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Law and Literature: Representing Lesbians

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What is involved in representing a lesbian in law or in literature? The premise of this article is that the work of novelists is enough like the work of lawyers that useful insights can be drawn in at least one direction. That is, lawyers can learn how to represent lesbian clients better by studying books with lesbian characters.

The work of a lawyer is, in some respects, like the work of a novelist. Litigation is a story-telling contest. To win, a lawyer representing any client before a decision-maker must tell a compelling story. This story is not pure fiction; the lawyer is obligated to present the truth, but truth is a conclusion. Every one of us experiences the world differently. From our particular vantage points, we see and hear what others do not, and we miss some of what they perceive. Six witnesses to the same event will swear to six different versions of it, and none will be lying. The lawyer's job is to take these conflicting accounts and, by selection and emphasis, construct a version that will convince the finder of fact. A litigator is a technician of the truth.

The lawyer needs convincing characters and a strong plot for her story as much as any novelist does. Generally speaking, the lawyer wants to portray her client in the most appealing light possible, in
order to show that the client's actions and motivations are justified. Presenting a believable version of any client's character involves imagining it, constructing it, and presenting it. Usually the hard part begins with construction and presentation, but sometimes—as when representing a self-identified lesbian, or a woman who is likely to be perceived as one—the hard part begins earlier. If the client has proclaimed herself a lesbian or is likely to be perceived as one, or if the case itself is somehow intertwined with the idea of lesbianism, the lawyer is unable to rely either on the fact finder's presumption that the client is heterosexual or on the hope that the fact finder will find the client's lesbianism irrelevant. In these cases, the lawyer cannot avoid grappling with perceptions about lesbianism. Any attempt to avoid this issue will only make the client vulnerable to innuendos she cannot challenge. In order to protect herself, she must confront, understand, and master the stigma.

This is not an easy job. Our culture is rich with mutually inconsistent and generally unfavorable stereotypes of lesbians. Lesbians are predatory, possessive, promiscuous, jealous, sadistic, masochistic, unhealthy, bitter, man-hating, masculine, aggressive, frustrated, over-sexed. Creating a favorable image for a lesbian client requires challenging these stereotypes—certainly not merely selecting from among them.

Fortunately, the lawyer need not struggle alone with this problem. Help is available from the client herself, who, after all, will have had to confront this problem in her daily life. Moreover, the lesbian community can be a rich resource of self-conscious attempts to understand and represent lesbianism in positive ways.

Contemporary lesbian novels have proven to be a valuable source of this community understanding. Ever since Radclyffe Hall invented the genre with The Well of Loneliness, lesbian novels have been argumentatively engaged in portraying, explaining, justifying, and apologizing for the lesbian. Read carefully, these books can illuminate the problem of creating a sympathetic lesbian character and help the lawyer solve it. A lawyer can learn the strengths and weaknesses of many possible strategies by studying novels employing these potential techniques.

Although some women have doubtless felt affection or sexual desire for other women in every society and every time in human

history, the construction of these feelings and their expression through the concept of lesbianism did not occur until the late 1800s in Western Europe. The idea that some women's sexuality makes them essentially unlike other women emerged from the new discipline of sexology at the end of the nineteenth century, at the same time that the women's movement was developing a critique of incest, rape, and sexual abuse of children, and just as some middle class women were finding it possible to live independently. Sexologists depicted the lesbian as a masculine woman, from birth more like a man than a woman in her tastes, inclinations, activities, and desires. Havelock Ellis, one of the first sexologists, called her a "congenital invert," and described her as a woman whose "female garments . . . usually show some traits of masculine simplicity," and whose "brusque energetic movements, the attitude of the arms, the direct speech, the inflections of the voice, the masculine straightforwardness and sense of honor, and especially the attitude towards men, free from any suggestion of either shyness or audacity" suggests her "underlying psychic abnormality." According to Ellis, congenital inverts smoked both cigarettes and cigars, had "a dislike and sometimes incapacity for needlework and other domestic occupations," and "some capacity for athletics." The name "congenital invert" conveyed the idea that from birth her interests were the opposite of what they should have been. Clearly, this concept depended upon seeing the sexes as opposite, with complementary but entirely different qualities. It depended as well upon a normative view of the true woman as one who knew, accepted, and even welcomed her place in the domestic sphere.

According to the early sexologists, the congenital invert had an unnatural interest in physical activity, intellectual rigor, and other women. But not in other women like herself. Just like a real man, this pseudo-man was interested in so called normal women. Every lesbian couple was thus composed of one real lesbian and one pseudo-lesbian, a normal woman whose naive trust and affectionate openness were being exploited by her lover. The real lesbian might be pitied because her congenital abnormality denied her a woman's true fulfillment: loving a man and bearing him children. The

3. Id.
pseudo-lesbian was even more to be pitied, however. Although capable of living a normal life, she was denied one by her thrall to her lover's sterile (if enticing) sexual wiles.

The concept of the invert had an obvious place in the struggle over whether women should be allowed to engage in such masculine pursuits as higher education, athletics, voting, holding public office, and working for wages outside the home. By asserting that autonomy was pathological in women, it lent scientific respectability to the political position that women should do none of these things, but instead should be subject to the control of men. It undermined women's solidarity by making them uncomfortable with their affection for one another. It was used to stigmatize the unmarried women who led the women's movement as unhealthy, bitter, frustrated, and dangerous spinsters, and to undermine support for feminist reforms.

Women responded to these assaults in a variety of ways, one of which was the invention of the lesbian novel. Radclyffe Hall, perhaps herself a good example of Carolyn Heilbrun's dictum that it is easier to do something than to imagine it, invented the lesbian novel in response to the concept of the congenital invert, which she accepted for literary purposes if not in her own life, and to the stereotype of the spinster, which she rejected. In The Well of Loneliness, she portrayed independent single women as self-sacrificing, generous, brave, moral, and noble. She hoped that the book would combat the prejudice against them.

Hall's heroine in The Well of Loneliness, Stephen Gordon, was so closely modeled on the sexologists' ideas that Havelock Ellis endorsed the book as presenting "in a completely faithful and uncompromising form, one particular aspect of sexual life as it exists among us to-day." Stephen's early interests in masculine pursuits were encouraged by her father, who recognized that she was an invert although he tried to protect her by never sharing this insight with anyone. After her father's death, Stephen fell in love with a married woman. When the affair became known to her mother,

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5. See Rebecca O'Rourke, Reflecting on The Well of Loneliness 3-4 (1989) (proposing that Stephen Gordon may have been modeled on Case 31 in R. von Krafft-Ebing, Psychopathia Sexualis (1892)).
6. Hall, supra note 1, at Commentary.
Stephen was forced to leave her ancestral estate. When the First World War began, Stephen joined the ambulance corps and met Mary Llewellyn. Mary was as closely modeled on the pseudo-lesbian as Stephen was on the congenital invert. She was a penniless orphan, younger and smaller than Stephen, and described as feminine. During the war, Stephen and Mary drove ambulances together and fell in love. After the war, they set up housekeeping together in Paris at Mary's request, but Stephen's scruples kept their relationship chaste until Mary, in frustration, threatened to leave. Even then, before she would make love with Mary, Stephen was bound by honor to warn her, "Our love may be faithful even unto death and beyond—yet the world will call it unclean." They lived together for some years, until Martin Hallam, an old beau of Stephen's, fell in love with Mary and convinced Stephen that Mary would be better off with a real man. Ever noble, Stephen pretended to be having an affair in order to drive Mary away and into Martin's arms.

_The Well of Loneliness_ was the first lesbian novel, and probably remains the best known. While it would be an exaggeration to say that every subsequent lesbian novel has been formed in response to it, it is true that many have been. Today, lesbians are usually understood and portrayed as women rather than as men born into the wrong bodies. Novelistic concern about the cause and development of lesbianism also seems outdated, perhaps because the respectable scientific opinion is now that it is merely one normal variation among many human possibilities. Those novels that even bother to provide an explanation for their characters' lesbianism tend to rely on psychology rather than biology. Nevertheless, from the 1950s to the present, lesbian novels have tended to have characters that Radclyffe Hall and Havelock Ellis would find familiar.

It is hard for an author writing about such a couple to keep the true lesbian character from seeming predatory, because by loving the pseudo-lesbian she is depriving her of other, better, opportunities. Stephen's self-sacrificing nobility is one solution, but it is self-defeating. To prove the purity of her love, Stephen had to renounce

7. _Id._ at 301.
8. _See Resolution of the American Psychiatric Association_ (December 14, 1973); _Resolution of the Council of Representatives of the American Psychological Association_ (1975); _Resolution No. 7514 of the American Public Health Association_ (1975); (all removing homosexuality from their lists of mental disorders).
Mary. This ending promoted Radclyffe Hall's argumentative program—Stephen's suffering was necessary to the plea for tolerance with which the novel ends. But whatever its artistic or argumentative function, Stephen's renunciation of Mary has depressed generations of the novel's readers. Many of the book's critics have tried to show that a more optimistic message is hidden within the novel, or have tried to explain that its portrayal of lesbians is factually inaccurate.

Perhaps the same energy that motivates critics of *The Well of Loneliness* to rewrite its ending also animates lesbian novelists. Whether such a tragic ending is inevitable is a puzzle that lesbian novels have sought to unravel for decades. Their solutions to the puzzle are diverse, but their strategies fall into a few recognizable patterns. All of them depend upon varying one or more of the key elements of *The Well of Loneliness* while leaving the others more or less constant.

There seem to be five key elements to the novel. First, the protagonist is stronger and more powerful than the woman to whom she is attracted. Second, the woman to whom she is attracted is capable of a satisfying relationship with a man. Third, the protagonist herself is attracted only to other women. Fourth, society offers two women no opportunities for a full, rich, satisfying, open life together. Finally, the protagonist cannot be happy unless she is in a committed, coupled relationship with another woman. Elsewhere, I have discussed and illustrated the way lesbian novels vary each of these elements to solve the puzzle; here, I will focus exclusively on what is perhaps the most frequently-used strategy for undermining the inevitability of Stephen's tragedy: equalizing the relationship between the members of the couple.

A common device for accomplishing this is to make the true lesbian younger, smaller, less sophisticated, less wealthy, or less self-confident than her lover. A true lesbian who is less powerful than her pseudo-lesbian beloved, it seems, does not bear Stephen's full responsibility for the relationship, and therefore need not renounce it. Claire Morgan's *The Price of Salt* is a classic example of this approach. To show that neither member of the...

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couple is the other’s victim, this book portrays both as autonomous actors whose occupations and circumstances make them relatively independent of both society and each other.

In *The Price of Salt*, the true lesbian is Therese. An orphan in her early twenties, Therese worked behind the counter of a New York City department store while trying to become an apprentice stage designer. She fell in love at her first sight of Carol, a wealthy married woman in her mid-thirties. Therese pursued Carol without entirely understanding why. Carol, a pseudo-lesbian who was divorcing her husband and had recently had a brief affair with a girlhood friend, understood, but waited through two-thirds of the book before taking Therese to bed. The novel is so successful in disempowering Therese that Carol herself is in danger of seeming predatory. A good part of the last third of the book is therefore spent diminishing Carol’s self-confidence and letting Therese mature a little. By the end of the novel, Therese is entering the bohemian and tolerant world of the theater; Carol has a job as a buyer for a furniture store. The book ends with the couple planning to move together into a two-bedroom apartment in Manhattan.

Alice Walker’s novel *The Color Purple*, which certainly has a larger agenda than simply re-writing *The Well of Loneliness*, takes the strategy of disempowering the true lesbian to perhaps its furthest possible extreme. Celie, the novel’s heroine, is in some respects a classic true lesbian: the only person she is ever sexually attracted to is another woman, her husband’s mistress, Shug Avery, whom she loves even before first sight (when she sees Shug’s photograph). Yet Celie is also the most powerless person in the book. She is raped by her stepfather, her babies are taken away from her, and she is married against her will to a man who treats her like a slave, even bringing his sick mistress home for her to nurse. For a long time, Celie passively endures these outrages; even when she begins to act independently, she never becomes particularly bold. It is simply not possible to see Celie as predatory, or even seductive. Yet Shug Avery (who is beautiful, powerful, and primarily attracted to men) comes to love Celie, eventually choosing her over everyone else. Because Shug Avery is very clearly just about the best thing that

ever happened to Celie, Shug, unlike Carol in *The Price of Salt*, runs no risk of being seen as predatory.

A variation on this strategy is to reimagine the lesbian couple as composed of two true lesbians rather than of one true lesbian and one pseudo-lesbian. *Patience and Sarah* is remarkably successful at this. The novel is set in the early 1800's in New England. Patience is a middle class Quaker spinster in her late twenties; Sarah is six years younger, the tallest daughter of a poor farmer who had raised her to do men's work because he had no sons. Neither woman was sexually attracted to men. They met, fell in love, and planned to homestead on the frontier together. When their families intervened, Sarah went away alone, dressed as a boy, to discover the limits of that impersonation and the dangers of the road. Upon her return, Sarah reconciled with Patience and they became lovers. When Patience's sister-in-law interrupted their lovemaking, the two were compelled to leave their community together. Patience's brother bought out her share in the family farm, and she used the money to buy a new farm in a distant community where, as the novel makes clear, she will live out her life with Sarah.

The novel alternates Patience's first-person narration of the story with Sarah's. This technique provides the reader with a window into each character's internal life, showing that each woman is moving autonomously toward the other, that their love is mutual, and that their sexual relationship is equally desired and equally important to them both.

These novelistic strategies can be applied by lawyers to help in solving the problems involved in representing lesbians. The famous case of Sharon Kowalski and Karen Thompson will be used to suggest the lineaments of a literary approach to the problem of understanding how to represent a lesbian client. This case involves a woman, who, with difficulty, successfully recast the meaning of "lesbian lover," so that her relationship with her severely injured lover became a reason for the court to make her the lover's guardian rather than a reason to prevent her from visiting the lover.

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13. On March 6, 1991, I attended a discussion given by Karen Thompson at Smith College in Northampton, Mass. Afterwards, I was able to speak with Ms. Thompson briefly. We also spoke briefly by telephone on March 17, 1991. With these two limited exceptions, I know about the case entirely from published reports.
Karen Thompson and Sharon Kowalski are perhaps the most famous lesbian couple in the United States. They are famous because, after Sharon was so severely brain-damaged in an automobile collision that she became paraplegic and unable to speak, Karen insisted on the importance, continuity, and permanence of their relationship. They are famous because Karen refused to go away when Sharon's parents asked her to; Karen instead hired a lawyer and fought to become Sharon's guardian. And when she lost that fight,15 Karen did not give up. She fought for the right to visit Sharon over the objection of the guardian the court had chosen, Sharon's father. When she lost that fight, too,16 Karen didn't give up; she fought to have Sharon's competence re-examined so that experts could determine whether Sharon was able to decide for herself who she wanted to have visit her and where she wanted to live.

Karen Thompson and Sharon Kowalski are famous because, in order to raise money for the legal battles, Karen named them and their love "lesbian" (something she had not done before her troubles began), and she made their story public in such a tremendously affecting way that, in 1989, on Sharon's thirty-second birthday, National Free Sharon Kowalski Day was celebrated with parades and vigils in twenty-one United States cities. They are famous because two weeks after Sharon was moved from a nursing home to a rehabilitation facility for evaluation and treatment, and more than three years after Karen had last been allowed to visit her, Sharon asked to see Karen.17 They are famous because finally, eight years after Sharon's accident, the Minnesota Court of Appeals named Karen as Sharon's guardian, ruling that "Sharon . . . has clearly chosen to return home with [Karen] if possible" and that "[Karen] Thompson and Sharon [Kowalski] are a family of affinity, which ought to be accorded respect."18

Sharon Kowalski and Karen Thompson are famous because their story is so arresting; it makes good copy. So many useful morals can be drawn from it: the importance of committed but unmarried

couples exchanging durable powers of attorney;\(^\text{19}\) the necessity of legalizing gay marriages;\(^\text{20}\) the possibility of women triumphing over adversity;\(^\text{21}\) the importance of disabled persons having a voice in their own destinies.\(^\text{22}\)

But notice this: the now-dominant version of the story, in which Karen has been steadfastly, faithfully, and courageously keeping the vow she made to Sharon when, in 1979, they secretly exchanged rings and promised to share their lives, was not the only possible interpretation of the evidence. Indeed, the trial judge twice rejected this view in favor of Sharon’s father’s competing version. According to Donald Kowalski, Sharon was not a lesbian and Karen was not her lover. Karen alone was a lesbian, with a predatory, aggressive, possessive, and unnatural interest in Sharon that exposed his gravely disabled daughter to possible sexual abuse.

Sharon’s car crashed in November, 1983. After that, once it became clear that Sharon had been gravely injured, both Karen Thompson and Sharon’s father, Donald Kowalski, sought to become Sharon’s guardian. The judge believed that Sharon and Karen had a significant relationship, and therefore, although he named her father as Sharon’s guardian, the judge at first required Donald Kowalski to let Karen visit.\(^\text{23}\) Unfortunately, Karen’s relationship with Sharon’s parents was, in the court’s delicate words, "difficult," and it "deteriorated."\(^\text{24}\) Karen and the Kowalskis fought repeatedly in court over access to Sharon’s medical and financial records and over Sharon herself. Finally, the judge decided that only one of them could be in control, and, in July, 1985, he picked Sharon’s

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\(^\text{19}\) See Karen Thompson & Julie Andrezejewski, Why Can’t Sharon Kowalski Come Home? (1988) (appending forms to be used to create a durable power of attorney); Rhonda Rivera, Lawyers, Clients, and AIDS: Some Notes from the Trenches, 49 Ohio St. L. J. 884, 896 (1989) (discussing the importance of obtaining a durable power of attorney in order to continue caring for a loved one); Nota, Developments in the Law: Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1623 (1989) (arguing that the court would have recognized Karen Thompson’s right to legal guardianship if Sharon Kowalski had executed a durable power of attorney).


\(^\text{21}\) See Sally Ann Stewart, Female Couple Given NOW's “Courage” Award U.S.A. Today, July 2, 1990, at 3A. When they received Women of Courage Awards from the National Organization for Women last July, N.O.W. President Molly Yard said, "Such a demonstration of guts. The letters I get from so many women who feel they’re being totally screwed by the legal system - Sharon and Karen give them hope."


\(^\text{23}\) In re Kowalski, 382 N.W.2d at 863.

\(^\text{24}\) Id.
When he made this choice, the judge surely knew that Donald Kowalski would use his power to move Sharon three hundred miles away from Karen's home and not let Karen visit. When Donald Kowalski barred Karen from seeing Sharon, the judge backed him up. The Minnesota Court of Appeals upheld the trial judge's decision both times. In fact, although Karen's version of the story is undoubtedly the one that, by helping her raise money for legal expenses, enabled her finally to succeed in court, it has never been entirely the source of that success. The trial judge finally let Karen visit Sharon not because he believed that Karen had a right to visit because she and Sharon were "spouses in every respect except the legal," but instead because he became convinced that Sharon was capable of knowing and expressing her own mind. Similarly, Karen has succeeded in becoming Sharon's guardian at last because the Minnesota Appeals Court, too, has become convinced that Sharon is capable of choosing her own guardian, and now believes that Karen is extremely caring and devoted to Sharon, and because it rejected the competing version that Karen is "possessive, manipulative and domineering."

When Donald Kowalski portrayed Karen as an unhealthy, domineering, masculine woman who had to be prevented from preying upon his naive, innocent, and normal daughter, he was casting Karen as a congenital invert. In certain respects, she fit this stereotype, being a college professor of physical education—that is, both an athlete and an intellectual. Moreover, she was nine years

25. Id. at 863-64.
26. See In re Kowalski, 382 N.W.2d at 863, 865; In re Kowalski, 392 N.W.2d at 313-14. On appeal, the court noted that there was conflicting evidence about the nature of the relationship before Sharon's accident, and that although Sharon enjoyed Karen's visits, she always became depressed after Karen left.
28. See In re Sharon Kowalski, No. 11146 slip op. at 3,6 (Minn. Dist. April 23, 1991); Murdoch, supra note 17.
29. See generally In re Kowalski, supra note 14, slip op. at 8-9. This conclusion was based upon the testimony of all of the "approximately 16 medical witnesses . . . who had treated Sharon and had firsthand knowledge of her condition and care"; Id. at 4-5.
30. Id. at 10-12. The court concluded that "Thompson (1) achieves outstanding interaction with Sharon; (2) has extreme interest and commitment in promoting Sharon's welfare; (3) has an exceptional current understanding of Sharon's physical and mental states and needs, including appropriate rehabilitation; and (4) is strongly equipped to attend to Sharon's social and emotional needs."
31. Lesbian's Plea to End Guardianship Battle, CHICAGO TRIBUNE, December 9, 1990, at 12. Although these opinions seem to have swayed the trial court, In re Sharon Kowalski, supra note 28, slip op. at 11, the Court of Appeals explicitly considered and rejected this version, In re Kowalski, supra note 14, slip op. at 12-13.
older than Sharon, had been her teacher, and had even encouraged Sharon to coach track and then to teach physical education at the high school level.

Karen Thompson’s response to Donald Kowalski’s version of the story seems to have gone through two phases. In the first phase, she offered the court a competing version of her relationship with Sharon. In her book, Why Can’t Sharon Kowalski Come Home?, Karen emphasized that it was Sharon who had pursued her. Sharon sought her out and asked to help coach the track team; Sharon visited her at home, and in Ohio when she went there to finish her degree; Sharon rode a motorcycle. Sharon pushed Karen to declare her love, and, after they exchanged rings, it was Sharon who took the sexual initiative. Without access to transcripts of the court proceedings, it is difficult to tell whether Karen intended to show that only Sharon was the true lesbian—the Therese to her Carol—or that, like Patience and Sarah, she and Sharon were mutually attracted true lesbians.

Either way, the story did not work for Karen. I offer two possible accounts of this failure. First, Karen’s story may not have been believed. Karen’s version fit the evidence before the court no better than Donald Kowalski’s did. After all, Karen was nine years older than Sharon, had supported her from time to time, and was the sole owner of their house. Moreover, the persuasiveness of The Price of Salt, The Color Purple, and Patience and Sarah all depend upon their presentation of the interior reflections of both members of the couple. For Karen’s version to be persuasive, Sharon would have had to be able to second it. At first, she could not. Inevitably, Sharon’s present vulnerability was read back into the past, undermining Karen’s story.

The second possibility was that Karen’s version was believed, but it did not prove enough. In effect, Karen’s story was that she was Sharon’s spouse, and should therefore be treated by the court as her natural guardian. But Donald Kowalski, Sharon’s father, was an equally natural choice for guardian, as the Minnesota Court of Appeals pointed out in denying Karen’s first appeal.

Karen’s response to Donald Kowalski’s version entered its next phase after she lost her second appeal. Now Karen relied not on her

32. THOMPSON & ANDREZBIJEWSKI, supra note 19, at 10-16.
own right to be Sharon’s guardian, but on Sharon’s right to make her own decisions. Perhaps recognizing that her earlier loss was linked to the court’s failure to see Sharon as autonomous, Karen pressed to have Sharon’s competence independently and professionally evaluated. If Donald Kowalski had won because he was Sharon’s father, then let the court consider the risk of his patriarchal authority unnecessarily infantilizing his daughter.

This second strategy has finally proved successful. Thanks to Karen’s efforts, Sharon was moved from the nursing home where Donald Kowalski had been keeping her to a rehabilitation facility. Soon afterwards, she asked to see Karen. Since then, Karen has visited "three or more days per week, actively working with her in therapy and daily care." 33 In December, 1990, Karen again sought to be Sharon’s guardian, with the support of all of the medical and allied health professionals who care for Sharon. 34 Although the trial judge named a "neutral third party" guardian instead, 35 Karen Thompson won on appeal. 36

By emphasizing and supporting Sharon’s autonomy, individuality, and choice, Karen both undermined the basis for Donald Kowalski’s version of her as a predatory, domineering invert and created the conditions for Sharon to speak for herself. Whether or not her lawyers learned it from the book, they seem to have succeeded by adopting the narrative strategy of *Patience and Sarah* to tell Karen’s and Sharon’s story.

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33. *In re Kowalski*, supra note 14, slip op. at 11.
34. *Id.* slip op. at 4-5, 8-9 and 12-13.