THE LAW IS STRAIGHT AND NARROW, HOW AMERICAN COURTS DEFINE FAMILIES

ELISA LAIRD*

> A right, whether in fact or in law, is something which is defined in relation to—in relation to a rule, a norm, a tradition. And therefore, by definition, a right refers to a request for power. To have the right is to be in a position decentred from the decision-making authority. A right is obtained, thus it is situated in a perspective of dependence, of a concession—not of negotiation or of exchange.[1]

I. INTRODUCTION

The law is straight and narrow.[2] It has a norm of heterosexuality and has limited applicability.[3] The law also follows the "straight and narrow path" laid out for it by its Christian roots.[4] The law has an inherent bias toward "traditional" families, causing "non-traditional" families (so defined by what they *are not*, not what they *are*) to have to go to the courts and legislatures to ask for the right to be held legally in the same regard as traditional families.[5]

II. BACKGROUND

Courts are increasingly called upon to apply the law of families to those who were not considered when those laws were formulated, particularly gay

---

* J.D. Candidate, Golden Gate University School of Law, B.A. East Carolina University, Cum Laude. The author would like to thank Professor Maria Grahn-Farley for her encouragement to publish this essay. The author would also like to thank the *Cardozo Women's Law Journal* for their diligent editorial work.

[1] Collette Guillaumin, *The Question of Difference, in* RACISM, SEXISM, POWER AND IDEOLOGY 239, 251 (Mary Jo Lakeland, trans., 1995).

[2] This essay will describe the ways in which the laws defining families is "straight" by favoring heterosexual norms over same-sex norms when determining what constitutes a family. The law, as this essay will show, remains "narrow" when it comes to its possibilities and willingness to include same-sex couples in the definition of family.

[3] David B. Cruz, *"Just Don't Call It Marriage:" The First Amendment and Marriage as an Expressive Resource* 74 S. CAL. L. REV. 925, 927 (2001) [hereinafter Cruz 1].

[4] Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage* 37 HARV. C.R.-C.L. L. REV. 255, 263-64 (2002).

[5] *See* Cruz 1, *supra* note 3, at 931.

and lesbian families.[6] In each case, the court has to decide what a family is and whether the pair or group of individuals before it constitutes a family.[7] On its decision rests the ability of the family to obtain the rights and benefits granted to most others in society. The results of these decisions have been mixed.[8] Their only certainty is their unpredictability of outcome for gay and lesbian families, whose lives are necessarily predicated on their decision.

III. PURPOSE AND METHOD

This essay will examine the impact of the straight and narrow law on lives that are neither straight nor narrow[9] by examining how families are defined in modern American law and how those definitions impact the individuals they attempt to label. This paper will examine judicial interpretations of state and local laws and ordinances and company policies affecting gay and lesbian families, as well as and other nontraditional family groupings. It will examine only a few of the many instances of judicial treatment of gay and lesbian families, which exemplify each of the ways that courts make decisions about gay and lesbian couples, their children and other family members.

IV. THE LEGAL RIGHT TO BE CALLED A FAMILY

Until fairly recently, gay and lesbian families have been mostly invisible to the outside world.[10] This invisibility was, and still is, sometimes cultivated by the family to avoid negative reactions from the heterosexual community in which the family must live and function.[11] Other families may experience invisibility due to an inability or unwillingness to explain or expose the family system to outsiders.[12] Heterosexual families have always been protected by the laws and enjoy the benefits—social and legal—bestowed by the larger

---

6 *See generally* Ross, *supra* note 4.

7 Cruz 1, *supra* note 3, at 931.

8 *Id.*

9 By not "straight or narrow," the author refers to families that consist of by same-sex couples.

10 *See* Cruz 1, *supra* note 3, at 927 (referring to the cases in the 1990's in Hawaii, Alaska, and Vermont).

11 *See* Ross, *supra* note 4, at 276-77 (describing the ways in which same-sex couples through shame and sometimes violence from family members and society been forced to keep their relationship secret).

12 *See* Sally Crawford, *Lesbian Families: Psychosocial Stress and the Family-Building Process, in* LESBIAN PSYCHOLOGIES, EXPLORATIONS AND CHALLENGES, 195, 202 (Boston Lesbian Psychologies Collective ed., University of Illinois Press 1987). "Language is an important aspect of visibility, as are cultural rites of passage. Lesbian families are often unsure how to describe or explain their relationships to the outside world, because there is no culturally acknowledged language for these connections. Furthermore, lesbians are denied cultural rites of passage that mark and celebrate such important life events as when one becomes a couple or a family." *Id.*

system.[13] These benefits include: the right to employment fringe benefits such as pensions, health insurance, survivor benefits and leave, and the right not to be taxed for these benefits; inheritance rights; child custody and visitation rights; immigration rights; use of step-parent adoptions; the right to make funeral arrangements for a partner; the right to make medical decisions for an incapacitated partner; the right to visit a partner in the hospital; domestic violence protections; divorce protections; the ability to collect unemployment benefits if the couple has to move because one partner takes a job far away; tax benefits, including exemption from inheritance taxes on the death of a partner, estate tax marital deduction, joint returns, and additional deductions and exemptions; the right to create a marital life estate trust; automatic transfer of a housing lease; eligibility for joint insurance coverage for car and home; the ability to sue for emotional distress, loss of consortium, and wrongful death; and the right to claim the marital communication privilege.[14] Lesbians and gay men recognize the value of these benefits and want to acquire them for their own families.[15] In the last twenty years, homosexuals, as well as unmarried heterosexual couples, single parents, and others falling outside the definition of the "traditional" or "natural" family, have increasingly turned to the courts to try to claim some of the advantages that previously have been reserved for nuclear families.[16] In seeking to have their families legitimized by the law, gay men and lesbians have been confronted by the reality that, to obtain the benefits they seek, they are required to request of the courts and the legislatures what those holding the power to decide such requests already possess: the right to legally call themselves a family.[17]

V. ACCESS DENIED: DEFINING GAY FAMILIES

The law is a pipeline through which rights are granted. The power to grant those rights is held by only a few.[18] Some use the law to protect those who have fewer rights because of their subservient relation to the law and the majority.[19] Others use the law to discriminate against individuals and deny

---

[13] Cruz 1, *supra* note 3, at 932.

[14] *Id.*

[15] *See generally* Cruz 1, *supra* note 3.

[16] *Id.*

[17] For further discussion on the privilege of being able to call oneself a family, see Ross, *supra* note 4 (comparing the struggle of mixed-race couples to be able to call themselves a family with the struggle of today for same-sex couples to be able to call themselves a family).

[18] Judges are one such group to which same-sex couples have appealed for recognition of their relationship as constituting a family. *See* Cruz 1, *supra* note 3. at 927; *see generally* Ross, *supra* note 4.

[19] Cruz argues that same-sex couples shall have the same protection under the Constitution as religious practice, race and gender. *See,* David B. Cruz, *Disestablishing Sex and Gender* 90 CAL. L. REV. 997, 1020 (2002). [hereinafter Cruz 2].

marginalized groups access to the law's protections.[20] This section describes some of the various decision-making methods courts commonly use to decide what constitutes a family. Often courts combine several of these types of reasoning in deciding a single case. These methods differ from one another, but have one thing in common: they serve to block homosexual families in their attempts to be recognized as a unit and given the rights and privileges other families already possess.

A. Semantic Interpretations

One method used by the courts to determine familial status is to consult a dictionary for the "common" or "recognized" definitions of family relationships.[21] This method has the effect of preventing gay and lesbian couples, who have not traditionally been considered families, from being acknowledged, because dictionaries record word meanings based on the traditional usage of words.[22] The Preface in Webster's Third New International Dictionary states that "the definitions in this edition are based chiefly on examples of usage . . ."[23] It obtains words from over ten million sources, including other dictionaries, books, magazines, newspapers, pamphlets, catalogs, learned journals, and "dozens of concordances to the Bible."[24] It notes that no word is defined dependent on only one source: "[P]rescriptive and canonical definitions have not been taken over . . . unless confirmed by independent investigation of usage borne out by genuine citations."[25] Given the heavy reliance this and other dictionaries place on historical and, particularly, religious usage of words, it is no wonder that homosexual couples suffer when courts use such outdated parameters to define families.

One example of the use of dictionaries by courts appears in *Jones v. Hallahan*,[26] a case in which two women sued the clerk of court when they were denied a marriage license. The trial court denied the license, and the Court of Appeals upheld the decision.[27] Acknowledging that the Kentucky statutes covering marriage failed to include a definition of marriage, the court turned to what it called "common usage."[28] After quoting three

---

[20] *See generally* Ross, *supra* note 4 (comparing the discussion about same-sex marriage with the discussion about mixed-race marriage).

[21] *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973).

[22] *Id.*

[23] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 4a (Philip Babcock Grove, ed., Merriam Webster, Inc. 1993).

[24] *Id.*

[25] *Id.*

[26] *Jones*, 501 S.W.2d 588.

[27] *Id.* at 590.

[28] *Id.* at 589.

dictionaries, all of which defined marriage as between a man and a woman, the court concluded that the women were incapable of being married as the term is defined.[29] The court refused to even consider the constitutional issues raised by the couple, although it acknowledged that a court in another state that was earlier faced with the same issue, *had* weighed the constitutional issues (though ultimately deciding them negatively for the couple).[30]

B. Biblical Influences

Before the modern concept of jurisprudence arising from case law and statutes emerged, law emanated from the Church.[31] When governments started to create and define systems of governance, they borrowed heavily from religious systems already in place.[32] Although the law as we know it has changed considerably from its canonical beginnings, there are still innumerable examples of its ecclesiastic roots.

"[B]asic institutions, concepts, and values of Western legal systems have their sources in religious rituals, liturgies, and doctrines of the eleventh and twelfth centuries .... Over the intervening centuries, these religious attitudes and assumptions have changed fundamentally, and today their theological sources seem to be in the process of drying up. Yet the legal institutions, concepts, and values that have derived from them still survive, often unchanged. Western legal science is a secular theology, which often makes no sense, because its theological presuppositions are no longer accepted."[33]

The Church's influence is especially apparent in the law's treatment of sexual issues and the definition of family.[34] For example, the origin of the idea of the "natural" family or relationship, often used by courts as the yardstick of what family is or should be, has direct ties to the Catholic Church and its teachings.[35] In the Twelfth century, St. Thomas Aquinas

---

[29] *Id.* at 589-90.

[30] *Id.* at 590.

[31] HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 86 (Harvard University Press 1983).

[32] *Id.* at 165.

[33] *Id.* Berman cites, as an example of the law's nonsensical state, the idea that an insane prisoner must be made sane before being executed. *Id.* This law was originally enacted to allow prisoners a final confession of their sins before being put to death, which was presumed impossible if the prisoner was insane. *Id.* Although that basis of reasoning has long since vanished, the legal construct remains in place. *Id.*

[34] JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE, 586-87 (University of Chicago Press, 1987) ("The virtual monopoly that the medieval Church enjoyed over the legal determination of who was married and who was not meant that the Church was in a position to influence patterns of inheritance in the medieval West.")

[35] Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 How. L. J. 173, 185-86 (1992)

established the concept of "natural" sexual activities. They were defined as those leading to propagation or those in which animals in nature could be observed engaging (or not engaging, depending on the act in question).[36] "Because the Anglo-American legal tradition took root from this religious soil, it is not surprising that laws and court decisions that sprung forth from this soil insulated the definition of marriage from change and were inhospitable, to say the least, to homosexuals."[37]

Modern judges rarely cite the Bible when deciding legal standards and definitions, yet its influence on the law is undeniable.[38] However, even today some judges do cite biblical passages or verbiage when authoring or interpreting law.[39] Even if the judge does not use direct biblical references or language, judges' decisions and the language they use to articulate those decisions still often contain religious overtones.[40]

> When modern courts decide cases involving sexual behavior and marriage, they are bound by a conceptual framework of scripture, canon law, 'nature' and 'natural law' so powerful that they are unable to break from it. This conceptual framework is not explicit; indeed, it is a subconscious reflection of religious values embedded in American culture.[41]

These religious overtones were apparent in *Adams v. Howerton*,[42] where a court was asked to decide whether two men who went through a marriage ceremony and were granted a marriage license in the state of Colorado were in fact married under immigration law After the marriage was complete, Sullivan, who was a citizen of Australia, filed a petition with the Immigration Naturalization Service ("INS") to classify Adams as his "immediate relative" for purposes of staying in the United States.[43] The petition was denied and, after exhausting their final administrative appeal, the case went to federal court.[44]

The court was required to construe the meaning of the word "spouses" for the purposes of the the INS Code dealing with the definition of "immediate relative."[45] It looked first to the statute, then to the entire Immigration Code, but the only further explanation of "spouse" contained

---

[hereinafter FRIEDMAN]

[36] *Id.*

[37] *Id.* at 187.

[38] *See* Ross, *supra* note 4, at 264 (describing how Christianity impacts the legal concepts of marriage).

[39] *Id.*

[40] *Id.*

[41] Friedman, *supra* note 35 at 177.

[42] 486 F. Supp 1119 (C.D. Ca 1980).

[43] *Id.* at 1120.

[44] *Id.* at 1121.

[45] *Id.*; *see* 8 U.S.C. § 1151(b) (2002).

therein was inapplicable to the case at bar.[46] After concluding that the marriage between the men could not be valid under state law, the court used religious reasoning to conclude that federal law also did not allow recognition of the marriage.[47]

The court cited public policy and "the societal values which underlie the recognition of marriage and the reasons that it has been a preferred and protected legal institution."[48] The first of these historical values the court discussed was the roots of current civil law in Jewish and Christian canonical law. The court said that current civil law could not sanction same-sex marriages, because both Christian and Jewish scripture forbade homosexual relationships.[49] Although the law has been evolving away from its religious roots, and the two are supposed to be independent of each other, gay and lesbian families will continue to suffer if courts continue to use the religious roots of the law as a modern day interpretive device.[50] Historically, law has only recognized heterosexual family structures.[51]

C. History and Precedent

Some judges avoid religious interpretation and look strictly to legal sources, such as precedent, to support their legal decisions. However, the earlier decisions on which judges rely used religiously influenced reasoning and historical interpretations.[52] A holding based on these earlier decisions is necessarily tainted by this history of religious entanglement with the courts.[53] The court in *Adams* also considered history when making its decision. It stated that marriage historically has been given special protections and status because marriage was designed to propagate the human species. Consequently, the court reasoned that because same-sex relationships cannot serve this function, they do not merit the same legal protections.[54] The court neither offered further support for its assertion nor discussed the possibility that heterosexual couples enter marriage strictly for the purposes of propagation or that all heterosexual couples may not be capable of

---

[46] *Id.*; *see* 8 U.S.C. § 1101(a)(35). The meaning of "spouse" does not include "a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated." § 1101(a)(35).

[47] 486 F. Supp. at 1122-23.

[48] *Id.* at 1123.

[49] *Id.*

[50] Cruz 2, *supra* note 19, at 1050.

[51] *Id.*

[52] For an extensive discussion on the history of precedent and Christianity, see Ross, *supra* note 4, at 263-64.

[53] PETER GOODRICH, LANGUAGES OF LAW, FROM LOGICS OF MEMORY TO NOMADIC MASKS 53 (1990).

[54] 486 F. Supp. at 1122-23.

producing children. The result of looking to history to determine what constitutes a family is that family structures that fall outside the definition of "family" historically used by the courts also fall outside the province of laws ostensibly designed to protect the family.

In *Storrs v. Holcomb*,[55] the Supreme Court of New York was charged with deciding whether two men should be issued a marriage license. This court based its decision only on precedent, unlike most courts considering the issue,[56] which rely on history, religion, or legislative intent. The judge stated that he did not find enough precedent in the state to allow him to uphold the marriage license.[57] Some of the cases the court relied upon used the various reasoning strategies discussed above, including religious, historical, and semantic discussions.[58] *Storrs* did cite other states' decisions, which supported the plaintiffs' claim, and it commented that the law may change in the future to allow a same-sex marriage.[59] However, relying purely on precedent from that state, which relied on other strategies, the judge was forced to hold for the defendants.

D. The Use (and Misuse) of Legislative Intent

When the judiciary decides questions regarding the statutory ambiguity in laws concerning families, there is often a negative outcome for gays and lesbians.[60] When asked to interpret a statute to uphold or deny gay and lesbian families, judges often take the position that only "natural" or nuclear families could have been contemplated by the legislature when the statute was formulated. In *Adams*, the court relied on the scriptural and historical rationalizations discussed above to conclude that Congress "did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes."[61] The *Adams* decision did not use records of legislative debate or discussion about the immigration legislation to ascertain what Congress's legislative intent might have been.[62] Nor did it examine any other Congressional record regarding the implementation of the INS code.[63] Instead, the court came to its own decision about how history and tradition prescribe current marriage laws and retrospectively ascribed those views to

---

55 645 N.Y.S. 2d 286 (Sup. Ct. 1996).

56 That is, the issue of whether two men could be issued a marriage license.

57 *Id.* at 287-88.

58 *Id.*; *see, e.g.*, Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); People v. Allen, 261 N.E. 2d 637 (N.Y. 1970).

59 *Id.*

60 Cruz 1, *supra* note 3, at 1001-02 (discussing the failure of the Heightened Scrutiny when it comes to the protection of same-sex couples and their rights).

61 *Adams*, 486 F. Supp. at 1123.

62 261 N.E. 2d 637 (N.Y. 1970).

63 *Id.*

Congress.[64]

Another situation in which courts are required to look to legislative intent is when asked to apply to same sex couples a gender-neutrally worded law that has traditionally been applied to straight, married couples. In this circumstance, many courts have held that the legislature could not have intended the statute to cover families other than those that look like their own. An example of this reasoning is seen in *Dean v. District of Columbia*,[65] in which the court was asked to examine the gender-neutral language of the D.C. marriage statute to determine is it permitted same-sex marriage. The court concluded, among other reasons, that Congress must have intended marriage to have its traditional, heterosexual meaning, because that kind of relationship was the only one rooted in this country's history and tradition.[66]

Sometimes judges refuse to rule in favor of same-sex families, even in the face of evidence of legislative intent to recognize such families. In *Rovira v. AT&T*,[67] a federal court in New York ruled that the surviving partner of a deceased AT&T employee and the surviving partner's children were not eligible beneficiaries of her company death benefits, even though the company had a non-discrimination policy that included sexual orientation. The court held that the non-discrimination policy affected only employees, not their families, and it included a notice that it was not a contract.[68] Since the plaintiffs failed to demonstrate that Rovira relied on the non-discrimination policy to her detriment, the court held that the policy did not create "third party beneficiary rights" on plaintiffs.[69] The court noted that New York courts had expanded the definition of family to include same-sex partners in the areas of housing, eviction, and rent control, and that New York City had a domestic partners registry, yet it still refused to use the expanded definition used by many other courts to order AT&T to provide company death benefits to Rovira and her children.[70]

In another case, *In re M.M.D.*, [71] the trial court held that unless the legislature specifically included non-straight families in the law, it would not recognize them. This case involved a second parent adoption petition by the partner of a gay man who had previously adopted a little girl. The trial court judge held that because there was an "absence of specific legislative intent," she must hold that Congress had rejected adoption by same-sex couples.[72]

---

64 *Id.*

65 652 A.2d 307 (D.C. App. 1985).

66 *Id.* at 331.

67 817 F. Supp. 1062 (S.D.N.Y. 1993).

68 *Id.*

69 *Id.* at 1071.

70 *Id.* at 1072.

71 663 A.2d 837 (D.C. App. 1995).

72 *Id.* at 844.

The Court of Appeals held that this conclusion was "an unconvincing leap of reasoning," and stated that such an apparent absence of intent "does not always mean the legislature thought about something and rejected it; the omission also can mean the legislature did not think about the idea at all, and thus took no position on it."[73] The court closely analyzed the language of the statute and ruled in favor of the adoption, stating that the neutral, general language of the statute allowed it to be interpreted inclusively.[74] This ruling by the Courts of Appeals was contrary to the earlier decision made by the trail court. The trial court's ruling, which was based on a presumption that the law was written to protect straight families.[75] Even ambiguous language is suspicious to the court, and it will not elect to preserve non-traditional families without an express mandate by the legislature.

E. Judicially Passing the Buck

Some courts have declined to take on the task of figuring out whom the legislature meant to include when writing laws that affect families. Instead, those courts have held that judges should not define what constitutes a family and that only the legislature should take on such a task. This judicial passing of the buck can be seen in *Ross v. Denver Dep't of Health and Hospitals.*[76] In *Ross,* a Colorado city worker took three days off to care for her injured domestic partner.[77] The Denver Career Service Board ruled that she was not entitled to the leave, because the definition of family set forth in the Denver Career Service Board's Rules did not include domestic partners.[78] Ross appealed, arguing that the City was discriminating against her on the basis of sexual orientation.[79] The district court reversed the Board's decision, but the Court of Appeals agreed with the Board, holding that it was up to the legislature to decide if the Rules were to be changed.[80] The court used this reasoning no less than three times to refute Ross's arguments, saying that the legislature was the only entity that could change the definition of family, explicitly extend city employee benefits to same-sex partners, or change the marriage laws to include same-sex couples.[81] The court ruled that there was no judicial authority to step in as long as the

---

[73] *Id.*
[74] *Id.* at 849.
[75] *Id.* at 844.
[76] 883 P.2d 516 (Colo. App. 1994).
[77] *Id.* at 518.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 520.
[81] *Ross,* 883 P.2d at 520.

Board's definition was "rational and valid."[82] Under this standard, it is unlikely that any court would find cause to change the definition, or require that the legislature do so; few courts are likely to hold that the traditional definition of family is irrational or invalid.

F. "Neutral" Principles that are not Neutral

When making decisions affecting families, courts occasionally look to the outcomes of their decisions as a guide. These supposedly "neutral" ways to evaluate family's claim do not end up being neutral in their application. An example of this type of reasoning is seen when courts apply the "best interests of the child" standard to determine the outcome in child custody, visitation, or adoption cases. The "best interests" standard, however, is necessarily dependent on the cultural norms of the decision maker. As a delegate to the Convention on the Rights of the Child[83] observed, the phrase "best interests of the child" "was inherently subjective and... its interpretation would inevitably be left to the judgment of the person, institution or organization applying it."[84] Not only is the phrase subjective when applied by various cultures around the world, it is equally subjective when applied by judges within the United States. Two judges may look at the same set of facts and determine two different ideas about what is in the best interests of the child. *Doe v. Doe*[85] exemplifies the subjective nature of the standard.

In *Doe*, the court was petitioned by John, the father of eleven-year-old Jack, and his wife, Ann, to allow Ann to adopt Jack and sever all parental rights of Jane, his mother, simply because she was a lesbian.[86] Jane lived in Ohio, and John and Ann lived in Virginia.[87] John had already obtained custody of Jack, over Jane's protests, although Jane had visitation rights that included the boy spending eight weeks every summer and alternate Easter and Christmas breaks with her.[88] A large number of witnesses testified on Jane's behalf, extolling her parenting abilities in glowing terms, even though most admitted to having reservations about homosexual relationships. The Children Services Board in Jane's Ohio hometown investigated Jane in the home she shared with her partner and reported very positively about her to

---

[82] *Id.* at 521.

[83] The U.N. Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess. 61st plen. Mtg., Annex, U.N. Doc. A/44/25 (1989) (creating an international treaty to protect children); *see also* Philip Alston, *The Best Interests of the Child, Reconciling Culture and Human Rights, in* THE BEST INTERESTS PRINCIPLE: TOWARDS A RECONCILIATION OF CULTURE AND HUMAN RIGHTS 11 (Philip Alston ed., Clarendon Press, 1994).

[84] *Id.*

[85] 284 S.E. 2d 799 (Va. 1981).

[86] *Id.*

[87] *Id.*

[88] *Id.* Several people even traveled from Ohio to testify in the Virginia hearing. *Id.*

the Virginia court, and the Commissioner of Welfare of the Commonwealth of Virginia recommended that the petition for adoption be denied. In spite of all of the positive testimony, the trial court held that her open lesbian relationship "would have a definite detrimental effect on Jack if he is permitted to visit and live with his mother, especially during his formative years, and that his being exposed to this relationship would result in serious emotional and mental harm to this child, and that his best interest will be promoted by the adoption."[89] Fortunately for Jane and Jack, the Supreme Court of Virginia denied the petition for adoption after reviewing the testimony, citing Jack's obvious well-adjusted personality and refusing to hold that a gay or lesbian parent is *per se* an unfit parent.[90] In light of all of the positive testimony, the judge appeared to use his own ideas of what constitutes the best interests of the child without regard to most of the witnesses he heard. Even the supposedly neutral best interests standard becomes laden with personal and cultural ideas about what really is in the child's best interests. Two judges, considering exactly the same facts, came to opposite conclusions about what was in Jack's best interests.

VI. USING THE LAW TO DISCRIMINATE

Courts have not only used the definition of family to keep homosexuals outside the bounds of those who receive the benefits given to families. Courts have also manipulated the law to prohibit gays and lesbians from benefiting from the same protection of the law as heterosexual families.[91]

What the court obviously knows, but fails to acknowledge, is that homosexual employees *cannot* get married.[92] As long as the law does not allow for same-sex marriage, same-sex couples will not be able to fulfill the legal requirement of marriage. Therefore, they cannot be similarly situated to unmarried heterosexual employees. Although unmarried straight couples may also warrant employee benefits that are currently offered only to married couples, it is absurd to say they are similarly situated to gay couples. Other decisions have reached the same conclusion that the *Ross* court did, using the same reasoning.[93]

In *Cleaves v. City of Chicago* another court used similar reasoning to hold that a city employee in a heterosexual, unmarried, cohabitating relationship did not qualify for domestic partner benefits, even though the city offered

---

[89] *Id.* at 745, 801.

[90] *Id.* The only negative testimony seems to have been from John and Ann, who admitted that Jack had never expressed any difficulties in accepting his mother's relationship. *Id.*

[91] *See generally* Cruz 1, *supra* note 3.

[92] *Id.* at 927.

[93] *See, e.g.*, Hinman v. Dep't of Personnel Admin., 213 Cal. Rptr. 410 (Cal. App. 3 Dist. 1985); Phillips v. Wis. Personnel Comm'n, 482 N.W. 2d 121 (Wis. App. 1992).

them.[94] Cleaves, a city police officer, was fired after calling in sick due to the death of his fiancée's stepfather.[95] He alleged violations of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act, stating that if he were a woman with a female domestic partner, he would have been granted bereavement leave, therefore the city was discriminating against him due to his gender.[96] The court held that the issue was not sex discrimination, but marital status discrimination, which is legal.[97] The decision did not mention the ability of the plaintiff to become married. If Mr. Cleaves had been married, he would have been granted the leave he requested because the deceased would have been considered a member of Cleaves' family under the city's policy.[98] In *Cleaves*, the reasoning typically used in deciding the issue for same-sex couples was applied to an unmarried opposite-sex couple. The holding differs from *Ross*, however, because, in *Ross*, the same-sex couple was found to be similarly situated to unmarried, cohabitating couples. However, in *Cleaves*, the two situations were found not to be similarly situated. The similarity between the cases arises in that benefits were denied because the court found that the only discrimination used by the employers was on the basis of marital status, not gender.[99]

In another case, a court recognized what the *Jones* and *Cleaves* courts failed to recognize. In *Foray v. Bell Atlantic*,[100] much like in *Cleaves*, a straight unmarried man sued to get domestic partner benefits for his partner, which his company offered to the same-sex partners of gay and lesbians. Like Cleaves, Foray claimed that he was being discriminated against on the basis of sex.[101] The court held Foray was not similarly situated to a hypothetical female employee with a domestic partner because Foray could marry.[102] This recognition was simple, yet it was a giant step forward for gays and lesbians.[103]

An Oregon court used the same reasoning cited in *Foray* to hold that gay and lesbian employees are entitled to the same employment benefits given to straight employees. In *Tanner v. Oregon Health Sciences University*,[104] three lesbian employees challenged the University's policy of offering family

---

94 68 F. Supp. 2d 963 (N.D. Ill. 1999).

95 *Id.* at 965.

96 *Id.* at 966.

97 *Id.* at 967.

98 *Id.*

99 *Id.*

100 Foray v. Bell Atlantic, 56 F. Supp. 2d 327 (S.D.N.Y. 1999).

101 *Id.* at 329.

102 *Id.* at 330.

103 Gay couples are *more* likely to win in cases that involve adoption by same sex couples and where courts focus purely on whether or not a couple is legally married, without considering sexual orientation in the process. *See, e.g., In re M.M.D.* (considering the gay couple involved in the petition as an unmarried couple for purposes of a gay couple's petition for a second parent adoption of a child).

104 971 P.2d 435 (Or. App. 1998).

health and life insurance benefits only to the spouses and children of married couples. The plaintiffs alleged that the denial of benefits to gay and lesbian couples violated the privileges and immunities clause of the Oregon constitution, as well as an Oregon law prohibiting discrimination based on sex or the sex of any other person with whom the employee associates.[105] The court agreed, stating:

> [Oregon Health Sciences University] insists that in this case, privileges and immunities are available to all on equal terms: All married employees—heterosexual and homosexual alike—are permitted to acquire insurance benefits for their spouses. That reasoning misses the point, however. Homosexual couples may not marry. Accordingly, the benefits are not made available on equal terms. They are made available on terms that, for gay and lesbian couples, are a legal impossibility.[106]

This is the first time a court recognized the legal quandary in which gays and lesbians are caught. To be granted benefits, a gay couple must be married, but gay couples are not allowed to get a legal marriage. There is a striking similarity between this line of reasoning and the laws enacted shortly after passage of the Thirteenth Amendment to the Constitution of the United States of America that prevented African-American men from voting. Even after African-American men were constitutionally given the franchise, states and localities began enacting various laws that became known as "grandfather clauses."[107] These statutes required voters to pass certain literacy tests, own a certain amount of property, or prove that their grandfathers had voted in previous elections.[108] Anyone unable to satisfy the requirements was not permitted to vote.[109] Because extremely few, if any, African Americans of the time could overcome these hurdles to voting, the franchise was effectively barred from them, even though the law, as written, gave them the right to vote. Similarly, the courts' holdings that gays and lesbians are not barred from receiving employee benefits for their spouses, as long as they are married to their spouses, effectively bars them from obtaining benefits that are ostensibly offered to all employees on equal terms.

A. Continued Problems

Gays and lesbians who lost family members in the events of September

---

105 *Id.* at 447-48. This statute does not include sexual orientation in its list of protected classes. *Id.*

106 *Id.*

107 LA CONST. OF1898, art. 197, *in* DOCUMENTARY HISTORY OF RECONSTRUCTION, Vol. 2, 451-53 (Walter L. Fleming ed., The Arthur H. Clark Company, 1906).

108 *Id.*

109 *Id.*

11 have been treated differently from straight families, despite the fact that all suffered the same type of loss. Keith Bradkowski lost his partner, Jeff Collman, who was a flight attendant on the first American Airline plane to hit the World Trade Center.[110] Although he was listed as Collman's next of kin, an executive at American Airlines told him that when it came to the $25,000 compensation payment American was paying to survivors of all those who died on September 11, his domestic partnership with Collman was irrelevant.[111] American instead recognized Collman's parents as his legal next of kin, and gave them his paychecks, the contents of his credit union account, and the compensation payment.[112] The airline now admits that giving the bank account and paychecks to Collman's family of origin was a mistake, but maintains that the airline has no choice but to give the compensation payment to them.[113] Although American says it is "trying to do the right thing here," so far its only offer to other gay employees is to "be sure that their legal affairs are in order because one never knows."[114] Its spokesman added, "The absence of a will made a huge difference here."[115]

This situation is a perfect example of the inequity faced by gays and lesbians. If Collman and Bradkowski had been able to legally marry, or if laws or company policies were in place to give them the rights other families have, Bradkowski would not have to be dealing with the trauma of fighting for his rightful compensation on top of the trauma of losing his partner of eleven years. This ordeal is made even more difficult by the blame-the-victim tactics American has used, suggesting that Bradkowski's loss of benefits is Collman's fault for not having drafted a will.

Bradkowski lives in California,[116] whose domestic partner law gives domestic partners limited rights in the areas of hospital visitation, and health benefits if one of the partners is a state employee.[117] California also recently passed Assembly Bill 25, which conferred over a dozen new rights, including the right to sue for the wrongful death of a domestic partner, or for emotional distress, step-parent adoptions, the right to make health care decisions for an incapacitated partner, and the right to be appointed

---

110 Ray Delgado, *Grieving Man Stakes His Claim to Equality*, SAN FRANCISCO CHRON., Apr. 21, 2002, at A3.

111 *Id.*

112 *Id.*

113 *Id.* (citing Tim Kincaid, an American Airlines spokesperson).

114 *Id.* (quoting Tim Kincaid, an American Airlines spokesperson).

115 *Id.*

116 *Id.*

117 *See Governor Davis Signs Civil Rights Legislation*, PPAC: News Stories, *at* http://www.ppacca.org/news/read.asp?ID=91 (last visited Mar. 1, 2003); *see also A Study of Incrementalism, Gay Marriage Creeps Up on California*, Capital Resource Institute, *at* http://www.sgn.org/2002/09/13/c.htm (last visited Mar. 1, 2003).

administrator of a partner's estate.[118] Neither includes inheritance rights (although a bill to do that is currently being debated in the California General Assembly).[119] The fact that California has some protections for registered domestic partners gives additional legal weight to Bradkowski's claim against American Airlines. Residents of states other than California, Hawaii, and Vermont, which are the only states with some protections for gay families, would face an even more difficult fight.

VII. CONCLUSION

In the end, unless American Airlines settles with Bradkowski, it will be up to a judge to determine whether Bradkowski will be treated as Collman's spouse or his roommate of eleven years. Situations in which gays and lesbians are forced to fight in court to be treated fairly do not have to happen. This paper has touched on only a few of the analyses of the concept of family commonly relied upon by American courts. Too many discriminatory rulings and lines of reasoning have been decided by courts against gay and lesbian families to cite them all here. However, an increasing number of courts are holding in favor of gay and lesbian family rights. But until inclusive family laws and policies are created and current ones are clarified and made explicitly applicable to gays and lesbians, the law will continue to be uneven while American courts, with all-too-human judges, decide who should be accorded the rights of families.

---

[118] *See AB 25—The New Domestic Partnership Law: How to Use It and What It Means for You and Your Family*, Nat'l Ctr. for Lesbian Rights, *at* www.nclrights.org/releases/ab25.htm (last visted Mar. 1, 2003).

[119] *See California Governonr Signs Landmark Domestic Partner Inheritance Rights Bill*, Seattle Gay News, *at* http://www.sgn.org/2002/09/13/c.htm (last visited Mar. 1, 2003) (This bill would amend the law of intestate succession to treat registered domestic partners as spouses for the purposes of inheritance.)