980):

'...I am now satisfied that the instability in the children's past existence is rooted in the psychological instability of Mrs Bezaire herself; that the continued need of movement from one spot to another, the changing of schools, the changing of relationships, even the changing of lesbian partners, indicate to this court a very deep-rooted instability in Mrs Bezaire herself' (at 362-3).

\textsuperscript{173}See eg Chapter 3, n 208.

If the mother actually had been depressed, or sought therapy to deal with any matter, such as child sexual abuse, these things were usually noted in the same breath with her sexuality. In Chicoine, 1992 (USA), for example:

'Lisa has experienced a myriad of psychological problems including an eating disorder, depression, suicidal threats, sexual abuse as a child and active homosexual relationships with several female partners' (at 893).

Messy houses and bad language were also frequently cited in the judgments as evidence that the mother was an unstable individual.

In the 1980 US case of Werneburg, the fact that both the mother and her partner had previously been engaged in heterosexual relationships and were now lesbian was sufficient for the court to conclude that they were 'confused' about their identities and relationship. On close reading, there is no suggestion that either woman was the slightest bit equivocal about her choices, and rather it was the judge who found it all so very confusing. As with the cases where judges refused to believe that the mother was lesbian because of her sexual activity with men, the judgments here are premised upon an implicit understanding of female sexuality as static, which was then projected onto the mother, regardless of other information and evidence.

Again, the question arises, why is instability of character such a focus here, when, frequently, the father's many defects go virtually untouched, sometimes noted but rarely explored or regarded as decisive. Perhaps the fact that the mother could change and had indeed changed

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175 See eg USA: Chicoine, 1992; Williams, 1990.
177 See Chapter 3, 'Competing fathers: who cares? a Dad is a Dad is a Dad' section.
in what is regarded as such a fundamental manner meant that she was viewed as volatile, unpredictable. If she could change from a housewife to a dyke, what else is she capable of? Evidence of her inherent instability of character was therefore sought out, and found.

Immaturity was another quality specifically sought out in the mother. Moving from a heterosexual to a lesbian relationship was implicitly viewed as evidence of such immaturity, symbolising a regression from full adult womanhood (wife/mother) to childishness (schoolgirl phase/incomplete non-phallic sexuality).178 In the Australian cases of Spry, 1977,179 Schmidt, 1979,180 and P.C and P.R, 1979, the mother was explicitly characterised as immature, easily influenced by and dependent on her lover, the 'real' (experienced) lesbian who had drawn her into this thing. In P.C and P.R, this characterisation is at its most detailed:

'The wife, however, I find is an emotional and I believe still immature person. Prior to [her current relationship] she was largely ignorant about homosexuality. Miss Argue was not; she had been a committed lesbian for a number of years. I believe the wife did not then and does not now fully perceive exactly what took place...I believe that Miss Argue from the time of that weekend onwards' [a period of two years] 'has deliberately educated the wife about homosexuality...Argue deliberately took the wife to see at least one lesbian couple bringing up children. I believe that the wife, then or now, has no real appreciation of what Argue was doing' (at 78,608).

Several cases from other jurisdictions characterise the wife as immature in a less direct manner. Sometimes this presumption of immaturity was suggested by the choice of language, for example in S v S, (Canada, 1992) the judge repeatedly refers to the mother's wanting to move to the city and begin relationships as an 'adventure' (at 44), and in Bezaire (Canada, 1980) the mother 'went out and broke' the conditions attached to her custody, like a naughty

178 The origins and pervasiveness of this view of lesbian sexuality will be explored in greater detail in Chapter 4.

179 See pp 76,444-5.

180 See pp 78,608, 78,612.
child. In the US case M.P v S.P (1979) the judge suggested that the wife was not to be blamed for her lesbian relationship as the husband's abusiveness 'stifled forever her initial attempts to enjoy heterosexual love' (at 1263). Lesbianism in that case was thus a retreat, perhaps a regression, from heterosexuality.

**Power imbalances, abuse and role playing**

It is sometimes suggested in the judgments, either by overt questioning or by implication from the choice of language, that children are at risk of sexual abuse from lesbian mothers, or more commonly, their partners. The presence of such concerns occasionally arises at the behest of the father, but more usually appears as a 'common sense' concern of the judges. Evidence that sexual abuse by women generally, or lesbians generally, and the mother/partner in particular is not probable is generally accepted on the face of the record, but does persist as a current at a subliminal level. This issue will be discussed in depth in Chapter 5, in the 'Witch' section.

Role playing between the partners in a lesbian relationship is another 'factor' which is actively sought out by the judges. Presumption of role playing is shown in the judgments in a myriad of ways. Frequently the judge will suggest that the partner is 'dominant' and/or the mother is 'submissive', with these traits implying 'male' and 'female' roles respectively. For instance the partner paying for entertainment, driving or appearing protective of the mother was

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gleaned as evidence that the partner was 'dominant'.\textsuperscript{184} On occasion, the mother was characterised as the 'dominant' one, particularly if her partner was younger than herself.\textsuperscript{185} In the Australian case of \textit{P.C v P.R}, 1979, the judge flatly refused to believe the testimony of the parties and expert witnesses that there was 'no role definition' between the women (at 78, 608). In \textit{L and L} (Aust, 1983) Baker, J looked for role definitions between the women, and seemed surprised that there were none, adding, 'Neither the wife nor Miss Y. are obvious homosexuals. Both dress in a pleasant and appropriate fashion...' (at 78, 363).

Masculinity was also implied by suggestions that one of the women wore 'men's clothes',\textsuperscript{186} had a 'masculine oriented mental status',\textsuperscript{187} or had been a tomboy when young.\textsuperscript{188} Judges also sometimes referred to the mother's partner by her surname alone, a form of address usually reserved in the judgments for men (such as the father and male experts). Although the mother's partner could also be referred to with a title, it was only lesbians and men who were referred to by their surnames alone; other women, such as relatives, experts, and the mother herself, were always referred to by initials, first name or a title.\textsuperscript{189}

The belief that lesbian relationships mimic the role definition in heterosexual relationships, or that lesbians are male-identified involves a clear projection of the centrality of a heterosexual gender role structure. Two people in a relationship must be a man and a woman, or pretending


\textsuperscript{186}See UK: \textit{Re A}, 1979, 10; USA: \textit{Breisch}, 1981, 817.

\textsuperscript{187}See USA: \textit{Breisch}, 1981, 817.

\textsuperscript{188}See UK: \textit{B v B}, 1991, 5.

to be them. A person who has sex with a woman must be a man or be pretending to be one. Such ideas are in fact common in psychoanalytic and popular cultural representations of lesbians, and will be taken up in the Chapter 4.

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This chapter has aimed to illustrate by way of examples drawn from standard legal literature on family law and from family law judgments themselves, the idea that lesbians are 'Other', the unknown (and thus terrible, frightening, dangerous etc), at precisely the same time that lesbians are assumed to be known (common sense dictating that lesbians are unstable and their relationships are butch/femme etc). Therefore lesbian mothers need not necessarily be 'seen' in the individual sense as parties to the case, but as emblematic of 'lesbianism' in the general. This knowing entails that proof of various common sense notions need not be produced, and moreover if evidence is brought to contest such notions it can easily be dismissed as nonsense.

The following chapter will illustrate through case analysis firstly that lesbianism is a central, definitional feature in family law matters where the mother is lesbian, and secondly the ways in which 'common sense' comes into play in overlooking evidence.
CHAPTER 3: Lesbianism versus motherhood

One of the foundations upon which this thesis rests is that child custody cases concerning lesbian mothers are primarily, if not exclusively, about lesbianism. Lesbianism may not always be the deciding factor in the cases, but it is the pivotal issue around which the inquiry revolves. 'Lesbian' is regarded as an inherently suspect category of identity, an un-womanly category, and thus the cases are, in my thesis, about lesbianism versus motherhood.

The central importance of lesbianism in child custody judgments regarding lesbian mothers is not usually explicitly stated on the face of the judgment, which more often contains rhetoric to the effect that lesbianism is not per se a bar to custody. In direct contrast to this veneer of evenly balanced factors or claims are the patterns revealed by a reading of available cases. Willingness to allow appeal where trial judges have not considered the mother's lesbianism at great enough length or as an onerous disadvantage for example, indicates that while lesbianism may be just one factor, it is a factor which must be treated with some weight and always as a disadvantage.

Also, in a significant number of cases, the father was not subjected to even the most routine inquiry - his lifestyle was most notable in the judgments by its absence, as questions regarding his parenting skills and partner were frequently left unanswered, or even unasked. Likewise the detail given to sexuality was not given to other categories of identity, such as race and ethnicity. Expert evidence stressing that the children of lesbians were likely to grow up heterosexual and developmentally 'normal' was overwhelmingly disregarded. Recommendations of court appointed, as well as partisan, psychologists and social workers, in favour of custody for the mother were dismissed as often as they were followed.
Evidentiary arguments that there must be a 'nexus' or causation shown between the mother's lesbianism and harm to the child/ren were also disregarded, or paid minimal lip service. As the future focused 'best interests' test encompasses speculative and possible harm, evidentiary requirements simply fell outside of its ambit. Likewise, rights-based arguments were uniformly dismissed, often with considerable outrage, as they were viewed not so much outside of, but in direct conflict with, the child's best interests principle.

Each of these issues will be dealt with in turn to illustrate that in cases involving a lesbian mother, lesbianism is regarded as of overriding importance, generally as an ill.

**Just one factor among many**

Judges frequently claim that the mother's lesbianism is 'just one factor to be considered among many.' This claim is most common in Australia, for example in *P.C v P.R*, (a case notable for its homophobic discourse):

> 'Lesbianism therefore is not a determining factor. It is a factor, however, to be taken into account. Its importance will vary depending upon the totality of the evidence and all the other factors that must be taken into account in the particular case' (McCall J, (1979) FLC 90-676 at 78,606).

Such statements of principle also appear regularly in Canada and the UK as well as in some states of the US.190

However, numerous judgments have suggested that lesbianism is the 'main' or 'major' issue without apparently sensing a contradiction, such as the UK case of *Re D*, 1983, where the

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190For an Australian judgment positive to the mother with a similar statement see Schmidt (1979) FLC 90-685, Fogarty J at 78,659. See also Canada: *Case*, 1975, Barkely, 1980; UK: *Eveson*, 1980; USA: *M.P v S.P*, 1979.
mother's lesbianism was designated the 'dominant problem' in the judgment.\textsuperscript{191} When a remark at trial level that the mother's lesbianism was the 'main' issue was appealed in a recent US case, it was held insufficient to reverse as a matter of law.\textsuperscript{192} Moreover the US case of Constant A v Paul C.A, 1984 held as a matter of law that the lesbian mother must disprove harm, and the UK Court of Appeal case of C v C, 1991 held as a matter of law that if a lesbian mother and heterosexual father's claims were evenly balanced, decisions must sway in favour of the heterosexual parent. The discourse of lesbianism as 'just one issue' is somewhat undercut by such decisions.

The central importance of the mother's lesbianism was most notable when momentarily displaced - such as when a trial judge regarded it as of little importance or implicitly characterised it as unharmful. In two cases in the UK and one in the USA such judgments were immediately overturned on appeal as it was held as a matter of law that the mother's lesbianism must be considered carefully and this consideration \textit{must} weigh it as a disadvantage.\textsuperscript{193} In the words of the appeal judge in \textit{Holder}, (UK, 1985),

\begin{quote}
'...it was hopelessly wrong to say that it was not a consideration, but it was of prime importance. It was what the whole case was about' (at 3).
\end{quote}

In this way, only when lesbianism has \textit{not} been considered vital to the case must it then be reaffirmed as central in a subsequent written judgment. More commonly, an implicit

\begin{footnotesize}
\textsuperscript{191}See also Australia: Doyle, 1992 (gay father) 'central issue' at 275, \textit{L and L}, 1983 'real issue of the case' at 78,363; USA: Jacobson, 1981 'overriding factor' at 80.

\textsuperscript{192}USA: White v Thompson, 1990.

\textsuperscript{193}UK: \textit{Holder}, 1985, \textit{C v C}, 1991; USA: Bennett. But contra Australia: Creswell and Harvey, 1988, where the trial judge had even omitted mention of the mother's former lesbianism from the face of the judgment, and this was held by the appeal court to be justified as it was no longer relevant.
\end{footnotesize}
assumption of the centrality of the mother’s lesbianism to the case can co-exist with statements
of principle that it is not really determinative at all.

*And the other factors are?*

Another matter which suggests that lesbianism is the central, *definitional*, feature of the cases,
is the absence of other societally marking ‘factors’, most notably race and ethnicity from the
judgments. In the pool of cases under examination, only four of them made any reference to
the race, ethnicity or cultural background of the parties.

In one Canadian and one US case the father's status as a foreign national was noted because he
had threatened to kidnap the children at some stage in the proceedings and the judge responded
by ordering surrender of his passport/s.\(^{194}\) In the two remaining cases, reference to race was
far more spurious. In the 1980 US case of *N.K.M v L.E.M*, the judge repeatedly and
emphatically referred to two witnesses (who appeared in order to attest to the mother's
relationship with another woman) as 'the Filipino nurses', without any apparent purpose for
doing so. In the 1979 UK welfare case of *Re A*, the judge noted that the children’s father was
'Black' and that the children were 'mixed' and 'black' - thereby implying rather than stating
that the mother was White. The mixed race of the children was noted as something that would
cause them additional difficulty in life, and was arguably an implicit criticism of the mother
for bringing about such a state of affairs. It is also notable that the father's race was stated in
close proximity to findings of his violence towards the mother - thereby reinforcing a racist
 stereotype of men of colour as violent/uncontrolled.

There are a number of possible explanations for the apparent 'colourlessness' of the cases. It is
possible that this omission is common practice in all family law matters, and not a particular

\(^{194}\)Canada: *Tomanee*, 1993, father was Czech; USA: *Anon*, 1986, father was Algerian.
feature of cases where the mother is lesbian. I have not attempted to do a quantitative comparison of cases where the mother is lesbian with cases where the mother is ostensibly heterosexual, not least of all because I am loathe to call the latter a 'control' group. A less plausible explanation is that the parties were all White Anglo-Saxon. Although the common practice of reporting cases with only the initials of the party's (particularly lesbian ones), to 'protect' the children conceals a majority of the party's names from the public record, nevertheless there remain some cases where parties names are present and are, for example, of Jewish or Hispanic origin.

A more likely explanation is that in most cases the parties were of the same racial or cultural group, and so race or culture was not perceived by the judge as an 'issue' which needed to be addressed and decided upon in the way it would if there had to be a 'choice' between them (eg. in placing the child either in an Aboriginal or an Anglo-Australian home.) Another possible explanation is that whatever the race or ethnicity of the parties, the judge nonetheless focused upon the lesbian 'factor' as being of overriding importance. Nitya Duclos suggests that in the context of Canadian Human Rights law, judges and legislators are capable of thinking only in terms of race or gender, never both at the same time, so the specificities of discrimination against women of colour are lost in the process. It is possible that such either/or vision occurs in family law matters also. Explanations can only be speculated upon, but the effect remains that race and ethnicity as 'factors' remain largely absent from judgments, whereas the 'factor' of lesbianism continues to shine, centre stage.

Case analysis regarding heterosexual mothers tends to be divided by such factors as whether the mother was working and who had care of the children after separation and prior to the hearing - the mother's heterosexuality is not even a feature. To the contrary, I will argue that in cases where the mother is lesbian, all other factors fall away into the background, as the focus of the case is upon motherhood versus lesbianism.

Competing fathers: who cares? a Dad is a Dad is a Dad

Numerous commentators have claimed that lesbian mothers are generally successful, or have a greater chance of success when the father is manifestly 'unfit' in some way. Although this claim may well be true, it is somewhat circumscribed by the rarity with which the father’s behaviour and fitness are examined, detailed or taken into account. Most cases at least make mention of the father’s employment and accommodations. Some, however, do not even do this, for example in the US cases giving or affirming custody to the father M.J.P v J.G.P, 1982, L v D, 1982, and Jacobson, 1981, judges mention neither; Dailey, 1981 notes only the father’s occupation.

Matters pertaining to paternal fitness include allegations of the father’s alcoholism, physical and/or threatened violence against the mother, and sexual abuse of the children. Frequently judges note such a serious allegation but flatly refuse to detail its substance, whether or not the allegation was held to be proven. For example in the Canadian case of Bezaire, 1980, the judge noted but did not detail allegations of sexual abuse of the children (at 360). In two UK cases, faults of the fathers were suggested but never made explicit. For example in S v S, 1978 the father’s 'abnormal sexual practices' were not named (at 3) and in Eveson, 1980, the father’s 'defects of character' (at 3, 5) remained un-named. In the 1991 US case of Diehl, the appeal court managed to pass over the mother’s allegation of the father’s violence toward her by simply making no finding on the matter at all (at 284).

197See eg Bateman, supra n 56, at 54; Rights of Women, supra n 148, at 123; Brophy, supra n 34, at 497.

198Also the dissenting judge in G.A v D.A, 1987, notes that the majority overlooked the father’s inadequate living conditions when awarding him custody, at 729. Such lack of detail may be partially explained in the US cases by the fact that they are all appellate level judgments which generally contain fewer references to the facts than do trial judgments. However, I do not regard this as a complete explanation, particularly as detail regarding the mother does appear.

199See also: Canada: Daller, 1988, allegations of threats and harassment of mother and her lover, at 57; N v N 1992, physical violence towards mother at 15; Case, 1975, violence against mother and kidnapping the child at
It is also instructive to note the range of cruel and hostile behaviour which was not generally considered to impact upon paternal fitness at all - such as attempting to sabotage the mother's relationship with her own parents by ' outing' her to them, verbal abusing the mother and/or her lover, abusing the mother verbally to the child in an attempt to turn the child against the mother, showing the children some of the mother's (lesbian) love letters and kidnapping the child/ren from the mother prior to initiating a custody action.

Moreover, a father accused of any of the more readily accepted grounds of unfitness, such as violence, alcoholism or sexual abuse may still win when contesting against a lesbian mother. For example, in the Canadian matter, Case, 1974, allegations of the father's abusiveness were...

134, 135: K v K, 1975 violence against mother at 59; USA: M.P v S.P, 1979, father's sexual assaults on mother during marriage, taken into account on appeal but not detailed, at 1262-3; Wernburg, 1980, allegations of father exercising 'severe' discipline and denying child food passed over; Australia: Jarman v Lloyd, 1982, father's violence to mother passed over at 879, 880; O'Reilly, 1977, father's violence to mother noted in passing in last paragraph of judgment.

200Canada: S v S, 1992, the father characterised by the judge as 'thoughtless' and somewhat 'selfish' at 46, 48; Australia: G v G, 1988, the husband was rebuked in this instance as he was a family law solicitor and achieved this end by sending affidavits to the mother's mother - a breach of the legislative provisions of which he was well aware, at 76,788.


202USA: Lundin, 1990, Blew v Verta, 1992. In addition it is reasonable to assume that verbal abuse and threats accompanied those cases where physical violence is noted. However, contra: Canada: N v N, 1992 (verbal abuse of mother in child's presence) and USA: Large, 1993, (verbal abuse of the mother to child in mother's absence) father's behaviour was held against the father because of negative impact upon the child.

203USA: L v D, 1982, accepted by the court as being without malice. How they came to be in his hands in the first place is predictably left unexplored.

204Canada: Case, 1974; USA: Williams, 1990, White v Thompson, 1990, (grandparents accepted child kidnapped by the father and subsequently won custody).

held against the mother, as evidence of her tendency to exaggerate, and in the 1990 American case, *Williams*, the father's threatened violence against the mother and her lover and his contempt of court for kidnapping the child were not considered major issues. In a direct comparison, the judge held that the father was more fit than the mother, who was the real criminal for breaching that state's laws against consensual same sex activity (at 1197, 1199).

A less dramatic example is that of *Black*, 1988, where upon gaining custody of the children, the father placed them in the care of his mother in her house (as they did not get along with his new wife's children) where they remained for the next four years. The father's custody was affirmed when the lesbian mother petitioned on the basis of changed circumstances, as the court held that the children were still cared for under his 'direction and control' and his fitness remained unquestioned (at 6).

Alternatively, the parents of clearly 'unfit' fathers joined the father in his application for custody and won; thus grandparents who had raised violent, suicidal and alcoholic sons were granted custody of the son's children over the lesbian mother.206

*Competing (ideal) families: stable is stable is stable*

It is often argued that it is the form, more than the substance of the ideal that matters in these cases: it is the Traditional Family (heterosexual and frequently re-constituted, with a 'new' mother) versus the Unnatural (lesbian mother and frequently a live-in lover).207 Obiter in a number of judgments regarding the 'threat' posed by homosexual parenting to the traditional family form and the continuance of society as we know it certainly provide fuel to this


207eg *Rights of Women*, supra n 148, 123.
analysis. A notorious example is provided by Justice Tamillia, writing for the majority in the US case of **Constant A v Paul C.A**, 1985:

>'The essence of marriage is the coming together of a man and a woman for the purpose of procreation and the rearing of children, thus creating what we know to be the traditional family. A goal of society, government and law is to protect and foster this basic unit of society...Simply put, if the traditional family relationship (lifestyle) were banned, human society would disappear in little more than one generation, whereas if the homosexual lifestyle were banned, there would be no perceivable harm to society...A primary function of government and law is to preserve and perpetuate society, in this instance, the family' (at 6, note 6).

No prizes for guessing who won custody there. The threat to society is usually articulated in quite different terms in the judgments, however, because the cases are living proof that lesbians and gays *do* have children (a remarkable oversight in the above quotation). In the US case of **Schuster**, 1978 (dissent) **M.J.P v J.G.P**, 1982 and **Collins**, 1988 the judges all quote with approval a law review article from 1977 which suggests that if lesbians and gays have children and live happy, unpenalised lives, the traditional family may crumble as heterosexuals everywhere flock to follow suit.208

It is this implication of the essentially fragile, even endangered, nature, of heterosexuality which provides a key clue. In the cases under consideration, the mother was heterosexual (or doing a damn fine imitation) and had then left the father/family/phallus for lesbianism - thus embodying the potential for other good wives and mothers to do the same.

208J. Wilkinson and G. White "Constitutional Protection for Personal lifestyles" (1977) 63 Cornell Law Review 563. The section quoted reads in part 'The most threatening aspect of homosexuality is its potential to become a viable alternative to heterosexual intimacy...Young people form their sexual identity partly on the basis of the models they see in society. If homosexual behaviour is legalized, and thus partly legitimised, an adolescent may question whether he or she should 'choose' heterosexuality...If society accords more legitimacy to expressions of homosexual attraction, attachment to the opposite sex might be postponed or diverted for some time, perhaps until after the establishment of sexual patterns that would hamper development of traditional heterosexual family relationships. For those persons who eventually choose the heterosexual model, the existence of conflicting models might provide further sexual tension destructive to the traditional marital unit.'
It is interesting to contrast cases where the nature of the ideal hetero-nuclear family is extolled in rhetorical terms, rather than described (as it was above) as endangered. The English lesbian mother cases Re D, 1983, C v C, 1991 (at first instance and again upon rehearing), the lesbian mother adoption case Re E, 1993, and the Australian gay father case of Doyle, 1992 all contained statements to the effect that it is unquestionable that in the ideal world a child would be blessed with a mother and father who were married. Yet in every case, custody of the child was given to the homosexual parent. It is as though, at the point of rupture of the hetero nuclear family, and affirmation of alternative family forms (by granting custody) the importance of the lost ideal must be reaffirmed rhetorically to obscure just what is actually taking place. Like the earlier matters where the relative unimportance of the mother's lesbianism was stated precisely because it was not so, the importance of the ideal family is stated because it is not being privileged in the instance at hand. Such a disjuncture between discourse and decisions is a continuing thread in the judgments under examination in this thesis.

Generally, the judgments did not deal with the ideal of heterosexual families in quite such an abstract matter. Instead of making blanket statements as to the preferability of heterosexual families, the judges often simply assumed the individual heterosexual family in question to be untroubled and stable. The father's reconstituted family, like the father, was itself subject to remarkably little scrutiny in the judgments, as though man+woman+child/ren were unquestionably a stable, harmonious and fertile equation. When the husband was noted as having a new partner, it was often simply assumed that this relationship was permanent and unquestionably beneficial for the children, particularly if it was a marital relationship.

In re-partnering, the father was generally characterised as attempting to 'rebuild' the family unit, thus displaying the traits of altruism and stability (whereas the lesbian mother's re-
Partnering was characterised as inherently sexual, and therefore selfish). In cases where the father had a new partner, matters such as the children disliking the partner (or, for that matter, the father), disliking the partner's children, the partner having not been seen by the court, the partner having psychological problems, or prior unstable relationships/divorces (a favourite ground of inquiry with the mother's lover), were all routinely glossed over as the father was granted custody. The father's numerous previous relationships, or recent unstable relationships were rarely noted, and where they were noted were not generally held against the father. This was in marked contrast to the level of inquiry into the duration and number of the mother's relationships, and the weight with which they impacted upon findings as to her stability.

The most frequently used word, unsupported by any evidence or observation, was that the father's new relationship and/or 'home' were "stable". For instance in Werneburg (USA, this will be discussed in detail in Chapter 5, 'Sex and altruism' section.

Other cases which describe the father's house and/or relationship in this manner are: Canada: Adams v Woodbury, 1986 (heterosexual couple seeking adoption of lesbian mother's child against her wishes), 'stable', 'normal' at 17; Elliott, 1987, 'guidance, stability and training' at 25; UK: Eveson, 1980, 'safety' of father's home versus 'risks' of the mother, at 5, Re D, 1983, 'ordinary household' (versus the mother's 'abnormal situation') at 1,2, C v C, 1991, 'normal home' at 11; USA S v S 1980, 'stable' at 66, M.P v S.P 'stable'
1980) the father's lifestyle was described as 'settled' (and preferred to the mother's relationship of some years standing) despite the fact the he and his partner had 'occasional separations', the children evinced behavioural problems and child welfare authorities had investigated abuse. Also in that case, the mother's superior accommodation and financial situation was regarded as a form of bribery, while the father's financial hardships and the children's subsequent material deprivation was characterised in such as manner as to valorise the father as a 'hard working family man.'

Another striking example of stability and permanence projected onto the father's family occurs is the US case of Collins, 1988. In that case the child at nine years of age had lived for the past eight years with her mother. The father was inconsistent in exercising visitation and applied for custody only after the mother sought court assistance to enforce his child support obligations. Nevertheless, the court granted the father custody, and the appeal court affirmed on the grounds that the father's home offered more 'consistency [and] stability.'

It is a virtual truism in commentaries on lesbian mother cases that the father stands a substantial chance of winning where he can provide a replacement female caretaker. Curiously, in the pool of cases under examination whether or not the father has had sexual

(overturned on appeal, 1979, at 1260); Constant A v Paul C.A, 1984, 'stable' at 7, White v Thompson, 1990, (grandparents) 'stable home' at 1183. A notable contrast is USA: Large, 1993, where the appeal court refused to accept the father's ground of appeal that the trial judge had given insufficient weight to his 'traditional family values' and had not held lesbian relationships to be ipso facto unstable.

218 At pages 1-2.

219 At page 8. Irene Thery has argued in the context of family law in France that the use of the term 'stability' has increasingly become a euphemism for 'morality'. Thery, supra n 121, at 89.

220 See eg Boyd, 1991 supra n 72, at 89, Rights of Women, supra n 148, at 123, Brophy, supra n 34, at 486.
relationships since the marriage ended, or had a new partner was often overlooked entirely, suggesting that the new female caretaker appears in the judgments at the father's behest, not due to judicial inquiry into the father's lifestyle. Moreover, in the cases I examined, the fathers with female caretakers had only a slightly better than even chance of gaining or retaining custody (13 winning and 12 losing) which was lower than father's chances of winning against a lesbian mother overall. I contend that overwhelmingly, the ideal is irrelevant, as is the father. They are viewed as 'stable' in as much as they provide safe harbour from the threat posed by the lesbian mother - and hence it is the degree to which she inspired fear which is pivotal.

**Dr Discourse: the irrelevance of science**

The major focus of 'doctor discourse' in the case law was to combat the long held view that homosexual parents will produce homosexual children (by modelling, encouragement, gender role confusion or molestation). The mother produced expert witnesses almost always in order to assert that the children of lesbians have been shown time and again to grow up


224 See note 373.

225 See Costello, supra n 50, at 135 for a discussion of modelling theory and its 'scientific' basis.
heterosexual. The unstated premise of the requirement for this refutation is that if the child were to grow up homosexual s/he (or society as a whole) would be 'harmed' by the award of custody to the lesbian mother. A vigorous assertion of the heterosexuality of lesbians' children becomes complicit in this framework, as it is intended as evidence that the children are, in effect, unharmed.

Regardless of the faith placed by lawyers in evidence, and by lesbian and gay commentators in the value of expert and scientific testimony to dispel myths about lesbian mothers, in the cases under review, research studies and specialist psychiatrists writing or appearing in support of the lesbian mother, or lesbian motherhood generally were frequently dismissed. In cases where either a court appointed or partisan psychologist, psychiatrist or counsellor had interviewed the mother and/or child and recommended in the mother's favour, the mother still had a far less than even chance of winning custody.

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226 This evidence was accepted and the mother successful in the following cases: Canada: Barkely, 1980, K v K, 1975; UK: B v B, 1991 (however, explicit acceptance of the data undermined by later suggestion that if the mother were militant the child could be 'corrupted'); USA: M.P v S.P, 1979, Bezo v Patenaude, 1980 (remanded for rehearing), Dog, 1983, S.N.B v R.L.B, 1985; Australia: O'Reilly, 1977, L and L, 1983. For a review of such literature, see F. Tasker and S. Glombock, "Children Raised by Lesbian Mothers: The Empirical Evidence" [1991] Family Law 184.

227 My question, when faced with the ongoing array of experts is: if nobody here is sick, why are we all calling the doctor? Nancy Polikoff is one of few commentators to express reservations about these tactics: see N. Polikoff, "Lesbian mothers, Lesbian Families: Legal Obstacles, Legal Challenges" (1986) 14 New York University Review of Law and Social Change 907 at 908-9.

228 Psychiatric testimony as to the father's unsuitability was also discounted: see eg Canada: Case, 1974, Bernhardt, 1979; UK: Eveson, 1980.

229 Although the major focus was on the sexual identity of the children of lesbians, there was some evidence as to children's self esteem and popularity also.

In a small number of cases, the judge refused to consider the evidence as persuasive in favour of the mother but did not expressly reject it either. Such disregard of the evidence was justified by the unavailability of experts to cross-examination, a claim that it was unnecessary to consider secondary sources when case law from that jurisdiction was available to follow, or because the empirical research was from another country.\footnote{These cases were, respectively, USA: Jacobson, 1981, Diehl, 1991; and Australia: P.C v P.R, 1979. The mother lost in all three cases.}

When judges found to the contrary, that children of lesbians would be influenced to be homosexual, the reasons for actually rejecting the evidence were manifold. Not uncommonly, the father would bring his own psychiatrist or psychologist to say that the children would be 'influenced' or 'harmed', and whatever the comparative levels of experience and expertise, the judge chose to accept the doctor advocating contagion.\footnote{See eg: USA: Re Jane B, 1976, S v S, 1980, Dailey, 1981. Julia Brophy argues that this practice is prevalent in the UK, see Brophy, 1992, 491-2.}

In numerous cases the judge would simply assert that it was common sense that the child would be influenced to be homosexual.\footnote{See eg UK: B v B, 1991 (a militant lesbian would influence child’s sexual identity, at 10), USA: N.K.M v L.E.M, 1980, S v S, 1980, M.J.P v J.G.P, 1982, L v D, 1982, S.E.G v R.A.G, 1987, G.A v D.A (no evidence adduced, but in explicit reliance upon three prior cases in the same jurisdiction holding that child would be influenced to become homosexual), Constant A v Paul C.A, 1985. This reliance on 'common sense', amounting to judicial notice, did also occur when no evidence was adduced either way: eg UK: Re A, 'morally damaging' at 10, Eveson, 1980 'risks'; USA: Wernenberg, 1980 (children unharmed so far, but this ignored because they were not residing with their mother), Kallas, 1980, Black, 1988, Collins, 1988, Chicoine, 1992 (concurring), Pleasant, (but remanded for rehearing on this and other grounds of error) 1993; Australia: Cartwright, 1977 (to be guarded against by the mother’s secrecy.) In contrast there are two Australian cases where the judge took judicial notice of the nature of lesbian relationships in a positive manner, absent any evidence: in Schmidt, 1979 as diverse, at 78,657 and Jarman v Lloyd, 1982 as sufficiently common to be noticed as producing children who are 'apparently happy and well balanced' at 889.}

Alternately, the judge would deflect away from the evidence by contending that whatever the children's sexual identity, s/he would nevertheless be 'harmed', 'disturbed' or 'traumatised' in some other, unspecified way, by the mother’s
lesbianism\textsuperscript{234} - a notion of the mother as horrific or monstrous to which I will return in Chapter 5.

\textit{A nexus test? the irrelevance of evidence}

Like evidence about sexual identity, arguments that there must be a 'nexus' shown between the mother's lesbianism and harm to the child likewise often failed to persuade. In only two cases where there was no nexus between the mother's lesbianism and the best interests of the child at trial and this issue was argued at appeal, did the appeal succeed on that basis.\textsuperscript{235}

On the one hand, judges can use the future focused welfare test to argue that they need not, in fact, must not, wait until 'the damage is done' if there is the slightest possibility of harm to the child.\textsuperscript{236} Thus, in family law matters using the 'best interests of the child' test, the judiciary may sidestep the nexus test as a matter of law. Furthermore, even if the sexuality of the children was not in issue, the untested possibility of the child/ren being teased or stigmatised by their peers at some time in the future was usually held to be sufficient evidence of harm.\textsuperscript{237}

Even courts in Canada and Australia, which have held unwaveringly that lesbianism \textit{per se} is not against the child's best interests and a nexus must be shown, have utilised the untested possibility of lesbian/gay or stigmatised children to require various 'protective' measures of


\textsuperscript{235}USA: \textit{S.N.B v R.L.B}, 1985, Bezio v Patenaude, 1980 (notably, in this case the father was not suing for custody; rather it was a 'friend' of the mother, whom it was also suggested was lesbian).


the mother as a condition of custody (such as not telling her children of her lesbianism, not showing affection with a lover, not allowing lover to live in).  

In essence the nexus test, like expert evidence, relies upon the notion of a testable truth - a claim generally made by science but one which is also aspired to by law. In any legal forum a judge is not bound to accept expert evidence and is capable of exercising discretion. In family law matters a judge is free to make numerous suppositions regarding the future, and indeed is required to do so. Evidence, like fact, is a very tenuous concept in such an arena, as family law judgments necessitate the subjective assessment of individual personalities and the ultimate pronouncement of what is 'best'.

Within such a structure, arguments by counsel and commentators based on scientific 'facts' and demanding a kind of evidentiary procedural fairness, have been, and arguably will continue to be, largely ignored.

Equality and freedom: the offensiveness of rights

Rights based arguments, by way of contrast with nexus arguments, have not been met so much with indifference as outright hostility. The cases in which 'rights arguments' were raised are all American, reflecting perhaps the relative newness of the Canadian Charter and its exclusion from the 'private' arena of family law and the absence of a bill of rights in the UK and

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239 See Smart, supra n 29, Chp 1.

240 See eg, Bradley, supra n 52, 159; Sack, supra n 7, 293.

Australia. Rights based arguments arise frequently in lesbian and gay articles and case notes on family law.242

In American case law, all at appellate level, constitutional arguments were raised in 14 cases between 1976 and 1992, and were either disregarded completely243 or dismissed after discussion.244 In not one case did a constitutional argument, for equal protection, privacy or freedom of association, succeed.245 In a small number of cases the court replied that government did have the right to regulate lesbian sexuality, or that lesbians had no right to protection.246 A typical dismissal is the judgment in the US case Re Jane B, which closed a review of constitutional cases raised in the mother's brief with,

'These cases do not, however extend the protection to innocent bystanders or children who may be affected physically and emotionally by close contact with homosexual conduct of adults... This is not a matter of constitutional rights of Respondent or [her lover] to be homosexuals or a violation of their freedom of choice of actions. The fundamental question is whether, in the sound discretion of the Court, this type of living environment is detrimental to the child and in her best interest' (at 857, 858).

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242 See eg Dooley, supra n 49; Notes, supra n 64; Fajer, supra n 49; Bateman, supra n 56; Leopold and King, supra n 68; Clemens, supra n 64; Brantner, supra n 49; Rosenblum, supra n 64; Dooley, supra n 49; Beargie, supra n 51; Gross, supra n 64.


245 In a single case, an argument for freedom of speech made by the mother under the State constitution in question was successful in overturning a 'gag order' which had banned the parties from speaking to any person, in public or private, about the matter: see S.N.E v R.L.B, 1985.

The premise of the immutability of sexual orientation, which was central to gay and lesbian rights claims to equal protection under constitutional law backfired completely, as judges responded that while it 'may indeed' be beyond the mother's control to be a lesbian, living with a lesbian lover and exposing one's child to lesbianism was nonetheless a choice, and a very selfish one at that. A further point, delicately ignored in the judgments, was that the lived reality of the lesbian mother's life directly contradicted a rights claim based upon immutability. The sexuality of the lesbian mother before the court, or her sexual choices, had clearly undergone enough of a transition to put her there in the first place - making an 'immutability' argument look somewhat paradoxical.

The general tone of response to right claims was that the welfare of the child, or children's rights, were always to be valued above parental claims. This approach is well illustrated by the dramatic response to a rights argument in the US case, Schuster and Isaacson, 1978,

'...there is more involved than the rights of these two women. The lives of six children are at stake' (at 132).

Thus, the very act of claiming a right in this forum was seen to imply a lack of concern for the child's welfare. A Good Mother puts her child first, a claim to rights is a self-interested, and

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247 See eg Dooley, supra n 49, 402, 406; Bateman, supra n 56. But contra Notes, supra n 64, at 621. This is not to say that constitutional rights claims must be based in essentialism, but rather that to date they mainly have been rather than, for example taking the 'disadvantage' approach adopted in the Supreme Court of Canada decision Andrews v Law Society of BC [1989] 1 SCR 143.


249 See also USA: S.E.G v R.A.G, 1987, at 167, Collins, 1988 at 22. Likewise in White v Thompson, 1990, a non-constitutional, case-law based 'nexus' argument against the trial decision was dismissed with the rejoinder, 'A parent's chosen manner of living may not take precedence over the well-being of the children involved' at 1184.
therefore Un-motherly act. In only two of the 14 cases containing rights claims did the mother win custody.

This chapter has aimed to highlight the extent to which lesbianism both focuses and delimits the inquiry when family law cases concern a lesbian mother. I have illustrated how the mother becomes the focus of inquiry and how sexuality permeates the judgements to such an extent that other factors become secondary. Rights and evidence are secondary to fears and perceptions of risk on the part of the judiciary. It is the origins and genesis of these fears which will be explored in the chapter to follow.

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250 This theme is also present in UK cases, eg B v B, 1991, in the words of Callum, J, if parents are 'sensible', 'nobody insists on their rights but always thinks of the children first' (at 11).

251 USA: Schuster and Isaacson, 1978, M.P v S.P, 1979, both on other grounds. In Blew v Verta, 1992, the mother's access restrictions were removed, on other grounds, but custody remained with the father.
CHAPTER 4: The creation and representation of lesbians

'How a group is represented, presented over again in cultural forms, how an image of a member of a group is taken as representative of that group, how that group is represented in the sense of spoken for and on behalf of (whether they represent, speak for themselves or not), these all have to do with how members of a group see themselves ... Equally, re-presentation, representativeness, representing have to do also with how others see members of a group and their place and rights, others who have the power to affect that place and those rights. How we are seen determines in part how we are treated; how we treat others is based on how we see them; such seeing comes from representation.' 252

This chapter aims to situate my thesis on lesbian mothers in family law within a cultural context of representations of lesbianism and lesbian relationships. The previous two chapters highlighted the ways in which 'common knowledge' about lesbians can be brought to bear in family law cases. This chapter will explore where such 'common knowledge' may originate by examining popular imagery of lesbians. This chapter will also examine how 'disease models' and medicalised theories of the origins of lesbianism have been translated into popular cultural images.

This is not to say that images in popular culture have been formed by psychoanalytic and psychiatric theories which have then proceeded to form what the public and the judiciary think about lesbians and lesbian relationships. Nothing so linear has occurred, or could possibly occur. For one thing, such a progression would suggest that psychoanalysis began with a 'clean slate', whereas it was itself an historically constituted ideology, full of the fears and fallibility of its proponents.253 Nor is mass culture simply a screen from which to read and analyse the subconscious fears and anxieties of those who produce it - as cultural representation involves both the conscious and unconscious of the many people who create it,


253See eg Kaplan, supra n 40, at 28, 45.
in addition to the views of the spectators who consume it. Both producers and consumers are constituted by the dominant ideologies of the cultures of which they are a part, and both may or may not resist these ideologies.

Elizabeth Traube characterises the two approaches above, albeit somewhat reductively, as the 'socialist' (mass culture inculcates inauthentic beliefs in audiences) and the 'psychoanalytic' (mass culture is a faithful expression of collective beliefs), arguing that both offer partial and unnecessarily linear accounts. Rather, what Traube names 'critical studies' posits a circular relation, whereby culture is both informed by and informs popular opinion/the unconscious.254 It is this view, of a dialectic relation between the two, which I will be taking.

The Western notion of lesbianism as a unified and overriding identity is often noted as a recent historical phenomenon, not really taking hold until the last century.255 The 'creation' of sexual identity as a definitive identity, a way of conclusively classifying a person and thereby understanding their actions and motivations in every aspect of life, has been laid squarely at the door of psychiatrists and sexologists.256 It is therefore important to review various medical model accounts of lesbianism - its 'causes' and 'manifestations' - when discussing the representations of lesbianism in popular culture. The impact of psychiatric and psychoanalytic theories, however elite and ill-understood they may be, should not be underestimated. In the words of Richard Dyer,

254Traube, supra n 94, at 4.

255See L. Faderman, Odd Girls and Twilight Lovers (New York: Columbia University Press, 1991), Chp 1. It must be emphasised, however, that the mere fact of the social construction of a category of identity does not make the lived reality and effects of an identity, any less real - as those who enforce it continue to believe and emphasise its 'naturalness' : see Costello, supra n 50, 124; Dyer, supra n 63, at 4.

256See Faderman, supra n 255, Chp 1; M. Merck, Perversions: Deviant Reading (London: Virago, 1993), pp 3-29.
'It is clear that no white person living in Europe, North America or Australasia in the twentieth century is likely to be untouched by psychoanalytic notions - they were designed to explain ourselves and have been successful. Popular and high culture alike are drenched in them....'\textsuperscript{257}

Interestingly, as will become clear in this chapter, almost every typology or 'scientific' theory of lesbianism has found its way into popular culture, albeit in a simplified and often overlapping or contradictory manner.\textsuperscript{258}

In discussing cultural representations, I will focus primarily on cinema, although I will also note other forms in relation to particular eras, for instance paperback novels in the 1950s, and television and magazines with regards to 90s 'lesbian chic'. I have chosen to focus on cinema, rather than more widely consumed forms such as television, for a number of reasons. One is that its rise has co-existed with that of lesbian identity.\textsuperscript{259} Cinema has also concerned itself more directly with the representation of sexuality than television, where matters such as lesbianism have been conspicuous only by their absence until very recently, and even then, usually going unnamed or unrepresented and existing by inference alone.\textsuperscript{260}

I have also chosen to focus primarily upon mainstream cinema from the USA - 'Hollywood movies' - even though the cases I discuss also come from the UK, Canada and Australia. There are a number of reasons for this choice. Pragmatism is one element, in that the sheer bulk of films emanating from Hollywood has ensured a cultural domination - they are seen and


\textsuperscript{258}E. Ann Kaplan makes this point in regard to the representation of mothers in film, saying that there is a 'literalizing and reducing' of Freud: see Kaplan, \textit{supra} n 40, at 110.

\textsuperscript{259}Andrea Weiss writes, 'Throughout the twentieth century - throughout the period in which the modern concept of 'lesbian identity has existed - the cinema has been one of the most pervasive cultural influences. Even in its slow decline, it continues to reach vast numbers of people and strongly define the ways in which we live.' A. Weiss, \textit{Vampires and Violets: Lesbians in the Cinema} (London: Jonathan Cape, 1992), at 163-4.

\textsuperscript{260}See Dyer, \textit{supra} n 257, at 30; J. Millbank, "LA Kissing" (1991) (Sept) \textit{Australian Left Review} 38.
distributed in the other countries in the study, whereas the reverse may not be true of, for example, an English BBC or Film Four production in the US market. The volume and widespread distribution of viewership means that such culture can truly be considered 'mass', along with television shows such as *Roseanne*, to be discussed later in this section.\(^\text{261}\) Along similar lines, theorists and commentators on film and cultural studies tend to write primarily, if not exclusively about American movies, even if they are from elsewhere. Most writers regard popular American film as influential across national borders, constituting a major part of 'Western culture'.\(^\text{262}\) Moreover, some theorists argue that the representation of lesbians in other forms, such as European art house cinema, are different in style but not in theme, from those in major Hollywood movies.\(^\text{263}\) Even with the relative decline of cinema in recent years, the words of the English writer Angela Carter regarding the 50s and 60s, '...Hollywood had colonised the imagination of the entire world and was turning us all into Americans,' still hold true to some extent.\(^\text{264}\)

It must be remembered that the production of film, to a greater extent than most other media, has been the almost exclusive terrain of white men, and the audience addressed has also often been assumed to either be such a group or to identify with their interests, although many others have nevertheless read films 'against the grain'.\(^\text{265}\) For this reason, Richard Dyer

\(^{261}\) Whereas a 'lesbian episode' of an Australian soap opera such as *GP* raised barely a mention, on top rating US shows such as *L.A Law* and *Roseanne*, there is the impact not only on the millions of viewers of the show at the time, but in media reportage of the event, both before and after it as well.

\(^{262}\) Two major writers upon whom I rely in this chapter, Richard Dyer and Barbara Creed are English and Australian respectively, but nevertheless write largely about US films.

\(^{263}\) See eg Merck, *supra n 256*, at 76, 162-3; Weiss, *supra n 259*, at 109.


remarks, 'The representation of women and other oppressed groups was, and by and large still is, a relentless parade of insults.' More particularly, Andrea Weiss claims:

'The few lesbian images offered by the cinema were created for heterosexual male viewers, to appeal to male voyeurism about lesbians and to articulate and soothe male sexual anxieties about female autonomy or independence from men.'

These images have had a profound impact on how lesbians see themselves, as well as how others view lesbianism, which in turn influences perceptions of lesbians in the courtroom. In Tania Modleski’s words, '...we exist inside ideology... we are all victims, down to the very depths of our psyches, or political and cultural domination (although we are never only victims).'

In addition, lesbians (and gays) more than many other groups have been subjected to 'typification' by mainstream cinema, because lesbianism as an identity is not in itself visible in the way that other categories of identity such as race and gender usually are. Also, until very recently, government-imposed and industry self-censorship meant that lesbians could not be shown engaged in that which defines them as such - sexual attraction to or activity with other women. Nor could identifying words, such as 'lesbian', 'queer' or 'that way' be spoken.

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266 Dyer, supra n 252, at 1.
267 Weiss, supra n 259, at 4.
268 Modleski, supra n 101, at 45.

269 There is much debate among lesbians as to how lesbianism is to be defined. See eg Adrienne Rich, arguing that lesbianism is a continuum covering a range of experience which may not be genital in, "Compulsory heterosexuality and lesbian existence" and Judith Butler arguing that lesbian as a category of identity is not of itself a useful thing in "Imitation and gender insubordination" (both printed in H. Abelove, M. Barale and D. Halperin, The Lesbian and Gay Studies Reader (New York: Routledge, 1993) at 227 and 307 respectively). However, this chapter is not concerned with how lesbians see ourselves, but rather how lesbians are perceived in mass culture. I contend that in popular consciousness, lesbians are defined as primarily, perhaps exclusively as sexual beings (see eg Fajer, supra n 49, at 514; Cain, supra n 2, at 213; Caroline Sheldon in Dyer, supra n 63, at 23) and constituted through an understanding of lesbian sexuality as a distortion or deviation from heterosexuality. Moreover, in the forthcoming section on lesbian chic, it becomes clear that some women may
In one of the most famous American films to be made about (false accusations of) lesbianism, *The Children's Hour* (1962), the most explicit reference was to 'it'. Thus lesbianism had to be signified by visual cues, such as being overweight or wearing masculine clothes ('women in comfortable shoes' being a euphemism for lesbians which has survived to this day) or by a character 'type', such as a frustrated older woman taking an inexplicable interest in the romantic life of a younger female character. Richard Dyer notes:

'Such a repertoire of signs, making visible the invisible, is the basis of any representation of gay people involving visual recognition, the requirement of recognisability in turn entailing that of typicality.'

In turn, the appearance of one lesbian character or film which represents lesbians, may be interpreted as showing a 'truth' about lesbianism generally. For instance, Vito Russo notes that the howlingly stereotypical *The Killing of Sister George* (1968) was received with comments such that it was 'true' and 'recreates the whole lesbian world' upon its release. Moreover, representations of 'types' and typicalities may themselves be contradictory, and various disjunctive myths appear side by side.

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270 See eg V. Russo, *The Celluloid Closet* Rev ed (New York: Harper and Row, 1987) at 63, 102, 105, 136-142, 158. The lengths to which censors were prepared to go should not be underestimated. Take for example a throwaway line in a 1951 film where a showgirl is asked whether she has a fairy godfather, and her reply, 'No. But I have an Uncle in Chicago we're not too sure about' being deleted as obscene (at 43). Even after the government codes were lifted in the USA, an industry code of self censorship with homosexual imagery persisted.

271 See Dyer, *supra* n 252, particularly in relation to film noir, at 31-68.

272 Dyer, *supra* n 252, at 19.

273 Russo, *supra* n 270, at 170. Likewise, Mandy Merck notes that a film both written and directed by a heterosexual man, *Lianna* in 1983 was received as 'true' and 'realistic' by reviewers: Merck, *supra* n 246, at 162.

274 Interestingly, E. Ann Kaplan makes this same point with regard to representations of (heterosexual) mothers in mass culture: Kaplan, *supra* n 40, at 19.
Lesbians and lesbian relationships have been portrayed by many 'types' in film, often in combination, and have included the following:

- Male-identified, masculine, 'butch'
- Manhating/Afraid of men, and/or rejected by men
- Immature, childish, a schoolgirl phase
- A mother/daughter mimicry
- Narcissistic
- An unequal/sadistic/vampiric relation

Each of these types can also be found in psychiatric literature, and in family law judgments. This chapter will explore the occurrence in medical discourse and popular culture of each type in turn. As most of the sources on which I rely are current up until the early 1990s, I will briefly discuss the impact of the so-called 'new lesbian chic' on mass culture. The chapter to follow will then explore their occurrence in family law judgments concerning lesbian mothers. I proceed from the assumption that none of these types are 'true', in the sense that while some lesbians may be accurately described by them, this would be no more so than women in any other section of the population.275 The typologies discussed in this chapter pathologise lesbians qua lesbians and ignore much clinical research showing that lesbian and non-lesbian women are similar in their placement along the entire spectrum of mental health and self identity.276

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275 The formulation of such types has consistently ignored the range and diversity of lesbian experience, discussed for instance in G. Hanscombe and J. Forster, Rocking the Cradle: Lesbian Mothers, a Challenge in Family Living (Boston: Alyson, 1982) and S. Pollack and J. Vaughan, Politics of the Heart: A Lesbian Parenting Anthology (New York: Firebrand, 1987). Ellen Lewin's research on lesbian and heterosexual single mothers in the USA concluded that they held more in common than they were different; see Lewin, supra n 30.

I: We know your type

*The masculine, male identified or 'butch' lesbian, and by extension butch/femme pairs*

The official typology of lesbians as masculine has its source in the late 19th century in the work of two men, from Austria and England respectively, Richard von Krafft-Ebing and Havelock Ellis. Although both men saw lesbianism as a form of masculinity, they took different views as to how lesbianism arose and manifested itself. Krafft-Ebing believed that homosexuality was congenital, a form of gender 'inversion' such that gay men were afflicted with femininity and lesbians with masculinity, to the extent that homosexuals formed an intermediate 'third sex'. This inversion was fixed and visible in appearance.²⁷⁷

The flaw in Ebing's theory was that it took no account of lesbians who were 'feminine' in appearance. Ellis theorised two distinct conditions; sexual inversion, modelled on Ebing's view, and also 'female homosexuality'. Female homosexuality was an acquired trait, which otherwise 'normal' women were lured into by real inverts. Thus Ellis accounted for the existence of 'femmes', who were theorised as too unattractive to interest men, or else had been deterred from doing so (thereby opening the door for later scientists to search for 'causes' of this repudiation of heterosexuality). Ellis also laid the blame for female homosexuality clearly at the door of the 'inverts', who had caused these indeterminate women to become homosexual by seducing them into it.²⁷⁸ Moreover, as Ellis' work progressed he came to identify the threat of contagion with female education and feminism, lending credibility to the fear that independence from men and/or all-female environments would corrupt women irretrievably.²⁷⁹

²⁷⁷ See Merck, *supra* n 256, at 3; Weiss, *supra* n 259, at 7-8; Faderman, *supra* n 255, at 41-2 for lesbian-oriented critiques of the work of both men.

²⁷⁸ See Weiss, *supra* n 259, 43; Merck, *supra* n 256, at 24.

²⁷⁹ See Faderman, *supra* n 255, at 45-6.
The typology developed by Ellis thereby laid the groundwork for popular conceptions of lesbian relationships as butch/femme, as arising in the boarding school, and also as vampiric - with the 'real' one trying to drag the innocent one down into 'the life'. By 1910 his work was in the mainstream press, in 1928 he wrote the introduction to the first edition of Radclyffe Hall's infamous *Well of Loneliness*, (said to be the first lesbian novel in the English language, and immediately banned in England)\(^2\) and by the 1930s his views were clearly discernible in films such as *Pandora's Box*.\(^1\)

By way of contrast, Sigmund Freud actually wrote very little directly on the subject of lesbianism, and was far more circumspect when he did so. Although he resisted any classification of sexuality as congenital, Freud nevertheless characterised the two lesbian clients about whom he wrote as masculine in appearance or identification, and lesbianism itself as a form of masculinity.\(^2\) Freud also made it clear in his one case study of lesbianism in 1920 that the client's express wish for a child had to be a substitute for some other real wish, as lesbianism was definitive evidence of masculine identification, and therefore could not genuinely co-exist with the desire to be a mother - a 'feminine' identification.\(^3\)

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280 Interestingly, Hall's novel relied more heavily on Krafft-Ebing's views: see Merck, *supra* n 256, at 88.

281 See Weiss, *supra* n 259, at 9. The most blatant homage to Ellis was a 1939 docu-drama entitled *Children of Loneliness*, which featured an onscreen psychiatrist discussing how to cure homosexuality. In the film, 'Eleanor' is susceptible to advances from another woman because she was 'frightened by a man in her infancy.' The other woman, 'Bobby', is a congenital invert, the audience is told, as the doctor successfully encourages Eleanor to spurn her. This cinematic lesson was not shown in the USA until 1953, due to censorship regulations which deemed it obscene despite its obviously anti-homosexual educational intentions: see Russo, *supra* n 270, at 104-5.


283 See Merck, *supra* n 256, at 28-29. Carl Jung was similar to Freud in his slight attention to lesbians, and characterisation of lesbianism as primarily an identification with masculinity: see O'Connor and Ryan, *supra* n 276, at 161.
Contemporary Freudians, such as Hanna Segal have taken these views even further, for instance positing that lesbian couples both mimic and loathe the heterosexual couple, and by having children together seek to attack their own parents.\(^{284}\)

The importance of the characterisation of lesbianism as a form of masculinity cannot be overstated in any work on lesbian motherhood, especially as it was yet further literalised by its introduction into popular culture: ie lesbians are mannish, therefore unwomanly, therefore incapable of mothering.

It took some years before these ideas 'filtered down' to the popular imagination. In Vito Russo's opinion,

>'Pop psychoanalysis was rampant in the Forties and Fifties, and gays were increasingly being defined in psychiatric jargon both onscreen and off.'\(^{285}\)

Throughout the 1940s and 1950s a masculine appearance and childlessness were two key elements used to signify lesbian characters in film, particularly in film noir where homosexual characters were more common than other genres.\(^{286}\) In the 1960s lesbian relationships were commonly configured as butch/femme with an aggressive 'committed' lesbian and a less powerful, feminine, easily influenced woman who was coded as indeterminate. A well known example of this is the UK film, *The Killing of Sister George* (1968) which focused on a lesbian relationship (with dominating George in tweedy suits and passive Childie in little night

\(^{284}\)See O'Connor and Ryan, supra n 276, at 88-9.

\(^{285}\)Russo, supra n 270, at 99. The reasons for this were manifold. Among them was the desire to drive women from the workforce and back into domestic 'family' life in the post-war years. Also in America conformity was encouraged, with any deviation equated with communism and being anti-family. See Faderman, supra n 255, at 130-141.

\(^{286}\)See Dyer, supra n 252, at 60-64.
gowns), although butch/femme signifiers were also present in a more subtle form in *The Children's Hour* and *The Fox* (1968). At a slightly less literal level this butch/femme patterning continued in a multitude of movies; for instance there are short haired/butch and long haired/femme couples in films such as *Personal Best* (1982), *Lianna* (1983), *Claire of the Moon* (1992). Usually the short haired 'butch' is the 'real' lesbian, and the longer haired 'femme' woman experiences lesbian desire only after encountering her (moreover, this desire often turns out to be transitory, a point which will be discussed in a later section on narrative in Chapter 6).

In smaller roles, lesbians appeared as masculine/butch in widely released commercial movies such as the James Bond films *Goldfinger* (1964) and *From Russia with Love* (1963) as well as to provide a plot twist or sight gag in numerous other mainstream movies of the 1960s. In many ways characterising lesbians as masculine continues as a frequent practice to date. As a quick gag or minor character lesbians are virtually always signified as butch, a sort of visual short hand to let the viewer know that the woman is lesbian without needing to waste screen time in establishing it (see eg *The Applegates*, 1990, *Chopper Chicks in Zombietown*, 1990, *Reform School Girls*, 1988, *Waiting*, 1990). Moreover, since the 1960s, feminism has often been signified in a character by masculine appearance, and the similarity of coding in lesbian and feminist characters has suggested that the two are interchangeable (see eg *Waiting*, *The Applegates*).

A desire to masculinise lesbian characters and to express lesbianism as a form of masculinity is so strong that even stories taken from the lives of actual lesbians are often changed to fit into

287 See Russo, *supra* n 270, "Frightening the horses" chapter.

288 Sasha Torres argues that television also tends to use lesbianism and feminism as 'stand ins' for one another (in Abelove, Barale and Halperin, *supra* 269, at 177).
such a structure. A stunning example of this is the 1990 television production of the story of Vita Sackville West's relationship with Violet Trefusis in England in the 1920s. *Portrait of a Marriage* was filmed by the BBC, long revered for its attention to historical accuracy. Faced with the stereotype shattering fact that in life Vita, who was taller, and wore pants in an era where it was considered very unfeminine to do so, was *not* the lifelong lesbian, *nor* the initiator of the relationship (highly feminine Violet was both), the writer reversed early incidents of pursuit, and added a completely fabricated rape scene, with Vita as the aggressor on all occasions, so that the couple were then readily identifiable as butch/femme.

Implicit in butch/femme characterisations is an underlying sense in the dominant conception (or the 'straight mind' as Monique Wittig calls it) that all homosexual relationships must be a mimicry of heterosexual relations - such that heterosexual relationships are the 'original' to which homosexual relationships must be the 'copy' - a point which will be discussed in greater depth in Chapter 6.

**Manhating dykes, rejected and fearful femmes**

The idea that lesbians feel active hostility towards men in addition to, or instead of identifying with them, is rooted in Freud's 1920 case study. Freud theorised that lesbianism was a reaction to a rejection by a man (such as the father) leading to a repudiation of men generally.290

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289 The series credits the source as Nigel Nicholson's 1975 book, *Portrait of a Marriage*, which is in fact partly a family history and biography of his mother, Vita, written by him, and partly an autobiographical account of Vita and Violet's relationship written by Vita at the time and discovered much later. Letters from Violet to Vita are also utilised, but uncredited. All three sources show Violet as the persistent initiator of the relationship, and none give any suggestion of sexual violence between the women.

290 See O'Connor and Ryan, *supra* n 276, at 41-45.
Jacques Lacan claimed that this rejection was even more crucial than Freud had suggested and espoused a view of lesbianism as thwarted and disappointed in essence. Mandy Merck has commented in relation to Freud, and Judith Butler with regard to Lacan, that the tone of their writings suggests that it is they, rather than the lesbians of whom they speak, who are carrying the bitterness of disappointment. Freud, in his explicit identification with the father in the 1920 case study, treated his client's lesbianism as a rejection of his fatherhood/therapeutic power, and abruptly terminated the analysis, suggesting the client should see a woman instead.

Freudian feminist Karen Horney accepted the rejection theory and took it further. In her view, the fact that lesbian relationships definitely arose from earlier damaging heterosexual experiences necessitated that, in O'Connor and Ryan's words, 'the subsequent homosexual relationship is likely to be extremely ambivalent, unstable and prone to violent eruption.'

This view is far from forgotten. In a feminist Freudian text on motherhood in 1988, Estella Welldon referred to women aged in their 30s who are single and childless, 'giving up hope for a mutually loving relationship with a man' and thus allowing 'the surfacing of lesbian impulses.' Once again it is interesting that in constructions of lesbian identity, specifically those seeking a 'cause', motherhood and lesbianism are construed as dichotomous opposites.

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291 Ibid at 146.

292 See Merck supra n 256, at 21. Butler writes, 'Indeed, is this account not the consequence of a refusal that disappoints the observer, and whose disappointment, disavowed and projected, is made into the essential character of the women who effectively refused him' quoted in O'Connor and Ryan, supra n 276, at 146.

293 Merck, supra n 256, at 21.

294 O'Connor and Ryan, supra n 276, at 211.

Manhating and masculine identification are often portrayed as corresponding characteristics in popular culture. Vito Russo says of the 1940s and 1950s cinema,

'Neurotic and cold, these steely gorgons hinted at a perverse sexuality that was never quite made specific. Their behaviour was often pathological; they were seen as women trying to be men while in reality needing a man; they were grown up tomboys made to look pathetic and incomplete in their quest for status.

In 1950 Lauren Bacall’s sophisticated Amy North in Michael Curtiz' Young Man with a Horn, Anne Baxter’s cool and deadly Eve Harrington in Joseph L. Mankiewicz' All about Eve and Hope Emerson’s sadistic prison matron Evelyn Harper in John Cromwell’s Caged all shared unstated lesbian feelings and murderous impulses.'

These impulses became more explicit as time passed, for instance in the above mentioned 1960s James Bond pictures, Goldfinger and From Russia with Love. Through the 1970s and 1980s it became commonplace to present murderous women as lesbian in dramas as well as in the burgeoning horror genre. Recent films with lesbian undertones such as Single White Female (1992) and explicit lesbianism such as the blockbuster Basic Instinct (1993) continue to perpetuate this theme of manhating killer dykes.

Rejected and disappointed women appear most often in the guise of the abused. Thus, both of the characters in the lesbian couple in The Hotel New Hampshire (1988), the daughter in The Applegates and Celie in The Color Purple are raped and/or beaten by men in the course of the story, before embarking briefly on a lesbian relationship. In the liberal film with a good heart, Lianna, the eponymous heroine’s otherwise incidental husband evinces much insensitivity and

296Russo, supra n 270, at 100.

297See ibid, at 154, 183.

298See Weiss, supra n 259, at 84; B. Creed, The Monstrous Feminine: Film, Psychoanalysis, Feminism (London: Routledge, 1993) at 59-63.
many affairs before she leaves him for another woman. Likewise in the recent subliminally lesbian *Fried Green Tomatoes*, Ruth’s husband batters her for years before she allows her 'best friend' Idgie to rescue her, and the two women 'settle down' together.\(^{299}\)

**Immature or childish lesbian, lesbianism as a schoolgirl phase**

Havelock Ellis explicitly pathologised the schoolgirl 'crush' in an essay in 1897 as leading to lesbianism, and henceforth romantic feelings between girls and young women became an increasing focus of sexology where before they had been regarded as healthy and even encouraged.\(^{300}\) In his work in the 1920s and 30s, Freud posited that lesbianism arose in part from the failure of girls to transfer their affections from their mothers to their fathers. Thus, in Freud’s conception, lesbianism was a form of arrested development, immature; not fully formed as a heterosexual love-choice would be.\(^{301}\)

Later Freudians have taken this theme further, arguing that lesbianism is actually an *infantile* state. Helene Deutsch for instance, emphasised that lesbian sex involved oral activity, characterised by her as sucking and therefore regressive and infantile and, as recently as 1989, London psychoanalyst Adam Limentani claimed that immaturity is a common personality feature of lesbians.\(^{302}\) From a phallocentric viewpoint, lesbian sex lacks something essential -

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\(^{299}\) Adrienne Rich (in Abelove, Barale and Halperin, *supra* n 269, at 245) notes that in literature one of the most frequently quoted passages regarding lesbianism remains that from Collette’s *The Vagabond*, which reads, in part, '...the melancholy and touching image of two weak creatures who have perhaps found shelter in each other's arms, there to sleep and weep, safe from man who is often cruel, and there to taste better than any pleasure, the bitterness of feeling themselves akin, frail and forgotten.'

\(^{300}\) See Dyer, *supra* n 265, 39; Faderman, *supra* n 255, Chp 1.

\(^{301}\) See Dyer, *supra* n 265, at 40; O’Connor and Ryan, *supra* n 276, at 33.

\(^{302}\) See O’Connor and Ryan, *supra* n 276, at 70-71, 87.
the phallus - and is therefore not 'real' sex. Lesbian sexual activity is viewed as that which ought to precede (heterosexual) intercourse, but instead is misused to merely play around on its own, an extended and unfulfilled 'foreplay'. Lesbianism is thus characterised by this school of analysis as fundamentally a form of incompleteness. On this basis numerous Freudian analysts, such as Donald Meltzer and Elaine Seigal, continue to view lesbians as immature, as does theorist Jacques Lacan. Once again, Carl Jung, although at loggerheads with Freud over so many things, was essentially in agreement with him here.

The genre of lesbian schoolgirl films began in the 1920s and 30s, with classics such as Madchen in Uniform (1931), Club de Femmes (1936) and The Wild Party (1929) and has continued to this day fairly much unabated, although with highs and lows at different times. Modern soft porn films such as Bilitis (1979) portray young schoolgirls in lesbian situations for the voyeuristic pleasure of heterosexual male viewers.

The depiction of lesbianism as an adolescent phase is prevalent even outside of the girls school setting. Films as diverse as Personal Best (female athletes), The Color Purple (rural women) and Emmanuelle (promiscuous woman in soft porn) have made use of lesbianism as a rite-of-passage for the adult heroine before she goes on to more mature, clearly heterosexual, relationships. Alternatively, the character may remain a lesbian, fixed forever in her immature state. This theme is brought home heavily in The Killing of Sister George through a character named more clearly than a street sign, 'Childie'. As an infantile child-woman Childie is shown

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303 O'Connor and Ryan write, 'Sex outside the phallic field appears to be inconceivable as 'proper' sex, and this impression is bourne out by an examination of contemporary psychoanalytic texts on the subject' : ibid at 175.

304 See O'Connor and Ryan, supra n 276, at 90-91, 95-96, 146.

305 Ibid, 164-5.

306 See Weiss, supra n 259, at 8-17.
as incapable of mothering because mothering is the terrain of mature femininity, thus she is reduced to flouncing around at the age of 30 with a collection of anthropomorphised dolls.

A common variation of the schoolgirl story involves a girl/teacher infatuation or relationship. Such a formulation highlights a mother-daughter relationship even more strenuously, and thus will be discussed below.

**Mother/daughter mimicry**

The link between lesbianism as arrested sexual development and lesbian relationships as mother fixation or a mother-daughter dyad is a very strong one, with roots in Freud’s conception of lesbianism as a failure to transfer from the mother to the father. A corollary of viewing lesbian sexuality as infantile is to then characterise lesbian relationships as mother/child. The idea behind mother/child characterisations is that lesbianism is a 'regression' or inability to engage in 'mature' (hetero) sexuality therefore points backwards to a longing for the mother. This view was present in the early work of feminist Nancy Chodorow and remains in a 1988 feminist psychoanalytic text by Estella Welldon. Such reductionist functionalism is also at the core of Freudian Helene Deutch’s work; her logic being that if one woman is a 'baby' for engaging in infantile lesbian sex such as sucking, the other must be a 'mother' for being sucked.

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308 *Ibid*, 40; O'Connor and Ryan, *supra* n 276, at 36.

309 Welldon, *supra* n 295, at 43-44.

310 See O’Connor and Ryan, *supra* n 276, at 70-71.
In film, the figure of the older 'motherly' woman preying in a sinister manner upon the innocence of younger women arose in the late 20s and 30s. Interestingly, the figure of the sinister, obsessive Mrs Danvers in the Hitchcock classic *Rebecca* (1940), was seen by heterosexual feminist E. Ann Kaplan as an over involved/consuming *mother* to Rebecca, whereas leftist gay theorist Richard Dyer read the same text and visual codes as symbolising a *lesbian* relation, suggesting that early codings for these two things were similar, or perhaps even deliberately conflated.

In recent times mother/daughter coding has continued at a subtextual level. In *Lianna* the student is an adult at university, and the woman whom she has a 'crush' on is a female professor (who is albeit, older, wiser, shorter haired and a 'confirmed' lesbian, as the saying goes). Another example is the character of 'Dolly' (once again a name highlighting childishness) who is unrequitably in love with Karen Silkwood in the film *Silkwood* (1982). She is consistently shown depending upon Karen emotionally and positioned as the child of Karen and her male lover, most notably when her 'first' sexual experience is shown from their viewpoint. Likewise, the older wiser Shug initiates the inexperienced Celie, alternately doting on and patronising her in *The Color Purple*.

Vampire films as a genre blossoming in the 1960s and 1970s, frequently depicted mother/daughter dyads, with the older, experienced vampire preying upon younger women

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311See Weiss, *supra* n 259, at 11-12.

312See eg Kaplan, *supra* n 40, at 117; Dyer, *supra* n 252, at 63.

313See Weiss, *supra* n 259, at 60, 78; Merck, *supra* n 256, at 171-2. Art house cinema has also used mother/daughter imagery in lesbian relationships, albeit perhaps more consciously. An overt example of this is the French-Canadian film *Anne Trister* (1986) where the relationship is between a young artist, Anne, and an older child psychologist, Alix. Scenes of the emotionally troubled Anne painting are intercut continually with those of Alix at work with a young disturbed girl, who is also frequently painting. Revealingly, in *Lianna*, the older woman is also a child psychologist.
and thus 'creating' others like her. This genre displays a visual breast fixation, and a great deal of sucking, often with blood being taken from the breast rather than the more traditional neck position.\textsuperscript{314} Titles also literalistically point towards the symbolism to follow, for example, \textit{Daughters of Darkness} (1970). In \textit{The Hunger} (1983) a modern and glamorous update on the traditional tale, the vampire, played by Catherine Deneuve, is marked as a mother to those she seduces and vampirises, notably as she 'trains' and 'teaches' Susan Sarandon how to feed.\textsuperscript{315}

In the print media, in the current throes of 'lesbian chic', mother-daughter imagery with its suggestion of regressive pathology, is not entirely absent either. A notable example is provided by the cover of the September 1993 \textit{Interview} magazine. The cover shows Raquel Welch in a skin tight low cut velour pants suit and an apparently identical woman, wearing a bathing suit of the same fabric is standing straddling her thigh. Their hands are clasped together and breasts are pressed tightly against each other in a sexualised tango pose. The bottom left corner reveals that this woman is Raquel’s daughter, Tahnee. The similarity of their hairstyles, the fabric of their clothes and the title 'Lightning strikes twice' suggests a narcissistic mirror-pairing.

\textit{Narcissism}

Theories of lesbianism as a form of narcissism are closely linked to those of immaturity and mother fixation, again originating in the Freudian conception of pre-Oedipal and Oedipal passage. In a similar manner, later Freudsians such as Adam Limentani and Elaine Seigal have taken these ideas further, and posited narcissism as an essential attribute of lesbians; the idea

\textsuperscript{314}See Weiss, \textit{ibid}, 94.

\textsuperscript{315}See Creed, \textit{supra} n 298 at, 67-70.
being that lesbians have relationships with other women because they cannot bear that which is different, seeking out instead replicas of themselves.316

The view of lesbianism as a form of narcissism also found its way into popular culture in the 1940s and 1950s, as medicalised discourse regarding sexuality took hold in Western countries. Narcissism is hinted at in voyeuristic 'body pics' such as Personal Best and Bilitus, as well as more 'serious' films such as Entre Nous and Lianna, where both the women themselves and the viewers spend much time gazing at the spectacle of female flesh. Moreover, in Entre Nous, the women discuss the attractions of each other's bodies while ostensibly eying themselves in a large mirror which they are both facing as they dress after a swim.317 In the vampire genre these links are also made explicit through matched appearances. After being seduced/vampirised, the victim appears increasingly similar to the vampire to the extent that they become narcissitically paired.318

Narcissism has recently had a resurgence through the Hollywood 'female psychotic' genre, for instance in the sub-textually lesbian Single White Female where the female psychopath 'cannibalizes her friend's personality, appearance and mannerisms' before escalating to murder. Her psychopathology is eventually revealed as being caused by the death of her twin sister, no less.319

316See O'Connor and Ryan, supra n 276, at 33, 87, 95-96.

317See Merck, supra n 256, at 173-4. Other European art house film has also shown lesbians engaged in narcissistic mirroring through identical or very similar clothing, such as The Bitter Tears of Petra von Kant (1972).

318See Weiss, supra n 259, at 94.

319Creed, supra n 298, at 122.
An unequal/sadistic/vampiric relation

Unlike the earlier categories, the widespread view of lesbian relationships as inherently unequal or sadistic has no firm basis in psychiatric or psychoanalytic theory. Rather, it is a pastiche of different views: one of which is that the female child's failure to transfer to the father, or her male identification in the family model, meant that she would have suppressed resentment and hostility towards the mother, and would thus enact aggression upon her lesbian partners. In a similar manner, Karen Horney's belief, mentioned earlier, that lesbianism arose from a disappointment in heterosexuality necessitated that lesbian relationships would be violent and unsatisfactory (as they were poor substitutes for the real object choice). The phallocentric characterisation of lesbian sexuality as essentially unfulfilled also forms the basis for assumptions that lesbians are therefore frustrated and twisted and liable to vent this frustration through sadistic acts. Alternatively, the belief that lesbian relationships followed a butch/femme configuration, mentioned earlier, laid the ground work for assumptions that such relationships would be unequal, as the 'butch' would hold more power, just like men are meant to.

In a discussion of film noir, Richard Dyer notes that many of the lesbian relationships are in an employer/employee form in a working context, and says,

"This emphasis on lesbians as working women always carries strong elements of tyranny and violence, of servants towards mistresses...of madames to their girls. This tyranny then shades into the character's feelings of attraction to the woman in question. The equation of lesbian love with tyranny is also the strongest impression we get from the scene between Irene and Georgia in the caravan in Tony Rome and between George and Childie in The Killing of Sister George (1969). The tyrannic

\[^{320}\text{See O'Connor and Ryan, supra n 276, at 75.}\]

\[^{321}\text{See Dyer, supra n 252, at 68.}\]
form of the employer/employee relationship which is established by the place of the lesbian relationship in film noir thus carries over into films where the lesbian characters are supposed to be each other's social equal. 322

Lesbian sadists also explicitly appear in Rome, Open City and From Russia with Love. Power imbalances in lesbian relationships through age, class and wealth differentials are common, and heavily laboured in popular cultural representations. 323 Women's prisons have been a popular setting within which to depict sadistic lesbians. Within the hierarchical and closed environment, as guards or highly placed prisoners, they rape, trick or blackmail 'innocent' (both in the sense that they are sexually inexperienced and did not commit the crime of which they were accused) female prisoners into non-consensual sex. The foremost examples of this are Caged (1950), and Scrubbers (1978) both of which were paid homage to in Reform School Girls (1988). 324

Another overt depiction of power imbalances and sadism in lesbian relationships is as a form of vampirism, an association that has been both far reaching and long lived, resonating through mainstream drama in addition to the horror genre. 325 Richard Dyer notes that in publicity stills for numerous films with lesbian texts or subtexts, the 'dyke' character appears dangerous and threatening and is positioned behind the 'sexually indeterminate' woman. In this position she 'appears to be trying to draw the indeterminate woman into her thrall, not by

322Ibid., 63-4.
323See Costello, supra n 50, at 135; Dyer, supra n 63, at 33-4.
324Sadistic lesbianism is also a stock-in-trade in television portrayals of women's prisons, for example the characters of 'The Freak' and 'Frankie' in the long running Australian series Prisoner, which was shown in the UK under the title Prisoner Cell Block H and re-filmed with the same scripts in the USA as Dangerous Women. In the Spanish film High Heels (1992) a prison sequence likewise features sadistic lesbians, albeit without sexual violence.
325Weiss, supra n 259, at 88.
direct assault or honest seduction but by stealth'; an image of 'malign lesbian power.'\textsuperscript{326} The character of the 'predatory dyke' is so common as to be a stock type in cinema.\textsuperscript{327}

Within the horror genre, Barbara Creed notes, 'The combination of "lesbian" and "vampire" is a happy one since both figures are represented in popular culture as sexually aggressive women.'\textsuperscript{328} The genre itself is also an appropriate site to examine for these representations, as she states further that horror films have been,

'...more willing to explore male and female anxieties about the 'other', than film texts which belong to mainstream genres such as detective, suspense thriller, comedy and romance films.'\textsuperscript{329}

Within the vampire genre, even a consensual relationship is pathological because the preservation of one party relies upon the destruction of the other and so, in the words of Andrea Weiss, 'sexuality and violence are visually coupled, as complementary qualities intrinsic to a lesbian relationship.'\textsuperscript{330} Vampires are also closely associated with the Western cultural notion of woman as nature, and lesbian sexuality as therefore close to bestiality. Richard Dyer notes that cinematic representations of lesbians often link them with animals and animality, both within the horror genre and without it\textsuperscript{331} - a point which will be taken up in Chapter 6 in a discussion of lesbian as 'abject.'

\textsuperscript{326}Dyer, \textit{supra} n 252, at 37-38.

\textsuperscript{327}See Weiss, \textit{supra} n 259, at 1; Russo, \textit{supra} n 270, at 102, 225; Dyer, \textit{supra} n 63, at 115.

\textsuperscript{328}Creed, \textit{supra} n 298, at 59.

\textsuperscript{329}\textit{Ibid}, 152.

\textsuperscript{330}Weiss \textit{supra} n 259, at 94.

\textsuperscript{331}Dyer, \textit{supra} n 63, at 31.
At present some claim that there has been a 'revolution' in the 1990s in the way lesbians are perceived and represented. The phrase 'lesbian chic' now appears to be in common usage in the US, and is known of in the UK, Canada and Australia, the countries which are the focus of my study.\textsuperscript{332} It is therefore important to examine these claims before progressing to an examination of linking themes in the characterisations, or lesbian 'types' discussed above.

\section*{II: What and why is lesbian chic}

'Lesbian chic' is a term which is used to describe a trend or 'wave' of media portrays of lesbianism which, it has been suggested, are so overwhelmingly favourable that it is fashionable, or 'chic' to be a dyke in the 1990s. Numerous newspapers and magazines claimed lesbian chic as one of the major 'events' of 1993.\textsuperscript{333} This view of the sudden desirability of lesbianism was expressed by one newspaper article headline in the somewhat tongue in cheek manner, 'Want to get ahead? Get a girlfriend.'\textsuperscript{334} The essence of claims of 'the new lesbian chic'\textsuperscript{335} is that there has been a deluge of media coverage of lesbians, this coverage has been unequivocally a positive thing for lesbians, and this coverage either reflects or has led to greater tolerance of lesbians by society at large. An example is an article in the newspaper \textit{USA Today} in July of 1993 which reads:

\begin{quote}
332 A search of the keywords 'lesbian chic' retrieved 85 entries from a LEXIS journalism database in April 1994. The articles were from the USA, Canada and England and all dated from late 1992, predominantly mid to late 1993. Interestingly, the reference librarian who conducted the search, a middle aged Canadian man, had never heard of the term, and asked more than once if I was sure there really was such a thing before proceeding.

333 See eg L. Hurst, "No matter who you are, (or used to be) it wasn't your year" \textit{The Toronto Star} December 26, 1993, A1; New York Times "The year in Style '93 was anything but waffishly endowed with trends, trivialities" \textit{The Atlanta Journal and Constitution} January 2, 1994, Section L, 3; US Magazine "The biggest stories of '93" January 1994 \textit{US Magazine} 50 (ranking lesbian chic 10 out of 93 'events').


\end{quote}
'Lesbians have long been society's 'invisible homosexuals'. But now, as if a spaceship from Planet Lesbos crash-landed on earth, they're everywhere. From the Hollywood sound stage to the Washington political arena; from the best seller lists to the top of the music charts; from fashion editorial spreads to top corporate advertisements, lesbians are looking good.'336

Underlying this kind of analysis is an implicit assumption of a fixed and linear historical progress (viz: once lesbians were frowned upon, now lesbians are smiled upon), a sense of self satisfied congratulation (the media created lesbian chic) and an unquestioning sense that 'chic' is universally accepted, at least in the Western world, and has eliminated any oppression that might have lingered until now.

I will argue in this section, that not only is lesbian chic a very limited, primarily American phenomenon, it is also a fashion 'fad' and in fact dresses up a great many of the 'old' lesbian types discussed earlier, in 'new' chic clothing, affirming the media's sense of its own modernity but changing little in terms of underlying assumptions about lesbian identity.

The collection of cultural representations, including both 'real' personalities as well as fictional characters, which are said to constitute lesbian chic are as follows. Singer/actress/publisher, Madonna, is widely credited as one of the originators of lesbian chic, specifically through the production of her Sex book (1993) in addition to the Erotica (1993) and Justify my Love (1991) video clips, all of which feature lesbian imagery. Originally as a lesbian 'personality' in connection with Madonna, actress/singer/entertainer/author Sandra Bernhardt (rumoured to have been her lover, and appearing in the Truth or Dare 1991 rockumentary of Madonna) was then linked romantically with actresses such as Amanda Donohoe (who played a bisexual character on the 1991/2 seasons of L.A Law). Other lesbian 'personalities' include

336E. Snead, "Lesbians in the limelight: Some chafe at media's embrace" USA Today July 13, 1993, 1D.
singer/actress kd lang, athlete Martina Navratilova, singer Melissa Etheridge, and on the periphery, an actress from the sit-com *Married with Children*, and comics such as Kate Clinton, and Lea Delaria. In 1994 both lang and Etheridge released video clips of songs which contain suggested lesbian imagery.\(^{337}\)

Sandra Bernhardt has recently played the fictional character 'Nancy' in the 1992-4 seasons of TV sit-com *Roseanne*. Nancy was originally heterosexual, then came out as a lesbian, having a relationship with 'Marla' (played as a visual gag by Morgan Fairchild) in the 1993 season, before promptly recanting, playing with heterosexuality once more and then deciding upon bisexuality. In the 1994 season 'Nancy' was shown in a relationship with 'Sharon', played by Mariel Hemingway (another visual gag, as Hemingway is perhaps best known for the athletic lesbian flick, *Personal Best*). Considerable attention focused upon the series when an episode was aired in which Sharon kissed 'Roseanne' when Roseanne and her sister 'Jackie' visited a gay bar with 'Nancy'.\(^{338}\)

Also on television in a single episode of the TV sit-com *Seinfeld* in 1993, 'Susan' the ex-girlfriend of 'George', turns out to have become a lesbian since she left him. This discovery leads George to have a renewed sexual interest in Susan (he finds it 'exotic' and a 'challenge). Within the 30 minute episode, Susan's girlfriend has left her for a man, 'Kramer', although Susan herself ignores George's attentions.

\(^{337}\)Being "Keep on movin" and "Yes I am" respectively. Notably, numerous other bands, not identified as lesbian in any way, have also released video clips with lesbian imagery in 1994, such as Angel Fish ('Heartbreak to hate'), Aerosmith ('Crazy') and Lush ('Nothing natural').

In the 1992 blockbuster film Basic Instinct, Sharon Stone played 'Catherine' a bisexual author suspected of a series of sex-killings of men. The other three female characters within the film were also shown as either bisexual or lesbian.

In the print media, the 1993 August issue of Vanity Fair magazine featured a cover of kd lang and model Cindy Crawford in a sexual pose. In that year both Newsweek (June) and New York magazine (May) featured cover stories on lesbianism/lesbian chic. Print advertisements, such as those for the clothing company Banana Republic, have also featured women in poses which suggest sexual relationships. The print media, primarily newspapers, but also magazines, have then commented upon all of the above (personalities, fictional characters and magazine imagery and coverage of lesbians) as creating a new trend or unified phenomenon, lesbian chic.

Firstly, this 'explosion' or 'revolution' has occurred over a very limited time period and primarily in the USA. Moreover, it constitutes a comparatively small number of personalities and characters. Vito Russo has noted in the context of film, that a trickle of one or two gay-themed movies in a market where 'gayness' is continually exorcised is almost always noted by the media as a deluge or 'gay explosion'. Journalists in the UK commentating on lesbian

339Commentary upon lesbian chic does not generally mention media coverage in countries other than the USA. In Australia the conservative national magazine The Bulletin had a 'lesbian' cover in October of 1992 and through 1993 several women's magazines, such as Australian Women's Forum (March), HQ (Winter), Cleo (October) and New Woman (June) contained lengthy and generally positive articles about lesbianism.

340Russo, supra n 270, at 267-7, 302. There also is a deceit in this 'deluge' claim as the most common representation of lesbianism remains total invisibility, as lesbian characters present in life or in written fiction are routinely excised in the transition to mass culture such as film. For example lesbian relationships were toned down, reduced or removed entirely in Waiting for the Moon, (1987) The Color Purple, (1985) Impromptu, (1990) The Hotel New Hampshire, (1986) My Brilliant Career, (1979) Fried Green Tomatoes, (1992) and Ghost (1990). Moreover, any attempts to depict lesbianism in a neutral or favourable light still receive considerable opposition. In the USA the National Endowment for the Arts banned funding to artists or groups producing works with homoerotic or homosexual themes in 1992 (see J. Breslauer, "Theater: Hughes's battles with national endowment for the arts are behind her now" Los Angeles Times August 22, 1993, Calender, 7) and in 1994 the episode of the sitcom Roseanne which featured a brief kiss between Roseanne and another woman was reportedly blocked from airing by the network which screens the top rating series (see Freedland, supra n 338). In the UK, Clause 28 has
chic are quick to point out that while there is considerable interest in the US situation, no such 'wave' appears to be occurring in the UK.\textsuperscript{341} A wave of interest, or plethora of cultural representations need not herald acceptance, either, as the multitude of 'lesbian paperbacks' produced and widely circulated by major publishers in the USA in the repressive 1950s attests.\textsuperscript{342} At the present time, bell hooks argues that,

'...within today's cannibalistic market economy the willingness to consume homoerotic and/or homosexual images does not correspond to a cultural willingness to stand against homophobia or challenge heterosexism.'\textsuperscript{343}

Much media coverage has treated lesbianism as a fad or fashion accessory. For example, an article in American Vogue unselfconsciously named lesbians 'the Hula Hoop of the 90s.'\textsuperscript{344} This attitude is also revealed by the placement of articles on lesbian chic, almost universally in the fashion, style, arts or lifestyle section of the newspapers which have covered it. The implications of lesbianism as a fad or fashion are twofold. On the one hand, lesbianism is trivialised to a style, a mere appearance of exoticism - lesbian chic is about 'looking good'\textsuperscript{345}

\textsuperscript{341}See Viner and Hankins, supra n 334; A. Stuart, "A touch of taboo; portrayals of lesbians in movies" (1993) Vol 6 No 265 New Statesman and Society 32 (August 13).

\textsuperscript{342}See Faderman, supra n 255, 146-7.

\textsuperscript{343}hooks in L. Frank, and P. Smith, (eds) Madonnarama: Essays on Sex and Popular Culture (Pittsburgh: Cleis Press, 1993) at 70. Likewise, Danae Clark claims that capitalism 'welcomes homosexuals as consuming subjects but not social subjects' and argues that incorporating homosexuality into 'style' can diffuse its political edge (in Abelove, Barale and Halperin, 1993 at 195-6).

\textsuperscript{344}Cited in Snead, supra n 336.

\textsuperscript{345}See eg quote by Snead, supra n 336.
and lesbians are thereby reduced to consumable sexual objects. On the other hand as a fashion that is 'in' one year, lesbianism may very well be 'out' the next.

Lillian Faderman argues that this faddishness is in fact the case. Faderman claims that lesbian chic occurred in America for around a decade from the 1920s. The Harlem blues scene in the 1920s, and the Greenwich Village intelligentsia in the 1930s featured a number of high profile women who engaged in lesbian relationships in a milieu which came to regard heterosexuality as reactionary or stale. Moreover, Andrea Weiss marks the 1930s as a time where popular film toyed with lesbian imagery - with stars such as Marlene Deitrich, Greta Garbo and Katherine Hepburn all playing androgynous characters in stories with strong lesbian undertones.

This period of chic in the USA did not confer lesbians with acceptability or status for very long; by the 1940s and 1950s lesbians were being purged from government and military, and pathologising imagery of homosexuality was dominant. It could further be argued that the 'personalities' who were chic at that time were seen as somehow beyond the scope of 'ordinary' moral standards and social expectations. They were singers and actresses and in the 1920s especially, many of them were women of colour such as Bessie Smith and Josephine Baker. As such, these women were in some ways expected to behave and present themselves as transgressive of cultural norms. The same could very well be said of the lesbian chic personalities today - who are overwhelmingly singers and actresses of considerable fortunes, some of whom, such as Madonna have made a career out of 'shocking' the public.

346See Faderman, supra n 255, Chp 3.
347See Weiss, supra n 259, at 32-33, 36-39, 42-44.
348See Faderman, supra n 255, at 130-146; Russo, supra n 270, at 100.
Furthermore, Lillian Faderman argues that it was actually bisexuality, rather than lesbianism which was truly in vogue in the 1920s and 1930s. Faderman notes considerable evidence that while engaging in lesbianism was regarded as 'interesting and provocative' or 'sexy', virtually all women who did so, whether lesbian or bisexual, sought the public cover of bisexuality through real or pretended relationships with men. This was in part because lesbian sex was not regarded as 'real' or a threat to men, and so could be indulged, especially if it were a 'phase' which women passed through; bisexuality preferably ending in heterosexuality.\(^{349}\)

There are very strong parallels with 1990s lesbian chic in this area, and many others. It appears that in the same breath that the mass media has designated lesbianism sexy, fashionable and chic, it has decreed that it need not involve actually being a lesbian at all. Some print articles go to some lengths to highlight the bisexuality of women in lesbian relationships, noting past or present marriages.\(^{350}\) Others go further than suggesting that lesbianism and marriage can go hand in hand, arguing that lesbian relationships do not make women lesbian or even bisexual - one can be a happily married woman having lesbian sex and still be unimpeachably heterosexual according to a recent article in the Globe and Mail newspaper.\(^{351}\) The end point of this reasoning is soon accessible, as the Daily Mirror newspaper happily claimed that lesbian chic need not involve having sex with another woman at all, rather, it was a state of mind, a 'more liberated attitude.'\(^{352}\) Thus lesbian chic is in reality bisexual chic, or an exotic same sex encounter indulged in by heterosexuals, or better still just heterosexuality with an open mind to enjoying homoerotic imagery - and the full circle is complete as heterosexuals voyeuristically consume lesbian imagery at the same time as

\(^{349}\)Faderman, supra n 255, at 75-6, 85.

\(^{350}\)See eg S. George, "The husband, his wife and her female lover" New Woman June 1993, 72.

\(^{351}\)B. Kemp, "Happily hetero, but hankering after a lesbian fling" Globe and Mail November 13, D5.

\(^{352}\)Noted in Stuart, supra n 341.
they distance themselves from it. The 1990's element of modernity is that this occupation is no longer smutty or pornographic, but seen as evincing a positive attitude to a heretofore oppressed minority. A voyeuristic vice has become a positive virtue; has anything else really changed?

A close examination of the extant imagery in 1990s lesbian chic reveals this process of the affirmation of the centrality of heterosexuality. Madonna, for instance, has always proclaimed herself heterosexual - while acknowledging lesbian sexual experience.\(^{353}\) The imagery in her *Sex* book, as well as her video clips continually code Madonna as a heterosexual experimenter or voyeur, distancing her from 'real' lesbianism, which is portrayed as involving large, shaven headed, tattooed and multiply pierced women in *Sex* and *Erotica*, and cross dressers in the earlier *Justify my love*.\(^{354}\) These 'real' lesbians were referred to by Madonna as a 'joke' and by the print media as 'those lesbian skinhead freaks'. Moreover they were framed by other images of sado-masochism, bondage and exhibitionistic masturbation, among other things. Thus bell hooks argues that Madonna's work,

'fits with a history of so-called sympathetic heterosexual framing of homosexual experience in popular culture which represents it as deviant, subversive, wild, a 'horror' that is both fascinating and fun but always a 'horror.'\(^{355}\)

In this sense, Madonna's contribution to lesbian chic has been to portray lesbianism along with a 'catalogue of perversions',\(^{356}\) as predatory, promiscuous, butch and above all, as an object of voyeuristic pleasure. Her work is arguably directed towards a specifically *male* voyeuristic

\(^{353}\)In both *Truth or Dare* and an interview with Carrie Fisher in a 1991 issue of *Rolling Stone* magazine.

\(^{354}\)See hooks in Frank and Smith, supra n 343, at 73 for an analysis of this.

\(^{355}\)hooks in Frank and Smith, supra n 343, at 71.

\(^{356}\)See Crimp and Warner in Frank and Smith, supra n 343, at 93-94 for a discussion of this.
pleasure, moreover, as men are present in all of the above works, 'viewing' lesbian sex, often as a prelude to 'the real thing' - sex with men.357

Basic Instinct drew on the ground laid out by Madonna in many ways. It contained a blond, vampish 'femme fatale' with an insatiable sexual appetite, who was, moreover, sexually attractive to men. Basic Instinct also contained virtually every pathological lesbian type discussed in the earlier section of this chapter, often disjunctively.358 For instance, it featured lesbians as manhater/killers who nonetheless need sex with men. Murderousness and lesbianism were deliberately conflated as all four women were bisexual or lesbian and all of them were revealed as suspected or convicted killers.359 The film also portrayed lesbians as vampiric, sexually obsessed and bestial, thereby acting as a 'crossover' film allowing representations of lesbians common to the minority horror and pornography genres into mainstream cinema. As Basic Instinct grossed US $385 million at the box office alone,360 the widespread pervasiveness of its influence should not be underestimated.

357See Lentz in Frank and Smith, supra n 343, 160. However, Andrew Ross contends that to the contrary, that Madonna has done much to advance lesbian and gay interests. He argues, 'Because she has come to occupy such a large portion of public media attention, Madonna functions rather like what environmentalists call a charismatic megafauna: a highly visible and lovable species, like the whale or spotted owl, in whose sympathetic name entire ecosystems can be protected and safeguarded through public patronage' (Ross in Frank and Smith, at 52).

358Lesbianism as a form of carnality or animality is established through the central character of Catherine. She uses base language, and in her first encounter with the police asserts her pleasure in impersonal sex (which she calls, to their horror, 'fucking'), she rakes her male sexual partners with her fingernails and draws blood, and is shown in riding boots, surrounded by animal trophies after the first killing. Catherine also establishes lesbianism as intended for the explicit voyeuristic pleasure of heterosexual men in that she offers up her lesbian relationship visually, and also engineers displays of herself naked on numerous occasions. Butch/femme lesbianism is established by the character of Roxanne, Catherine's girlfriend, who is known as Roxy, dresses frequently in black leather, and is called 'Rocky' by Curren, who also addresses her 'man to man' and kills her (in a driving duel, no less). Lesbianism as a type of narcissism is recurrent, both in the visual pairing of Catherine and Roxy in some scenes, and in the story of Elizabeth mirroring Catherine in appearance and mannerisms after they had a sexual encounter years earlier. Mother/daughter lesbianism is suggested by a sexualised shot of Catherine and a middle aged woman who was earlier shown as a 'mother figure' to her.

359When Curren, the male detective, confronts Elizabeth and shoots her, his remark, 'Do you still like girls?' actually stands as a simultaneous accusation of murder - lesbianism being her motive in allegedly killing her husband.

360Stuart, supra n 341.
Likewise, popularised 'old' pathological views of lesbianism are present in other 'new' lesbian chic images, albeit in a slightly less overt manner. As mentioned earlier, the Interview Magazine cover of Raquel and Tahnee Welch suggested both mother/daughter lesbianism and narcissistic lesbianism at a subtextual level. In the Vanity Fair spread, kd lang in suits and shaving lather is unequivocally the 'butch' to Cindy Crawford's barbie doll bathing suit 'femme', and in other photos in the magazine, lang is also shown in suits with a phallicly placed cello.

In both Roseanne and Seinfeld in 1993 a lesbian character was swiftly placed in a heterosexual relationship, thereby contradicting or undermining her claims to lesbian identity and suggesting that lesbians are 'really' bisexual, or need only to have sex with a man to be 'cured' of their phase. The place of heterosexual male voyeurism in such apparently unsexualised images is not to be underestimated, and is best expressed in the words of one of the creators/writers of Seinfeld, Larry Charles,

'[the lesbian episode] was purely our way of dealing with the straight male's fascination with a taboo subject...We took the male point of view. Even though some gay women find straight men horrifying, straight men find gay women fascinating. We don't care about their politics: lesbian chic is not about politics, it's about style, fashion. Lesbians in sitcoms can look beautiful, be beautifully dressed...’

The episode of Roseanne in which Roseanne received a 'lesbian kiss', while superficially about homophobia, also enforced numerous stereotypes and offered itself up to male voyeuristic pleasure. Notably, the kiss was not consensual, and Roseanne was shown pulling a face of disgust after receiving it. Furthermore, Rosanne's husband, 'Dan' was depicted as aroused by

361Quoted in Rubin supra n 335.
the occurrence when told of it, and asked questions such as 'What were you both wearing' so he could 'picture it'.

Lesbian chic affirms the centrality of heterosexuality, by emphasising continually the 'otherness' of lesbianism. Plots revolve around the heterosexual character's reaction to homosexuality, not the homosexual character her or himself (eg in Roseanne and Seinfeld, it was the heterosexual characters, their reaction, feelings and point of view which were centred). In media discussion of lesbian chic there is often an implicit 'us' (the reader) and 'them' (the lesbians). For example an article which noted lesbian chic as an 'event' of 1993 was entitled, 'No matter who you are (or used to be) it wasn't your year' - implying as it does that 'you' are not a lesbian. Moreover, by discussing only very beautiful, successful and wealthy young white characters/personalities in relation to lesbianism, and doing so, moreover, with a perpetual tone of surprise, lesbian chic places lesbianism in a location of unreality - 'other' and odd, it is not a commonplace pastime of ordinary women, much less of ordinary wives and mothers.

This section has aimed to show that lesbian chic, far from its claims to newness and transformation, in fact reproduces many of the 'old' negative stereotypes of lesbianism. Also, the images provided by lesbian chic, even where they could be considered positive in some

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362 The intensity of male voyeuristic pleasure at this episode is well conveyed by the bar-room setting in which I viewed it. The bar was populated entirely by men, with the exception of myself and two female friends. The large screen TV which heretofore I had only ever seen screening sports, was turned suddenly to Roseanne, because, in the barman's words 'tonight's the big night'. During the 30 minute episode a complete silence fell in the bar twice, as Roseanne was kissed, and as Roseanne told Dan about it (greeted with hearty chuckles) - the rest of the episode being almost entirely ignored by the crowd.

363 Hurst, supra n 333. Other examples are the 'space ship' metaphor in the earlier quotation by Elizabeth Snead in USA Today, with its suggestion of lesbians as an alien life form: Snead, supra. Inset 'glossary' boxes appear in other articles with 'translations' of various lesbian types and expressions, such as 'Dyke', 'Bar dyke', 'Leather dyke': see D. Cornwall, "Girls just want to have fun" Sydney Morning Herald February 27, 1993, 41; E. Salhowtz, D. Glick and et al, "Pride and Prejudice: Lesbians Coming Out Strong" Newsweek June 21 1993 54.
ways, contraindicate the possibility of lesbian mothering. Lesbian chic concerns a lifestyle of promiscuity, notoriety and narcissism. The woman in lesbian chic is too preoccupied with herself to be capable in ideological terms, or motherhood - she is too busy looking good and being seen.364

III: What do all of these lesbian types have in common?

A linking theme in all of the images of lesbians discussed in this chapter is that of childlessness. As a rule, lesbians simply do not have children in films, even where they have been previously heterosexual, and certainly not with each other. The few exceptions prove rather than disprove the rule, notably Lianna (1983) where the protagonist’s lesbianism means that she must relinquish her children, and the small role of the lesbian ex-wife in Manhattan (1979) where Woody Allen’s character taunts the mother’s partner (whom he had previously tried to run down in a car), 'You’ll never be the real father'.

Even more notable than the fact that mothering is literally absent in the portrayal of lesbians, is that lesbians in film are defined in essence by their childlessness. The various 'types' are all marked in some way as lacking or hostile to procreation and nuturance. They may be characterised as anti-mother in the sense that their qualities and attributes are oppositional to those defined as motherly in Western culture, qualities such as altruism, nurturing, and a servicing relation to men and 'their' children. Lesbians may also be characterised as unmother, in that while not openly hostile to mothering values, they are pictured as incapable of satisfying them. In the anti-mother league are male-identified lesbians, manhating lesbians and sadistic/vampiric lesbians. Un-mother encapsulates the other types; immature, mother/daughter and narcissistic.

364Take, for example, the title of an article on lesbian lifestyles in a Sydney newspaper, "Girls just want to have fun": Cornwall, supra n 363.
**Anti-mother**

Within the typology assigned to 'male identified' lesbians by popular culture, they are constructed as fundamentally anti-mother because they are viewed as essentially un-womanly. Envisioned as 'butch' make-believe men, male identified lesbians do not contain the necessary qualities for mothering, having repudiated femininity, and therefore all which that entails, including motherhood. The closest nurturing relationship envisaged for such unwomanly women is that of 'father', as shown by the quote from *Manhattan* above.\[365\]

The 'manhating lesbian' type is similarly viewed as diametrically opposed to mothering, as hating men is often conflated with hating children and families, as these are in some cultural sense the accoutrements of men. This projected hostility is at its most colourful in the horror genre, where the lesbian vampire is shown repeatedly as attacking the nuclear family form as well as stable society generally.\[366\] Moreover, the sadism of the sadistic/vampiric lesbian to her female partners could be viewed as a displacement of this antipathy to the family form, and is certainly constructed as anti-mother in that it posits selfishness, perniciousness and cruelty as inherent features of lesbians. The vampire as a cultural emblem of lesbianism is particularly revealing. Whereas Mother is meant to *give* of herself (milk, time, love) to the young and vulnerable, Vampire *takes* to feed herself (blood, life, innocence) from the young and vulnerable. Selfish, hungry and ruthless, the Vampire is a lesson in the ideology of lesbian as anti-mother.

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\[365\] Furthermore, when a lesbian is characterised as masculine, her interest in children or nurturing relationships with them are then considered highly suspect and potentially indicative of sexual abuse: see US cases, *Re Jane B*, 1976; *N.K.M v L.E.M*, 1980.

\[366\] See Creed, *supra* n 298, at 61.
Un-mother

Within her culturally constructed typology, the 'immature', or 'schoolgirl' lesbian may well contain feminine qualities, but is depicted as incapable of mothering because her own development is not yet formed. Likewise the narcissistic lesbian type and the 'daughter' half of the mother/daughter dyad; their immaturity is expressed through their arrested development (lesbianism being the conclusive proof of impairment). Heterosexual relationships are marked as the completed passage to maturity, as is childbirth and rearing - 'marriage and a family' being the ideal happy ending in both popular culture and psychiatric literature. Thus the child-like lesbian cannot yet attain the maturity needed to mother, and is more likely to seek a 'mother' in her female partner.

The 'mothering' lesbian in the dyad has her hands full already, with her partner playing the role of surrogate child, leaving no room left for a real one. Moreover, the relation of the 'mother' half of the dyad to children is problematised by the equation of her sexual partners with symbolic 'children' and she may thus be suspected of a propensity towards paedophilia.367

This discussion of lesbian types in psychiatric and popular culture texts has aimed to show how pathologised the popular notion of lesbianism is, as well as how lesbian and mother have come to be viewed as dichotomous opposites. Both of these elements, I will argue in Chapter 5, have a strong presence in family law judgments involving lesbian mothers.

There is never, of course, a universal order and uniform results. Lesbian mothers, for example, may sometimes win custody cases over the claims of heterosexual fathers. Exactly

367See discussion and cases in the 'Witch' section of Chapter 5.
how lesbian mothers inspire horror in the judges, how this is expressed, and how lesbian mothers sometimes circumvent notions of monstrousness will be explored in the following chapter.
CHAPTER 5: Goddess, Virgin, Witch: Archetype and the unconscious in judgments

'The mythic level...is linked to the level of the unconscious. Althusser's concept of ideology takes this into account, "ideology" for him being precisely that which in social practices is assumed to be natural, the truth, unquestioned.' 368

In discussing the ways in which lesbian mothers are characterised in family law judgments, I will utilise a structure of mother archetypes to frame the manner in which mothers are judged. The three mother archetypes are Virgin, Goddess, and Witch; described by J.C Smith as 'the sexually appealing young woman, the birth giving matron and the death-bringing old crone.' 369 The benefit of such a three-fold structure is that it provides a manner in which to discuss mediated successes, where lesbian mothers may not be characterised as bad or un-mother (Witch), but neither are they viewed as 'good' mothers (Goddess).

Archetype is used as a method of structuring analysis of the cases in an attempt to find themes beneath the surface characterisations of mothers in the judgments. The use of archetype provides a path into the symbolic. It is important not only to describe features of the case law (such as disapproval of maternal sexuality), but to ask what do they symbolise, what fears and horrors do they encapsulate? The purpose of this structure is to allow the possibility of links with the prior chapter regarding the representations of lesbians in popular culture, and with arguments to follow in the conclusion of this thesis where I explore links with the experience of lesbian mothers and other marginalised mothers in law.

368Kaplan, supra n 40, at 15.

369J.C. Smith, Psychoanalysis and the Roots of Patriarchy: the Neurotic Foundations of Social Order (New York: New York University Press, 1990), 186. The utilisation of three mother archetypes relies upon the reinterpretation of mythic figures and the work of Jung and Neumann for a psychoanalytic social theory. Smith, eg pp 122-3, 253. Kaplan also argues that a triptych of mother archetypes structures the unconscious, although she believes that these have changed over time from 'Virgin, Mother, Whore' to 'Career Woman, Mother, Tart': Kaplan, supra n 40, at 182. This constellation is similar enough to my own that I believe they are compatible, 'Mother' in her framework standing for perfect mother, or Goddess in my own.
In most family law cases involving a lesbian mother, the judge is faced with a mother who has left the father/family/phallus for lesbianism: an active choice between dualisms, a choice which is meant to be made the other way around. Female sexuality and male dispensability are foregrounded in this situation in such a way that Lesbian is often construed as fundamentally Witch (symbolising attributes discussed in Chapter 4 such as: aggressive, sexual, anti-male, dangerous, sterile, diseased). Lesbians are thus perceived through a prism which views them symbolically as agents of castration, dangerous to men, the family, and society as a whole.

If this were always the case, however, lesbian mothers would never be successful in the courts, whereas experience shows that this is not universally so - even where discourse disfavours lesbian mothers, decisions sometimes granted lesbians custody. In these cases, I contend that the lesbian mother has been de-sexed/disempowered - she is rendered (by the judge, her lawyer or herself) hyper-feminine and aligned with male interests such that she does not fit the witch archetype. In this case, she becomes Virgin, and can be viewed in some

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370In a Canadian divorce case, the judge referred to lesbianism as 'the antithesis of marriage' and a 'repudiation' of it: Guy, 1982 at 16, 22.

371A truism of popular cultural representations of lesbians is that she will either be killed or rescued by a heterosexual relationship with a man. The importance of these formulaic plots will be explored more fully in Chapter 6.

372In her book The Monstrous Feminine, Barbara Creed argues for a complete re-reading of Freud’s theory of castration anxiety. Creed argues that men fundamentally fear women as castrating (not castrated as Freud suggested) and that the image of woman as castrator exists in a widespread manner in popular culture and ancient mythology (eg Medusa): Creed, supra n 298.

373My review of approximately 75 reported cases and unreported judgments available through Quicklaw and Lexis, although arguably not a representative or ‘scientific’ group, broke down a lesbian mother’s chance of winning a litigated custody case roughly as follows: Australia 55%, Canada 50%, UK 45%, USA 25%. These figures are unreliable for a number of reasons: they do not take account of the majority of unreported cases, a ‘win’ on appeal may simply be the right to a rehearing, not necessarily to custody, and the possibility of later appeals is unaccounted for. I excluded from this win/lose breakdown cases where both the mother and father were involved in homosexual relationships, and cases where the mother denied being lesbian and was believed.
contexts as a 'good' Mother. This construction is not necessarily to the mother's advantage, as the Virgin archetype brings its own constraints.

All of the lesbian 'types' discussed in Chapter 4 appear in family law judgments regarding lesbian mothers and can be discussed within the framework of mother archetypes outlined above. When a lesbian mother is perceived as masculine, manhating, sadistic, narcissistic or the 'mother' half of a mother/daughter dyad with her sexual partner, she is within the ambit of the Witch archetype. When a lesbian mother is perceived as feminine, afraid of men, immature or the 'daughter' half of a mother/daughter dyad with her sexual partner, she is within the ambit of the Virgin archetype. The presence of each of these archetypes within the judgments will be discussed at length. I believe that lesbian mothers do not, at any stage, fall within the scope of the Goddess archetype, and this exclusion will be discussed first.

**I: Goddess?**

Not one lesbian culturally constructed 'type' discussed in Chapter 4 is capable of fitting within the Goddess archetype, because the Goddess is more than simply fertility/goodness/abundance, she is all of those things in connection to men. The ability to care for, nurture and properly socialise children is seen as a corollary of a monogamous sexual relationship with an adult man. Barbara Tizard has argued that the intense and singular nurturant focus upon a child which is demanded of 'good mothering' is a reflection of the ideal of 'monogamous love.' Adrienne Rich cites a feminist paper on women, children and work in 1976 which read,

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374 Adrienne Rich argues that the ideal of matriarchy, where the archetype of Goddess is revered, is nonetheless a fundamentally heterosexual ideal: Rich in Abelove, Barale, Halperin, supra n 269.

Biologically men have only one innate orientation - a sexual one that draws them to women, - while women have two innate orientations, a sexual one toward men and reproductive toward their young.376

In the absence of one of these 'innate drives' - toward men - lesbians and their intentions towards children become fundamentally suspect.

Julia Brophy notes case law in the UK prior to the advent of no-fault divorce in 1969, in which judges were quick to point out that,

'One must remember that to be a good mother involves not only looking after the children but making and keeping a home for their father...' per Lord Denning, Re L (infants) [1962] 3 All ER at 3.377

This view is echoed in a slightly more subtle manner by the remark that the lesbian mother in B v B (UK, 1991) was, 'a blameless, faultless mother so far as care of her children is concerned, except that she has left her husband' (at 7).

In the context of cultural representations, Barbara Creed argues that representations of women who reproduce without men are invariably monstrous, and their offspring mutant or horrifically destructive.378 Likewise in relation to access to insemination (AI) in Britain, Didi Herman and Davina Cooper note that both lesbian and single heterosexual women who

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376Rich, in Abelove, Barale, Halperin, supra n 269, at 228.

377Brophy argues that adulterous wives 'effectively forfeited their claims to motherhood - not because they were neglectful or ineffective mothers - but because the legal construction of motherhood included, by definition, a prior commitment to the sanctity of the family': Brophy in Smart and Brophy, supra n 85, at 102. Brophy contends that while such an overt judgment has abated under the current child's best interest test, the sexual identity and behaviour of mothers is still very influential on child custody proceedings.

378In the context of science fiction, usually conception occurs through technological means. Creed, supra n 298, at 45.
expressed a desire to reproduce without input from men (sexual or otherwise) were construed by the medical/psychiatric professions as ill, and by the media as selfish and dangerous.  

Single mothers and female headed households have been blamed for deviance and criminality in children consistently since the 1940s. Such a view has persisted to this day, and is exacerbated when the 'single' mother is lesbian, or worse still provides improper 'modelling' for children by partnering with another woman. The lesbian mother in a family law dispute may be seen as having deprived her children of a father by choice, whereas a heterosexual mother in the same situation has the possibility of appearing blameless (especially if abandoned), or procuring a 'father substitute'.

The closest to a Goddess characterisation of a lesbian mother in the case law is in the US matter of Doe, 1981, where the mother was described as follows:

'Although there was testimony that her relationship with the woman with whom she lives is unorthodox, the testimony is that Jane Doe is an exceptionally well-educated, stable, responsible, and sensitive individual. Witnesses describe Jane in

379 Herman and Cooper, supra n 139, at 43-44, 56-7.

380 For a review of criminological theories and their tendency to mother-blame, as well as specific accounts of crime as a response to fatherlessness see generally N. Naffine, Female Crime: The Construction of Women in Criminology (Sydney: Allen and Unwin, 1987).

381 See eg a parliamentary speech made by Lord Ashburne in the UK in 1990, 'If we get the family right, all those other things will come right as a spin off effect. Our prisons will not be bursting; our abortion rate will not be higher than anywhere else; marriages will not break down; and divorce will not be higher than anywhere else' (cited by Herman and Cooper, supra n 139, at 41).

382 Ibid, 57, 58.

383 I do not mean to suggest that heterosexual divorcing mothers have easy or unproblematic access to the Goddess archetype, merely that it is within the range of possibilities. In lesbian mother cases it is the figure of the heterosexual stepmother who is most often configured as Goddess. The stepmother is attached to the father, and her claim to the children is seen to be in service of him and an expression of her own altruism: see eg Canada: Elliott, 1987, the stepmother was 'anxious and desirous of sharing with the father the responsibilities of giving loving care and affection to the children' at 9; USA: Collins, 1988 where the stepmother was extolled as she would love the child 'as her own' at 3, 7.
various ways but always in a highly complimentary manner. They referred to her as a conscientious and creative parent, friendly by nature, who instils in the boy a love for other people and of animals. It was testified that Jane's love for Jack was a nurturing love, and that she exercised a selfless wisdom in caring for him. Jane Doe has apparently earned the respect of her peers in Yellow Springs because of her civic work and active interest in the community and her relationship with the people with whom she comes into contact' (per Harrison J for the majority, at 804).

Ruthann Robson remarks of this quote, 'The court's opinion sounds like she is winning the contest for Miss Congeniality rather than a custody appeal.' A key point is that Jane Doe was not winning a custody appeal, rather she won a case preventing her ex-husband and his new wife from adopting the child against her will (which would have severed her parental rights and the limited access she had as a geographically distant non-custodial parent). For all her altruism and nuturance, Jane Doe still fits more properly within the Virgin archetype as her mothering role is so tightly circumscribed. She may well be a great little Mum, but she did not have or win custody, her relationship was de-sexed and her offer to cease living with her partner was noted in her favour (the judgment closing with the significant remark that she may have to 'honor this commitment' when her son was older (at 860)).

A lesbian mother is not a Goddess, nor can she ever be. She has rejected Father as well as Fathers more generally. Lesbian is constructed as Un-mother in some sense precisely because she obliterates Father - stepping beyond the bounds of familial ideology into the terrain of the anti-social. This highlights the manner in which the ideology of motherhood intersects with, and depends upon, ideologies of the family, a point which will be explored in Chapter 6.

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384Robson, supra n 81, at 133.

385In that it was 'sexual at times' and more of a 'friendship' (at 802).
II: Witch

In the popular imagining, lesbians are attributed with numerous characteristics which render them Witch, or in Barbara Creed's terms, 'the monstrous feminine.' Patricia Cain lists archetypal images of lesbians which include, 'lesbians are not mothers', 'lesbians are sick', 'no one knows lesbians' and 'lesbians are sex.' Chapter 4 detailed at some length various popular representations of lesbians. It is worth restating that the overwhelming majority of cinematic representations of lesbian appear in two guises - as horrific (most notably as vampires) and within (heterosexual) pornography. In the following discussion of case law, I argue that family law judgments where a lesbian mother is concerned reflect and reconstitute the above mentioned archetypes, and the influence of the horrific and pornographic notions of lesbianism can be found throughout.

Masculine and Butch/femme

Various cases in which the mother or her partner was characterised as masculine, or their relationship as butch/femme either explicitly, or implicitly through use of language have been discussed in Chapter 2, and so will not be repeated here. In those cases, judges actively strove to find 'role definition' between the partners, and to masculinise one of them, for example by finding that the woman who most often drove the car, or paid for meals was the 'dominant' one. Imputed masculinity was also evidenced by judges referring to a lesbian by surname alone, an appellation otherwise reserved exclusively for men.

386Cain, supra n 2, at 213.
387Weiss, supra n 259, Chp 4; Creed, supra n 298, Chp 5.
388Dyer, supra n 63, 2; Hooks in Frank and Smith, supra n 343, at 71-72; Lentz in Frank and Smith, ibid, 160; MacKinnon, 1987 supra n 71, at 199.
389See Chapter 2 'Power imbalances, role playing and abuse' section.
Use of profane language, raised voices suggested or actual physical violence or an 'aggressive' attitude on the part of either the mother or her partner were construed as evidence of masculine identification and from there butch/femme inferences about the couple were often drawn. In the Australian case P.C and P.R (1979) the mother's partner was continually configured as masculine to the extent that the judge interpreted her closeness with the child as an attempt to 'displace' and 'compete' with the child's father.

Another case which highlights just how closely a conception of lesbianism is conflated with masculinity is a matter recently decided by the Family Court of Australia under its jurisdiction regarding the authorisation of certain medical procedures on minors. In Re A (1994), a 14 year old girl was born with adrenal hyperplasia, a condition which results in an over production of androgens and consequent masculinisation of appearance. The girl was diagnosed at birth, surgery was performed to feminise her genitalia and a lifelong hormone treatment prescribed. Negligence on the part of the parents and infrequent monitoring by the hospital meant that the girl was in fact given insufficient hormones, and she again began to take on a masculine appearance. At the age of 14 she requested a sex change (involving both bilateral mastectomies and a hysterectomy in addition to the construction of male genitals). The court acceded to her request, in part because she experienced 'painful erections in the presence of women' and 'her sexual orientation is towards females' (at 10). Implicit in the court's reasoning is that she therefore is, or feels herself to be, or is comfortably to be viewed

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393See eg USA: Dailey, 1981, Pleasant (mother held to be 'defiant' and 'hostile' at trial) 1993.

as, a little boy - not a little dyke. The choice between these options is never countenanced, in fact, as her attraction to girls is held as the final evidence of her masculinity and of the desirability of allowing surgery.

**Manhating**

A belief that lesbians hate men is evidenced in the judgments in multifarious ways. It is possible that the oft-used epitaph 'militant'\(^{395}\) in this context refers to a fear that lesbians hate men and will try to turn their children against men. In the UK case *B v B* (1991), where the mother was successful, the judge emphasised that this was because she was not 'militant'. As evidence of this 'non-militancy', the judge noted that both the mother and her partner had previously had heterosexual relationships (marriage and engagement, respectively), which suggests that it is manhating which is the element to be most feared in 'militancy' (at 10). Likewise, in the Canadian case *K v K* (1975) the judge noted with approval that the non-militant mother expressed the view that she may return to heterosexual relationships at some time in the future.

In some cases the mother was questioned as to the number of men she knew, and whether or not these men were homosexual.\(^{396}\) Ostensibly the issue was 'male role models' for the children, but an undercurrent persists that it was the mother's own attitudes to men (as well as to heterosexuality) which were under investigation.

If the child/ren in question were male, any anti-male sentiment could be readily interpreted as showing that the mother's care would not be in the child's best interests. For example, in

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\(^{395}\)See Millbank, *supra* n 11, for a note as to the frequency of words such as 'militant' and 'crusading' and their impact upon decisions.

\(^{396}\)See eg Australia *Spry*, 1977, *P.C and P.R.*, 1979; USA: *Collins*.  

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Seselja (Canada, 1994) the mother's reply that she 'hated men' when asked by a social worker whether she was seeing any men was registered as being 'strange' when she was fighting for custody of three boys. In Eveson (UK, 1980) the fact that both the mother and her partner were 'assertive' was used by the judge to suggest that the mother's home was a damaging environment for the male child to grow up in (at 7). Within such a context the meaning of 'assertive' slides into 'aggressive' and from there into 'manhating' with considerable ease.

In cases where the child/ren were female, concern was expressed in the judgments that they would be given a 'balanced' sex education. It was universally favourable to the mother if she expressed a desire for her daughter/s to be heterosexual or stated that she would encourage them in that direction. Such a focus belies a fear that the mother would try to steer her daughter/s away from men, as she herself had an 'aversion' to them.

Hostility on the part of the father towards the mother and/or her partner is commonplace in lesbian mother cases. Yet animosity between the mother's partner and the father was sometimes noted in the decisions in such a way as to lay the blame for this situation entirely on the partner, again suggesting a subliminal theme of the manhating lesbian.

Sadistic

Role playing and power imbalances are read into relationships by the judges such that they conform to a vampire/victim model. As noted in Chapter 4, some of the most common

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397 See eg Australia: L and L, 1983.


399 See eg Chapter 3 'Competing fathers: who cares: a Dad is a Dad is a Dad' section, also see note 83 in Chapter 1 regarding violence against lesbian mothers at the hands of ex-spouses.

cultural representations of lesbians are as vampires, with the vampire/lesbian seducing 'innocent' (less powerful) women away from men and turning them into replicas of herself. There is a literal parallel in the cases which come before the family courts - as the mother’s partner may often be her first lesbian relationship, and so her partner is perceived as having 'turned her into' a lesbian.

The characterisation of the mother/partner relationship as one of sexualised power abuse frequently parallels butch/femme visions of the women and occurs in the judgments at a subtextual level much of the time. Most commonly, the judges will not actually claim that there is role definition between the women,\(^{401}\) but will intimate that the partner is 'dominant' or has led the mother into this way of life. The mother is positioned as 'submissive', passive or immature; not really responsible for the relationship.\(^{402}\) On a few occasions this vampire/victim characterisation is reversed, with the mother positioned as the abuser.\(^{403}\)

The most overt example of characterising lesbianism as a form of sexual vampirism occurs in the US case of Williams, 1990, where the judge stated:

>'Here the evidence reveals that the mother exhibited gross character defects. The mother, while a nurse at Lifeway, actively recruited a patient who was a minor [17 or 18 years of age, disputed, mother's age not noted] 'to engage in an illicit and criminal relationship...In doing so, the mother showed her propensity to feed her sexual appetite without regard to morals, ethics or law. As an employed nurse at this drug treatment program, Marian abused her position in order to take advantage of an underage drug addict whom she desired as a sexual partner' (at 1199).

\(^{401}\)An exception is Australia, P.C v P.R, 1979 and in L and L, 1983 the judge looked for role definition but found none.


Mother/daughter and therefore sexual abuser

References in the judgments to one of the women in the lesbian relationship being in 'control', in 'charge' or 'leading' and 'dominating' the other are frequently oblique, and have been largely discussed under the rubric of butch/femme and sadistic. In a small number of cases the age difference between the mother and her partner has been emphasised within the judgment to the extent that the mother is positioned as though she is (or is old enough to be) her partner's mother. For example, in the US case D.H v J.H (1981), both of the witnesses who were brought by the father to attest to the mother's lesbianism (first hand, having allegedly slept with her) were referred to throughout the judgment as 'young women', 'young ladies' and 'girls'. The most overt example of a mother/daughter construction of a lesbian relationship is the previously discussed case of Williams (USA, 1990). In that case, the mother was held by the court to be responsible for her partner, and her partner's youth and neediness was highlighted in such a way as to suggest that the mother would have her 'hands full' taking care of her partner, and therefore have no room for her 'real' child.

Once the mother or her partner is configured as sadistic, the 'butch' half of a butch/femme pair or the 'mother' half of a mother/daughter pair, she may then be seen as having an inherent interest in sexual partners less powerful than herself. As her power in her relationship with her partner is often perceived and expressed in terms of age and 'dominance', it is therefore no large step to then characterise such a woman as having a propensity to sexually abuse children.

References to the possibility of child sexual abuse are usually oblique, such as referring to the 'physical' as well as 'moral' impact on a child of growing up in a lesbian household.\textsuperscript{404}

\textsuperscript{404}eg USA: Re Jane B, 1976, S v S, 1980.
mention of unspecified 'risks', \textsuperscript{405} the possibility of 'corruption', \textsuperscript{406} emphasising the youth of the mother's lover/s, \textsuperscript{407} or questioning the mother about the safety of leaving the child/ren alone with gay and lesbian friends.\textsuperscript{408} Moreover, the plethora of orders barring partners living in the house with the mother and children, or from being present during (particularly) overnight access contain an undercurrent of fear of sexual abuse from the partner.\textsuperscript{409}

There were also a small number of direct references to the possibility of child sexual abuse at the hands of the mother's partner. In Williams, (USA, 1990) the mother's partner's statement that too many victims of sexual abuse become abusers was taken by the court to mean that she had a propensity to abuse herself. In Re Jane B (USA, 1976) the mother's partner was subjected to a series of questions as to whether she had ever had a 'physical relationship' with the 11 year old daughter or 'any other child' (at 854) and the testimony of a psychiatrist that homosexuals 'sometimes switch affection to another partner' was taken as evidence that the child was at risk of sexual advances from her (at 854). In the US case of N.K.M v L.E.M, (1980) it was suggested by the judge that the daughter's letters to the partner were too 'passionate' and 'adult' to be healthy. Her close relationship with the daughter was therefore suspect as it was suggested that she had exerted a 'direct and baleful' influence on the child (at 185).\textsuperscript{410}

\textsuperscript{405}eg UK: Eveson, 1980 at 5, 7.
\textsuperscript{406}eg UK: B v B, 1991 at 4, 10.
\textsuperscript{408}eg USA: Collins, 1988, Pleasant, 1993.
\textsuperscript{409}These orders will be discussed in detail in the section to follow. For a list of cases where such restrictive orders were made see notes 413, 414.
\textsuperscript{410}See also allegations that the mother's lesbian partner sexually abused her child, unsubstantiated in Canada: Bernhardt, 1980; Australia: G and G, 1988; UK: Re P, 1983 ('corruption').
Sexual, sick and troubled

Common to all of the above lesbian 'types' is the suggestion of excessive, aggressive or uncontrolled sexuality. Likewise, the undercurrent of pathology occurs throughout. These two themes appear in the family law judgments with considerable regularity, unlinked to any specific characterisation of the mother in terms of the 'types' discussed above. Therefore I shall discuss the occurrence of both 'sexual' and 'diseased' notions of lesbianism as separate elements of the Witch archetype.

(i) Sex and altruism: one of these things is not like the other

Lesbianism figures in the cases as synonymous with sex and selfishness. The mother is generally viewed as having 'abandoned' her role as wife-and-mother to pursue a life of sensual delight, oblivious to the needs of her children. In an early US case, the very existence of the mother's lesbian relationship was held to prove ipso facto 'clea[r] neglect' of the children. In a more recent US case, Williams, (1990), the mother lost custody because the court held that the child took second place to the mother's, 'Propensity to feed her sexual appetite without regard to morals, ethics or law' (at 1196).

This dichotomy is so pronounced that the mother may be forced by the court to choose between her sexual identity and her children. In fact, awards of custody and access have frequently required that the mother's partner move from the house, or not be present when the

411See eg Constant A v Paul C.A, 1985 at 9, Mohrman, 1989 at 1286.
412Townend, 1975 at 2831.
413eg USA: N.K.M v L.E.M, 1980, custody dependent on mother ending relationship, her failure to do so leading to custody award to the father; L v D, 1982, mother asked whether she would give up being homosexual for children, replied in negative and lost custody, Pleasant, 1993 access suspended at first instance because mother would not give up lesbian relationship.
children are, and breaches of these conditions have resulted in revocations of custody or access. These type of orders have diminished recently in Canada and Australia, but continue to be common in American decisions. Moreover, voluntary assurances that the mother will give up her relationship with a partner have been viewed in a positive light.

Any suggestion that the mother's relationship is more important to her happiness is damning proof of her lack of ability to mother - for example in the above mentioned case of Townend, 1975, where the mother's diary entry to this effect was introduced into evidence and she subsequently lost custody.

In a Canadian decision, Case, 1975, the judge noted an incident whereby the father kidnapped the child by force as an example of the mother's selfishness, as she returned to her lover rather than chasing the (arguably dangerous) father (at 137). In the US case of S.E.G v R.A.G,


Also, in the USA welfare case of Breisch, 1981 the mother refused to obey a condition that her partner leave the home. This order was to 'foster the close relationship between the mother and son' without the 'disruption' of the partner, and its breach resulted in the child being taken into care (at 819, 821).

415 eg Canada: Robertson v Geisinger, 1991, the judge expressed concern regarding the mother's lesbianism (the father was also gay) but was 'comforted when Katherine made it clear that [the child] would always be her first priority' at 264. USA: Doe, 1981 (adoption) the mother's offer to move her lover from the house (so that her own access-based parental relationship would not be severed by an adoption order to her ex-husband and his new wife) was looked on favourably as evidence of her being a good mother and putting the child 'first' at 802, 803. The judge concluded with the remark, 'There may come a time when the welfare and best interest of her son require that she honour this commitment' at 806. (Contra: Australia Cartwright, 1977 where the court denied the necessity of this move). However, in the USA such assurances were not always sufficient: see USA: M.J.P v J.G.P, 1982, Lundin, 1990.
1987, the mother's openness about her lesbianism was selfish because it 'imposes her preference upon her children and community' (at 167).\textsuperscript{416}

An example of charges of selfishness levelled at the mother in a more subtle manner is the Canadian case \textit{S v S}, 1992. In this case, the mother and father had moved from a city to a small town at the father's behest, prior to the birth of the children. As, at the time of trial, the mother had not had a lesbian relationship, it may at first seem a difficult task to construe her as selfishly imposing her sexuality upon her children. Not so. The mother's plan to return to the city, partially due to the unlikelihood of meeting a partner in the small town, served the same purpose as a lover in this case. Despite numerous reasons for the move, and possible benefits to the children from moving, the judge referred continually to the likelihood of the mother's moving as being intended to search for lovers and as an 'adventure' (at 10, 39, 41, 42, 43, 44, 47). The mother's refusal to see the move as negative was because she wished to 'fulfil her own personal needs' (at 41) and was 'so intent on moving that she is blind to the needs of her children' (at 42).\textsuperscript{417} Whether the mother has a lover or not, lesbianism is a selfish, sexual choice.

This theme is also present in cases which liken the mother's sexuality to a vice, for example by comparing it to addictive behaviour such as drug use, or paralleling it with the father's substance use. For example in the Canadian case of \textit{K v K}, 1975 the mother's lesbianism was 'no more of a bar' to custody than the father's drug use (at 64). In the American cases of \textit{N.K.M v L.E.M}, 1980, the presence of a lover in the house is equated with a 'drug pusher'

\textsuperscript{416}See also USA: \textit{Black}, 1988 the mother 'subjecting' children to her lesbianism at 7, 8; \textit{Pleasant}, 1993 at trial the mother 'subjecting' son to a gay pride rally he had requested to attend, at 5.

\textsuperscript{417}Likewise, Australia: \textit{Spry}, 1977, 'their passion for each other has blunted their perception' of the children's difficulties (in this case, the suggestion of peer trauma) at 76,589.
(or other 'criminal' or 'immoral' influence, at 183) and in Collins, 1988 the concurring judgment suggests that:

'Just as an alcoholic overcomes the habit and becomes a non drinker, so this mother should attempt to dissolve her 'alternate lifestyle' of homosexual living. Such is not too great a sacrifice to expect of a parent in order to gain or retain the custody of his or her child' (at 29).

In the Australian case of O'Reilly, 1977, the metaphor is also present, as the wife's refusal to forsake her relationship with her partner was seen as selfish and held on a par with the father's drinking binges (at 78,605). Moreover, in cases where the mother or her lover actually did use or abuse alcohol or drugs, this trait was commonly noted in the same sentence as lesbianism, so that the two became conflated: ie 'homosexual drug abuser.'

These cases reveal that the focus upon lesbianism as sexual may be a symptom of something more, as they highlight the notion of lesbianism as a secret, illicit pleasure; an indulgence which therefore negates altruism.

The characterisations in the cases discussed in this section reveal that the ideology of Motherhood primarily requires altruism. Asexuality may well be part of such altruism, especially for lesbians as lesbianism is sex - a theme common in popular cultural representations as well as in male pornography, to be discussed in the next section.

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418See eg: Canada: Bernhardt, 1979 at 40, 41; Australia: Harvey and Creswell, 1988, allegations of mother's lesbianism and marijuana use in same sentence; USA: Kallas, 1980, 642 and on three occasions at 643, Breisch, 1981 (welfare) sexual displays and marijuana use discussed in proximate paragraphs at 817, Williams, 1990 at 289, 296, White v Thompson, 1990 marijuana use and immoral sex in same sentence at 1182.
(ii) Every little thing you do is sexual: the pornography of a lesbian life

It is not only the selfish act of choosing a female sexual partner which positions the lesbian mother as a Witch, it is her nature as a sexual being which now contorts everything she does. On reviewing the cases, it is quite astounding the range of behaviour which, when done by a lesbian, constitutes a sexual display or is viewed as an actual sex act. Just as in the days of witchcraft persecutions, every thing a witch did was magic (being able to recite the Lord's prayer, or not), in the cases at hand, everything the lesbian mother does is sex.

Actual sexual activity was sometimes the subject of direct inquiry, usually when the mother denied being lesbian, and the father then brought photos, alleged lesbian lovers, eyewitness testimony of sexual exchanges and letters into evidence, all of which were then pored over to determine whether the mother was, in fact, lesbian. Even when the mother admitted that the relationship was lesbian, judges sometimes wanted to know just how lesbian, by assessing how 'much' sex there was. A discussion of how often, how loudly and where the mother had sex was also brought into evidence under the rubric of the child's welfare - presumably because overhearing it would constitute 'exposure' of the child to lesbian sex and be harmful. At the furthest extreme are the American cases of Lundin, 1990, where there were lengthy discussions as to whether the mother had ever had (lesbian) sex while the two year old child was asleep in the house (at 1274, 1275, 1277) and Chicoine, 1992, which described with

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considerable disapproval the mother's sexual behaviour in a nightclub as 'public', before noting that the children were absent (at 894).

More frequently, the mother actually having sex took second place to a variety of other activities which were viewed as inherently sexual and monitored closely to register their impact. The mother sleeping in the same bed, or same room with her partner, for instance, was noted in numerous cases and described, universally, as a sexual display which amounted to 'subjecting' the children to the relationship or 'exposing children to sexual activities'. Not only the mother, but also the child were questioned extensively about sleeping arrangements, as though these had a momentous bearing on the case.

Likewise, the mother and her lover spending time in the bedroom together during daylight, or walking around the house with their dressing gowns on (or 'partially clad' as the judges put it) was treated as a sexual display. More commonly, holding hands, hugging or exchanging kisses of greeting and departure were scrutinised at length, always with the implicit or explicit understanding that such gestures were sexual conduct or a sexual display, which would, of course, be inappropriate in front of children.


423USA: Black, 1988 at 7.


427See eg USA: M.J.P v J.G.P, 1982, holding hands equals 'lover's caresses' at 393, S.E.G v R.A.G, 1987 and G.A v D.A, 1987 hugging equals 'sexual conduct' at 728, Collins, 1988; Australia: Spry, 1977, Cartwright, 1977, Brooks, 1977, Schmidt, 1979, the mother gained custody on the condition that she would not show 'sexual affection' in front of the child. In only one case I have read did a judge disagree with the focus upon affection and the presumption that it was sexual. In the US case Pleasant, 1993, the mother had lost custody and had her access restricted, supervised and on occasion denied over a four year period, based in part upon allegations that the
The lengths to which judges went to inquire in numerous cases as to whether affection was shown, judges' readiness to see anything as sexual (for example a shower curtain adorned with naked female forms, presumably innocuous enough to be sold freely to the general public, discussed as though it were lesbian pornography in the US case *L v D*, 1982 at 244) and the lengths to which they were prepared to go to protect children from even a glimpse of the terrible sight of affectionate lesbians (usually banning the mother's partner from the house, or from the children's presence428) is so striking on reading the cases that I kept thinking *they must be seeing things*. I contend that the judges saw and described what was to them a monstrous sight - aberrant and dangerous - as the mere view of it could harm children irreparably, like Medusa's head turning men into stone. Moreover, it was a monstrous vision from their own imaginings, as it was they who suggested and searched out what they felt to be these sexual visions - visions which were arguably never perceived by either the mothers or the children in this way. An example of such projection occurs in the UK case of *Eveson*, 1980, where, despite the six year old boy being happy and well balanced, the trial judge continually reiterated that he would 'instinctively' feel his mother's relationship to be 'strange or unusual' (at 4) and 'would learn more and more and it would fill him with dismay and would be very worrying and upsetting for him' (at 7).429

Effectively, the judgments suggest that hugging and holding hands are sexual things to do because lesbians are doing them. Which is, I believe, the key. A primary source of

428See notes 413, 414.

429An example of projection in another context is the US case of *Wernburg*, 1980, where the mother and her partner identify as lesbian, but the judge decided that they *must* be confused about their sexual identities given their heterosexual or bisexual pasts - voicing in effect his own confusion at their choices.
representations of lesbianism is in pornography of every medium, aimed at heterosexual men. Even in popular films, lesbianism often exists as an erotic prelude, or 'tease' to the main heterosexual romance. There is a substantial likelihood that these images have been a source, perhaps the only ones, by which the male judiciary is familiar with lesbianism. So not only are lesbians selfishly consumed by sex and defined by it, the mere sight of them is pornographic. Such an explanation is, of course, untestable, but I suggest that it goes some way towards understanding why apparently well balanced and untroubled children are being so zealously protected from the horror of the arguably everyday sight of two women hugging.

The focus in judgments upon whether a mother is 'discreet' about her sexuality or 'flaunts' it is often taken by theorists to mean that mothers who approximate the heterosexual (middle class, white) ideal as closely as possible will have a better chance of success. This was not always true, as some very discreet and apolitical mothers nonetheless lost custody, and two of the most outrageous 'flaunters' and 'missionaries' imaginable, the Mesdames Schuster and Isaacson, though ordered to live apart, retained custody of their children in 1970s despite appearing regularly in print and on radio with their jointly raised children proclaiming the great benefits of lesbian families (USA, Schuster and Isaacson, 1978).

A few exceptions do not, however, disprove the rule, as it was generally true that the mothers tagged 'discreet' won, and mothers who 'flaunted' lost. However, I suggest that there is more to the rule than meets the eye. Notably, 'discretion' was sometimes taken to mean with

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430See eg Millbank, supra n 11; Polikoff, supra n 227; Boyd, supra n 76; K. Arnup, "'We are Family': Lesbian Mothers in Canada" (1991) 20 (3/4) Resources for Feminist Research 101; Robson, supra n 81.


432The most blatant application of this standard is the UK case B v B, 1991, where the judge made it clear that the mother won because she and her partner were 'private persons' and not 'militant lesbians where the risks... may be so much greater' at 10. However, see contra UK Eveson, 1980, where discretion with the child meant 'slyness and falsity' - so in a Catch 22 situation, the discreet mother lost.
the world at large (the public), and sometimes taken to mean with the children (the private). In some cases discretion in the 'private' realm was held to be of importance and, in other cases, it was 'the public' realm that mattered.

Being openly lesbian and 'indiscreet', then, could mean selfishness or imposition in two respects, which correlate with the previous two sections under discussion. One is that the mother, in staying closeted, not joining organisations and not seeking community support is expected to exercise self discipline (ostensibly to prevent peer trauma) and show herself capable of altruism. She is selfish in being a lesbian, but still capable of making sacrifices for her child, thus proving herself to be a good mother. The second is that in remaining closeted with the child/ren, the mother, in not 'looking' like a lesbian or leading a lesbian 'lifestyle' removes the pornography of her life from the children's view; kissing her lover goodbye is no longer sexual because it is not, apparently, done by a lesbian. Her everyday actions are once again everyday, and no harm is done by viewing them.

In essence, sexuality was synonymous in the cases with sex, and sex with selfishness, neglect and possible abuse. In cases where the mother's relationship was referred to in sexual terms, with words such as 'lover', 'sexual partner', 'affair' and 'paramour', 'active' or 'practicing homosexual', with very few exceptions, the mother lost.434

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433 For example in USA: G.A v D.A, 1987, the mother 'didn't advertise' but this was insufficient as she 'didn't attempt to keep it a secret' either, at 727, and lost.

Pathological lesbian mothers

Aligned with the idea of the lesbian mother as Witch due to her selfish sexuality, is the theme of lesbianism as a form of disease. Within Ellis' model of lesbianism discussed in Chapter 4, lesbians are ill and abnormal, as well as contagious or converting. Many of the theories of lesbianism explored in that chapter proceed from the assumption that there must be something wrong with lesbians; something lacking, displaced or thwarted, because it is a sexual and emotional orientation from which men are excluded. This view persists in family law judgments also.

Lesbians may be viewed as diseased, and thus within the Witch archetype because they engage in non phallic, or what the judges call instead 'non procreative', sexuality. Carol Smart states,

'Sexuality is comprehended as the pleasure of the Phallus, and by extension the pleasures of penetration and intercourse - for men. Although this does not disallow the possibility of [male] homosexuality it undeniably renders lesbianism incomprehensible and pathological. Female pleasure is assumed either to coincide with the male definition or to be beyond understanding.'

Paradoxically, this view of lesbian sexuality may also render the lesbian mother un-sexed, and allow her to be positioned as Virgin, an idea which will be discussed in the section to follow.

The language used by the judiciary to describe the mother's relationship frequently utilised a disease model and did, on occasion ring with a tone of such disapproving incomprehension as

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436 Smart, supra n 29, at 28.
to suggest a bizarre occult ritual. For instance in the US case of Re Jane B, 1976, there are references to the mother's 'abnormal' and 'deviant' relationship and 'clandestine deviate conduct', 'carried on at night in their bedroom' (at 851, 852-4, 856). In a 1982 US case, L v D, the judge referred to the mother's 'deviate' nature with 'bewildered compassion' (at 243), a la hunchback of Notre Dame. Words such as 'deviate', 'deviant', 'unhealthy' and 'abnormal' are less common in recent Australian, English and Canadian judgments, but continue to appear in American cases.

Even seemingly minor deviations from generally acceptable conduct have been interpreted in the case law as evidence of severe disturbance. For example in Re Jane B (1976), much was made of the fact that the mother's partner was silent and spent a lot of time in a rocking chair when the father and other witnesses visited the apartment (eg at 851). In another US case Werneburg (1980), the fact that the mother often moved housing was noted by the court as typifying her flightiness and emotional instability ('she becomes dissatisfied with her neighbours', at 2281) where she could well have been avoiding homophobia for her own and her children's sakes.

Emphasis upon houses which were 'unclean' or 'chaotic' (and in which profanity occurred) acted in some cases as a metaphor for a view of the mother herself as unclean, and her relationships as unhealthy. It is possible that such concerns also reflected a view of


lesbianism as savage, or uncivilised, a point which will be explored in greater depth in Chapter 6.

In addition to the cases mentioned in Chapter 2, where any admitted emotional instability or interaction with the mental health system on the part of the mother were conflated with her lesbianism in the judgments, in cases utilising language which reflected a disease model, such as 'deviate', 'unhealthy' or 'unnatural', the mother lost almost without exception.

**Warrior**

In only one case was there any evidence that a lesbian or Witch archetype was in any way perceived as being a positive, and indeed *motherly* attribute. I refer to the characterisation of the warrior, encapsulating as it does the lesbian/Witch qualities of aggressiveness, ferocity, and a certain measure of barbarity. The case in question is *Re D* (UK, 1983). In that case in a protracted series of legal proceedings, the father had originally been granted custody, the mother had appealed and won, and then the father appealed and lost. Although the judges at every instance were in agreement that an 'ordinary' household was preferable to the mother's home with her lesbian partner, it was held by Sir Roger Ormrod writing for the full Court of Appeal,

>'...the fact is that experience shows that this situation does happen quite frequently. A mother who is very determined to keep contact with her children, particularly when they are young, will often fight very hard for them, the result being that neither the children nor anybody else can establish a stable way of life' (at 12).

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439See Chapter 2 'Lesbians are unstable' section.

440See cases in note 437. The one exception among all of those cases is *Re P*, 1983 - in that instance the alternative to the mother’s custody was state care, and so the mother narrowly won.
Therefore, the court decided it would be 'less disruptive' for the children to be in the custody of their mother.

The ferocity and determination of the mother in this case was viewed in a positive light (the judge dismissed unfavourable adjectives such as 'manipulative' used by the social worker to describe the mother, at 12) rather than as evidence of her aggressiveness or manhating - which would render her un-mother. I believe the reason is that in this case all four children wished to be with their mother, and their wishes were made plain continually over the years of litigation, such that the mother could then be seen to be fighting for her children rather than over them. In this way, the mother, however warrior-like, could be viewed as fighting for her children's welfare rather than her own rights. She was therefore motivated primarily by the good-mother quality of altruism, and her claims did not contradict the prevailing norm that the welfare principle should always overshadow right claims.

I do not mean to suggest that this case is entirely unproblematic. It does, for example, reek of lesbian-as-beast or savage imagery, in the sense that mothers fighting fiercely for their young is a 'natural' quality, often attributed to female animals. Assertiveness or aggression are therefore only acceptable within an altruistic paradigm, and also reflect a certain baseness, a lack of civilisation which is excusable because the primitive drive which causes it is perceived as being outside the mother's control.

In this section, I have argued through an examination of the sexualising and pathologising discourse used by judges that lesbian mothers are configured as Witch in child custody judgments. Once within the realm of Witch, lesbian mothers almost invariably lose custody of their children. Lesbian mothers within the Witch archetype are threats to the gender order and
the presumed indispensability of Father, thus they are viewed symbolically as castrating. There is not even the comfort of viewing the lesbian mother as somehow severable from 'normal' women, because the lesbian mother in the court had achieved 'fulfilment' as a 'normal' woman (or passed as one) and has since rejected/castrated it. She signifies lesbianism as a continuum, or worse still, a choice. As long as lesbianism and castration are conflated, she signifies the castrating possibilities of all women.

The threat posed by the lesbian mother can be defended against in one of two ways. Either the judge can react by removing her child/ren and so defeat and disempower her, or s/he can de-sex her and so remove the major element of threat. De-sexing may also take one of two forms. It may take a very real form - such as granting custody of or access to her child/ren only on the condition that she end her relationship or bar her lover from the house, an option discussed earlier in this section. De-sexing may also be symbolic, positioning her as Virgin rather than Witch, an idea which will be discussed in the section to follow.

III: Virgin

Lesbian mothers are not always placed within the Witch archetype, nor are they always unsuccessful in child custody disputes. My contention is that when lesbian mothers are successful, the discourse used most often reflects the Virgin archetype. Once within the Virgin archetype, the lesbian mother's chances of success are greater than within the Witch archetype for a number of reasons. Positioning the mother as Virgin means that the mother conforms more closely to traditional expectations of femininity. She is no longer seen as anti-social or anti-family in the way Witch is. Virgin also quite literally suggests receptivity to later male advances. There is the possibility of re-conversion of the mother if she is seen as Virgin, as her sexuality has been (perhaps temporarily) led astray and is perceived as essentially pre-male rather than anti-male.


Not real sex, or not much of it

A symbolic de-sexing of the lesbian mother is not as difficult a manoeuvre as it may at first sound. The constancy with which the lesbian, and most particularly lesbian desire, is thwarted in cultural representations\(^{441}\) means that lesbians are symbolised paradoxically as all-sex and yet un-sex.\(^{442}\) As Carol Smart noted earlier, in a phallocentric culture, non-phallic sexual expression is not really sex at all.\(^{443}\) Such a vision is reflected in judgments where, despite a detailed focus on sex and sexuality, the mother's lesbian relationship is nevertheless discussed as a 'friendship' and seen as not quite real.

De-sexing a relationship may be at the mother's instigation, as a way of increasing her chances of success, for instance by moving away from her lover prior to trial,\(^{444}\) or bringing witnesses to attest that her relationship did not appear sexual to the untrained eye.\(^{445}\) In this way, 'discretion' can simply mean the mother pretending not to have sex, thus allowing others to think of her in a non-sexual way.

\(^{441}\)See eg Weiss, supra n 259, Chp 3; Russo, supra n 270, 'Frightening the horses'. See also the section 'A note on narrative and abjection' in Chapter 6.

\(^{442}\)This paradox is well expressed in a Canadian divorce case M v M (1972) 7 RFL 385 (PEI SC) where the ground petitioned for by the husband was the wife's homosexual act. Nicholson J. delivered a judgement some 14 pages in length trying to determine whether or not the wife and Mrs G. by 'kissing and petting' and 'mutually fondling' each other's naked bodies had, in fact, engaged in a homosexual act. Considerable testimony as to these acts was reiterated in an alternately lascivious or agonised process of trying to determine just what it was lesbians did together and whether or not that constituted a homosexual act (as it was not defined in the Divorce Act). The word 'sex' was never applied to the activity, although it was eventually settled that the women's conduct did indeed constitute a homosexual act, on the basis of the wife's testimony that their conduct 'would result in each of [them] reaching climax or orgasm' (at 391).

\(^{443}\)See note 436.

\(^{444}\)See eg USA: M.P v S.P, 1982.

\(^{445}\)See eg Canada: N v N, 1992.
More often the de-sexing in the cases occurred through the use of language which appeared to express the judges' own feelings about the issue, rather than reflect the evidence brought by the parties. Desexing did not always have positive results for the mother, however, and the disadvantages of the Virgin archetype will be discussed in a subsequent section on 'Virgin deadlock'. The impact of the remaining lesbian 'types' (immature, narcissistic, daughter and femme/afraid of men) will be integrated throughout this section.

Not really sexual

Where the mother and her relationship were discussed in non-sexual terms the mother was then firmly within the bounds of acceptable motherhood ideology. She could be viewed as asexual and moreover, her relationship was also acceptable as it was safely within the bounds of female friendship, and the place of men/fathers was not usurped.

The use of language in describing the mother's relationship often revealed a desire to de-sex or obscure lesbianism. For instance the mother's partner was frequently described as a 'friend', 'roomate' or 'companion'. The mother's relationship was often denoted as an 'arrangement' or 'association'. In these situations the mother had a substantial chance of succeeding.


See cases in notes 446, 447. The only cases where unsexual language was used and the mother lost were: Canada: Elliott, 1987 at 7, 22, UK: Eveson, 1980 at 2, 2, 6; USA: S v S, 1980 at 65, Constant A v Paul C.A, 1985 at 5. This is a sharp contrast to the cases where sexualised language was used, and the mother was generally unsuccessful, see note 434.
In characterisations of the relationship between the mother and her partner, if the judge found that there was not a great deal of sex in the relationship, the mother was capable of being seen as Virgin, and her chances of gaining custody improved.\textsuperscript{449} In other cases, if the mother denied being lesbian, or denied that her current relationship was sexual and the judge believed her, the mother's chances of success were good.\textsuperscript{450} Similarly, the possibility that the mother may return to heterosexual relationships, or had previously enjoyed heterosexual relationships and had 'nothing against' them, was held in a favourable light.\textsuperscript{451} All of the above characterisations fall within the 'immature' or 'schoolgirl' conception of lesbianism.\textsuperscript{452} Lesbian relationships are viewed as friendships, not really sexual, and as something which is not fixed or exclusive - a stage which does not define and limit the mother's identity because she may well pass through it.

\textit{Not really to blame}

Lesbian relationships may also be conceptualised as a non-sexual haven to which the mother has flown after abusive experiences with men, a view which accords with the 'afraid of or rejected by men' 'femme' lesbian type discussed in Chapter 4. In such instances, it is intimated that the mother can 'hardly be blamed' for choosing a female partner. Take, for example, the words of Anttell, J.A.D writing for the majority in M.P v S.P (USA, 1979):

\textsuperscript{449}See eg Canada: Daller, 1980 (the judge weighed up admission against the fact that she and her partner had not had sex for a year); UK: B v B, 1991 (the mother 'did not put sex high on her list of activities and interests' at 6); USA: Doe, 1981 (relationship 'sexual at times' at 802); Australia: P.C and P.R, 1979 (judge decided not an 'unduly active relationship sexually' at 78, 607). P.C and P.R was the only case in which the mother lost.


\textsuperscript{452}See also USA: Constant A v Paul C.A, 1985 where the dissenting judge in support of the mother referred to her partner as her 'childhood friend' at 13.
'Nor may we disregard the appalling character of the sexual onslaughts carried out during their marriage by the [father] upon [the mother] for which the divorce was granted. Without detailing his singular conduct or the variety of foreign objects he introduced into her person, we acknowledge our willingness to understand how these could well have stifled forever her initial efforts to enjoy heterosexual love in a conventional relationship' (at 1262-3).

A number of other cases note the father's alcoholism (and consequent lack of financial provision) as a factor in the ending of the marriage and intimate that the mother's choices are therefore not to be blamed as they otherwise might be.453 The mother's relationship is again construed as non-sexual and the mother is largely successful - especially if the father's abusiveness was extreme enough to be viewed as rendering him unfit to parent.454 In this setting, the mother’s altruism in relation to her children also tends to be highlighted.455

The 'daughter' half of the mother/daughter dyad is also present in matters where the judge construes the mother's partner as the 'dominant' one and the mother as passive or subservient. Within such a paradigm, it is also then possible to see the mother as Virgin. She is seen as deprived of agency, having been led astray by someone more powerful, corrupt, sexual and less feminine than herself. Where the mother's partner has had prior sexual relationships with women (and the mother has had none, or fewer), is less feminine in appearance or demeanour or has displayed aggressive or protective behaviour, such a characterisation is not


454See eg USA: M.P v S.P, 1979, at 1262-1263. This may also be evidence that it is possible to see the mother as unsexual because the father is so much more sexual - as in this case in addition to the father's 'perversions', the father's house contained pornography of which the children were aware, including pornographic photos of the new wife, and the new wife talked in an inappropriately sexual manner to the girls.

455See eg USA: M.P v S.P, 1979, Doe, 1981.
uncommon.\textsuperscript{456} In this way, not every lesbian need be a Witch, if there is another lesbian nearby to take on this role, and the mother can continue to occupy a blameless and essentially sexless position.

**Virgin deadlock**

A simple switch in archetype from Witch to Virgin poses numerous problems, both for lesbian mothers engaged in litigation and for feminist theory and engagement with family law. Even supposing that lesbian mothers are capable of 'fitting' the Virgin image,\textsuperscript{457} there are numerous possible exceptions to successful outcomes for the 'Virgin' mother.

There is one strand of de-sexing which occurred in the judgments and was generally less positive to the mother than those discussed earlier. This strand occurred where the mother's relationship was described in terms which suggested that it was not 'real'. Once viewed as unreal, the mother's relationship could readily be seen as transient, unstable, unhealthy or an imitation, and the mother tended to lose. The most common way in which the mother's relationship was rendered unreal was by the use of quotation marks and qualifiers, so for instance the judgment would read, "the 'relationship'...as it is termed".\textsuperscript{458}


\textsuperscript{457}Lesbians who are of 'masculine' appearance or who work as prostitutes, for example, would be incapable of using the Virgin archetype to their own advantage, in the same way that the so-called 'maternal preference' privileged only a limited class of mothers. See eg USA: \textit{Breisch}, 1981, where social workers decided that the mother had a 'masculine appearance', wore men's clothes and had a 'masculine oriented mental status' (this last appellation primarily on the grounds that she argued with them) at 817.

\textsuperscript{458}USA: \textit{N.K.M v L.E.M}, 1980 at 183, likewise the trial judge in \textit{Bezio v Patenaude}, 1980 at 1209, (overturned on appeal) see also \textit{Chicoine}, 1992 'lover' in quotation marks, Australia: \textit{Spry}, 1977 'de facto relationship' in quotation marks at 76, 443. See also the Canadian divorce case of \textit{Guy}, 1982 where the relationship is 'akin to lovers' at 13. In all of these cases the judge using the quotation marks delivered a decision unfavourable to the mother.
In a small number of cases the mother and her partner had engaged in a commitment ceremony of some kind. A commitment ceremony was in no instance seen as establishing the seriousness of the women's intentions towards one another or the stability of their relationship. Rather, judges referred to their actions as a 'mock wedding' in tones of considerable outrage - as though the women were, in fact 'mocking' marriage or suffering under some kind of delusion as to what 'real' marriage is.

The virgin archetype may be also used to such an extent that it infantilises the mother and renders her incapable of mothering. Once viewed as immature or the daughter half of a mother/daughter dyad, the lesbian mother may be pathologised such that she is judged emotionally 'unhealthy', too immature or too unstable to be capable of nurturance and 'good mothering.'

The essentially tenuous nature of the Virgin archetype is well illustrated by the Canadian case of S v S (1992). In that case the mother literally was a lesbian virgin, having identified as lesbian and left the father, but not having had any lesbian relationship at the time of trial (whereas the father had promptly had an affair). In an incredible stretch of logic, the court nevertheless managed to sexualise the mother rather than the father, as her present celibacy was reconfigured in such a manner as to display her future sexual availability. One of the reasons used in denying the mother custody was that the court was unable to determine the later 'influence' the children would come under, as the mother began one or several lesbian relationships. Effectively then, the mother's 'virginity' in that case stood as proof of the promiscuity to come.


For these reasons, the archetype of Virgin provides merely a problematic and temporary source of refuge from the punishments which accrue to lesbian mothers positioned within the Witch archetype. The Virgin does not necessarily result in success, nor, in the longer term, does it transform, as its primary function in lesbian mother cases is to sanitise/disempower the Mother and reduce her to a position whereby she no longer appears threatening.

In this chapter I have utilised a structure of mother archetypes as a method of inquiry into motherhood ideology in Family law. Mother archetypes provide a method to delve beneath what is occurring at a surface level in the judgments, of avoiding the deadlocks which occur in 'rights (and discrimination) talk', such as those discussed in Chapter 3, and of tracing the occurrence and impact of popular conceptions of lesbian 'types' throughout legal judgments. Due to the pathologising nature of the lesbian 'types' and the inexplicability of choices which exclude men, lesbian mothers do not fall within the realm of the Goddess archetype. When the mother is viewed through conceptions of lesbianism which figure her as sexual, selfish, anti-male or anti-social, she falls within the Witch archetype and stands little if any chance of success. If the mother is viewed as un-sexual, or deprived of agency in such a way as to appear blameless, she falls within the Virgin archetype. Once perceived as Virgin, the lesbian mother stands a better chance of success than she would have as Witch, but within a highly circumscribed framework.

Having drawn out in detail various ways in which lesbians are characterised and examined the presence of such characterisations both in popular culture and legal judgments, it then becomes possible to determine the themes which link, and perpetuate, these ideas. I will refer to this as
the ideological 'necessity' of lesbian mothers in the family law system, and focus upon it in the following chapter.
'Analysis of the abject centres on the ways in which the 'clean and proper self' is constructed. The abject is that which must be expelled or excluded in the construction of the self in order to enter the symbolic order, the subject must reject or repress all forms of behaviour, speech and modes of being regarded as unacceptable, improper or unclean.'462

The previous two chapters illustrated the presence, in culture and law, of formulaic lesbian 'types' which are generally derogatory, universally anti-mother and very prevalent. Chapters 2 and 3 illustrated how the 'Witch' vision of lesbians was often sought after and held onto by judges, in the face of contradictory evidence. This chapter aims to draw together the characterisations of lesbians in law and culture to examine what the purpose and effect of such a hegemonic vision of lesbianism could be. What value and meaning does the 'Witch' vision of lesbian hold in ideological terms?

This chapter focuses upon the ideological process of drawing forth and casting out 'the lesbian'. The first section briefly discusses the role of narrative in cultural representations and draws parallels between formulaic narratives in culture and the 'story' told by judges in typical family law cases involving lesbian mothers. The concept of 'abjection' is then introduced as a manner of interrogating the meaning and purpose of such formulaic representations. Abjection is the process of drawing forth and casting out 'the other'. In Judith Butler's words, abjection is 'the mode by which others become shit.'463 The second and third section of this chapter explore the role of lesbian as 'other' and the what the process of abjection offers to traditional familial and maternal ideologies.

462Creed, supra n 298, at 37.

463Butler, supra n 114, at 134.
I: A note on narrative and abjection

Chapter 4 examined the origins and depictions of various 'types' of lesbians in popular culture. The narrative function of the various lesbian images was not discussed because the plot structure and narrative function of lesbians in film are remarkably consistent. This style cuts across all the 'types' as well as various genres - being one of two things, the highlighting of perversity, or the love triangle. Both of these formulaic plot types provide 'closure' by death or heterosexualisation of the lesbian, and the restoration of the 'natural order'.

Perversity

Within film noir, Richard Dyer argues that characters coded as homosexual existed to add to the catalogue of perversions (such as sado-masochism, prostitution) already present in the seamy underworld of the *mis en scene*; thus their function is simply to highlight perversity. In the section on lesbian chic in Chapter 4, I made this claim of most of Madonna's work which features lesbianism. The same claim could also be made of recent psychotic woman films, such as *Poison Ivy* and *Basic Instinct* where lesbianism is featured along with an array of murders, seductions and exhibitionism carried out by a generally unhinged character. Within such an underworld, with its concomitant excessive violence, it is no surprise that the lesbian character usually meets with a nasty death.

The purpose of a lesbian character in such a plot is fairly straightforward. She assists in the process of pathologising the 'bad' characters, and by way of contrast makes the 'good' characters look all the more normal and wholesome.

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464Dyer, *supra* n 252, at 60.
**Love triangle**

The love triangle plot is far more pervasive. The bones of virtually every plot involving a lesbian are thus: lesbian, indeterminate woman, and heterosexual man are the characters; lesbian and man tussle over woman, emotionally or physically, often (in more recent films) following a sexual relationship between lesbian and woman; woman ends up with man and lesbian is vanquished, often in death.\(^{465}\) The vampire film follows the plot structure unwaveringly, with the man usually doing physical battle and killing the lesbian vampire himself, in order to 'save' the woman, both from lesbianism and vampirism, and thereby restore the natural order.\(^{466}\) This structure is as prevalent in dramas, where it is usually described as a 'bisexual love triangle.'\(^{467}\)

The essence of popular representation of lesbianism is thus that it must be killed or cured; whichever path is taken, lesbian desire and lesbian relationships are thwarted.\(^{468}\) This paradox

\(^{465}\) Dyer, *supra* n 252, at 22.

\(^{466}\) See Weiss, *supra* n 259, at 92, 101.


\(^{468}\) Weiss, *supra* n 259, at 54, 59, 83, 101-2; Dyer, *supra* n 252, at 68. The persistence with which lesbian and gay characters meet with death in the film medium led Vito Russo to include a morbidly funny 'Necrology' at the end of his influential book, listing film, character and cause of death in alphabetical tables.
at the heart of most mass media representation of lesbianism; lesbians are created and displayed to show that there really are no such things as lesbians.\footnote{The above pattern was most explicitly put to this purpose in the pulp novels of the 1950s, which acted as cautionary tales and illustrations of the unfeasibility and likely tragedy of lesbian desire. See eg Priest, J Private School, (New York: Beacon, 1959), with a cover which exclaims in part 'Behind the venerable facade of many private schools lurks unutterable vice and wickedness. This novel affords a glimpse of conditions which cry for correction!...Obviously only experiences with virile men could rescue such girls from their own warped passions.' Also see the 1992 Canadian documentary, Forbidden Love. The same point could be made of pornography, where lesbian sex is a non-orgasmic prelude to the 'real' sex, with a man who is either watching all along or who appears in time to break the couple up and proceed to have sex with them both.}

The aforementioned narrative structure bears a stunning resemblance to the narrative thread present in family law cases involving a lesbian mother. In family law cases there is the man (father), sexually indeterminate woman (mother) and lesbian (mother's lover). The mother is characterised as sexually indeterminate, regardless of her self-identification, because she has been previously engaged in a heterosexual relationship and furthermore been 'fulfilled' by creating a family, before 'changing'.\footnote{See eg Chapter 5 'Not really to blame' section.} The mother's partner is characterised as the 'real' lesbian, regardless of her past or self-identification, because she is both outside of the family structure, and viewed as responsible for its rupture.\footnote{See Chapter 2, 'Lesbian relationships are unstable' section.} This is particularly so if the partner has had prior lesbian relationships, the mother has not, and the mother left the father for her current partner.

The characters present in the lesbian mother family law cases depart radically from the traditional lesbian 'story' in one important area - in family law matters, as the parties appear before the court, the man has not triumphed but rather lost out, in quite a public way, to the lesbian. The natural order has not been restored, unlike in film, where there is a closure which destroys the lesbian and the viability of lesbianism. The judge is presented with an unfinished story, and it is up to her or him to provide the 'ending'. For this reason I wish to discuss Julia
Kristeva's theory of the abject to draw out the ideological effect of such narratives. Why is the same 'story' told over and again? What is the purpose of creating and destroying, the monstrous lesbian?

**Abjection**

Julia Kristeva has theorised that, in the process of entering the symbolic order (of language, identity and rules, the 'paternal law') the child is taught about the exclusion of bodily waste, and through this process a sense of the 'I' and the 'not I' is learned. Kristeva, in her work *Powers of Horror*, discusses a notion of the abject present in religion and literature. The abject is that which blurs the boundaries between the 'I' and the 'not I' and therefore threatens a sense of identity, both in terms of the individual self and in terms of the social order. In religion, Kristeva argues, the abject may take the form of prohibition of types of food, homosexuality, incest and bestiality; the thematic link being that all of the above blur a boundary of self and other, culture and nature or human and non human in a way which threatens the existing social order.\(^{472}\) The abject is that which 'disturbs identity, system, order. What does not respect borders, positions, rules. The in-between, the ambiguous, the composite. The traitor...'\(^{473}\)

The abject can never be entirely expelled, but hovers around the edges of the subject, being continually drawn forth and rejected so that the subject can create and maintain boundaries and


\(^{473}\)Ibid, 4.
In this way, social and individual order is maintained by a process of expulsion and delineation of the abject. In Kristeva's words,

'For abjection, when all is said and done, is the other facet of religious, moral and ideological codes on which rest the sleep of individuals and the breathing spells of societies.'

Since the decline of religion, Kristeva argues that the process of abjection has been taken up by the arts. Barbara Creed takes this contention a step further, and specifically explores abjection in horror films. Creed argues that the horror genre exists to draw forth the horrific/monstrous/abject, purify it and thus redraw the boundaries between human and non-human, thereby stabilising the social order. Creed contends that the image of the female/lesbian vampire is a particularly explicit illustration of abjection in Western cultural thought. She writes,

'The female vampire is abject because she disturbs identity and order; driven by her lust for blood, she does not respect the dictates of law which set down the rules of proper sexual conduct...

Because she is not completely animal or human, because she has lovers on the boundary between these two states she represents abjection.

...The lesbian is associated with a number of forms of abjection. She signifies sexual difference and the threat of castration, she causes women's blood to flow and she crosses gender boundaries.'


475 There are strong parallels here with Carrie Costello's work on Race and Sexual Orientation as threats to American ideologies of family. Costello discusses the 'order' as a system of hegemonic ideological maintenance which defines the 'other' for different purposes at different times - and draws together similarities in the ways in which Black Americans and gays and lesbians have been characterised and excluded. For example, 'The Order exalts its position by defining itself against the Others who are definitionally debased. It interprets the intimate relations of the Other as lascivious, promiscuous and sexually savage' (Costello, supra n 50, at 85).

476 Kristeva, supra n 472, at 209.

477 Ibid, 208.

478 Creed, supra n 298, at 14.

This accounts for the pattern in the horror genre of conjuring up the lesbian vampire specifically to slay her and restore the 'natural order'. As mentioned above, the formulaic plot involving the defeat of lesbians crosses all genres, not just horror, and lesbians are arguably abject in many guises, not only as vampires. A close examination of the lesbian 'types' discussed in chapter 4 shows many of them to be pathologised precisely because they are seen as crossing borders, for instance gender boundaries (the masculine lesbian), or boundaries between the natural and the unnatural (mother/daughter). Moreover, Richard Dyer argues that the association of lesbians with bestiality or animalism is commonplace in many film genres, suggesting the human/animal or culture/nature border is traversed by lesbianism.480 This argument is supported by the fact that lesbianism, as conduct constituting a ground for divorce in Canada and the UK in the past, and a crime in some states of the USA, is categorised along with bestiality, rather than as a form of adultery.481

A strong argument can be made regarding abjection in relation to lesbian mothers in family law matters. The vast majority of these mothers are women who were (or appeared to all to be) heterosexual, were encased in woman's 'natural destiny' of marriage and child rearing, and then left the father and family structure to engage in a lesbian relationship (associated with all manner of bestiality and baseness), to which she wished to take her children also, and is prepared to fight in court for the chance to do so. Such a woman has not only broken the prohibition on homosexuality (and is thus suspected of wishing to break the one on incest also), she has appeared ambiguous, or deceitful, and crossed boundaries of identity and behaviour contrary to conventional wisdom ('becoming' lesbian, 'rejecting' men, rather than relinquishing lesbianism, embracing men). She is thus emblematic of the 'perverse', wily

480 Dyer, supra n 63, at 31.

metamorphosis and the possibility of the collapse of order (heterosexuality/nuclear family) discussed by Kristeva as essential elements of the abject. \(^{482}\) Kristeva posits that,

'An unshakeable adherence to Prohibition and Law is necessary if that perverse interspace of abjection is to be hemmed in and thrust aside. Religion, Morality, Law.' \(^{483}\)

When the lesbian mother is before the court, the judge is presented with an unfinished story, a story to which s/he must write the end. While I do not believe that judges are the passive aquisitors of the lesbian 'types' and formulaic plots extant in popular culture, their influence is nevertheless present in some form, however mitigated.

Whatever the judge decides in terms of custody, the formulaic lesbian plot cannot be followed, as the father cannot 'win' the mother back and vanquish her partner, as in film. The man can 'win' the children, however, and the judge can vanquish the lesbian from the family, and from the mother's bed, if not from the mother herself. Utilising a theory of abjection allows for an explanation both of judicial 'horror' at lesbian mothers, and expressions of disgust, and also for the heavy regulation of lesbian mothers through for example, supervision orders and bans upon the children's contact with partners.

II: The natural family

"The family" is presented both in law and in popular culture as the basic unit in society, a sacred, timeless and so natural an institution that its definition is self evident. Its privacy is sought to be protected and its sanctity proclaimed. That it is the fittest place to raise children is again self evident as to not merit question and the hold of the family is strong despite the knowledge that large numbers of individuals live in households which bear no resemblance to the ideal family.' \(^{484}\)

\(^{482}\)Kristeva, supra n 472, at 70, 207.

\(^{483}\)Ibid, 16.

\(^{484}\)Gavigan, supra n 31, at 293.
It has been made clear through the course of this thesis that lesbian mothers profoundly threaten traditional ideologies of both motherhood and 'the family'. Familial ideology becomes integral to a discussion of lesbian mothers and motherhood ideology because of the ways in which lesbian mothers are seen as Bad Mothers precisely because of their (actual or imputed) rejection of The Father and the creation of intentionally fatherless families. Hence in this chapter the ideological necessity of lesbian mothers in family law will be framed in terms of both motherhood and familial ideology in an understanding that the two are often linked and are interdependent as belief systems.

One factor which must be kept in mind during the course of this argument is the site of the cases under discussion - almost without exception the Family Court or the family division of a civil court. This site is one in which hundreds and thousands of heterosexual nuclear families are seen to rupture, and rupture in the most acrimonious manner - as only the most bitter and intransigent of opponents resort to a full scale legal battle, after private negotiation, organised mediation/conciliation and extended legal negotiation have failed. The 'family' stands divided into 'parties' who are 'versus' one another and the time honoured qualities of altruism, sharing and life long romantic/companionate bonds are frequently nowhere to be found.

The paradoxical import of such a situation should not be underestimated, the 'Family' Court being the vantage point from which the most perilous vision of the family is afforded. Nowhere is this rupture between what law says and what law does in relation to the family more delightfully displayed than in Australia in *The Family Law Act 1975 (Cth)* s 43(b), which recognises 'the need to give the widest possible protection and assistance to the family as the

485 This is so however terminology may be juggled to try to obscure conflict, for example in Australia cases are reported as 'X and X' rather than versus, and various recommendations have suggested changing the terms of custody and access orders to be less combative and encourage the concept of 'shared parenting': see eg ALRC, *supra* n 14, at 96.
This statement is part of an Act which regulates the division of property and care of children as a result of unprecedented numbers of divorces, in part possible due to the no-fault system it introduced. This highlights one of the central arguments of this section, that rhetorical proclamations about 'the family' must be made and repeated precisely because of the knowledge that they are not true.

The role and necessity of lesbians in the face of such rupture in meaning is the focus of this chapter, as I contend that the 'Other' of the lesbian mother is used to define the normative 'Self' of 'the family'. In this way, the process of 'abjection' explored in part one of this chapter, will be placed within the context of ideology in this and the following section. Previous chapters have explored the 'casting out' of the other-figure of the lesbian mother. This chapter aims to explain the 'drawing forth' of the other-figure of the lesbian mother to explore the importance of her role within the system as a whole.

The originality and naturalness of 'the (heterosexual) family'

'The prevailing form of family is seen as inevitable, as naturally given and biologically determined. As such, however, it is imbued with a unique social and moral force, since it is seen as the embodiment of general human values rather than the conventions of a particular society.'

Central to the mythic status of 'the family' is a notion of its originality as an ahistorical and acultural, static and universal entity. Within this framework, change and relativism cannot be countenanced without facing destruction. 'The family' is a building block of society, and must, therefore be as solid and timeless as rock. Who better to express this argument than Pope John Paul II, who in a speech in June 1994 denounced 'relativism' and 'doubts on the existence of an objective truth' saying that such 'moral uncertainties' threaten the human race.

Further, he stated that the traditional family is 'a natural right that unites all people and all cultures...The marriage, which is a stable union between a man and a woman that they open to the future generations, not only is a Christian value but an original value. To lose this truth is not just a problem for the faithful, but a danger for all humanity.' 487

In the face of the reality of events in the family law system - the revelation that the interests of women, men and children within any given family may not be in unison (nor may they have ever been) and that families in large numbers are changing through divorce, remarriage, partnerships outside marriage and so on - the dominant conception of 'the family' as timeless and fundamental comes under considerable doubt. That is, if these families in the courtroom are changing (or, in the more alarmist common parlance, 'disintegrating'), then perhaps the family itself is a changeable thing, perhaps the family has not always been as it now is, and perhaps it will soon be different again. Such widespread change is attested to by a wealth of social science data since the 1970s which show fewer and fewer people to be living in relationships known as the 'traditional' or 'ideal' family structure. 488 The very claim for the superiority and moral worth of 'the family', that it is the fundamental unit of society, is thus thrown into disarray if it is seen as a fluid entity changing according to social context.

Continual repetition of the originality and naturalness of 'the family' thus becomes suspect.

That water is the basis of all life is a fact rarely proclaimed by Western politicians, the self

488Nor is religious doctrine alone in asserting the originality of the family. The International Covenant on Civil and Political Rights, for instance, is comfortable asserting that 'The family is the natural and fundamental unit of society and is entitled to protection by society and the State' (Art 23(1)).
evident nature of such an assertion rendering it redundant and also rather uninteresting. Yet the political clamour from all sides to represent 'the family' and 'family values' because 'the family' is the fundamental unit of society is quite deafening.489 Judith Butler claims that, 'heterosexuality is an incessant and panicked imitation of its own naturalised idealisation' and 'that heterosexuality is always in the act of elaborating itself is evidence that it is perpetually at risk, that is, that it "knows" its own possibility of becoming undone.'490 The same argument could be made of the compulsive repetition of the natural state of 'the family' as evidence that it must be claimed precisely because it is not so.

It is here that the value of the ideological project of exhaustively characterising lesbians as imitative (eg lesbians, by virtue of their masculinity are not 'real' women, neither are they men, lesbian relationships are butch/femme, and lesbian couples with children are 'pretended families') becomes apparent in reflecting a sense of originality back upon heterosexual relations. It is worth quoting Judith Butler in full as she argues that,

'Compulsory heterosexuality sets itself up as being the original, the true, the authentic; the norm that determines the real implies that 'being' lesbian is always a kind of miming, a vain effort to participate in the phantasmic plenitude of naturalised heterosexuality which will always and only fail...

Here 'imitation' carries the meaning of 'derivative' or 'secondary', a copy of an origin which is itself the ground of all copies, but which is a copy of nothing. Logically, this notion of 'origin' is suspect, for how can something operate as an origin if there are no secondary consequences which retrospectively confirm the originality of that origin? The origin requires its derivations in order to affirm itself that they are differentiated from that which they produce as derivatives. Hence, if it were not for the notion of the homosexual as copy, there would be no construct of heterosexuality as origin. Heterosexuality here presupposes homosexuality.'491

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489 See eg Barrett and McIntosh referring to this 'unseemly spectacle' in Britain in the 1980s: *ibid*, 12.

490 Butler, in Abelove, Barale and Harlepin, *supra* n 269, at 314.

491 Butler, in Abelove, Barale and Halperin, *supra* n 269, at 312-3.
Representations of lesbians in popular culture and the presence of a lesbian mother in family law judgments, with the implicit construction of her identity or relationship as derivative of heterosexual relations thereby acts to affirm the original, natural and ahistorical primacy of the heterosexual family form in the face of all that threatens it.

*The superiority and goodness of 'the (heterosexual) family'*

Inherent in an ahistorical claim of naturalness for the family as fundamental unit-of-society is the unquestionable benefit and goodness of 'the family' (why, without it, none of us would be here now). 'The family' is the centre from which children are socialised into civilisation, the family is thus the centre of civilisation, the family is *civilised*. Concepts of goodness and civility, like the concept of originality, are relative terms. Simply put, they require the 'other' so that they can themselves be measured against it and proved superior - without the barbarian, the civilised content of civilisation loses its meaning.

Peter Fitzpatrick has argued that the Western conception of social order (from which the jurisprudential basis of law as morally legitimate is drawn), relies upon a sense of the undesirability of the 'state of nature' which preceded social ordering to lay its claim to authority. The so-called state of nature, Fitzpatrick eloquently argues, was in fact a conception by Europeans at the time of peoples in Non-European societies as 'primitive' and 'savage' (notably native Americans). The essence of Fitzpatrick's lengthy and complex argument is that it is the unspoken presence of the mythic 'savage' which shapes law and defines its meaning.492

492 Fitzpatrick argues, 'It is the savage which in 'negative' terms gives content to the 'political' and gives content to law': P. Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992) at 79.
In a similar manner, I argue that the 'other' of the lesbian mother, and the projection of all manner of danger, chaos and pathology onto her allows for a fully rendered sense of 'the family' as a safe and stable haven despite all the evidence to the contrary.494 Take, for example Fitzpatrick's comment that,

"The primitive, to take a figure of the other, is uncontrolled, fickle, irresponsible, of nature, and so on. The European is disciplined, constant, self-responsible, of culture and so on."495

If 'primitive' were replaced with 'lesbian' and 'European' with 'family' the sense of this remark would still hold, and could readily be applied to the case law explored in Chapters 3 and 5.

Remembering Chapter 3, a rhetorical reification of 'the family' in abstracted terms in the judgments was virtually always followed by a decision giving custody to the lesbian mother.496 Such decisions did not necessarily undermine the rhetorical import of the value of the 'ideal

493Ibid, 45.

494Since the 1960s a considerable body of work has explored abuse within families. Much of this work has highlighted that the majority of women who experience physical or sexual assault do so at the hands of a male partner or family member. See eg R. Dobash and R.E. Dobash, Violence against Wives (Somerset: Open Books, 1980); J. Scutt, Even in the Best of Homes: Violence in the Family (Melbourne: Penguin, 1983); D. Russell, The Secret Trauma: Incest in the Lives of Girls and Women (New York: Basic Books, 1984).

495Ibid, 30.

496See Chapter 3 'Competing families: stable is stable is stable' section. Take for example the contradiction inherent in saying, 'It goes without saying that the most desirable situation for the children of a marriage would be for such children to be part of a household comprising both mother and father living together in a harmonious relationship': L and L, 1983, 78,365.
family', but rather marked out the general rule of the centrality of 'the family' as a healthy and happy home and proceeded to allow the individual mother to be an exception to this rule.497 Perversely then, in such cases the lesbian mother's success in a custody claim could actually be seen as affirming 'the family'. Likewise when the general dangers of lesbian mothers were explored (usually in terms of the sexual identity and/or orientation of the children) but the mother in question was found to be an exception (often due to her 'discretion' with the children), such decisions actually affirmed that lesbian homes are by and large a danger to the healthy happy development of children.498 For example, the eight step test to which the lesbian mother was subjected by the court in the Australian case of L and L (1983):

1. Whether children raised by their homosexual parent may themselves become homosexual, or whether such an event is likely.
2. Whether the child of a homosexual parent could be stigmatised by peer groups, particularly if the parent is known in the community as a homosexual.
3. Whether a homosexual parent would show the same love and responsibility as a heterosexual parent.
4. Whether homosexual parents will give a balanced sex education to their children and take a balanced approach to sexual matters.
5. Whether or not children should be made aware of their parent's sexual preferences.
6. Whether children need a parent of the same sex to model upon.
7. Whether children need both a male and a female parent figure.
8. The attitude of the homosexual parent to religion, particularly if the doctrines, tenets and beliefs of the parties' church are opposed to homosexuality'.499

497 The somewhat squeamish reluctance of judges to outline the details of any allegations of the father’s abusiveness in these cases could also be read as an attempt to protect a vision of family life as stable and wholesome rather than as a source of unhappiness and inequality: see Chapter 3 ‘Competing fathers: who cares?’ section.

498 The UK case of B v B, 1991, is one of many such cases, but a particularly shining example in that the judge elaborates upon psychological testimony that the child will not be gay or experience gender confusion at considerable length and accepts the weight of this evidence as generally factual. Then at the very conclusion of the judgment, almost as a postscript, the judge adds that if the mother had been a different kind of lesbian (a ‘militant’ one) the risks for the son would have been very different - thereby implying that just because some lesbians don’t turn their boys into sissies and poofs, does not rule out the possibility that the rest still do.

499 At 78,363- 78,364. Overlooked completely by the Family Court in the subsequent case of G and G, 1988, but resurrected as ‘an extremely handy check-list’ of ‘matters which a court must take into account in arriving at its decision where a homosexual is seeking custody or access to children’ in a gay father case, Doyle, 1992 at 277.
In that case, the mother passed through all eight steps with relative success, aided as she was by her feminine appearance, closeted lifestyle and determination to send the children to Catholic schools and raise them as practicing Catholics, strenuously indoctrinated in the matters of 'normal heterosexual relations, marriage and the procreation of children' (at 78,366). Not only does this eight step test throw into question and thus explicitly problematise such matters as lesbian mothers' capacity for love and responsibility (point 3), balance and objectivity (point 4) it also encodes a privileging of heterosexual parents who are not subject to such a test. Apparently it can be taken for granted, such a test suggests, that heterosexual parents provide a loving, balanced, objective and asexual environment for children.

The family facing extinction

A certain social Darwinism is at work in the invisible links between 'the family' being a dominant social form, 'the family' creating society as we know it and 'the family' being a morally and socially superior force. That is, the prevalence of 'the family' proves it to be the fittest and most proper social institution, which thereby justifies social and political action to ensure its continued dominance, and so on. The paradigm of Darwinism at play in contemporary familial ideology is evidenced by the frequent use of terms in connection with the family, such as 'extinction' and 'endangered species', along with calls for its 'protection' and 'preservation'.

500Peter Fitzpatrick traces how Darwin's theories were used as a circular justification for colonialism; the Europeans conquered, therefore they were naturally superior, therefore they had the moral right and duty to conquer to bring their superior and civilised society to the savages whose inferiority was the reason Europeans conquered. Fitzpatrick, supra n 492, Chp 4.

501For recent examples in the press see: C. Wattie, "Saskatchewan homosexuals" April 29, 1993, Quicklaw (ECNG database); Serjeant, supra n 488; Sweetman, supra n 488.
Hence, when changes in family forms are acknowledged (reluctantly), it is often to bemoan the disintegration of civilised society. A European Parliament Working Paper on Family Policy in the early 1980s stands as an illuminating example of this line of logic:

'It is striking that the widespread disintegration of the concept of the family as the nucleus of society, the increasing instability in family relationships reflected by the spread of cohabitation and divorce, the crisis in traditional moral values, the falling birth rate, which is now approaching or even falling below the rate required for the population to renew itself, are trends common to all the countries of Europe, even if they vary in intensity. Thus the future and the very survival of these countries is at risk.'

Here 'the family made society as it is' is neatly reversed, as a collapse of 'the family' will inevitably lead to a collapse of society. The thread of Darwinism which is left unexplored by such an agenda is the one which interests me the most. That is, if the dominance of 'the family' proved its unquestionable superiority as a social and moral institution (survival of the fittest), does the same logic not demand that a downturn in the prevalence of 'the family' proves the end of its superiority, or more damming still, the temporary illusion of superiority all along. (Was 'the family' the hula hoop of the 1900s?) Within the Darwinian paradigm that made 'the family' great, a lessening of the prevalence of the heterosexual nuclear family form suggests that 'natural selection' has found it no longer suited to its environment, and thereby prone to extinction.

The possibility that 'the family' is disappearing as a consequence of its own lack of adaptability or inherent limitations and inappropriateness is a particularly sticky one to those who have so great a stake in its timeless, static universalism. The method by which the contemplation of such possibilities can be avoided is to look for the threat outside rather than

502 Cited in Barrett and McIntosh supra n 486, at 11-12.
503 An argument most prominently promoted by sociologist Shere Hite in her most recent work Growing up under Patriarchy (London: Bloomsbury, 1994).
inside 'the family'. Maintaining the Darwinian paradigm, another answer offers itself to the question of extinction - an external environmental threat. There could be a toxic, polluted environment, that is being contaminated with an unnatural substance, for example, which is threatening the species. Or there could be some cultural interference with the environment, causing an unforeseen and unnatural increase in predators of the species. Lesbians (and gay men) enter the picture at this point - as a threat 'both uncivilized and unnatural.'504

Within the family law context, lesbianism can be viewed as the pollutant of the natural state of marriage, causing rupture and disintegration. Lesbianism is the threat from without, drawing innocent women away from their natural and proper roles. This view is reflected in the American judgments, noted in Chapter 3, of Schuster (1978)(dissent), M.J.P v J.G.P (1982) and Collins (1988) all of which posit that, 'The most threatening aspect of homosexuality is its potential to become a viable alternative to heterosexual intimacy.' Cultural interference with the natural environment is conceptualised as the state refusing to punish homosexual behaviour, regarding it neutrally or even providing some recognition or protection of homosexual people. The State, by not acting to stamp out the predator, thus allows its proliferation (by a form of vampirism, 'converting' otherwise heterosexual young folk) and 'the family' becomes endangered. Thus, the judges in the three cases above continue,

'If homosexual behaviour is legalized, and thus partly legitimized, an adolescent may question whether he or she should 'choose' heterosexuality...If society accords more legitimacy to expressions of homosexual attraction, attachment to the opposite sex might be postponed or diverted for some time, perhaps until after the establishment of sexual patterns that would hamper development of traditional heterosexual family relationships.'

Such a position is reflected in the reasoning behind Clause 28 in the UK which prohibits Local Councils from 'promoting homosexuality' in a positive or morally neutral light or as a

504Butler, supra n 114, at 132.
'pretended family relationships' and recent changes to education policy in that country which mandates that homosexuality be 'taught' in schools as immoral and inferior to discourage pupils from it. The 'natural' role of Church and State is thus to intervene to punish homosexuality in those that are and discourage it in all others - who, moreover are thereby characterised as those who might well be homosexual given half a chance. Fantastically, familial ideology, by focusing on the threat out there, also manages to suggest the latent homosexuality in everyone and the possibility that given an even political playing field it would proliferate.

In this way, I argue that lesbians and lesbian mothers in particular are not incidental to familial ideology, but absolutely integral to it. They provide the mirror on which to project a distorted and evil vision of savage and sexual women who threaten to corrupt the young and destroy marriage; thereby affirming the originality, goodness and stability of 'the family' which, moreover, is never to blame for its own troubles.

III: Natural Mothers

In the same way that lesbians are integrated in familial ideology to naturalise and affirm 'the family', lesbian mothers are utilised by motherhood ideology to affirm and reinscribe various elements 'natural' to motherhood. Chapter 5 illustrated the extent to which lesbians are viewed as bad mothers, or incapable of mothering at all, and the ways in which such presumptions are played out in the case law. This section aims to draw together the use of archetype in that

505 See eg T. Helm, and V. MacDonald, "Sex lessons shake-up ordered, Education must stress morals not mechanics, says Pattern" Sunday Telegraph December 2, 1993. See also hysterical reactions to proposed anti-discrimination legislation to protect lesbians and gay men and proposed legislation to recognise same sex couples in Canada as undermining 'the family' moral values and corrupting the young: N. Oosterom, "MPs clash on family values" July 9 1994 Quicklaw (ECNG database); Wattie, supra n 501.

506 This is further evidenced by the fact that the utterance of the term 'family values' by politicians, religious organisations and social scientists is never more than a breath away from mention of same sex couples: see eg Oosterom, ibid, Wattie, supra n 501, Helm and MacDonald, ibid ; Welsh, supra n 488.
chapter, and the insights of the earlier sections of this chapter regarding abjection and the 'other' in constructing ideology. In essence, the casting out of the Witch/other is the process by which the Goddess/self knows itself, defining its own boundaries and inscribing itself with virtue.

The position of Virgin here offers an additional layer of complexity beyond the simple dualism of Good and Bad mother. The Virgin holds some possibility of being redeemed, in part because she is viewed as oppositional to Witch (eg passive and asexual rather than aggressive and sexual), and in part because she is imbued with some of the qualities of Goddess (virtue, altruism). The Virgin archetype thereby acts as an intermediary between the two other archetypes while still being problematised as inferior. Tzvetan Todorov notes in relation to the Spanish perceptions of native Americans, Edward Said in relation to European perceptions of 'the Oriental', and Terry Goldie in literature representing indigenous peoples, that the racial 'other' is viewed in a positive or reified manner only when perceived as reflecting values or attributes which the viewer posits as inherent to 'his' own culture (such as rationality). Deviation from the 'norm' of the viewer/self is immediately translated into inferiority and denigrated. 'What is denied is the existence of a human substance truly other, something capable of being not merely an imperfect state of oneself'. The Virgin archetype is therefore arguably as much a part of the process by which the Goddess/self is known as central and definitional of all around it as the other/Witch archetype is.

507 See Chapter 5 'Virgin Deadlock' section.


509 Todorov, supra n 26, at 42.
If such an argument begins to seem circular, this is not entirely accidental, as the process by which a dominant self/group comes to know itself through the creation of an 'other',

'shares with magic and with mythology the self containing, self reinforcing characters of a closed system, in which objects are what they are because they are what they are, for once, for all time, for ontological reasons that no empirical matter can either dislodge nor alter.\textsuperscript{510}

The tenacity with which the notion that lesbians are bad mothers (who must inevitably turn their young into homosexuals, or confuse their gender identities or traumatise them in some other sexual but unspecified manner) is clung to in family law cases, and evidence to the contrary regularly discarded, as Chapter 3 showed. That the lesbian mother is 'bad' in ideological terms is unquestionable; she differs therefore she is inferior. Similarity is used to tightly circumscribe her by making success conditional.

What the process of characterising lesbian mothers as 'bad' shows about what it takes to be a 'good' mother in ideological terms is the focus of the remainder of this chapter.

\textit{Motherhood as asexuality}

The rendering of lesbian mothers as Witch due to an (imputed or actual) active sexuality, a visible sexual identity (she says, or other people say, she's a lesbian) and active sexual choices (she left the father) illustrates very clearly that sexuality is viewed as hostile to motherhood. Moreover the process of de-sexing by which the chances of a lesbian mother's success were increased illustrates that motherhood is still perceived, by the judiciary at least, as primarily as asexual role. This insight is nothing very new, although the clarity with which this old maxim was visible in the case law was nonetheless surprising.

\textsuperscript{510}Said, supra n 508, at 70.
Sexuality, and the exercise of it, was emblematic of far more than this, however. The sexual relationships of lesbian mothers in the case law, discussed in Chapter 5, stood for addiction, selfishness and the exercise of choice. Each of these things were viewed as inherently irrational: not just bad choices but inexplicable ones. Good motherhood was thus conceptualised (in its absence) as involving a denial of agency for mothers.

Motherhood as a denial of agency

Chapter 5 showed that the exercise of sexuality by lesbian mothers was perceived as a selfish and 'bad' thing in the case law. Denial of sexual identity was encouraged by the courts, or failing that, repression of any outward expression of it. To be sexual is bad, to display it even worse - an indulgence, a selfish imposition on innocent children and an alarmed community. An inherently selfish sexual identity could thus be neutralised by evidence of 'discretion', which entailed considerable sacrifice on the part of the mother, to the point of making her relationship a complete facade.

The discovery of selflessness and altruism as fundamental qualities to 'good' mothering, like the requirement of asexuality are also nothing terribly new. What is interesting is the extent to which choice itself is viewed as a bad thing for mothers to be engaged in. The mother, in 'becoming' lesbian and leaving a heterosexual relationship - often contemporaneously - is seen to exercise choice. Even where the mother claims always to have been lesbian as an innate identity and only just 'discovered' it, she is still seen as making a 'choice' to act upon it, rather than continue to repress it (as the judge may suppose she is capable of doing, having been married for however long). Her selfishness arises from her sexuality, but is expressed by way of choice and action which, often, are viewed as thereby rupturing 'the family'. Her
knowledge of self and the fulfilment of her self entails the destruction of the collective entity - 'the family'.

Good motherhood, if it is to be the 'mirror image' of such Bad motherhood, entails a commitment to the family first, a denial of the self and a lack of knowing and activity as an individual self. It is not so much that the Good Mother chooses to put 'the family' ahead of herself, as that there is never seen to be a conflict in the first place. To be part of a family (as opposed to leaving a family) is a passive activity, requiring non-action. The Good Mother is the one who does not leave, does not act selfishly, does not, in fact, act as an individual at all. Motherhood in ideological terms is thus founded upon identity as a denial of agency.

That individualism, a value intrinsic to Western liberalism (and legal liberalism in particular), is so strongly denied in the setting of 'the family' supports the idea that 'the family' is construed as a different realm - the Private - where very different standards apply.

Motherhood as private

Lesbian mothers, by exercising choice and free will and acting to fulfil their own needs and interests are seen to be individualistic and therefore anti-family. In this way, lesbian mothers have somehow stepped out of the 'private' and emerged as fully 'public' beings in the sense that individualism is meant to be a quality of the marketplace rather than the home.51 Indeed,

51 Judith Williamson writes, 'Women, the guardians of 'personal life', become a kind of dumping ground for all the values society wants off its back but must be perceived to cherish: a function rather like a zoo, or nature reserve, whereby a culture can proudly proclaim its inclusion of precisely what it has excluded. It is as if Western Capitalism can hold up the image of freedom and fulfilment and say 'look, our system offers this!' while in fact the reasons those values [caring, sharing, personal development] are squeezed into personal life (and a tight squeeze it is, too) is that they are exactly what the economic system fundamentally negates, based as it is on the value of competition and profit, producing lack of control, lack of choice and alienation': in T. Modleski, (ed) Studies in Entertainment: Critical Approaches to Mass Culture (Bloomington: Indianna University Press, 1986) at 106.
Richard Dyer claims that part of the reason for the hysteria over lesbian mothers is that they symbolise an integration between opposing realms (sexuality and family).  

Another example is the way in which lesbian mothers were scrutinised for 'displays' of their sexuality, with the implicit assumption that 'exposure' to it would harm children. The sexuality of the lesbian mother was thus conceived of as a very 'public' affair, as even sharing a bedroom constituted a display. Mothers who remained married, and increasingly mothers who have subsequent relationships with men after marriage are not conceptualised in this way in the judgments. What goes on in their bedrooms, or for that matter in the kitchen or at the front door, is not the subject of inquiry. It is conceptualised as private, and thus children are somehow immune from the knowledge that their heterosexual parents have a sexuality. This paradigm oddly suggests that it is not only motherhood, but by extension also marriage, that is asexual - which is a queer conclusion to come to with regards to the 'fundamental unit of society'.

**Motherhood as instinct**

Lesbian mothers are conceptualised as 'unnatural' because they have exercised choice to deny their destiny as wives and mothers. They choose a sexual and familial life unconnected to men and are thus pathologised by a patriarchal framework. Lesbian mothers are also conceptualised as 'uncivilised' because they have brought the 'public (or marketplace) values of individualism and free choice into the 'private realm' and shattered the collectivity of 'the family'. They

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512 Dyer, supra n 257, at 162. The same argument could be made of disapproval of 'working mothers', in that they have combined two oppositional worlds in one identity.

513 See Chapter 3 sections on 'Competing fathers' and 'Competing families' for cases in which the father's relationship with his new wife or girlfriend went unexamined. For example, the father's new relationship was not perceived at any stage as subjecting the children to 'displays of sexuality' (with the exception of the extreme case of M.P v S.P (USA, 1979) where the girls were exposed to pornography featuring the stepmother and were regaled with sexual tales involving their father.)
have chosen their own needs (to be lesbian) at the expense of the continuity of the family. Lesbian mothers are therefore anti-social because they do violence to the civilising unit of society and all of the values it holds dear. Their sexuality, I have argued at length, is perceived as rapacious, bestial and uncontrolled and the choices which they make to 'satisfy' it are therefore viewed as irrational.514

The paradox of the lesbian mother as both unnatural and uncivilised gives rise to a certain ambiguity about what the Good Mother is. If Bad mother occupies both halves of the nature/culture dualism at once, and Good Mother is a mirror of Bad Mother, where exactly does Good Mother stand in the dualism? Moreover, it suggests the possibility of common ground between Good and Bad Motherhood. This ambiguity was well highlighted by the UK case of Re D (1983) discussed in Chapter 5. In that case the aggressive tenacity of the mother (in persistent litigation over custody to the children) was construed as evidence of her natural instincts as a mother in such a way that animality (usually associated with lesbians) and good mothering were seen to coexist.

By highlighting the animality of lesbian mothers, ostensibly to give content to the civilised, yet instinctively, Good Mother, an uncomfortable similarity arises in that both Good and Bad mothers are more closely associated with the body and nature than with the realm of the mind and the social. Good mothers will fight for their young as a matter of instinct. Good mothers, as argued above, stay with the father and form families also out of instinct (lack of agency). Good mothering is the heart of the civilising influence of the family. So Good mothers, then, must be both natural and civilised. Which leads to the question: in what manner are mothers - both good and bad - conceived of as of nature. If distanced from culture and the male/mind, are mothers animals?

514See eg USA: Williams, 1990.
By way of example, a focus upon clean and tidy houses is clear in the judgments, as is the assumption that foul language is evidence of bad mothering. Such standards, although arguably applied more harshly with lesbian mothers, can be seen in many family law matters.\textsuperscript{515} Houses and language are taken as outward manifestations of the inner self of the mother. By keeping both home and language clear and ordered, the mother shows that she is civilised and capable of instilling civilisation into her children. That she must distance herself from nature and prove a claim to culture betrays a fear of motherhood as animality.\textsuperscript{516}

\textit{Motherhood needs Fatherhood?}

Possibly the clearest conclusion to be drawn from the foregoing analysis of popular culture and case law is the extent to which, ideologically speaking, motherhood needs fatherhood. Without a father, and with the imputation of anti-male, anti-family sentiment, the mothering of the lesbian mother becomes instantly suspect. Why does she want these children? Her offer of care which pre-lesbian was instinctual or altruistic, post-lesbian becomes evidence of selfishness, a lack of balance, an inability to perceive reality - or worse still, her propensity to abuse.

Good mothers are not subjected to such suspicions, although in the family law context they too often embark upon 'fatherless' families in their contest for custody. Even in rupturing families, Fatherhood persists as a separate-but-equal complement to Motherhood, a psychical if not a physical necessity. There is the illusion of the 'eternal biological family'\textsuperscript{517} with

\textsuperscript{515}Marlee Kline has shown the effect of clean and tidy homes in welfare apprehensions of First Nations children: see Kline, \textit{supra} n 72.

\textsuperscript{516}Children are of nature in this framework also, and are thereby linked to their mothers in their need to have civilisation put upon them. This supports Peter Fitzpatrick's argument that women, children and the mad are often evaluated in the same terms and equated with 'savages': Fitzpatrick, \textit{supra} n 492, at 132.

\textsuperscript{517}A phrase taken from Graycar in Smart and Sevenhuijsen, \textit{supra} n 5, at 184.
'parenting plans' for the future or 'joint custody' to ensure input from both parents, or if the children are young enough, there is the possibility of the mother remarrying and providing a replacement 'father figure' in the future. In contrast, the lesbian mother is seen to sever irrevocably her connection with the father and her relationship is viewed as an attempt to usurp Fatherhood (to replace not only the father but Fathers as a distinct and male class).

The relentlessness with which lesbian mothers are viewed with suspicion, even where judgments are liberal or positive, or a decision is granted in favour of the mother illustrates a continued construction of lesbianism in active opposition to motherhood. Such continual opposition and reiteration of difference, a 'panicked' repetition betrays both a knowledge that all is not as it is represented and a fear of what it could be if it is not as it is said to be.

(i) All is not as it seems

There is a subtextual knowledge present in the judgments, if not in popular culture, that all is not as it seems. Categories of Good and Bad mothers have been laboriously pored over, heterosexuality and lesbianism have been rigidly opposed, the Good Self has been defined with precision through the invocation and expulsion of the Bad Other and yet every category and boundary is known to be meaningless. The very purpose of categories and boundaries are to

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518 There is a grain of truth here in that father's hostility to the lesbian mother may well make 'shared parenting' impossible in a number of cases. This is usually used to deny the mother custody (see eg Aust: P.C v P.R, 1979) but in one instance it was instrumental in a decision to deny a father's request for joint custody and order sole custody to the mother (see USA: Large, 1993).

519 See Aust: L and L, 1983 and UK: B v B, 1991 respectively for examples of judgments which are liberal and successful for the mother in question while nevertheless evincing much suspicion.

520 Judith Butler argues that 'The rules that govern intelligible identity, ie that restrict the intelligible assertion of an 'I', rules that are partially structured along matrices of gender hierarchy and compulsory heterosexuality, operate through repetition. The subject is not determined by the rules through which it is generated because signification is not a founding act but rather a regulated process of repetition that both conceives itself and enforces its rules precisely through the production of substantialising effects': Butler, supra n 114, at 145.
distinguish, to separate and therefore to 'know' the contents. Yet the participants in the family law disputes in question have blurred these categories and frankly crossed the boundaries - before the lesbian mother was a lesbian she was a mother, and now she is a lesbian and somehow she is both. Such a catastrophic traversing of primal boundaries throws into disarray the comforting purpose of having them at all. The response to such 'knowing' of the flimsiness of the construct upon which so much is invested is to reiterate it as truth and as essential. To do otherwise would be to face the fear of what might be, if all is not as it seems.

(ii) The fear factor

Just as the lesbian mother throws boundaries into doubt by her very presence in the family law system, she signifies the possibility that other mothers could do the same. If this particular mother can 'become' lesbian and leave the father, perhaps any or all other mothers can do likewise - leaving Fatherhood behind. Such a signification is especially frightening for a number of reasons, highlighting as it does male dispensability in female sexual satisfaction, and in child rearing as well as positing a fluidity of identity categories and familial forms. To return to Pope John Paul II, such relativism, by threatening the categories upon which familial ideology is built, is seen to threaten the whole human race.

This chapter has aimed to illustrate the manner in which lesbian mothers are integral to familial and motherhood ideology. By their very marginalisation, lesbian mothers create a 'centre' for the dominant conceptions of motherhood and family. This chapter has argued that the figure of 'the lesbian' (Witch) is essential in both culture and law. She is drawn forth and

521Butler, in Abelove, Barale and Harlepin, supra n 269, at 314.
cast out as part of a process by which social order is established, and by the projection of all manner of 'badness' upon her, content is given to the 'goodness' of the established heterosexual nuclear family form and Good motherhood within it.

What the 'badness' of lesbian mothers reveals about 'good' motherhood within dominant ideologies of motherhood is somewhat more complex. Good motherhood is shown to require asexuality, a denial of agency, the perpetuation of 'private' values such as altruism and nurturance, and a constant striving for 'culture' (tidy houses, civilising children).

Good motherhood, is however, sometimes paradoxical, for example combining nurturance (an active task) with a denial of agency (passive) and rendering the privacy of marriage asexual. The construction of Good Motherhood at the site of lesbian mother's contests in law is shown to be a particularly perilous enterprise. Good motherhood threatens at some points to spill over into shared territory with the Bad lesbian mother, as both must prove their claims to civilisation. The stable edifice of Good motherhood is also close to becoming undone when confronted with the lesbian mother - herself the potential for change made flesh. If Bad motherhood exhibits fluidity and contradiction, and Good motherhood is opposition to Bad motherhood - perhaps Good motherhood is likewise fluid and contradictory, varying according to context. Perhaps the most tangible insight this chapter has to offer about dominant ideologies of motherhood is that Good Motherhood is most clearly defined, most knowable as an entity, when there is a contrast available - a worse mother.
Conclusion

This conclusion will summarise the methods and findings of this thesis, and discuss the relative merits and disadvantages of the approaches taken to the question. It will then progress to an exploration of the similarities which my conclusions may have with other feminist theorists writing about motherhood ideology.

I: Methods, meanings and theoretical insights

This thesis has used a variety of methodologies to examine child custody cases concerning lesbian mothers in an attempt to discuss ideologies of motherhood more generally. My initial premise was that lesbian mothers, as 'marginal' mothers, could be used successfully as a focus point to illuminate the 'centre' of dominant ideologies of motherhood. Chapter 6 highlighted the strengths and weaknesses of this premise. Lesbian mothers can be seen as both a very particular threat to familial and maternal ideologies (eg lesbians as child abusers), and also as emblematic of wider fears and concerns (eg mothers don't really need fathers, the family is obsolete). In this way, I believe the 'bottom up' or 'marginal' approach has been and can be successful only if the specificity of the experience of those on the margins is not overlooked in an attempt to draw conclusive generalisations. For this reason, the discussion of similarities in the conceptualisation of lesbians and other marginal mothers explored in the latter part of this conclusion is very tentative.

The two other methodologies used in this thesis were the examination of popular culture and the use of archetype as a manner of structuring the characterisations of mothers in the judgments. These methods were used in an attempt to draw thematic connections and examine the ways in which lesbian mothers were 'seen' by the judiciary. My premise was that the extent of 'horror' at lesbian mothers present in the judgments and the pervasiveness of
'common sense' assumptions amounting to judicial notice betrayed a sense that the judges were 'looking' for something. This insight indicated the possibility of fears and beliefs about lesbians which were not evoked by the specific mother herself but existed as part of common cultural thought in Western society. The discussion of popular culture in Chapter 4 illustrated the extent to which perceptions of lesbians are typified, and Chapter 5 showed that such typologies are very much present in legal judgments. Lesbian mothers are thus viewed through a prism which reflects as much or more about those engaged in the viewing than about the mothers themselves. This process of 'projection' thereby reveals widespread fears and fantasies both about lesbianism and motherhood. Kristeva's theory of 'abjection' was utilised to inquire into the wider meaning and importance of drawing forth and casting out fearful lesbians. It was then possible to examine negative imagery of lesbian mothers as an integral part of dominant ideologies of motherhood and the family.

Some issues, such as maternal selfishness, were readily identifiable in the judgments. Others, such as maternal animality and pathologised sexuality existed at a more subtextual level. The use of an archetypal framework in Chapter 5 was designed to draw out some of these less explicit themes from the judgments and order them in an accessible manner. The use of mother archetypes was helpful in highlighting the mythic level of 'mother' in addition to the mythic level of 'lesbian' which had been illustrated in Chapter 4. The three fold structure of the archetype was useful in drawing out and explaining the mediated success of some lesbian mothers. The 'Virgin' stood as an intermediary between 'Good' (Goddess) and 'Bad' (Witch) motherhood in a way that explained how lesbian mothers could win cases while their mothering roles were tightly circumscribed.

The failing of this structure, as with any structure, is that in seeking to make information intelligible, complexity is lost. A three fold structure disallows the possibility of other 'types', for example that of the 'Warrior', which does not fit properly within it. Because it originates
from a conception of the unconscious, an archetypal analysis is also at risk of being divorced from the material conditions which create and perpetuate such archetypes - thus denying the possibility of changing them.

Despite these limitations, I believe that the use of archetype has been integral in laying the groundwork from which to make connections which traverse different 'types' of mother and different mothering contexts (e.g., custody proceedings and access to assisted conception) by delving beneath the surface discourse of judgments to touch upon deeper fears and fantasies regarding the 'other'. The final section of this conclusion will explore thematic links between the insights of this work and the work of other feminist theorists on motherhood ideology, although I do not propose to re-order the work of other theorists to fit an archetypal framework.

II: The other mothers

The first chapter of this thesis laid the charge that much feminist work on motherhood has generalised about the situation of 'different mothers' (working mothers, black mothers, lesbian mothers, promiscuous mothers) as disadvantaged by the dominant ideologies of motherhood without detailed consideration of what such groups would have in common, and the ways in which they may also differ. While Chapter One outlined some of the ways in which the legal treatment of lesbians may differ from other mothers, this section of the conclusion aims to draw together some of the issues which have arisen in this thesis and show where tentative similarities have appeared.

Noting the work of feminist theorists writing on differing aspects of the ideology of motherhood, in addition to feminist writing on familial ideology, this conclusion will highlight
thematic links between lesbian mothers and other 'bad mothers' through the themes of selfishness, agency, 'threat to the family', animality, otherness and sexuality.

**Selfishness**

In her work on child welfare law and First Nation women in Canada, Marlee Kline notes that the theme of selfishness arises frequently.\(^{521}\) When mothers tend to their own needs (e.g., by escaping from violent partners or relocating in order to get work) they are viewed as neglectful of children, rather than as establishing the grounding from which they as mothers may be able to raise children capably and happily. Susan Boyd has explored the ways in which working mothers are perceived in family law matters as taking away from their child/ren's welfare when engaged in paid employment (whereas fathers in the same situation are seen as contributing to it).\(^{522}\)

There are parallels with both of the above works and this thesis in that lesbian mothers who leave marriages are characterised as shattering families in order to indulge themselves in sensual delights, and are therefore seen as capricious and neglectful. Within the framework of legal judgments it is never countenanced that a lesbian mother remaining in a marriage would be unhappy and that children of an unhappy mother might well suffer themselves.

In short, the application of the 'best interests of the child' test in both welfare proceedings regarding First Nations mothers and family law proceedings involving employed and lesbian mothers is predicated on the unstated premise that while what is good for children is good for mothers (if they care about their kids), what is good for mothers is not good for children

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\(^{521}\)Kline, *supra* n 72, eg at 323, 330.

\(^{522}\)Boyd, *supra* n 72.
(children must come first). In such a light the motherly requirement of altruism begins to look a little like masochism. It is possible that mother's and children's needs are conceptualised in a kind of inverse relation.\textsuperscript{523}

The theme of denial of agency raised in Chapter 6 again arises here, as the mother's choices are instantly suspect as originating from selfish motives, suggesting that decisions must be made by someone else (someone 'objective') to genuinely reflect the child's best interests. This idea finds a strong parallel in feminist work on women's choices to have abortion and women's choices to utilise reproductive services to assist conception. With assisted conception, the decision must be a legislative or medical decision as to who needs, and who should properly be given, access to such services. Herman and Cooper\textsuperscript{524} and Mary Anne Coffey\textsuperscript{525} have argued that 'single' and lesbian women who sidestep decision makers and conceive children without men and without authoritative approval are viewed as selfish and irrational. Strict scrutiny of who is permitted access to sperm supplies implies that it is doctors and parliamentarians who are the fittest and most objective persons to make such a decision. Likewise, Shelley Gavigan notes in her work on abortion that access to abortion, even in liberal jurisdictions, is premised upon a doctor's opinion that it is a necessary step for the mother rather than the mother's own decision that her circumstances are not optimal for birth and child rearing.\textsuperscript{526}

\textsuperscript{523}Within my study, the US case of Breisch (1980) is the best example of this, see note 414. An even more overt expression of such a concept is found in 'oft quoted dicta' by Freedman, CJM in a Canadian welfare case Children's Aid Society of Winnipeg v Lambert (Unreported, Man CA, Jan 24 1979), 'In our view another chance for the mother is one less chance for the child; and it is the child's welfare that must be our paramount concern'. Quoted with approval in Winnipeg South Child and Family Services Ltd v CW (1990) 69 Man. R (2d) 78 (Man. Q.B).

\textsuperscript{524}Supra n 139.


While the connections between lesbian mothers in family law and such works on motherhood and the medical establishment are not immediately apparent, strong thematic links appear at a subtextual level. Women seeking abortion and access to assisted conception (as an alternative to intercourse with men or outside of a 'stable heterosexual union') although seeking very different goals are conceived of through a prism of motherhood ideology that characterises them both as unnatural. Because they are acting in a manner perceived as unnatural, their choices must be supervised and their agency as rational decision makers denied. Likewise, lesbian mothers were characterised in the case law explored in Chapters 2 and 5 as unnatural mothers, to be regarded with suspicion and Chapter 6 argued that lesbian mothers' exercise of agency removed them yet further from the bounds of good motherhood.

**The family**

From the perspective of familial ideology, just as abortion denies (potential) fathers their children, 'single' and lesbian women who avail themselves of assisted conception deny children their fathers, mothers who leave marriages for lesbian relationships and claim custody seek to deny children a (live in) father. All are therefore framed as selfish; anti-family and thus anti-mother for actively denying the importance and centrality of fatherhood.

Katherine Arnup and Susan Boyd have both examined the extent to which hostility towards lesbian mothers, in Canadian and English family law decisions respectively, is

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527 Whereas having children within a marriage is so natural and unremarkable an event that it requires no supervision from the state unless the children are severely harmed or endangered.

528 Arnup, supra n 66.

529 Boyd, supra n 51.
predicated upon fears of a challenge to the 'traditional' family form. Carrie Costello draws explicit parallels with the denigration of gay and lesbian families and Black families in America, positing that both threaten the racial 'purity' of dominant white heterosexual culture epitomised in the nuclear family form.\textsuperscript{530} Chapter 6 of this work argued that the denigration of lesbians as imitative, inferior, contagious and dangerous is an integral part of familial ideology, necessary to assure the symbolic position of 'the family' as central, stable, universal and good. This argument finds a parallel with Costello's that, 'The Good Society knows and organises itself by rejecting and controlling the Deviants',\textsuperscript{531} although I go further in suggesting that the 'Good Society' actually draws forth the 'Deviants' in addition to expelling them.

\textit{Of nature, bestial}

Another similarity in Kline's above mentioned work on First Nation mothers and this thesis on lesbian mothers is the judicial concern shown over 'clean and tidy homes' and how a failure to meet these standards is used as evidence of 'bad mothering'. This suggests that both lesbian mothers and First Nations mothers are conceived of as 'of nature' in dominant ideology, and must prove their claim to 'culture'.

Carrie Costello has argued that a dominant ideology is capable of creating an 'other' which it views as debased and bestial on any number of grounds of difference - most particularly on the grounds of sexuality and race. Once debased, both the 'other', and by extension their intimate relations, become 'lascivious, promiscuous, and sexually savage'.\textsuperscript{532} Costello argues that once

\textsuperscript{530}Costello, \textit{supra} n 50.

\textsuperscript{531}\textit{Ibid}, 81.

\textsuperscript{532}\textit{Ibid}, 85.
conceived of as essentially savage, attacks upon or threats to civilisation can be imputed to the 'other' (black men as rapists and thieves, lesbians and gays as child abusers), thereby justifying a continuation of oppression and denial of personhood. This argument finds a parallel in this thesis whereby the difference of lesbian mothering was translated to inferiority, inferiority equated with animality, and animality viewed as requiring repression.

The Other

Marlee Kline demonstrates how First Nation cultures are frequently viewed as an homogenised whole, such that judges in Canadian welfare decisions would place a child with a First Nation family or parent who was from a culture entirely different from her/his own while believing that this was sufficient to ensure cultural continuity.533 This suggests a commonality with this thesis in the sense that both First Nation and lesbian mothers are viewed as 'other' to the extent that each group occupies a place as a symbolic whole rather than individuals being seen as differentiated and complex, (although the effects of this homogenisation are, of course, different for both groups). Lesbian mothers in the cases under study were frequently discussed in the general, as a class unquestionably similar who would of necessity have this or that effect upon children. This conception of lesbians as a class was evidenced both by 'common sense' presumptions against lesbian mothers and of expert and documentary evidence positive to lesbian mothers.534

The interplay between an homogenised view of 'the other' and the focus upon the welfare of the individual child also occurred in both lesbian mother and First Nations cases in such a way


534See latter parts of Chapter 2 and Chapter 5.
as to obfuscate consideration of structural inequality. A focus upon the child's 'best interest' meant that judges did not need to take into account the discriminatory effects of their judgments. Thus the devastation of Native communities by the removal of children need not be considered if the child at hand is seen to be 'better off' in a non-Native family, and the possibility of stigmatisation of the children of a lesbian mother is sufficient reason to grant custody to a non-lesbian parent, thus re-enacting and re-encoding such stigmatisation. The 'other' thus can be seen as a whole, at the same time that the effects upon them as a collective group or community can be disregarded.

**Sexual**

Julia Brophy has argued that the welfare principle has been applied in child custody matters in such a manner that it is the mother's sexual behaviour which becomes a primary focus of judicial inquiry, the experience of lesbian mothers providing the paradigmatic example. Some feminist theorists have expressed the opinion that the same kind of scrutiny extends to both 'promiscuous' or 'adulterous' heterosexual mothers and lesbian mothers, sometimes conceding that the scrutiny of lesbian mothers is more severe.

While I believe that the cases in my study did reveal judicial disapproval of active sexuality and a conception of motherhood as an asexual role, I argue that lesbian sexuality was emblematic of far more. It was not just sexuality, but a *pathologised* sexuality, viewed as both uncontrolled and diseased, which was the subject of concern. While extramarital heterosexual sexuality was at one time viewed as inherently pathological, such a conception has lessened over time, particularly with the increase of cohabiting heterosexual couples in Western society

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535Brophy, *supra* n 85.

536See eg Frug, *supra* n 123, at 340.
and increased recognition of such couples.\textsuperscript{537} Thus, I believe that the closest current parallels to the construction of lesbian mothers may be found in the legal treatment of mothers who are regarded in a manner both sexed and pathological - for example mothers who are identified as prostitutes or as survivors of child sexual abuse. The treatment of these two groups in legal discourse have a further similarity in that their identity is regarded as transferable to their children, or 'contagious' in the same way that lesbian mothers' lesbianism is.

There is not, to the extent of my reading, a body of work available on mothers who have been sexually abused as children and their interactions with either the welfare or family law systems. However, based on the few cases which arose in my study,\textsuperscript{538} and comparisons with a small number of Canadian cases found searching the Quicklaw database,\textsuperscript{539} tentative common threads arose. When mothers were identified within judgments as having survived childhood sexual abuse, it was to suggest one or more of the following possibilities: that the mother was a potential perpetrator of abuse, that the mother could not adequately protect her child/ren from sexual abuse, that the mother was 'obsessed' with sexual abuse and would instil fear or a false complaint of abuse in the child/ren, or that the mother was chronically immature.\textsuperscript{540}

Linking all of the various characterisations was the sense that a mother who had been abused

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\textsuperscript{539}See welfare decisions: New Brunswick (Minister of Health and Community Services) v (C) S (Unreported judgment, NB QB, October 1, 1990); Re (J) M (Unreported judgement, Alt. Prov. Ct. September 9, 1988); Children's Aid Society of Halifax v YL (Unreported judgment, NS Fam. Ct, October 29, 1991); Alberta (Director of Child Welfare) v (T) R (1990) 70 DLR (4th) 306; Winnipeg South Child and Family Services Agency v (D.D) S (Unreported judgment, Man. QB, January 23, 1990); child custody decisions: (HB) M v (JE) B (Unreported judgment, BCSC, June 21, 1989); VAL v JFL (Unreported judgment, Ont Ct Justice, March 21, 1994).

\textsuperscript{540}This is not to suggest that all of these things were impossibly untrue in the cases to hand, but rather that inferences were being drawn and presumptions made as psychologists and judges interpreted the mother's history in a particular manner as necessarily \textit{causal}.
was incapable of providing safety and nuturance, was psychologically 'at risk' and would, by her actions or lack of them, somehow 'infect' her child/ren with her own experience.

Although a significant body of writing from a feminist perspective exists on prostitution and sex workers, legal work in this area tends to focus largely upon criminalisation of prostitution and inadequate legal protection of sex workers from crimes such as sexual assault.\textsuperscript{541} Carol Smart has noted the ways in which legislators and Magistrates in the UK characterise prostitutes as 'promiscuous' and as a fundamental threat to 'the family and the nation'\textsuperscript{542} - a characterisation which finds strong similarities in dominant views of lesbians discussed in Chapters 5 and 6 of this thesis. Mothers who are prostitutes may also be scrutinised as liable to 'pass on' this aspect of their identities to their child/ren in the same way that lesbian mothers and sexually abused mothers are presumed to.\textsuperscript{543}

This conclusion in conjunction with the preceding chapter suggests that the legal conception of lesbian mothers has much in common with the ways in which 'other mothers', particularly Native Canadians and African Americans, are conceived by dominant discourse. Analogies between race and sexuality have been drawn too often and too hastily (especially by white people wishing to make a political 'point') to be free from suspicion. Therefore it must be stressed that the suggestion of some elements of commonality is a tentative one drawn from a


\textsuperscript{542}C. Smart, "Legal subjects and sexual objects: ideology, law and female sexuality" in Smart and Brophy, \textit{supra} n 5, at 50, 52-55.

\textsuperscript{543}See eg the remark of Robson, Prov. Ct. J 'The mother was admittedly a prostitute for many years and I can see these daughters going the same way' (of two girls of 13 and 11) without any evidence in support. \textit{Children's Aid Society of the Regional Municipality of Waterloo v (BA) R} (Unreported judgment, Ont. Prov. Ct, May 7, 1987) at 22.
limited number of works, and that the commonality I posit is one of an 'otherness' created by racism and homophobia, while acknowledging that the actual experience of racism and homophobia may differ radically.

Unfitness and non-idealness are generally held as a common link between various groups of mothers in feminist work on motherhood ideology, but the origins of such a link have been scarcely touched upon. I hope that this thesis has contributed to a body of work which focuses upon the margins and from which it is possible to begin to ask where and how connections between differing groups of women in relation to the ideology of motherhood arise.

I would like to stress in conclusion that the 'subjects' of this intellectual inquiry, the lesbian mothers who fought lengthy court battles, have been, and continue to be, bullied and derided by the legal and mental health systems in all of the countries of the study - particularly in some states of the USA where restrictive orders regarding mothers and their partners continue to be accepted as valid judicial action to 'protect' children. No matter how stylised and removed from 'reality' reported cases become, it is still clear on reading them that they have exacted a heavy toll on the women involved.

Whether lesbianism is currently chic or not, Adrienne Rich's words still hold true today:

'Two women sleeping
together have more than their sleep to defend'.

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It is a tribute to lesbian courage that in the face of the depressing tirade of homophobia which available case law largely constitutes, women have fought and keep on fighting.
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