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Parallel Lives: Women's Rights and Lesbian Rights Litigation

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I love the title of this panel because it gave me a chance to think about the historical themes and emerging issues in law related to women's rights, which of course is a mere endless set of possibilities.

I spent much of the last decade doing lesbian and gay civil rights litigation, and the question that I will focus on today grows out of that work and is a comparative one or at least a relational one. The question is this: What is the relationship between women's rights litigation as it has evolved in the last thirty years and lesbian rights litigation during that same time period? Are there connections or are there disconnections and what are they?

I am first going to talk about why I am asking the question and then talk about three points at which there are arguably connections, but my ultimate, though tentative, conclusion is that the connections are fairly limited. A further caveat: this is an early work in progress that will surely benefit from further discussion today.

I am asking the question in the first place because as a lesbian and gay rights litigator and feminist, it continually struck me when I was at Lambda Legal Defense and Education Fund – where we focused on lesbian and gay rights litigation – that lesbian rights cases are typically treated as gay rights cases and not women's rights cases, both by the organizations that do gay rights or women's rights work and by the courts. A lesbian presenting a case in court is typically viewed as bringing a lesbian case, not as a woman bringing a women's right case. For purposes of thinking about the relationship between women's rights and lesbian rights work, I am interested in both specific legal cases and broader themes and doctrinal developments. Have they been the same in work for lesbian rights as for women's right generally, or very different?

Now, you might think it obvious that, of course, lesbian rights work is women's rights work and that the two are actually not just related from the larger standpoint of lesbians are women but also from the doctrinal or theoretical standpoint. Before I turn to litigation, I want to be theoretical for a moment regarding our comparative inquiry. For many years women of color have pointed out that much of what is in feminist legal theory deals marginally, if at all, with the relationship between women's rights and race. Even today, articles addressing feminist legal theories will often include a footnote that cites two major articles critiquing feminist legal theory for the failure to embrace and treat as integral the way that race shapes the lives of women. But often too, that footnote seems to be the stopping point in the effort to fully integrate the consideration of race in feminist legal theory. While this integration occurs sometimes, it is not very common.

The body of feminist legal theory often also attempts to drop a footnote or include a couple of paragraphs about lesbians before re-

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turning to the "real" subject, which is theorizing about the relationship between law and the constructs of gender. The footnote is a reminder that the author has not forgotten that lesbians' experience in relation to the law is often distinct from that of heterosexual women. But at the same time it is a strong, albeit unarticulated statement fully integrating that lesbian lives will destabilize the project of feminist theorizing about gender and the law.

Let me just say right at the outset that I am speaking in generalities and that exceptions exist to what I am suggesting. However, more importantly, my point is not intended as a criticism of feminist theory. Instead, I want to question whether lesbian legal theory really belongs in feminist legal theory at all. Is it appropriate that feminist theory simply includes a footnote or a quick mention of lesbians, but instead goes on to discuss gender without reference to sexual orientation – without reference to how gender is experienced by lesbians? My answer, probably not surprising at this point, is that this approach is partly reasonable and in part unreasonable.

And with that theoretical framework in mind, I want to turn back to the litigation – but one more footnote. When I talk about women's rights work, I am really talking about the kind of work that is done by organizations like NOW Legal Defense, that identify themselves as feminist legal organizations, and when I am talking about gay and lesbian rights work, I am talking about the kind of work that is done by groups like Lambda Legal Defense and Education Fund – my former employer – that identifies itself as a lesbian and gay rights organization. And perhaps the fact that one of the other major national public interest organizations has separate projects to address women's rights and gay and lesbian rights helps demonstrate my theses regarding the separateness of lesbian rights and women's rights work. Obviously, litigation is also taken on by private individuals and that litigation can be as much impact litigation as the legal litigation of these groups, but because of time and for simplicity's sake I will just focus on these organizations.

I want to talk about the relationships between lesbian rights and women's rights litigation in three different ways. First, we will look at some of the ways in which lesbian rights litigators and women's rights litigators have made alliances; then at the question of whether sexual orientation discrimination is a subset or particular manifestation of sex determination, in which case lesbian's rights work should or could be thought of as a type of women's rights work; and then lastly look briefly at one area in which lesbian rights work and women's rights work might conceivably have a close and maybe even an overlapping relationship – although I think this presumption turns out not to be true.

So first, the alliances. Lesbian and gay rights organizations occasionally sign on to *amicus* briefs in cases filed by NOW Legal Defense or other women's rights organizations. However, it strikes me that although the alliances were for our mutual benefit, what lesbians as lesbians would get out of these lawsuits is actually distinct from what women or girls as women or girls would get out of these lawsuits. Again, to restate the obvious, lesbians are women so to the redress at issue, a favorable reading would also benefit lesbians. But my question here is whether a victory in any of these cases actually bears on the lives of lesbian women in the same way as on the lives of other women.

So for example, Lambda for years has signed on to *amicus* briefs challenging restrictions on abortion and other restrictions on women's reproductive freedom. Why? Obviously, there is political solidarity. Obviously, lesbians can get pregnant, lesbians seek abortions, lesbians want to access to reproductive services, etc. But why would these cases actually matter to lesbians from a legal rights perspective assuming that most lesbians will not be seeking to terminate unwanted pregnancies? The answer here is less about wanting access to abortions than about a core shared concern and commitment to ensuring body autonomy. If the state can deprive a woman from the right to terminate her pregnancy, what argument is left for challenging a state's restriction on consensual sexual conduct between adults, such as sodomy laws that criminalize sexual conduct between consenting adults?

Likewise, a women's rights group may sign on to a brief in a case supporting the right of a gay-straight alliance to meet in a public high school. Certainly there is a commitment there in women's rights organizations to the rights of

lesbian youth. But I think also there is a concern, I assume more fundamentally, that restrictions on gay-straight alliances could also lead to restrictions on access to other sexuality-related services for young women. The concern, presumably, is that the line drawn to restrict gay rights groups can easily be extended to prohibit all conversations about sexuality in school, which would be very harmful to women or girls generally. So in short, while the alliances exist and are mutually beneficial, there is not necessarily a lot of overlap between women's rights and lesbian rights. This is not to diminish the value of alliances, but the point of actual intersection between the rights of women and the rights of lesbians is not clearly apparent from these cases in which both groups are working.

The second point of possible overlap is in the theory that sexual orientation discrimination is a form of sex discrimination. And if the argument works, then it would seem like distinction between lesbians' rights and women's rights is really an artificial distinction because it is all sex discrimination. The argument goes like this – lesbians are discriminated against because we don't conform to social sexual expectations of what a woman should be sometimes by appearance, sometimes by demeanor, and more fundamentally by the choice of partner. In other words, when lesbians are maltreated, it is sex discrimination at fault because by having female partners lesbians are defying social sexual expectations.

Now, this may or may not be a very good argument from a theoretical perspective, but from a litigation perspective is has not enjoyed a great success record. If the argument did prevail, it would certainly be advantageous to lesbians to be able to rely on sex discrimination protections to challenge anti-lesbian discrimination, especially because there are relatively few protections against sexual orientation discrimination. But for women generally, the courts generally (but not always) recognize that sex role stereotyping is a bad thing; that it is impermissible that treating women differently or badly because they don't conform to sexual stereotypes constitutes sex discrimination. So it would be a terrific development for lesbians, but perhaps not significant at all for women if this argument was actually won.

Given my being the moderator and not wanting to overstep too much my time constraint, let me just jump to the third point which is a specific area of overlap. Perhaps not surprisingly, it is in the family law arena where lesbians' and women's rights are litigated and appear to overlap. The example I want to offer you is in the area of custody and visitation. In making determinations about custody and visitation, courts regularly consider a parent's sexual relationship with a third party. In many cases, courts will not change custody or visitation unless it is demonstrated that the parent's relationship is actually harmful to the child. When the parent has a same-sex relationship, however, courts are much quicker to presume harm than in the case of a heterosexual relationship. But the truth is that courts actually invoke pretty similar language when they are assessing whether the parent's relationship with a third person is harmful.

Consider this characterization by a Virginia court in 1991, following an order that the mother should have no overnight guests of the opposite sex during the child's visitation. The court commented that exposing children to their parents living with persons to whom they are not married has been disfavored, and the moral climate in which children are to be raised is an important consideration for the court. In a 1986 ruling in Florida upholding a ban on overnight visitation to the mother based on her cohabitation with a boyfriend, the court specifically noted that courts play an important role in protecting and preserving the institution of marriage and the family, and that they are not powerless to prevent impressionable young children from being thrust into the middle of a cohabitation living arrangement which would tend to foster the development of a distorted view by such children of acceptable norms of family life in our society. And in many cases involving lesbian parents, you hear the same thing. In 1998, for example, an Indiana court observed that "it is not puritanical or unreasonable to attempt to shield a child of a tender age from the sexual practices, whether those practices are heterosexual or homosexual, such protection is sound practice designed to foster the child's emotional well-being." This idea it is widely employed. So we would think that these restrictions represent direct overlap between lesbian rights

and women's rights generally. And I do think that heterosexual women would gain from a court ruling rejecting concerns about third party relationships. After all, the argument would go, if restrictions cannot be imposed on a lesbian parent without showing harm how could restrictions be imposed on the heterosexual parent without the same showing?

But the converse is not necessarily true, as anti-lesbian bias has deep roots regarding expression distinct from non-conforming sexuality condemnations of relationships between unmarried women and male partners. For example, a much-criticized recent opinion observed that "homosexualct is and has been considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and God, upon which this nation and our laws are predicated. Such conduct violates both the criminal and civil laws of this state and is destructive to our basic building blocks of society, the family . . . it is an inherent evil against which children should be protected." That is a different level of venom than any you will see in cases restricting the rights of heterosexual parents. Now that level of venom doesn't appear explicitly in an awful lot of cases, but it is my strong sense that it underlies many cases.

So where does this leave us? Just to jump right into the very end of my conclusion. We need to consider at least two things regarding the relationship between lesbian rights and women's rights work. One, I think it is invaluable to recognize that there are distinctions between women's rights litigation and lesbians' rights litigation, and these are real. And I think our theoretical and strategic challenged, which can be addressed during the next anniversary of the *Women's Rights Law Reporter*, is how we then continue the effort to cross and bridge these theoretical and strategic divides.