INSCRIBING LESBIAN AND GAY IDENTITIES: HOW JUDICIAL IMAGINATIONS INTERTWINE WITH THE BEST INTERESTS OF CHILDREN

CHRISTOPHER CARNAHAN[*]

Percolating into mainstream American culture over the past twenty-five years, discourse about gay and lesbian civil rights is now a central component in an ongoing cultural tug-of-war. As evidence of this centrality, the Human Rights Campaign, the nation's largest gay and lesbian advocacy organization, has approximately half a million members.[1] There are gay characters on many prime time and mainstream television shows.[2] Hawaii enacted reciprocal beneficiary laws.[3] Vermont became the first state to offer gay and lesbian partners all of the state benefits of marriage.[4] Massachusetts went one step further by granting full state marriage rights to gay and lesbian couples.[5] The American Academy of Pediatrics estimates that there are anywhere between one million and nine million gay parents.[6] In a USA Today article, Marilyn Elias wrote, "a 'gayby boom' is taking place as growing numbers of gays adopt or have their own biological children using donor sperm or female surrogates."[7] The evolving definition of family has lead to an increase in litigation to resolve a multitude of new family conflicts.[8]

In terms of social acceptance, current debate about gay families delineates an in-between point in history for many gay and lesbian Americans: a point in-between a culture of acceptance, and one of rejection. This situation finds dramatic emphasis in a recent six to six split opinion in the 11th circuit, which denied en banc review of a Florida statute prohibiting adoption by homosexuals.[9] Concluding his opinion in opposition to the petition, Judge Birch wrote:

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[1] *See* Human Rights Campaign, *Working for Gay, Lesbian, Bisexual and Transgender Equality*, *at* http://www.hrc.org/Content/NavigationMenu/About_HRC/What_We_Do_HRC.htm (last visited Nov. 15, 2004).

[2] For example, *NYPD Blue*, *ER*, and *Will & Grace* all feature gay characters in lead and supporting roles. *See* Gay & Lesbian Alliance Against Defamation, *Where We Are on TV: LGBT Characters for 2003-04*, *at* http://www.glaad.org/eye/ontv/03-04/broadcast.php (last visited Nov. 15, 2004).

[3] *See* HAW. REV. STAT. ANN. §§ 572C 1-7 (Michie 2003).

[4] *See, e.g.*, VT. STAT. ANN. tit. 15, § 1202 (2002).

[5] *See* Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003).

[6] *See* Ellen C. Perrin, *Technical Report: Co-parent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341-44 (2002).

[7] Marilyn Elias, *Doctors Endorse "Co-Parent" Laws for Gays*, USA TODAY, February 4, 2002, at 1D.

[8] *See* Jill Schachner Chanen, *The Changing Face of Gay Legal Issues*, ABA JOURNAL, July 2004, at 46.

[9] Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275 (11th Cir. 2004) (en banc).

> If I were a legislator, rather than a judge, I would vote in favor of considering otherwise eligible homosexuals for adoptive parenthood. In reviewing the record in this case one can only be impressed by the courage, tenacity and devotion of Messrs. Lofton and Houghton for the children placed in their care. Thus, I consider the policy decision of the Florida legislature to be misguided and trust that over time attitudes will change and it will see the best interests of these children in a different light. Nevertheless, as compelling as this perspective is to me, I will not allow my personal views to conflict with my judicial duty—conduct that apparently fewer and fewer citizens, commentators and Senators seem to understand or appreciate.[10]

In-between-ness: a culture in which Judge Birch can vigorously argue that discrimination based on constitutionally protected activity is itself constitutional, and yet still feel compelled to distance himself from that discrimination in the text of his opinion.[11] This dichotomy illustrates the fact that despite a new level of acceptance, much of American culture still imagines gay and lesbian people as fundamentally different than everyone else. Putting this otherness in the spotlight, Judge Barkett wrote in her dissent:

> There is no comparable bar in Florida's adoption statute that applies to any other group. Neither child molester, drug addicts, nor domestic abusers are categorically barred by the statute from serving as adoptive parents. In a very real sense, Florida's adoption statute treats homosexuals less favorably than even those individuals with characteristics that may pose a threat to the well-being of children.[12]

A body of legal scholarship exists dedicated to the application of social science research to the legal dimensions of lesbian and gay parenting cases.[13] The following analysis is not intended to add directly to this area of scholarship. Nor do I engage in a strictly legal analysis of the various statutes and common law involved in these cases. Rather, what follows is an examination of various images of gay and lesbian people inscribed on the pages of case reporters *via* court opinions dealing with adoption and child custody. I examine what judicial language says about gay and lesbian identity, and indirectly, the impact that speculative judicial imaginations have on the primary function of the family court: determining the best interests of children. My goal is not to suggest new laws. Rather, I hope to encourage members of the legal community to find language that protects both the best interests of children and avoids the negativity involved in

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[10] *Id.* at 1290 (Birch, J., concurring).

[11] *See id.* at 1275-90 (Birch, J., concurring).

[12] *Id.* at 1290 (Barkett, J., dissenting).

[13] *See, e.g.*, Carlos Ball & Janice Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (1998); WILLIAM ESKRIDGE AND N.D. HUNTER, SEXUALITY, GENDER, AND THE LAW (2001); Charlotte Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191 (1995); Lynn Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997).

treating gay or lesbian people as strangers to the law.

In Part I, I examine two opinions that delimit the positive and negative boundaries within which most of these opinions fall. The first case deals with an adoption in Delaware.[14] This opinion, granting co-parent status to two men in a committed relationship, serves as a paradigmatic example of the way that a positive image of gay men works hand in hand with an analysis of the best interests of the child. The second case deals with an Alabama child custody dispute.[15] The concurring opinion in this case serves as a paradigmatic example of the way a negative depiction of a lesbian couple and their relationship can potentially derail a best interests analysis.

In Part II, I focus on the negative opinions by examining a variety of judicial decisions that unfairly portray gay and lesbian litigants, their relationships, and their families. The analysis in this section engages four specific types of judicial depictions: gay people, gay relationships, gay parents, and gay families. First, I examine two Michigan Court of Appeals child custody decisions, in which the courts struggle to describe lesbian women.[16] Second, I examine Tennessee Supreme Court and Court of Appeals decisions where the courts apply a negative cultural concept about gay relationships—flagrant flaunting.[17] Third, I examine a Washington Court of Appeals decision where the court applies a formal definition of parent excluding the partner of a woman who was artificially inseminated.[18] Fourth, I examine three Pennsylvania Superior Court decisions where the courts portray gay and lesbian families as something other than families.[19]

In Part III, I focus on positive opinions by examining judicial decisions that serve as models for the equitable ways attorneys and judges might portray gay and lesbian people, their relationships, and their families. I begin this section with an examination of two Florida District Court of Appeals decisions that serve as models of moral neutrality.[20] Following these cases, I examine a New Jersey Supreme Court decision in which one of the concurring opinions attempts to uncover the underlying values that underpin all parenting cases.[21] Finally, I examine two Pennsylvania Superior Court decisions that demonstrate the import of extending the concept of family outside its formal definition.[22]

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[14] *See In re* Hart (Del. Fam. Ct. New Castle County 2001) (case number unavailable), *available at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/49.pdf (last visited Nov. 15, 2004).

[15] *See ex parte* H.H. (*In re* D.H. v. H.H.), 830 So. 2d 21 (Ala. Sup. Ct. 2002).

[16] *See* McGuffin v. Overton, 542 N.W.2d 288 (Mich. Ct. App. 1995); People v. Brown, 212 N.W.2d 55 (Mich. Ct. App. 1973).

[17] *See* Eldridge v. Eldridge, 42 S.W.3d 82 (Tenn. 2001); Dailey v. Dailey, 635 S.W.2d 391 (Tenn. Ct. App. 1981).

[18] *See* State *ex rel.* D.R.M. v. Wood, 34 P.3d 887 (Wash. Ct. App. 2001).

[19] *See In re* C.C.G., 762 A.2d 724 (P.A. Super. Ct. 2000); *In re* R.B.F., 762 A.2d 739 (P.A. Super. Ct. 2000); Constant A. v. Paul C.A., 496 A.2d 1 (P.A. Super. Ct. 1985).

[20] *See* Jacoby v. Jacoby, 763 So. 2d 410 (Fla. Dist. Ct. App. 2000); Maradie v. Maradie, 680 So. 2d 538 (Fla. Dist. Ct. App. 1996).

[21] *See* V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000).

[22] *See In re* C.C.G., 762 A.2d 724 (P.A. Super. Ct. 2000); *in re* R.B.F., 762 A.2d 739 (P.A. Super.

The final part of the paper consists of recommendations. I focus on broad suggestions dealing with consistency, applying modern psychology, rejecting cultural stereotypes and incorporating a functional approach to definitions of parents and families. The conclusion reexamines the best interests of the child analysis in light of these recommendations, and poses questions for future writing.

I. BOUNDARIES

Delaware's Committed Relationships

Wherever you go, I shall go,
Wherever you live, so shall I live
Your people shall be my people,
And your God shall be my God too.
Wherever you die I shall die,
And there shall I be buried beside you,
We shall be together forever
Our love will be the gift of our lives.
May God do this for us and more,
If even death shall come between us.[23]

This quote from the biblical book of Ruth begins a remarkable opinion by Delaware Family Court Chief Judge Vincent Poppiti.[24] The opinion grants Mr. Burke Shiri and Mr. Gene Hart, two men living in a committed relationship, co-parent adoption rights.

In 2001, Gene Hart and Burke Shiri had been in a committed relationship for more that 20 years.[25] Initially Gene Hart adopted two brothers, Peter and George.[26] Both brothers were born prematurely, under weight, and tested positive for cocaine.[27] After a number of years, the two decided that it would be in the children's best interests for Burke to co-adopt them. Burke petitioned the court for co-parent status with Gene Hart.[28] That petition resulted in Judge Poppoti's decision.

The Bible story quoted by Judge Poppiti begins with a disastrous famine in the land of Judea.[29] In the story, Elimelech, his wife Naomi, and their two sons

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Ct. 2000).

[23] *Ruth* 1:16-18 (King James).

[24] *See in re* Hart (Del. Fam. Ct. New Castle County 2001) (case number unavailable), *available at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/49.pdf (last visited Nov. 15, 2004).

[25] *See in re* Hart, at 6 (Del. Fam. Ct. New Castle County 2001) (case number unavailable), *available at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/49.pdf (last visited Nov. 15, 2004).

[26] *Id.* at 2,4,5.

[27] *Id.*

[28] *Id.* at 7.

[29] *See Ruth* 1:1 (King James).

Mahlon and Chilion flee from the city of Bethlehem to the fields of Moab.[30] During their time abroad, the two sons marry two Moabite women, Ruth and Orpah.[31] Elimelech, Mahlon, and Chilion all die.[32] Naomi is left destitute.[33] As she prepares to return to Bethlehem, she tells her two daughters-in-law to go back to their own people.[34] After heart wrenching protest and wailing, Orpah agrees to return home, but Ruth vows to stays with her mother in law.[35] Ruth becomes a model adoptive daughter. The text quoted above is Ruth's vow of love for and commitment to Naomi.

In his decision, Judge Poppiti commented on Ruth's vow. He wrote:

> Words probably first spoken and later written well over 2000 years ago. Words painting a picture of one person's love and commitment to another during life and beyond. Words of love and commitment whose reality is more difficult to achieve in these times of transitory bonds . . . . Words of love and commitment written on behalf of Burke Shiri requesting that the Family Court of the State of Delaware bind him with Peter and George and they with him and permit each of them to say in the eyes of justice and law what they surely have said—in words and actions—each day of their lives together: "I love you son, I love you Poppy!"[36]

The court analogizes the bond between Ruth and Naomi with the bond between Burke Shiri and the two children, establishing a positive model for portraying gay and lesbian individuals in parenting cases. This model is positive because it is directed towards the proper goal in parenting cases—the best interests of the child.[37] In light of this standard, Judge Poppiti chose to depict the relationship between parent and child, as opposed to other possible ways he might have described the living arrangement. Even when the opinion makes reference to the relationship between Burke Shiri and Gene Hart, he opts not to depict the erotic,[38] respecting the privacy and the fundamental human dignity of the two men. Commenting on the court order terminating the parental rights of Peter's biological parents, Judge Poppiti makes the following characterization of Gene Hart: "[A] gay man living in a committed relationship with Burke Shiri for some 22 years."[39]

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[30] *Id.* at 1:2.

[31] *Id.* at 1:4.

[32] *Id.* at 1:3-5.

[33] *Id.*

[34] *Ruth* 1:8 (King James).

[35] *Id. at* 1:15.

[36] *Id.* at 1.

[37] Delaware requires that all matters of legal custody and residential arrangements be resolved in the best interest of the child. *See* 13 Del. C. § 732 (2004).

[38] As will become apparent below, erotic depictions of gay relationships bordering on the pornographic find their way into some opinions transvaluing the very morality the particular judges seek to uphold.

[39] *See in re* Hart, at 6 (Del. Fam. Ct. New Castle County 2001) (case number unavailable), *available at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/49.pdf (Last visited Nov. 15, 2004).

The opinion characterizes Hart and Shiri with three descriptive terms. The first is race. The judge includes the term "Caucasian" because, later in the opinion, he examines the steps the two men have taken to insure they have the necessary support to maintain an interracial family.[40] The next two descriptive terms deal with commitment and longevity. Often gay men are deemed *ipso facto* unfit parents based on statistics dealing with multiple sex partners and transitory relationships.[41] By focusing on the commitment and longevity of the Hart/Shiri relationship, Judge Poppiti described that relationship in a positive light based on empirical evidence. He could have based his decision on the hypothetical application of negative statistical assertions.

In his recitation of the facts relevant to jurisdiction, Judge Poppiti stated,

> Gene Hart and Burke Shiri, his life partner, have lived together in a committed relationship since the summer of 1979. In their nearly 22 years together they have shared legal and financial responsibilities as co-equals—they pool their income, have co-signed mortgages on the homes they have owned, and have designated each other as beneficiaries on their respective retirement plans and life insurance policies.[42]

Again, rather than making an *a priori* inductive judgment based on dubious statistical analyses regarding the nature of gay relationships in general, his attention is directed towards the relevant issues specific to this particular case—those things affecting the stability of this particular household.

After a lengthy legal analysis, the opinion concludes:

> When Mr. Hart adopted first Peter and then George, the fact that these men are gay was not even mentioned. In fact and therefore in law, what does matter in the best interest of both Peter and George is that Gene Hart and Burke Shiri live in a loving and long lasting committed relationship. In fact and in law what does matter in their best interests is that Peter and George have already begun to reap the benefits of the love of these two men and have even in their [t]ender years returned it in kind. In fact and in law what does matter in the best interests of Peter and George is that they are thriving in the environment created by Gene Hart and Burke Shiri . . . . Peter Hart—shall be and is HEREBY the adopted child of Burke Shiri. George Hart—shall be and is HEREBY the adopted child of Burke Shiri.[43]

By acknowledging that the sexual orientation of the two men is an irrelevant

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[40] *See id.* at 2.

[41] A policy paper produced by the Family Research Council (FRC) cites four studies that suggest that gay men have multiple sex partners. *See* Timothy J. Dailey, *The Negative Effects of Homosexuality*, Family Research Council, *at* http://www.frc.org/get.cfm?i=IS01B1 (last visited Nov. 15, 2004). Curiously, Dailey argues against a biological basis for homosexuality only to subvert his position by illuminating studies suggesting that gay men are essentially promiscuous. The existence of committed long-term relationships like the one under examination *ipso facto* destroys Dailey's type of quasi-essentialist reasoning.

[42] *Id.*

[43] *Id.* at 23-24.

consideration for single parent adoptions, Judge Poppiti extends that irrelevancy to co-parent adoptions. In this decision, therefore, gay men have achieved equal treatment under the law. This equal treatment aims to insure the best interests of the children will be protected.[44] However, just as judges' opinions can evoke beautiful images, they can also evoke ugly ones as well. The next case is an example of ugly images.

Alabama's Inherently Evil Lesbians

Compare Judge Poppiti's decision with the following concurring opinion penned by Chief Justice Moore of the Alabama Supreme Court. This decision concerned a petition for custody modification. A brief outline of the facts:

A man and a woman were married in California.[45] They had three children.[46] In 1992, they were granted a divorce and retained joint custody of the children.[47] The father moved to Alabama.[48] In 1996, the mother, then single, petitioned the court to grant primary custody to the father.[49] Three years later, after allegations of abuse by the father surfaced, the mother (now involved in a long term relationship with another woman) changed her mind and petitioned the court to grant her physical custody again.[50]

The father's request to transfer the case to Alabama was granted.[51] The Alabama trial court found no substantial change in circumstances. Based in part on *ore tenus* evidence, it found the allegations of child abuse mostly unsubstantiated and denied the mothers petition for custody.[52] The mother appealed. After conducting a *de novo* review of the evidence, the court of appeals concluded that there had been a substantial change of circumstances and reversed the trial courts decision.[53] The father appealed.

The Alabama Supreme Court focused on which standard of review an appellate court should apply when a trial court admits evidence *ore tenus*. The majority determined that the proper standard of review was abuse of discretion.[54] Applying this standard, the majority concluded that the court of appeals erred in reversing the trial court: the court of appeals should have determined whether the

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[44] The benefits to the best interests of these children are not speculative. The children have more tangible legal rights than they enjoyed before. For example, they can inherit from both parents now rather than just one.

[45] *Ex parte* H.H. (*in re* D.H. v. H.H.), 830 So. 2d 21, 22 (Ala. Sup. Ct. 2002).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Ex parte* H.H. (*in re* D.H. v. H.H.), 830 So. 2d at 23.

[51] *Id.* at 22.

[52] *See id.* at 24.

[53] *Id.* at 24.

[54] *Id.* at 25.

trial court had abused its discretion, not whether the facts of the case could support an alternate conclusion.[55] The majority further held that trial court had not abused its discretion, and it was therefore improper for the court of appeals to reverse its decision.[56]

In a scathing concurring opinion, Chief Justice Moore began by noting:

> I write specially to state that the homosexual conduct of a parent—conduct involving a sexual relationship between two persons of the same gender—creates a strong presumption of unfitness that alone is sufficient justification for denying that parent custody of his or her own children or prohibiting the adoption of the children of others.[57]

Unlike Judge Poppiti's opinion, Chief Justice Moore does not focus on the relationship between the mother and the children. He focuses on the relationship between the two women. This focus is distinctly visible in his review of the facts. "In this case there is undisputed evidence that the mother of the minor children not only dated another woman, but lived with that woman, shared a bed with her, and had an intimate physical and sexual relationship with her."[58]

Whereas Judge Poppiti depicts the commitment and the stability of the relationship between the two men, Chief Justice Moore depicts the erotic nature of the relationship between the two women. For Judge Poppiti, the length and stability of the relationship are factors that favor the best interests of the child. In contrast, Chief Justice Moore's position is that the longer these two women remain together, the greater the evil they inflict on society. He is not primarily concerned with the children's best interests; he is primarily concerned with what he believes to be the best interests of society.

There was no indication in the trial court record that anything improper took place in the presence of the children, or that any negative consequences followed. In fact, the record suggests that the children preferred to live with their mother.[59] Nonetheless, it is the private aspect of the lives of these two women that is ultimately important to the Chief Justice. He stated:

> Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of Nature's 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 a basic building block of society—the family. The law of Alabama is not only clear in its condemning such conduct, but the courts of the State have consistently held that exposing a child to such behavior has a destructive and seriously detrimental effect on the children. It is an

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[55] *Id.*

[56] *See ex parte* H.H. (*in re* D.H. v. H.H.), 830 So. 2d at 24.

[57] *See ex parte* H.H. (*in re* D.H. v. H.H.), 830 So. 2d at 26 (Moore, C.J., concurring).

[58] *Id.* at 26

[59] *Id.* at 24.

inherent evil against which children must be protected.[60]

By reciting the precedent as such, the Chief Justice does more than attempt to dignify and historically ground his opinion. He transfers these sentiments to the mother. In doing so, he paints a picture of her in the context of her relationship as abhorrent, immoral, and detestable. In the Chief Justice's opinion, the mother's relationship is inherently evil and a threat to society; and, as a result, her own children must be protected from her.[61]

After a lengthy historical summary of sodomy laws that includes the Levitical Code in the Bible, St. Thomas Aquinas' teachings, British common law, early American common law, and modern Alabama common law, Chief Justice Moore went on to discount current scientific research. He stated:

> The "detrimental effect" of such conduct is established by the great mass of Alabama law, which prohibits and condemns homosexual conduct. Courts must make decisions based on fixed principles. Judges should not make decisions based on the latest psychological or sociological study or statistical poll, the interpretations of which are subject to the bias and philosophical leanings of the researchers and which are subject to being refuted by other studies.[62]

It doesn't seem to bother the Chief Justice that the fixed principles to which he refers were based on the latest psychological understanding, biases and philosophical leanings of his predecessors. The term "fixed" that modifies the term "principles" seems merely to add the quality of a temporal extension. Because anti-gay bias has existed since the time of Moses, it is fixed. This fixed quality of the principle apparently makes the principle *ipso facto* the "correct" point of reference for current opinions dealing with potential psycho-ethical harm that affects the best interests of society.

The Chief Justice's tirade illustrates a linguistic choice that I hinted at above. Framed as a question it may be stated like this: should gay and lesbian people be described as fit parents after their entire individual living situations are taken into

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[60] *Id.* at 5.

[61] One could argue that the Chief Justice was speaking about homosexual conduct and not about homosexual people, employing the familiar "love thy sinner, hate thy sin" dichotomy. However, this argument is problematic. At the very least, the Chief Justice is logically inconsistent when he argues that homosexual acts are separate from the definition of homosexual persons and relationships, while upholding the act of procreation as the necessary part of the definition of heterosexual marriage. While I do not wish to suggest that homosexual acts are sufficient to give rise to homosexual self-identity, or that such a self-identity is reducible to physical activity, under the dichotomy suggested by the Chief Justice, this either/or dilemma is present. Further, it seems odd to speak as if acts exist in a vacuum, somehow devoid of actors. If actions were separate from actors, there would be no need for praise or criticism. In everyday language we identify someone as a hero only after they have undertaken heroic actions. The actions are part of the identity of the hero—not disembodied matters of fact.

[62] *See ex parte* H.H. (*in re* D.H. v. H.H.), 830 So. 2d at 35-36 (Moore, C.J., concurring). While it is easy to sympathize with the Chief Justice's desire for consistency in law, one wonders whether or not attorneys may make use of psychologist's testimony any longer in Alabama. Imagine a criminal trial where the defense calls to the stand a psychologist and the prosecution objects on the grounds that psychology is an ever-changing field, therefore only common law is necessary to decide psychological issues.

account, or should the description flow from an *a priori* judgment? The Chief Justice's view is clear. He chooses to characterize gay and lesbian couples as *ipso facto* unfit parents without any investigation into their individual lives or their relationships with their children. He states in his conclusion:

> The Court of Civil Appeals erred in indicating that the mother's homosexual relationship would not have a detrimental effect on the children. From its earliest history, the law of Alabama has consistently condemned homosexuality. The common law adopted in this State and upon which our laws are premised likewise declares homosexuality to be detestable and an abominable sin. Homosexual conduct by its very nature is immoral, and its consequences are inherently destructive to the natural order of society.[63]

Chief Justice Moore paints a frightening picture of this mother. Not only is she an unfit parent, her relationship is "inherently destructive to the natural order of society."

There is another important aspect of this opinion. Sometimes it is not what is included, but what is omitted that speaks loudest. Part of what the trial court weighed was evidence indicating that the father hit his son "causing his nose to bleed" and in addition, he "whipped the children with a belt."[64] The father's behavior was sufficiently abusive that the trial court ordered him to attend parenting skills classes.[65] Equitably weighing this evidence against the mother's homosexuality ought to at least have been part of the equation when determining whether or not there was an abuse of discretion at the trial level. Yet the Chief Justice chose not to write a three thousand year history of assault.

Compare the harm of assault and the potential harm of indirect exposure to homosexual conduct. Assault exposes the children to lawlessness in the same way that homosexual conduct does; both were illegal in Alabama at the time the opinion was finalized.[66] But assault has an additional element. In addition to being exposed to lawless behavior, the children are subject to physical harm. Unlike the so-called harm of being indirectly exposed to homosexual conduct, physical assault is a demonstrable harm. Where there is a bloody nose, one is not left to infer some vague harm from the circumstances.

Finally, homosexual conduct is not forbidden in the mother's home state of California. Stable gay relationships are supported through various domestic partner laws.[67] Therefore, children living in California are not exposed to lawlessness. The harm they will allegedly suffer apparently comes from the moral imagination

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[63] *Id.* at 37-38.

[64] *Id.* at 2.

[65] *See id* at 3.

[66] Chief Justice Moore's opinion was written prior to *Lawrence v. Texas*, 539 U.S. 558 (2003), which calls into question the constitutionality of Alabama's sodomy statutes.

[67] *See, e.g.*, CAL. CIV. PROC. CODE § 377.60 (2001) (granting domestic partners standing to bring a civil action for wrongful death).

of the Chief Justice. Because he does not point out any specific harm to the children, nor does he employ any psychological mechanism to explain how future harm might occur, his opinion says more about his personal bias than it does about the best interests of the children in this case.

The opinions of Judge Popitti and Chief Justice Moore clearly illustrate contrasting views. Judges may describe gay and lesbian people, their relationships and their families with positive or negative images. Yet not all family law opinions are as positive or as negative as these first two examples. It is more important to examine the numerous middle-of-the-road opinions. In these opinions, gay and lesbian people are depicted negatively in subtle and perhaps unintentional ways. It is to these other opinions that I now turn.

II. PROBLEMATIC LANGUAGE

Michigan's State of Lesbianism

In the following cases, two different courts grapple with how (or perhaps where) to apply the qualifier "lesbian." One court seems unable to apply this predicate to women, as the following quote demonstrates: "According to the allegations in the petitions, the home was rendered unfit because the mothers were living together *in a state of lesbianism* which created an immoral atmosphere."[68]

The two mothers in this case, each had two children from previous marriages.[69] They lived in the same residence and jointly took responsibility for raising both sets of children.[70] Over the course of a number of years, their relationship was passionate and often volatile.[71] Although this couple was involved in physical altercations, evidence attests to the commitment and love they shared. One of the letters between the two reads: "Why are you doing this to me. You know you're driving me crazy. What you've done to me doll, they are putting me in jail. I still love you . . . ."[72]

During a challenge to the custody rights of Mrs. Brown, the trial court ignored the internal aspects of the relationship, and focused instead on what the appellate court deemed their "state of lesbianism" as partial justification for ruling against her.[73] The precise meaning of the phrase "state of lesbianism" is unclear. Residing in this state was apparently sufficiently evil for the trial court to conclude that these women were unfit parents.[74] Accordingly, the best interests of the child analysis required the court to protect these children from what it deemed the negative effects of "lesbianism."

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68 People v. Brown, 212 N.W.2d 55, 57 (Mich. Ct. App. 1973) (emphasis added).

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.* at 58-59.

73 *See id.* at 57.

74 *See Brown*, 212 N.W.2d at 57.

On appeal, the court re-examined the facts, concluding that no harm to the children was demonstrated.[75] Potential harm was not sufficient to deprive the women of custody.[76] The appellate court reversed the decision, but not the language used to describe the relationship between these two women.[77]

The phrase at issue here is this interesting "state of lesbianism." The use of the word "state" suggests a certain type of mobility and impermanence. One can move in and out of a state of anger. Or, to equivocate, one can pack up and leave the state of Alabama. As such, the word is suggestive of a choice. The "ism" tacked onto the end of lesbian is also curious. This suggests that being a lesbian is akin to accepting a doctrine like Hinduism, Catholicism, or Capitalism. Yet even that doesn't quite add up in this phrase. One would not say one was living in a "state of Hinduism." What the court seems to be suggesting here is that these women chose a particular life philosophy and not only adhered to it, but took up residence in it. The court does not use the term lesbian as an identity statement. It uses the term to depict some place external to the women, foreign and inherently harmful. The line of reasoning leads to a question: what is sexual orientation? Is it properly predicated of a subject as an identity statement, or is it properly predicated of an external locus in which the subject may dwell?

The American Psychiatric Association states:

> "Sexual Orientation" is a term frequently used to describe a person's romantic, emotional or sexual attraction to another person.... The concept of sexual orientation refers to more than sexual behavior. It includes feelings as well as identity. Some individuals may identify themselves as gay lesbian or bisexual without engaging in any sexual activity.[78]

Accordingly, the American Psychological Association states:

> Sexual Orientation is an enduring emotional, romantic, sexual or affectional attraction to another person. It is easily distinguished from other components of sexuality including biological sex, gender identity (the psychological sense of being male or female) and the social gender role (adherence to cultural norms for feminine and masculine behavior).... Sexual orientation is different from sexual behavior because it refers to feelings and self-concept. Persons may or may not express their sexual orientation in their behavior.[79]

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[75] *Id.* at 59.

[76] *See id.*

[77] The Appellate Court remanded this case on the grounds that a homosexual relationship did not render a home per se unfit for children. *Id.* at 59.

[78] AM. PSYCHIATRIC ASS'N, FACTSHEET: GAY, LESBIAN AND BISEXUAL ISSUES 1 (rev. May, 2000), *available at* http://www.psych.org/public_info/gaylesbianbisexualissues22701.pdf (last visited Nov. 16, 2004).

[79] AM. PSYCHOL. ASS'N, ANSWERS TO YOUR QUESTIONS ABOUT SEXUAL ORIENTATION AND HOMOSEXUALITY, *at* http://www.apa.org/pubinfo/answers.html (last visited Nov. 16, 2004).

In these definitions, behavior and self-identity have elements of choice. One can chose whether or not to engage in sexual behavior, and one can chose whether or not to self-identify as gay or lesbian. However, people do not choose their internal emotional structures. It is this internal emotional structure that people refer to when they self-identify as gay or lesbian – it is the *sine qua non* of the definition.

> Human beings can not choose to be either gay or straight. Sexual orientation emerges for most people in early adolescence without any prior sexual experience. Although we can choose whether to act on our feelings, psychologists do not consider sexual orientation to be a conscious choice that can be voluntarily changed.[80]

To return to the court's words, when it describes the women as living "in a state of lesbianism," it misses the mark.[81] The term lesbian does not denote some place external to women, it denotes an internal emotional structure, a component of their existential identity. As with the Alabama opinion quoted in the introduction, the trial court in this case focuses primarily on the relationship between the two women and not on the relationship between the women and the children.[82] This improper focus was part of the error assigned after appeal.[83] This case demonstrates again how the best interests of the children are thwarted by an improper focus on a strange conception of lesbian identity.

At least one recent case decided by the Michigan Court of Appeals struggles with similar predication problems.[84] In *McGuffin v. Overton,* the court was called upon to decide whether the partner of a woman who died had standing to pursue a child custody claim.[85] The facts are as follows.

Between 1982 and 1984, Leigh McGuffin gave birth to two children, Nathaniel and Jonathan.[86] In 1984, Leigh filed paternity actions regarding each child.[87] Russell Overton stipulated that he was the biological father.[88] The court granted Leigh custody of the boys.[89]

From 1987 until 1995, McGuffin was involved in what the court deemed a "monogamous lesbian relationship" with Carol Porter.[90] McGuffin changed her name to Leigh Porter.[91] Together, they raised Jonathan and Nathaniel.[92] In 1995,

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80 *Id.*

81 *Brown*, 212 N.W.2d at 57.

82 *See id.*

83 *See id.* at 59.

84 *See* McGuffin v. Overton, 542 N.W.2d 288 (Mich. Ct. App. 1995). This case was not decided by the same court. I include this case not merely for comparison, but in order to demonstrate that the identity question the court struggled with in 1973 continues on some level to be an issue.

85 *Id.*

86 *Id.* at 289.

87 *Id.*

88 *Id.*

89 *McGuffin*, 542 N.W.2d at 289.

90 *Id.*

91 *Id.*

92 *Id.*

after a long illness, Leigh died.[93] Before her death, Leigh executed a power of attorney delegating all her parental powers to Carol.[94] She also designated Carol as guardian of the children in her will.[95]

One month after McGuffin's death, Russell, who at this point was $20,000 behind on his child support obligations, obtained an ex parte order from a Jackson County Court for Nathaniel and an ex parte order from the Wayne County Court for Jonathan.[96] He picked them up from school and took them home with him.[97] In addition, he obtained an order canceling the $20,000 owed in child support.[98]

Carol sought custody of Jonathan in Wayne County Circuit Court, and Nathaniel in the Jackson County Court.[99] The Wayne County Circuit Court determined that Carol had standing. Consequently, it vacated the ex parte order that allowed Russell to take Jonathan.[100] The Jackson County Circuit Court determined that Carol did not have standing. Consequently, it denied Carol's motion to vacate the ex parte order.[101]

Russell appealed the Wayne County Circuit Court decision, and Carol appealed the Jackson County Circuit Court decision. Both appeals were consolidated.[102] The Court of Appeals reversed the Wayne County Circuit Court, and upheld the Jackson County Circuit Court.[103] It found that Carol did not have a legal relationship to the children and therefore did not have standing to challenge the ex parte orders.[104] However, the court went on to state that its opinion did not affect Carol's petition for guardianship which would grant her the legal relationship she sought.[105] That motion was still being considered.[106] Carol appealed. The Michigan Supreme Court declined to hear the appeal.[107]

The only mention in the opinion about the nature of the relationship or the identity of the two women is the phrase "monogamous lesbian relationship."[108] The term "lesbian" in this case does not function to identify the women in this case, nor does it identify some place external to them. The term "lesbian" narrows and specifies the term "relationship" by adding a potentially pejorative element.

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93 *Id.*
94 *McGuffin*, 542 N.W.2d at 289.
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 *McGuffin*, 542 N.W.2d at 290.
100 *Id.*
101 *Id.*
102 *Id.*
103 *Id.*
104 *McGuffin*, 542 N.W.2d at 290.
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.* at 289.

It is also unclear why the term "monogamous" is necessary. The term "monogamous" acts to give a narrow and specific connotation to the term "relationship," but it is unclear why the court chooses to give such a specific connotation as opposed to leaving "relationship" unmodified. There seem to be two possibilities. First, the court could be trying to infer a sexual or romantic component to the relationship as opposed to a long-term non-sexual friendship between the two women. Or, the court may mean to use the term in opposition to the term "polygamous." In either case, the court does not indicate any legally necessary or relevant reasons for using the terms "lesbian" and "monogamous" to describe the relationship.

If neither the term "monogamous" nor the term "lesbian" is necessary, what justifies their inclusion? If the court finds it necessary to clarify the relationship in a manner consistent with a best interests of the child analysis, the court could have indicated that the two women were engaged in a committed relationship. Yet judges don't only struggle with unnecessary language. As we will see in the next part of this section, judges sometimes employ cultural stereotypes in their depictions of gay and lesbian relationships.

Tennessee's Flagrant Flaunting Rule

In the late 1970's, Ronnie and Sabel were married in Cleveland, Tennessee.[109] The marriage faltered, and in July of 1980, the couple separated.[110] The court granted Sabel custody of their minor child.[111] On December 17, 1980, they were divorced.[112] After the separation, but before the divorce, Sabel began a relationship with another woman—Peggy.[113] Soon there were rumours in town.[114] Sabel initially denied the rumors.[115] She left Cleveland with Peggy for Nashville, Tennessee.[116] The two lived with the child in one bedroom of Peggy's mother's home.[117] After they were settled into their Nashville residence, Sabel notified her former husband of her new relationship.[118] Both Ronnie and his parents each individually petitioned the court in Tennessee to grant primary custody to the father.[119] The trial court granted Ronnie's petition.[120] Sabel appealed the

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109 Dailey v. Dailey, 635 S.W.2d 391 (Tenn. App. 1981).
110 *Id.* at 392.
111 *Id.*
112 *Id.*
113 *See id*
114 *See Dailey*, 635 S.W.2d at 392.
115 *See id.*
116 *Id.*
117 *Id.*
118 *Id.*
119 *See Dailey*, 635 S.W.2d at 393.
120 *Id.*

decision.[121] The appellate court upheld the trial court's decision.[122]

The Tennessee Court of Appeals found that the trial court erred when it ruled that the relationship between the two women was sufficient grounds to demonstrate a substantial change of circumstances that would adversely affect the welfare of the minor.[123] Writing for the court, Judge Sanders explained:

> In the case at bar the proof does not sustain the contention of the Appellant that the Appellee knew of her homosexual relationship prior to the granting of the divorce. Proof shows the Appellee asked her about whether or not she was a homosexual and she categorically denied it. There is also proof in the record that she *flagrantly flaunted* her relationship with Peggy Maynard in the presence of the minor child. They would hug and passionately kiss each other and rub the private parts of their bodies while in the home where the child was. They would go to bed together and during their sexual stimulation of each other make audible expressions of pleasure and satisfaction that could be heard throughout the house and in the area where the child slept. They would have the child in bed with them while they were embracing each other in the nude.[124]

One of the ideas that appears to have worked its way through American culture is the idea of gay people "flaunting" their relationships. What does the term flaunting usually mean? Webster's definition of flaunting reads: "[T]o parade or display oneself conspicuously, defiantly, or boldly . . . . [T]o parade or display ostentatiously."[125] An example of a gay couple flaunting their relationship might be holding hands or kissing in public. The same type of behavior that is perfectly acceptable for straight couples is called flaunting when engaged in by gay couples.

It is instructive to read what the court does not say. The court does not say the women "passionately kissed" in the presence of the child; it says they kissed "in the home where the child was."[126] It does not say that the child heard their lovemaking. It says that it was "audible" in places "where the child slept."[127] The only thing the court says that these two women did in the presence of the child was to hug while they were undressed.[128] Would an opposite-sex couple be deemed a threat to the welfare of a child for hugging in bed? Perhaps.

However, the conduct suggestively ascribed to these women, if it were done in the presence of a child by any couple, straight or gay, might be inappropriate. But it would not be "flaunting." By depicting these women as flaunting their

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121 *Id.*

122 *Id.*

123 *Id.*

124 *See Dailey*, 635 S.W.2d at 393. While the court self-righteously condemns this type of activity, its titillating and quasi-voyeuristic recitation of the facts clearly treads into the realm of sexual fantasy, subverting the moral premises that substantiate its position. In addition, this recitation of the facts unnecessarily ignores the privacy of the women involved.

125 Webster's New Universal Unabridged Dictionary 731 (1996).

126 *Dailey*, 635 S.W.2d at 393.

127 *Id.*

128 *Id.*

relationship, Judge Sanders unfairly attributes an element of brazenness to the identity of these women that would not be attributed to an opposite-sex couple.

The inequitable treatment does not stop with "flaunting." Judge Sanders goes on to consider the expert testimony offered by both parties. Regarding the expert testimony offered by the mother, Judge Sanders writes only this:

> The Appellant offered the testimony of Dr. James Trent, who expressed little concern about the child being reared by a homosexual mother. He seemed to predicate his views primarily on the fact that there was a positive relationship between the child and his mother and there was no evidence of any harmful effects from his living with his mother up to this time.[129]

Regarding the expert testimony offered by the father, Judge Sanders writes this:

> The Appellee offered the testimony of Dr. Tom Biller, who expressed considerable concern as to the harmful effects that could result to the child by being reared by a homosexual mother . . . . Dr. Biller further testified that homosexuality is not a widely accepted practice in society in general and particularly not accepted in this region and there was a stronger possibility of an individual to develop instability because of his chosen lifestyle of homosexuality than individuals who choose the norm chosen by society of heterosexuality. He further testified that in his professional opinion it would be damaging to a child whose parents were openly living in a homosexual situation because of peer pressure and social stigma. He stated that homosexuality would be more likely to be learned by one who was exposed to it than by an individual who was not. Given the choice of whether a homosexual relationship involving a mother in the submissive role or a normal relationship wherein males and females adhere to their roles, Dr. Biller voiced his opinion that the situation involving the natural father would be preferable for Rusty. He felt that a homosexual parent who has custody of a young child would be damaging because homosexuality is not a socially accepted practice; that homosexuality is a learned trait and it would be very difficult for Rusty to learn and approximate sex role identification from a homosexual environment.[130]

It is fascinating that Judge Murphy did not seem to base his decision on the fact that neither expert demonstrated actual harm to the child. In his summary of Dr. Trent's testimony, he notes that there was a positive mother-child relationship.[131] In addition, he found that there was no evidence of harm.[132] Dr. Biller did not testify that there was a negative mother-child relationship. Nor did he testify that Sabel harmed her minor child. He merely stated that he was

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[129] *Id.*

[130] *Id.* at 393-394.

[131] *Dailey*, 635 S.W.2d at 393-394.

[132] *Id.*

concerned about the "harmful effects that *could* result to the child."[133]

In *Eldridge v. Eldridge*, a Tennessee case twenty years after *Dailey*, the Tennessee Court of Appeals was again called to examine the sexual conduct of two women.[134] This time the court found in favor of the mother.[135] While the court's analysis seems to be more sensitive to the realities of gay and lesbian litigants, it continues to employ unnecessarily inequitable language to depict gay and straight couples.

The court recites the facts as follows:

> Anthony and Julia Eldridge were divorced in 1992. The couple agreed to joint custody of their minor daughters, Andrea and Taylor, who were ages eight and nine respectively. Two years later, a dispute arose regarding Ms. Eldridge's visitation rights. Ms. Eldridge, who is engaged in a *live-in homosexual relationship* with Lisa Franklin, moved the court to establish a visitation schedule. In response, Mr. Eldgridge moved for sole custody of the children.[136]

While on its face, this phrase "live-in homosexual relationship" is merely descriptive and seemingly innocuous, it raises a few questions. Why is the term "live-in" necessary? Is there a legally important difference between a "live-in" and a "live-out" homosexual relationship? And why even add "homosexual" here? If this were a child custody dispute where Mrs. Eldridge lived with a man, would the court have stated that she was "engaged in a live-in heterosexual relationship"? The answer to the last question is no. In fact, the court provides us with an example of how it describes heterosexual relationships. Regarding the living situation of Mr. Eldridge after the divorce, the court writes in a footnote, "Mr. Eldridge admitted under questioning that he and Chantal [his current wife] cohabited with the children for several months while unwed."[137]

Absent from this sentence is the term "heterosexual," and the phrase "live-in" is replaced with "cohabited." Finally, the verb "engaged" is not used at all. If we were to revise the latter statement about the father to be consistent with the statement about the mother, it would sound strange: Mr. Eldridge was engaged in a live-in heterosexual relationship with Chantal. While the court treated the lesbian couple equitably, its written description of them did not. An implicit distrust of lesbian relationships appears to lurk behind the language employed by the court—a distrust that could work against the best interests of children in future cases.

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133 *Id.* (emphasis added).

134 42 S.W.3d 82 (Tenn. 2001).

135 *See id.* at 83.

136 *Id.* at 84 (emphasis added).

137 *Id.* at 87.

Washington State – Depicting Parents

As we have seen, courts have difficulties describing gay people and their relationships. These difficulties are exacerbated when these individuals become parents and their relationships lead to the development of families. The debate about how to describe these relationships can be understood as a conflict between those who prefer a formal definition of family versus those who prefer a functional definition.[138] It is important to remember that the best interests of the child analysis does not necessarily apply when determining parentage under the Uniform Parentage Act (UPA).[139] Nonetheless, determination of parentage under the UPA in certain cases does in fact have a direct and negative impact on the best interests of the children involved.[140]

This point is demonstrated in the case of *State* ex rel. *D.R.M. v. Wood.*[141] In 1992, Kelley McDonald began a relationship with a woman named Marie Wood in Washington State.[142] The two lived together for several years, and over the course of their relationship, they discussed starting a family.[143] It was decided that Kelley would undergo artificial insemination.[144] In September 1996, after many unsuccessful efforts, Kelley became pregnant, and in June 1997 she gave birth to a baby girl.[145] Marie agreed to jointly adopt the child, but the adoption never took place because shortly after the birth of the child, the relationship between the two women fell apart.[146] Marie paid support money to Kelley for a few months following the split, but her support payments eventually stopped.[147] The State of Washington, along with Kelley, sought child support payments from Marie based on claims of breach of contract and promissory estoppel.[148] The court, while not disallowing either theory, ruled in favor of Marie, finding that no contract existed and that Kelley did not legitimately rely on Marie's promise.[149]

The court wrestled with the definition of the term "parent" and the use of the term to describe Marie's relationship to the child.[150] The state argued, "[t]he sole issue is under what circumstances does a non-biologically related person become

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138 *See generally* WALTER WADLINGTON & RAYMOND C. O'BRIEN, DOMESTIC RELATIONS (5th ed. 2002).

139 Washington has adopted the provisions of the UPA at Wash. Rev. Code Ann. § 26.26 (West 2004).

140 *See Wood*, 34 P.3d at 887.

141 *Id.* at 890.

142 *Id.* at 890.

143 *Id.*

144 *Id.*

145 *Wood*, 34 P.3d at 890.

146 *Id.*

147 *Id.*

148 *Id.* at 891.

149 *Id.*

150 *See id.*

financially responsible for the support of a child?"[151] Additionally, it was argued in the *amici*[152] that "[t]here is no reason to hold a lesbian who consents to the insemination of a female partner to a lower standard of parental responsibility than is applied to a man who consents to the insemination of a female partner . . . Wood should be found to be a parent to the child." [153]

The court notes that the common law narrowly defines a parent as "the biological mother or the biological father of a child."[154] In addition, "adoption did not exist at common law."[155] Next, the court refers to the UPA that defines a parent as "either a natural parent or an adoptive parent."[156] Marie is neither. If Marie is legally a parent, she must qualify under another theory.

Kelley argued in her appeal that "Wood *acted* like a parent in encouraging conception of the child."[157] The court dismisses this argument under the UPA.[158]

> To establish parentage based on conduct, McDonald must rely on the UPA presumptions or surrogacy provisions. But, the state and McDonald have not assigned error to the trial court's conclusion of law that the UPA does not apply on these facts. Therefore, Wood is not a parent under the UPA.[159]

By concluding as it did, the trial court did not act (or was not able to act) in the best interests of either the child or society. It deprived the child of the child support promised by Marie, and the state was forced to issue welfare to Kelley so she could support her child. However, the legislature must shoulder some of the blame in this case. The court relied on a strict construction of the UPA in order to ground its decision.[160]

The question of form versus function also arises in the definition of and depiction of "family."

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151 *Wood*, 34 P.3d at 891.

152 The amici was written by The National Center for Lesbian Rights, Youth Law Center, Children of Lesbians and Gays Everywhere, and Northwest Women's Law Center.

153 *Wood*, 34 P.3d at 891.

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* (emphasis added).

158 *See id.*

159 *Id.*

160 *See id.*

Pennsylvania – Definition of a Family

Constance and Paul were married in Pennsylvania and had two children before divorcing in 1980.[161] After the divorce, Constance moved to Boston to "liv[e] in a fully acknowledged lesbian relationship."[162] In August of 1985, she petitioned the court for modification of the visitation schedule to expand her visitation rights with her children.[163] The court denied this petition.[164]

The majority found that Constance's lesbian relationship was immoral, posed a direct threat to the well-being of the children, and limited her visitation rights.[165] The dissent, while agreeing with the majority on the issue of Constance's immorality, argued that direct evidence of harm to the children should be required before denying her petition for expanded visitation.[166]

This case was decided early in the history of the gay and lesbian civil rights movement in the United States.[167] It is important because it sets up the form versus function dichotomy. Both the majority and the dissenting opinions in this case acknowledged the fact that "homosexual relationship[s] . . . have now become more open, and to some degree more accepted in our culture."[168] They also acknowledged that "[p]arents living in openly homosexual relationships have begun to use the courts to seek custody and partial custody."[169] Nevertheless, the majority goes to great lengths to value heterosexual families over homosexual families. Perhaps the best example of this in the majority opinion is as follows:

> The essence of marriage is the coming together of a man and 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. It therefore is entitled to a presumption in its favor over any other form of lifestyle, whether it be polygamy, communal living, homosexual relationships, celibate utopian communities or a myriad of other forms tried throughout the ages, none of which succeeded in supplanting the traditional family. The test of equality between the traditional family and the homosexual relationship cannot be met by the homosexual relationship. Simply put, if the traditional family relationship (lifestyle) was banned, human society would disappear in little

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161 *Constant A.*, 496 A.2d at 2.

162 *Id.* at 2, 13.

163 *Id.* at 2.

164 *Id.*

165 *Id.* at 10.

166 *Id.* at 12.

167 On June 28, 1969, police raided the Stonewall bar in New York: the revolt that ensued resulted in the first gay pride march, and the birth of the modern gay rights movement in America. There are many articles and websites dedicated to this topic. *See e.g.* Charles Kaiser, *The Man Behind Stonewall*, THE ADVOCATE, Aug. 15, 2000, *at* http://www.advocate.com/html/stories/817_8/8178martinlutherking.asp.

168 *Constant A.*, 496 A.2d at 12.

169 *Id.*

> more than one generation, whereas if the homosexual lifestyle were banned, there would be no perceivable harm to society.[170]

The court constructs a direct opposition between traditional and non-traditional families and confers positive value on the traditional family based on a highly technical argument limited to procreation.[171] Although this decision is almost two decades old, this split between traditional and non-traditional families, and the valuations placed on each form, are still evident in current opinions. Those charged with penning these opinions must decide to what extent this structure and these valuations are legitimate. The Pennsylvania courts are currently debating whether to adopt a formal or functional definition of family.[172] Consider the following two cases.

In the first, two men had been in a committed relationship for eighteen years.[173] One of the men adopted two children.[174] After eleven years and raising the children from birth, his partner sought the right to co-adopt the children.[175] In the second, two women lived together for a similarly long time.[176] One of the women gave birth to twins through artificial insemination.[177] After three years, her partner sought to co-adopt the twins.[178] The trial courts denied the joint adoptions for both families, who later appealed.[179]

In both cases, the appellate court denied the adoptions.[180] The majority opinion adopted a formal definition of family that it derived from the formal definition of marriage stated in Pennsylvania's Defense of Marriage Act.[181] The opinion states:

> Appellants' *attempt at establishing a de facto family*, which would qualify for adoption under Section 2903, is unavailing. It is the "strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman . . . [and] a marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth."[182]

The majority does not cite any statutes or common law defining "family" in order to strengthen its opinion.[183] Instead, it cites the statute defining

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170 *Id.* at 14, n.6.
171 *See id.*
172 *See In re* C.C.G., 762 A.2d at 724; *In re* R.B.F., 762 A.2d at 739.
173 *In re* C.C.G., 762 A.2d at 724.
174 *Id.*
175 *Id.*
176 *In re* R.B.F., 762 A.2d at 739.
177 *Id.*
178 *Id.*
179 *See In re* C.C.G., 762 A.2d at 724; *In re* R.B.F., 762 A.2d at 739.
180 *In re* R.B.F., 762 A.2d at 739.
181 *Id.*
182 *Id.* at 741 (quoting 23 PA. CONS. STAT. § 1704) (emphasis added).
183 *See id.* at 739.

"marriage."[184] Apparently, the majority believes that it is impossible to establish a *de facto* family outside of marriage. Marriage then provides the form of family. Outside of that definition, a family cannot exist in the majority's eyes. The court essentially held that eighteen years of commitment plus eleven years of child-rearing count as merely an attempt to establish a family. Yet, if the couples and their children are not families, it is unclear what they are. The majority would legally consider them a gathering of strangers. The inequity involved in such a depiction seems striking. In order to remedy such inequity, the court might consider adopting a functional definition of family.

III. MODEL OPINIONS

Florida— Moral Neutrality

As noted in the introduction, the State of Florida has been in the family law spotlight recently because an Eleventh Circuit decision upheld the constitutionality of the state statute that prevents gay and lesbian people from adopting children.[185] However, in a few child custody opinions, the Florida courts have been slightly more equitable.[186] It is to these opinions that we now turn.[187]

A couple was married in Florida in 1991 and had one daughter before commencing divorce proceedings in 1993.[188] The dispute between the parents focused on the "moral fitness" of the mother.[189] The evidence indicated two issues that were pivotal to the trial court: 1) the mother's self-identification as a bisexual, and 2) the mother's relationship with a woman.[190]

The trial court wrote:

> The testimony reveals that Mrs. Maradie, with her homosexual lover, spend [sic] nights and sleep together in the same bed, kiss, hold hands and speak in terms of endearment in front of the child. The possibility of negative impact on the child, especially as she grows older and reaches her late pre-teen and early teen years, is considerable. The Court does not have to have expert evidence to reach this conclusion, but can take judicial notice that a homosexual environment is not a traditional home environment, and can adversely affect a child. To say that this cannot be considered until there is actual proof that is has occurred is asking the Court to abdicate its common sense and responsible decision-making endeavors.[191]

It is fascinating that the trial court listed among its negative evidence

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184 *See id.*

185 *See Lofton*, 2004 U.S. App. Lexis 15056, at *1.

186 *See Maradie*, 680 So. 2d at 538; *Jacoby*, 763 So. 2d at 410.

187 *See Maradie*, 680 So. 2d at 538; *Jacoby*, 763 So. 2d at 410.

188 *Maradie*, 680 So. 2d at 540.

189 *Id.*

190 *Id.*

191 *Id.*

"speaking in terms of endearment in front of the child."[192] Words of love and commitment are apparently *ipso facto* harmful when spoken by one woman to another. The court's "common sense" negated the expert testimony of a psychologist at trial.

> Q. Are you aware of her present involvement with another woman?
>
> A. Yes.
>
> Q. Does that involvement impair her parenting of Kaylan or Jason?
>
> A. I've seen no evidence of that so far . . . .
>
> Q. From your own research, does being raised by a bisexual or homosexual parent significantly affect a child's own sexual orientation?
>
> A. There's no research indicating that it has an impact on a child's development of sexual preference.[193]

The Court of Appeals reversed and remanded based on the fact that the trial court misconstrued the Florida statute and common law dealing with judicial notice.[194] The Court of Appeals found that under common law, "judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities."[195] The court went on to examine a statute dealing with judicial notice and concludes that the enumerated situations in which it may apply have not been satisfied in this case:

> [A] connection between the actions of the parent and harm to the child requires an evidentiary basis and cannot be assumed. In addition, the mere possibility of negative impact on the child is not enough. This is not to say that the trial court must have evidence of actual harm, past or present. The trial court can base a decision on proof of the likelihood of prospective harm.[196]

With this conclusion, the court chose to depict gay and lesbian people and relationships in a morally neutral sense.[197] At least according to this opinion, gay people and relationships are not *ipso facto* harmful.[198] Like any other relationship, evidence of actual harm, or likelihood of actual harm must be taken into account. Cases such as this benefit children of homosexual parents by not allowing judges to dismantle their families based on preconceived notions about gay and lesbian people.

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192 *Id.*

193 *Id.* at 540, n.2.

194 *Maradie*, 680 So. 2d at 543.

195 *Id.* at 543.

196 *Id.*

197 *See id.*

198 This also comports with the American Academy of Pediatrics statement. *See* Ellen C. Perrin, *Technical Report: Co-parent or Second-Parent Adoption by Same-Sex Parents,* 109 PEDIATRICS 341-44 (2002).

The next case follows the previous fact pattern. Julie and David were married in Florida and had two children.[199] One day Julie "informed her husband that she had fallen in love with a longstanding family friend who is a lesbian."[200] Upon separation, Julie and her children moved in with the other woman.[201] Julie and David shared custody of the children on a weekly rotating basis.[202] Each sought permanent custody, which the trial court granted to the father.[203] The Court of Appeals reversed, explaining:

> As often happens in child custody cases, each parent attempted to prove examples of the other's lapses in parental judgment. The court wisely refused to consider a number of these minor conflicts . . . . [H]owever, the court's remarks during the final hearing and in the final judgment demonstrate that it succumbed to the father's attacks on the mother's sexual orientation . . . .[204]

Succumbed means "to yield and cease to resist or contend before a superior strength, overpowering appeal or desire, or inexorable force."[205] By its use of the word "succumbed," the court suggested that attacks based merely on sexual orientation are destructive or disruptive. Its use also suggests that the the court valiantly resisted these attacks. The court cited precedent requiring evidence of a direct effect or impact on the child and opined, "[w]e have reviewed the court's comments concerning the negative impact of the mother's sexual orientation on the children, and have found them to be conclusory or unsupported by the evidence."[206]

The trial court determined that David's opinion regarding the immorality of homosexuality "is shared by others in the community."[207] The Court of Appeals found that "there was no evidence addressing 'the community's' beliefs about the morality of homosexuals or their child rearing abilities."[208] In addition, it found that the trial court had "mischaracterized Dr. Merin's [the psychologist's] testimony" relating to the prejudice the children might face by their peers as a result of their mother's sexual orientation.[209] The appellate court further argued that, "even if the court's comments about the community's beliefs and possible reactions were correct and supported by the evidence in this record, the law cannot give effect to private biases."[210] Private biases cannot be part of a "direct effect"

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199 *Jacoby*, 763 So. 2d at 410.
200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.*
204 *Id.* at 412-13 (emphasis added).
205 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2283 (1986).
206 *Jacoby*, 763 So. 2d at 413.
207 *Id.*
208 *Id.*
209 *Id.*
210 *Id.*

analysis if the law cannot give effect to them.

The appellate court criticized the trial court's conclusions regarding the possible confusion that the daughters might face as a result of having a gay mother and attending a private Baptist school.[211] The appellate court found no evidence from the trial court record as to what kind of religious instruction the children had received.[212] The trial court could not have concluded that the children would be confused without first demonstrating that they had been taught lessons in school which condemned their mother's sexual orientation. Next, it found that Dr. Merin's testimony regarding possible future confusion was insufficient to support a conclusion that harm would arise from the mother's sexual orientation.[213] Finally, the court found the evidence regarding Baptists' beliefs was poorly grounded.

> Several witnesses testified about the Baptists' beliefs without ever explaining the sources of their knowledge. When Mr. Jacoby's attorney asked Dr. Merin if he knew the Baptists' position on homosexuality, the doctor responded that they were strongly opposed to it. Mr. Jacoby also testified he had learned that the Baptist religion was against homosexuality. At one point, the trial court itself questioned Mrs. Jacoby directly asking whether she was aware that 'the Baptists' had boycotted Disney World. None of this was competent evidence; nothing in the record suggested that the psychologist, Mr. Jacoby, or the trial court was qualified to expound on Baptist doctrine.[214]

One myth is that religious communities unanimously disapprove of homosexuality.[215] The trial court, by allowing laymen to "expound on Baptist doctrine"[216] in effect relies on and perpetuates this stereotype. One can imagine how the mother felt when the trial court judge called her private religious convictions into question. The Court of Appeals in this situation dismantled the assumption, and paved the way towards more positive depictions of gay and lesbian people, their relationships, and their lives.

The court continued:

> [N]o evidence was presented to show to what degree, how, or even whether this supposed Baptist doctrine of anti-homosexuality was espoused at the children's school, or for that matter, at the church with which it was affiliated. Indeed, the only evidence with any bearing on these questions suggested an atmosphere of tolerance; Mr. and Mrs. Jacoby both testified that the school employed a teacher who was widely known to be

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211 *Id.* at 414.

212 *Jacoby*, 763 So. 2d at 413.

213 *Id.*

214 *Id.*

215 *See* HUMAN RIGHTS CAMPAIGN, *Mixed Blessings: Organized Religion and Gay and Lesbian Americans in 1998, available at* http://www.hrc.org/Template.cfm?Section=Press_Room&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14849> (*last visited* August 15, 2004).

216 *Jacoby*, 763 So. 2d at 414.

> homosexual. The court's question about "Disney World" presumably referred to the 1996 and 1997 votes by attendees at the Southern Baptist Convention to boycott the Walt Disney Company in part because it extended health benefits to employees in same-sex relationships. But there was no evidence in this record about that boycott. The court's implication either that Baptists were unanimous in that position or that the Southern Baptist Convention wields some sort of hierarchal authority over Baptist churches and schools had no evidentiary support.[217]

By calling the trial court's opinion into question, the appellate court did a double service. First it strikes a blow against unfair discrimination against gay and lesbian people, and second it dismantles a monolithic construction of religious authority.

The court also addressed the double standard the trial court applied in evaluating the living quarters of the parties. In an almost tongue-in-cheek manner, the court wrote:

> The judgment referred to the father's fiancée's house as "a very appropriate home" and a "very nice home." It went on to state that "the preference of this home to the one proposed by the wife is obvious . . . ." Again, although we are confident that the court accurately assessed Mr. Jacoby's new home, the obviousness of its preference is not apparent from the evidence. Nothing in the record suggested that Mrs. Jacoby's house was physically inappropriate for raising children; that is, that it was too small or in an unsavory neighborhood, or some such.[218]

If the Court of Appeals was correct, that the trial court's choice of the physical dwelling was based on anti-gay bias, then the trial court took anti-gay bias to a whole new level. Prejudice against a physical structure based on lesbian ownership suggests that in the court's imagination the actual physical structure became infused with a lesbian identity. Perhaps this is overstated. Nonetheless, the court was so biased against the women living in the house that it devalued the property in the court's imagination.

The appellate court provided a model opinion for a variety of reasons. First, the court made use of language that accurately reflects the current state of psychological research. For example, when discussing the mother, it often employed the words "sexual orientation,"[219] the same words used by medical professionals.[220] Second, it raised and dismissed many of the negative cultural stereotypes that inform depictions of gay and lesbian people.[221] Conclusions based on false religious intuitions and false psychological concerns in the trial court opinion were brought to light, dismantled, and dismissed.[222] Finally, the opinion

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217 *Id.*

218 *Id.* at 414-15.

219 *See e.g., id.* at 413.

220 *See e.g.*, American Psychiatric Association, *Gay, Lesbian and Bisexual Issues, at* http://www.psych.org/public_info/gaylesbianbisexualissues22701.pdf (last visited December 14, 2004).

221 *Jacoby*, 763 So. 2d at 410.

222 *Id.*

itself is morally neutral. It makes, and allows for, no *a priori* judgments about the parenting skills of gay and lesbian people.[223] All of these things compel future courts to examine the facts of each individual case in an unbiased manner. This will help to safeguard the best interests of the children.

New Jersey – Gay-Friendly Family Law

The next case deals with the break up of a lesbian relationship. The facts are as follows: in 1993, M.J.B., who was in a committed relationship with V.C., began an artificial-insemination process that would culminate in the birth of twins in September 1994.[224] Before and during M.J.B.'s pregnancy, V.C. attended two of the insemination procedures, and pre-natal and Lamaze classes with M.J.B.[225] The two had joint bank accounts, designating each other as beneficiaries in their wills and life insurance policies, and held themselves out to be a family.[226]

The twins developed relationships with both women calling M.J.B. "Mommy" and V.C. "Meema." Eventually, the women grew apart and their relationship ended.[227] V.C. moved out of their residence in December 1996.[228] She was allowed to see the children every other weekend until May 1997.[229] Tension between the two arose, and M.J.B. ceased to allow V.C. to visit the children.[230] V.C. petitioned the court for joint legal custody.[231]

The trial court denied V.C.'s petition.[232] The appellate court upheld the trial court's decision, but did allow V.C. visitation rights.[233] The New Jersey Supreme Court found that although V.C. did qualify as a psychological parent, granting her petition for legal custody after four years of not making legal decisions for the children would be disruptive.[234] The court upheld the appellate court's grant of visitation, finding that V.C. had been involved in the lives of the girls during the four years of litigation.[235]

Outside of the recitation of the facts, there is only one reference to sexual orientation.[236] That reference occurs in a concurring opinion.[237] It is not even directed at the women, but is used to illustrate the fact that sexual orientation is

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223 *Id.*
224 *V.C.*, 163 N.J. at 206.
225 *Id.*
226 *Id.*
227 *Id.* at 207.
228 *Id.* at 210.
229 *Id.*
230 *V.C.*, 163 N.J. at 210.
231 *Id.*
232 *Id.* at 212.
233 *Id.* at 213.
234 *Id.* at 220.
235 *Id.*
236 *See V.C.*, 163 N.J. at 232.
237 *See id.*

irrelevant to parental ability.[238]

The court began by examining the New Jersey statute's definition of the word "parent."[239] It concluded that the language was "expansive" such that non-biologically related individuals could qualify as parents depending on the context.[240] Finding that V.C. had standing to petition for legal custody, the court then discussed whether V.C. presented sufficient evidence that she should qualify as a psychological parent.[241]

The court explained how one may qualify as a psychological parent. "[T]he legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged."[242] After a more in-depth explanation of each of the criteria, the court concluded:

> Th[e] full record informs us that M.J.B. fostered and cultivated, in every way, the development of a parent-child bond between V.C. and the twins; that they all lived together in the same household as a family; that despite M.J.B.'s after-the-fact characterizations of V.C. as a "stranger" and a "nanny," V.C. assumed many of the day-to-day obligations of parenthood toward the twins, including financial support; and that a bonded relationship developed between V.C. and the twins that is parental in nature.[243]

The court does not even mention the sexual orientation of V.C.[244] By not mentioning sexual orientation, the court avoids a huge number of potential problems. There are no issues of disparate treatment between heterosexual and homosexual litigants. There is no question as to what constitutes the proper language to discuss gay and lesbian people. And, there is no misuse or misunderstanding of current psychological or theological developments. In a sense, not mentioning sexual orientation, taking it merely as a given, is one of the most equitable acts the court could perform because it says: the debate is over—gay and lesbian families are no longer the subjects of debate, they are established facts. The court's role is to judge the circumstances based on the same analysis in gay and lesbian cases as in any other case.

The lack of direct reference to sexual orientation in the majority opinion is important in another way. It is important because the Concerned Women of America filed an amicus brief arguing against a "heavy judicial hand favoring the

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238 *See id.*
239 *Id.* at 216.
240 *Id.*
241 *Id.* at 222.
242 *V.C.*, 163 N.J. at 223.
243 *Id.* at 229.
244 *See id.*

homosexual agenda."[245] The ACLU and a variety of gay and lesbian rights organizations weighed in as well.[246] The court did not address their arguments, leaving politics to the legislature and instead focusing on the legal theories appropriate and necessary to resolve the case.

The concurring opinion takes gay and lesbian families as a given, and sets out model criteria by which any family structure might be judged. From a variety of sociological studies, Judge O'Hern distills three qualities that characterize American families.[247] These are 1) the stability of the parents' relationship; 2) parental nurturing; and 3) privacy understood as "awareness of itself as a precious emotional unit" demanding isolation from outside intrusion.[248] While these qualities have always been associated with the "nuclear family" Judge O'Hern writes,

> [W]e should not be misled into thinking that any particular model of family life is the only one that embodies "family values." Those qualities of family life on which society places a premium—its stability, the love and affection shared by its members, their focus on each other, the emotional and physical care and nurturance that parents provide their offspring, the creation of a safe harbor for all involved, the wellspring of support family life provides its members, the ideal of absolute fealty in good and bad times that infuses the familial relationship (all of which justify isolation from outside intrusion)—are merely characteristics of family life that, except for its communal aspect, are unrelated to the particular form a family takes.[249]

Judge O'Hern enumerates some of the forms a family might take:

> That bond is not the result of the sexual orientation of the adults or of their marital status. It does not arise solely from biology or legal adoption. Rather, it is borne out of the daily toil parents engage in to keep their children healthy and safe from harm; out of love and attention provided to the children; and out of the unconditional regard returned by the children to the parental figures . . . . In other words, the nuclear family of husband and wife and their offspring is not the only method by which a parent-child relationship can be created. The values attached to family life, although properly attributed to the nuclear family model, can exist in other settings, including families created by unmarried persons regardless of their sexual orientation.[250]

This opinion puts married, non-married, heterosexual and homosexual family forms on the same level. Judge O'Hern raises the distinctions between these forms,

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245 *Id.* at 215.
246 *Id.* at 200.
247 *Id.* at 231.
248 *V.C.*, 163 N.J. at 231.
249 *Id.* at 232.
250 *Id.*

then renders the differences inconsequential when viewed in light of the values shared by all of them. To put it in another way, ideal family values are instantiated or participated in by a variety of concrete family forms. By recognizing differences of form but finding common ground in ideals and values, the court recognizes the unique dignity of the person as an individual, and the unique dignity of the person in relation to others.

Pennsylvania—Dissent and the ground work for a functional definition of family

Recall the two cases examined earlier in which a gay man and a lesbian woman sought co-adoptive parent status but were denied based on a formal definition of marriage.[251] In both of those cases, two of the judges dissented. We turn now to those dissents, and to the functional definition of family adopted by both judges.

Judge Johnson's dissent at the outset depicts the couples as families: "[w]e are here asked to decide whether the Adoption Act, 23 Pa.C.S. §§ 2101-2910, bars a *de facto* father from becoming a second *de jure* parent to the seven-year old girl and eight year old boy whom he has co-parented since birth."[252] The co-parenting function of the non-adoptive partner is stated as a fact, as is his *de facto* fatherhood status.

After an argument concerning the canons of statutory construction in Pennsylvania, and a critique of the majority's reading of one of the provisions, the court goes on to criticize the majority's adoption of the formal definition of family.

> Although courts have gone to great lengths to provide every child with precisely one mother and one father, the realities of family formation and parenting are considerably more complex. [Same-sex parent] families are but one alternative to the presumed form. In resolving disputes about the custody of children, the court system should recognize the reality of children's lives, however unusual or complex. Courts should design rules to serve children's best interests. By failing to do so, they perpetuate the fiction of family homogeneity at the expense of the children whose reality does not fit this form.[253]

In this paragraph, Judge Johnson establishes the necessity for courts to admit to the existence of functional families. Justice Todd joining in the dissenting opinion of Justice Johnson discusses the iniquitous results of the majority's choice to use the form definition over the functional definition.[254] Judge Todd begins his dissent by illustrating the inequity in the majority's adoption of the formal definition of family: "Here both parents have raised the children since their

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[251] *See In re* C.C.G., 762 A.2d at 724.

[252] *Id.* at 730.

[253] *Id.* at 735.

[254] *Id.* at 737.

infancies, have financially supported them, loved them, taken them to church, and educated them. Under the circumstances presented, I must respectfully dissent from the Majority's holding that Appellants may not, through the vehicle of adoption, both legally parent them."[255] Justice Todd specifically lists the impact the majority's formulation will have on a child's life:

> These benefits, which the Majority by its decision herein has decreed shall not be obtainable, include the legal protection of the children's existing familial bonds, their rights to financial support from two parents instead of just one, rights to inheritance from each parent and rights to obtain other available dependent benefits, such as health care insurance and Social Security benefits, from either parent. No legal mechanism other than adoption can offer such protection to these children, and yet the Majority finds that it cannot reach a best interest of the children analysis.[256]

Justice Todd concludes:

> In this case, the Majority's interpretation of the Adoption Act will not further the interests of these children by preventing this adoption. This decision will not change the everyday reality of the children's lives, their living arrangements or the parties' parenting practices. It will, however, deny the children the benefits of parental recognition, stability and future security.[257]

There are a few things to note about the way both justices depict the family. First, they both focus on the relations between the parents and the children, not on the relation between the two parents. Second, the justices rely on empirical data dealing with the reality of functional families rather than on *a priori* constructions.[258] Third, the justices focus on the best interests of the children rather than what might be deemed a policy judgment on what is in the best interests of society.[259] In so doing, their opinions actually reach the best interests of the children, and therefore they serve as model opinions for my purposes here.

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255 *Id.* at 738.

256 *Id.* at 737.

257 *In re* C.C.G., 762 A.2d at 738.

258 Justice Todd points out that "The Courts of Common Pleas of at least fourteen counties in Pennsylvania have permitted such second-parent adoptions in over one hundred cases." *Id.*

259 Lurking behind the majority opinion seems to be the fear that recognizing second-parent adoptions will lead to gay marriage. The recognition of gay marriages is often equated with the destruction of the traditional institution of marriage. *See e.g.* PETER SPRIGGS, OUTRAGE: HOW GAY ACTIVISTS AND LIBERAL JUDGES ARE TRASHING DEMOCRACY TO REDEFINE MARRIAGE (2004). By quoting Pennsylvania's Defense of Marriage Act, the Majority sacrifices the best interests of the children on the altar of tradition.

IV. RECOMMENDATIONS

Throughout this paper, I investigate four distinct types of characterizations made in judicial opinions. Firstly, I examine how courts characterize gay and lesbian people as individuals. Next, I examine the judicial gloss given to relationships between gay and lesbian people. Thirdly, I examine competing definitions of parenthood. Finally, I examine competing definitions of family. What are some of the conclusions that may be gleaned from this investigation?

Individuals

There are very few reasons to refer to a person's sexual orientation when drafting a court opinion. As I pointed out above, often judges do not understand sexual orientation, or they improperly predicate it—negatively affecting the best interests of children. Yet times will undoubtedly arise when sexual orientation must be mentioned. In these situations, one should use language that reflects the current research in the psychological community. The American Psychological Association and the American Psychiatric Association both utilize language that might serve well as a model for understanding and discussing sexual orientation.[260] This is the type of language that should be employed when portraying gay and lesbian people in an unbiased manner.

Relationships

Gay and lesbian relationships are subject to bizarre portrayals. Courts use phrases such as "live-in lesbian relationships,"[261] "fully acknowledged lesbian relationship,"[262] and "state of lesbianism."[263] Each of these opinions could have been written without the term "lesbian." In addition, these opinions are often inconsistent. Courts do not use terms such as "straight" to describe opposite-sex relationships.[264] Legal professionals should describe same-sex relationships and opposite-sex relationships in as consistent a manner as possible. While in some situations an individual's sexual relationship must be part of an opinion, it is not necessary to mention the sexual orientation of the relationship. In fact, it does not really make sense to do so. Sexual orientation is properly predicated on people, not relationships.

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260 *See* American Psychological Association, *Answers to Your Questions About Sexual Orientation and Homosexuality, at* http://www.apa.org/pubinfo/answers.html (last visited December 14, 2004); American Psychiatric Association, *Gay, Lesbian and Bisexual Issues, at* http://www.psych.org/public_info/gaylesbianbisexualissues22701.pdf (last visited December 14, 2004).

261 *Eldridge*, 42 S.W.3d at 82.

262 *Constant A.*, 496 A.2d at 1.

263 *Brown*, 212 N.W.2d at 57.

264 *Eldridge*, 42 S.W.3d at 82.

Parents and Families

These two categories present particular problems in drafting opinions that depict gay and lesbian people as parents or family members. These problems stem from state statutes, codes and administrative regulations. The common law defines the terms "parent" and "family" very narrowly.[265] Therefore, it is often necessary to look to statutes for guidance. In addition, adoption is not generally a common law category.[266] It is also necessary to look to statutes for the requisite definitions.

Many times these statutes do not address the reality that gay and lesbian people create families, or are parents. Yet, as we have seen, some of these families have been together for decades and will continue to exist even though statutes do not acknowledge them.[267]

In order to bridge the gap between law and reality, legislators and judges ought to imagine an equitable future for non-traditional parents and families. They ought to create a definition of parenthood large enough to deal with individual liberty, tradition and the best interests of the children. These evolving definitions ought to establish some sort of parenthood for a man or a woman, gay or straight, married or unmarried, who spends a substantial amount of time loving a child, raising that child, taking care of that child when they are sick, teaching that child, providing for that child, and developing a strong lasting emotional bond with that child. When a same-sex couple lives together, raises children, shares their resources, and creates a loving household, those people function as a family and should be considered to be a family by the law. Judges charged with portraying these parents and these families should do so with that in mind.

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265 *Wood*, 34 P.3d at 891.

266 *Id.*

267 *In re* C.C.G., 762 A.2d at 724; *In re* R.B.F., 762 A.2d at 739.

V. CONCLUSION

Prejudice affects the best interests of children. Children in Alabama read an opinion calling their mother's relationship "abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of Nature's God upon which this Nation and our laws are predicated."[268] A boy in Michigan was taken from a woman who raised him for twelve years—since birth—and placed with a father who was twenty thousand dollars in arrears with his child support payments.[269] A mother was legally denied child support payments by her partner after she was artificially inseminated—even though the partner had agreed in writing to provide support.[270] Children in Pennsylvania were denied the benefits they would have been entitled to had co-parent adoption been allowed, however, because their parents were not married—nor capable of being married—in Pennsylvania they could not be co-adopted.[271] The list of these inequities goes on and on. This is just a small sampling of the extant parenting cases dealing with gay litigants.

In many of these cases, the inequitable outcomes stem not from statutes or common law. The inequity stems from the inability of judges to imagine a world with gay parents and gay families. It is this lack of imagination, not statutory restrictions that lead to uninformed and often mean-spirited opinions.[272] These opinions are inscribed in case reporters to be read by generations to come. They are woven into the common law that forms the fabric of order in this country. Yet, they are opinions that will undoubtedly be viewed one day as the cultural artifacts of a dying system of bigotry.

To conclude, I ask the reader to think about the language in this case:

> Mr. Reed, plaintiff's assistant manager who handled the loan, testified that he explained in French to Skinner, *an illiterate French-speaking Negro*, that he was to sign as an endorser; that he told Skinner that if Avie did not pay the note, Skinner would have to pay it; that Skinner understood this explanation, after which Skinner 'touched the pen' and then Reed placed Skinner's X mark on the face of the note, actually on a line intended for a co-maker.[273]

Was the word "Negro" necessary at all? Would anyone writing an opinion in the twenty-first century use that word? Why did the judge use it? What images does that word evoke? What impression of the judge do you have? When you write about gay and lesbian people, what words will you use?

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268 D.H. v. H.H., 2002 Ala. LEXIS 44, at *13 (Ala. Sup. Ct. 2002).

269 *McGuffin*, 542 N.W.2d at 288.

270 *Wood*, 34 P.3d at 890.

271 *In re* C.C.G., 762 A.2d at 724; *In re* R.B.F., 762 A.2d at 739.

272 *D.H.*, 2002 Ala. LEXIS 44, at *13.

273 St. Landry Loan Co. v. Avie, 147 So. 2d 725, 726 (La. Ct. App. 1962) (emphasis added).