

2006

The Authoritative Moment: Exploring the Boundaries of Interpretation in the Recognition of Queer Families

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Recommended Citation

32 Wm. Mitchell L. Rev. 655 (2005-2006)

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THE “AUTHORITATIVE MOMENT”: EXPLORING THE BOUNDARIES OF INTERPRETATION IN THE RECOGNITION OF QUEER FAMILIES

Kris Franklin[†]

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I. INTRODUCTION

Pop quiz: What do all these cases have in common?

- A father dies intestate. His son claims that he is the sole heir because the deceased man’s wife is a postoperative male-to-female transsexual, and hence the marriage certificate issued by the State of Kansas is invalid.¹
- A husband sues for divorce on the grounds of adultery because his wife has had an affair with another woman.

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1. Estate of Gardiner, 42 P.3d 120 (Kan. 2002).

The woman insists that the divorce action must be brought as a no-fault claim, because a same-sex relationship does not qualify as adulterous under New Hampshire law.²

- Two parents of the same sex are granted an order of adoption in the District of Columbia. The child was born in Virginia, which does not permit second-parent adoption and explicitly prohibits legal recognition of same-sex partnerships. The parents claim that the State of Virginia is obliged, in accordance with the D.C. court's order, to reissue the child's birth certificate, listing both of them as legal parents.³
- A lesbian couple petitions for name changes so that they may share a common surname. The New Jersey trial court rejects their petition for fear that granting it would inappropriately suggest that the women have a partnership acknowledged under New Jersey law. The women appeal, arguing that, barring deliberate fraud, they should be permitted to change their names for any reason they choose.⁴

While they are grounded in quite disparate bodies of law, all of these cases ask the courts to think about the growing elasticity in cultural understandings of families in the United States, and to make decisions about where to draw the line in defining the legitimacy (or illegitimacy) of different kinds of families. Indeed, the question of what constitutes a family is perhaps one of the more contentious that American culture has been asking itself in recent decades.⁵ This question is not insignificant or simply technical—it reaches into every corner of our personal, social, juridical, financial, and religious lives, and generates any number of other lines of inquiry. Which relationships are sanctioned by the state or by religious institutions? How do we define who is a parent? Are these changes in family forms genuinely new modes of human relation or are they simply variations on pre-existing themes? What is the connection between the health of the polity and the

2. *In re Blanchflower*, 834 A.2d 1010 (N.H. 2003).

3. *Davenport v. Little-Bowser*, 611 S.E.2d 366 (Va. 2005).

4. *In re Bacharach*, 780 A.2d 579 (N.J. Super. Ct. App. Div. 2001).

5. See, e.g., *THE FUTURE OF THE FAMILY* (Daniel Patrick Moynihan et al. eds., 2004) (explaining that Americans are reexamining definitions of family and assessing new family structures, primarily in a heterosexual context).

narrowness or breadth of family definition?

An important component of (and often a catalyst to) this crisis of definition has been the steady increase in cases dealing with lesbian, gay, bisexual, and transgendered (LGBT)⁶ people asserting various family rights in the courts. Its most explosive manifestation has been the fraught and sometimes vitriolic struggles over the institution of marriage, and the possibility of extending the legal rights of marriage to lesbian and gay couples. However, gay marriage is only the most visible element of a variety of shifts within family definition; along with struggles to achieve (or prevent) the extension of marriage to same-sex couples, the courts have been faced with queer parents petitioning for equal legal relationship to their children, transgendered people and their spouses arguing for (or against) the legitimacy of their chosen identities, and lesbian and gay couples negotiating the separation of their relationships and guardianship of children in the absence of legal marriage, to name just a few issues.

LGBT family law poses particularly vexed questions because the ways queer people construct our lives may not be recognized in law. But families are as much defined by legal definitions as they are by affect ional bonds or cultural approbation. All family constructions, even informal and non-legal, may eventually intersect with the law, even if the connection is one of non-recognition, or the denial of recognition.⁷

This Article examines the cultural riptide the courts are wading into when grappling with these issues—what makes a family and who gets to decide. Courts deciding to extend legal recognition to new family forms, especially in the hotly-politicized

6. When dealing with sexual and gender minorities, nomenclature is always an issue. Throughout this essay I use "LGBT," "queer," and "gay" somewhat interchangeably (particularly in the phrases "gay families" and "queer families" which could, in this discussion, mean same-sex couples with or without children, couples one or both of whose members is transgendered, or families whose legal conflict stems from the homosexuality, bisexuality, or transgender status of one of its members), mostly for the sake of brevity. At the same time, I am very much alert to the fact that the legal, personal, and political issues facing people who identify through sexual orientation are quite different from those whose identity is organized around gender transition (not to mention those people for whom these issues powerfully intersect).

7. For a discussion of the ways in which non-traditional families may try to replicate some of the rights automatically afforded to legally recognized family relationships, see Angie Smolka, *That's the Ticket: A New Way of Defining Family*, 10 CORNELL J.L. & PUB. POL'Y 629, 636-38 (2001).

queer contexts, face charges of overstepping their authority. That is, of engaging in “judicial activism.”⁸ But law generally, and perhaps especially family law, is inherently fact-driven, individualized, and subject to significant discretion.⁹ Courts examining questions of family definition, especially state courts interpreting state laws, frequently have a great deal of latitude.¹⁰ So in the context of changing cultural notions of family constitution, especially the increasing recognition that gay, lesbian, bisexual, and transgender people form their own families in need of legal acknowledgement, it can at the very least be disingenuous to suggest, as commentators frequently do,¹¹ that courts recognizing queer families are taking drastic steps, while implying that those

8. Of course, “activist” decision-making is in the eye of the beholder. As many observers have argued, “judicial activism cannot be said to be either conservative or liberal by nature.” Joseph A. Reinert, *The Myth of Judicial Activism*, 29 VT. B.J. & L. DIG. 35, 35 (2004); see also Adam Cohen, *Psst . . . Justice Scalia . . . You know, You’re an Activist Judge, Too*, N.Y. TIMES, Apr. 19, 2005, at A20. For a searching discussion on the history and significance of the term, see Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 CAL. L. REV. 1441 (2004).

9. Virtually all introductions to U.S. family law note that domestic relations statutes are drafted as general guidelines, and that courts are given broad discretion to resolve specific disputes. For but one example of such commentary, see JOHN DE WITT GREGORY ET AL., *UNDERSTANDING FAMILY LAW* 2-3 (3d ed. 2005).

10. Though courts’ latitude and responsibilities will necessarily differ depending on whether their work is based in interpretation of statutes, common law, or constitutional law. These forms of reasoning have significant conceptual overlap, but each works from its own body of authority, and each has unique properties. As a result, however, scholars tend to talk about them as entirely distinct from one another, which deprives us of the opportunities to examine points where their varying tracks might run parallel, or even converge. While acknowledging the difficulty of talking about how courts deal with three such disparate bodies and sources of law, this Article tries to bridge the gaps, and to find common ground among their approaches to the questions of queer family definition.

11. Recently, the pejorative categorization “activist judges” has become almost code for “judges who would find constitutional protection for gay marriage.” The call for a constitutional amendment banning same-sex marriage was nearly-universally predicated upon the need to protect the U.S. Constitution from the threat of “activist judges.” See, e.g., George W. Bush, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> (last visited Dec. 27, 2005); *Same-Sex Marriage Senate Battle Over, War is Not*, CNN, July 14, 2004, <http://www.cnn.com/2004/ALLPOLITICS/07/14/samesex.marriage/index.html> (last visited Dec. 27, 2005) (quoting President Bush’s comments about “activist judges” continued efforts “to redefine traditional marriage”; Senator Bill Frist asking whether “activist judges” would “destroy the institution of marriage”; and Senator Orrin Hatch’s comments that the amendment would protect the institution “that a few unelected judges” were trying to change).

denying such legal recognition are simply "applying the law."

To see where the boundaries of judicial interpretation of family definitions lie, this Article examines and contrasts state court opinions that take sharply differing views of their own interpretive power in LGBT family law cases.¹² Though each opinion must rest squarely on the statutes and precedents of its own jurisdiction, by juxtaposing them and examining their reasoning and rhetoric, I hope to show that arguments on each side of the debate can be weakly-supported or can rest on solid interpretive foundations. More importantly, within the boundaries of each jurisdiction's body of substantive law, arguments favoring each position—finding for or against the recognition of LGBT families—can be equally "legal." There is something profoundly inaccurate, perhaps even dishonest, in describing rulings against queer families as engaging in legal analysis, while suggesting that decisions in favor of those same families are infused with politics.

I suggest, moreover, that quite aside from the relevant statutes and precedents with which the courts must grapple, much of the action in these decisions actually takes place at the site where the court does, or in some instances does not, examine the limits of its own interpretive power. That is because this "authoritative moment" in many ways indicates a crossroads at which a court must decide which direction it wants to go, before it comes to any substantial determination.¹³ It is the moment at which courts ask: Are we empowered to decide this case at all? If so, what are the terms on which we are empowered, and what are the limits on our jurisdictional mandate?

In queer family law cases (and perhaps many others, though

12. I began my research by gathering as many queer family law decisions from 2000 to early 2005 as I could find. These date restrictions were imposed to limit the scope of my examination, but also because the enormous changes in cultural and political attitudes toward gay and transgender people and their families in recent years suggest that older opinions might not have current cultural resonance, even if they still stand as binding legal precedent. But I did not adhere rigidly to these limitations. In some instances, older decisions were so significant that I felt compelled to include them. Moreover, though I have attempted to make my pool of potential sources as complete as possible, this paper is not intended to offer a statistical survey, and I certainly do not discuss here, nor do I purport to include, every possible opinion that fits within the parameters that I set.

13. This temporal reference can be confusing, though. It is certainly true that the methodological discussion tends to be placed in an opinion after a recitation of the facts of the case, and just before the discussion of the court's legal reasoning. This makes sense given the logic of a legal opinion, but it does not necessarily follow that this is the *order* of the decision maker's reasoning.

that is well beyond the scope of this Article) the authoritative moment embodies the collisions and resolutions of many smaller and correlated determinations. If we unpack all the different strands and directions of thinking that are implicitly recognized, packaged, and resolved within discussions of interpretive authority (or, equally importantly, elided in the absence of such discussions), then we can have a clearer idea of how many facets there are to the substantive rulings in these cases. Thus, this Article asks what the courts are really up to when they decide such cases, and attempts to untangle some of the cords of thinking that are inevitably part of the rationales for these decisions, but that can be so invisibly intertwined that we as a legal community (lawyers *and* judges) do not recognize their importance.

This Article tries to begin teasing these threads out, or, metaphorically, to “map the mind” of the courts. That is, it seeks to understand what, and more importantly *how*, the courts are “thinking” as they decide these cases. In so doing, we begin to see that only some of these strands are explicit—that is, if they really were neurological processes, only some would be cognitive and conscious. Others, I suggest, are sympathetic,¹⁴ in that they reflexively take place in order for the court to reach its decision, but are not necessarily examined, or directly articulated in the court’s opinion. This mapping of queer family law decisions is more than theoretical. It matters because this way of analyzing what courts are doing and how they are doing it tells us something new about how family law is being extended or restricted across the country. It helps us chart patterns of the relationship between the precedential, the analogical, and the methodological, which allows us to see the implicit factual predeterminations built into what look like exclusively procedural and jurisdictional conversations.

The issues in the cases this Article examines range from seemingly mundane questions regarding uncontested name changes to unquestionably far-reaching topics of LGBT parenting and marriage. But from a queer perspective, at least, (and here is the answer to the pop quiz) all these cases are asking the same

14. The sympathetic nervous system is autonomic, and almost completely out of conscious control. For a medical definition of the term, see AMERICAN HERITAGE STEDMAN’S MEDICAL DICTIONARY 809 (2002). For a more complete discussion of the phrase in legal terms, see NAT’L DYSAUTONOMIA RESEARCH FOUND., GENERAL ORGANIZATION OF THE AUTONOMIC NERVOUS SYSTEM (1999), <http://www.ndrf.org/ans.htm> (last visited Dec. 27, 2005).

question in different ways; are the courts willing and able to recognize the families we have defined for ourselves, and do we in fact have the power to identify ourselves and our families in relation to each other within the law?

A. *The Interpretive Braid*

In order to begin examining some of these under-articulated considerations in LGBT family law cases (and perhaps others as well), I describe three distinct categories of thinking that the opinions seem to employ. I contend that we can understand these decisions as braiding together all three strands of reasoning. The first and most obvious, which I dub "lex reasoning,"¹⁵ maps onto the substantive law at hand: either the precedent that is directly on point or, in the case of first impression where there is no guiding authority, the policy and interpretive parameters given to or taken on by the court. The second and third strands, however, may be equally, and in some instances more, significant to the ways in which the courts treat these cases.

The second thread I identify follows the courts' factual reasoning, and their understanding of the cultural significance or cultural reality of family formation when they encounter and analyze LGBT families seeking legal recognition. That is, this analytical thread represents the line along which the courts do or do not see gay family structures as analogous to families that the law *already* understands and recognizes.

The third strand shifts our vision of LGBT family law into the courts' methodological inquiry itself. It asks how much room the courts imagine themselves having in order to interpret the law in ways that will recognize queer families. More importantly, it constructs a correlation between family definitions that the law already accepts and sanctions (or rejects and prohibits) and the ways in which that law can or should be interpreted: Broadly and

15. From the Latin "lex, legis," meaning "law" or "rule." Black's Law Dictionary defines "lex" in modern American jurisprudence as "a system or body of laws, written or unwritten, or so much thereof as may be applicable to a particular case or question, considered as being local or peculiar to a given state, country, or jurisdiction." BLACK'S LAW DICTIONARY 908 (6th ed. 1990).

I use this term to refer to courts' grappling specifically with the substance of their own relevant statutory and common law authority because any more common description of courts' consideration of law—say "legal reasoning" or "substantive reasoning"—would carry with it the implication that the other forms of reasoning I describe were not similarly significant.

loosely, or narrowly and restrictively.

While this Article will not ignore the importance of the application of binding authority embodied in the first strand I discuss, my focus will be on identifying and describing the second and third strands of analogy and methodology. My braid metaphor suggests that each of the strands I've named intersects with the others, although not necessarily at the same point. It also suggests that at any given time, we can narrow our focus to see only one strand, examine the intersection of any two, or step back to take in a broader view showing how all three are ultimately woven together.

Just as a braid can tie together strings of similar or quite different heft, I suggest that the significance of these three factors in a given case need not be equal. In fact, they may be inversely related; if the first thread effectively shapes the decision—that is, if there is enough guidance in the extant body of law to tell the courts explicitly what to do—the court does not face an interpretive crisis, and can minimize or even gloss over the other two. But in the kinds of cases I am looking at, statutes and precedents rarely provide such clear guidance. Where the directions to the deciding court are minimal or nonexistent, the court needs to grapple more significantly with the analogical and methodological components of its own thinking.

B. A Word About Gay Marriage

Of course, at this particular moment in time the specter hanging over all of this discussion is the controversy about same-sex marriage.¹⁶ In recent months and years, several municipalities and state courts have generated unprecedented anxiety either by granting marriage licenses to same-sex couples¹⁷ or by ruling that

16. The issue has recently become hotly contested, such that the American Bar Association Section of Family Law, not especially known for overblown rhetoric, can describe gay marriage as having “burst with fury into our national consciousness in 2003.” Am. Bar Ass’n Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 342 (2004); see also Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: “Same-Sex” Marriage Issue Dominates Headlines*, 38 FAM. L.Q. 777, 777, 799-800 (2005).

17. In 2004 several municipalities licensed or solemnized same-sex marriages, including San Francisco, *Lockyer v. San Francisco*, 95 P.3d 459, 465 (Cal. 2004), New Paltz, New York, Kathianne Boniello, *Ulster Wins Appeal to Prosecute Over Gay Vows*, *POUGHKEEPSIE JOURNAL*, Feb. 3, 2005, at 1, and Multnomah County, Oregon,

the state constitution must allow gay marriage.¹⁸ We have come to a point in which struggles over same-sex marriage have transcended straightforward controversies over the meaning of marriage statutes, to become full-blown cultural wars.¹⁹

In the 1970s, gay petitioners in a case such as *Baker v. Nelson*²⁰ could essentially slip in under radar with the argument that a local marriage statute simply failed to specify gender and might consequently be expanded to include same-sex couples.²¹ But with the national and local defense of marriage acts (DOMA)²² and threats of amending constitutions to prohibit gay marriage,²³ that kind of sleight of hand would today seem disingenuous. Gay marriage at the turn of the 21st century is an explicitly political, constitutional, and national issue.

While this essay does not deal directly with the legal and cultural issues surrounding same-sex marriage, in recent LGBT family cases the fear of legalized gay marriage is a clear, if unspoken, subtext—a subtext that makes itself visible through increasingly restrictive “legal” (what I dub “lex”), factual, and methodological analyses. When we try to unpack the various factors affecting these LGBT family law cases, then, we must keep in mind the cultural climate; the impact of fears about the “threat” of gay marriage may be so powerful that it can be felt in statutory

Li v. State, 110 P.3d 91 (Or. 2005).

18. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

19. In his dissent to *Lawrence v. Texas*, Justice Scalia frets at length that the Supreme Court's abolition of consensual sodomy laws will lead inevitably to the sanctioning of gay marriage, and that in so doing, “the Court has taken sides in the culture war.” 539 U.S. 558, 602, 604-05 (2003) (Scalia, J., dissenting).

20. 191 N.W.2d 185, 291 Minn. 310 (1971).

21. *Id.* at 185, 291 Minn. at 311. Not that this litigation strategy was successful. The Minnesota trial court and Supreme Court determined that the term “marriage” meant, and would have meant to the drafters of the state's marriage statute, “the state of union between persons of the opposite sex.” *Id.* at 186, 291 Minn. at 311.

22. The Federal Defense of Marriage Act, 1 U.S.C. § 7 (declaring that for the federal government the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife) was enacted in 1996. On its heels dozens of states have proposed, considered, enacted, and in some instances repealed their own versions. For an up-to-date survey of the fast-changing array of DOMA legislation and litigation, see Robin Cheryl Miller & Jason Binimow, Annotation, *Marriage Between Persons of Same Sex—United States and Canadian Cases*, 1 A.L.R. Fed. 2d 1 (2005).

23. A recent threat to amend the U.S. Constitution included language specifying that marriage “shall consist only of the union of a man and a woman.” S.J. Res. 26, 108th Cong. (2003).

analyses of LGBT family cases that on their face have no direct relationship to the legality of same-sex marriage.²⁴

That caveat aside, I here engage in an analysis of queer family law decisions that takes seriously the ways in which courts approach LGBT families. I will be focusing on the analytical frameworks courts construct in order to make sense of the people whose lives they are considering and to whom they are granting or withholding legitimacy. Each section of this essay corresponds to each of the strands of reasoning that I have explicated above—analysis of lex, fact, and method. At the end of this Article I discuss the ways in which the three work in relation to one another, and show how all may be woven together into what I term the authoritative moment, which may encapsulate, or even determine, the holding in a judicial opinion.

II. LEX REASONING IN QUEER FAMILY LAW CASES

One of the first things we teach beginning lawyers is that the primary duty of the courts is to decide how the rules of law, as set forth in statutes and interpreted in the common law, apply to the facts of a given case.²⁵ Without taking seriously this body of controlling authority, courts might have unfettered discretion to render potentially capricious decisions. The very fact that the ambiguous (and reductive) term “judicial activism” is available as a universal pejorative for any judicial action that is seen to exceed the courts’ authority or interpretive mandate²⁶ suggests how strongly we

24. Courts’ concerns that they may be criticized as overreaching in recognizing queer families, or fear that they may inadvertently establish precedent for gay marriage in their own jurisdictions, seems to affect their decisions in a wide array of cases which do not, on their face, address the issue. *See, e.g., In re Bacharach*, 780 A.2d 579 (N.J. Super. Ct. App. Div. 2001) (overruling a trial court order refusing to allow a woman to change her last name to that of her lesbian partner, on the grounds that it would create an impression that the two were married).

25. Though perhaps simplistic, this basic description is the ubiquitous foundation for more sophisticated considerations of legal reasoning. *See, e.g.,* ANTHONY G. AMSTERDAM ET AL., *LAWYERING BY THE BOOK* 17-67 (2004) (self-published text of the NYU Lawyering Program); BERCH ET AL., *INTRODUCTION TO LEGAL METHOD AND PROCESS* (3d ed. 2002); JANE C. GINSBURG, *LEGAL METHODS: CASES AND MATERIALS* 2-3 (2d ed. 2003); CATHY GLASER ET AL., *THE LAWYER’S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH AND ADVOCACY* 9-12 (2002); RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY AND STYLE* 15-22 (2d ed. 1994).

26. As Judge Frank Easterbrook recently commented, “Everyone scorns judicial ‘activism,’ that notoriously slippery term.” Frank H. Easterbrook, *Do*

view the courts' obligations to rule within the bounds of already established law.

So to take seriously the various modes of "thinking" required by courts in determining whether the LGBT families before them constitute a family, the only fair place to start is with a consideration of the relevant bodies of law guiding each court. Courts themselves struggle mightily to find direction from extant law even in cases which undeniably present questions of first impression. LGBT family cases so often require courts to categorize unfamiliar family structures that they can feel as if they present entirely novel legal questions. But family law schemes are generally meant to be flexible, fact-bound, and ultimately pragmatic, so as to respond to the lived experiences of the personal lives with which they engage. When deciding how to understand a new family status such as a same-sex "civil union" then, the limitations of "lex" guidance can place great strains upon the courts.

After the State of Vermont enacted its historic law permitting same-sex partners—even those who did not reside in the state—to enter into legally-recognized civil unions, the burden necessarily fell on other states to decide under their own laws the legal significance of such unions. Civilly united same-sex couples pressed for their status to be recognized by other states on a variety of fronts. Given the lack of historical precedent for this newly-constructed legal status, it is not surprising that most states have little direct statutory or common law assistance in deciding what to do with same-sex unions created in other jurisdictions.

Nonetheless, courts examining the status of gay marriages and civil unions nearly universally strive to find "lex" guidance to resolve the question of how to understand this purported legal relationship. In *Burns v. Burns*,²⁷ for example, the Georgia Court of Appeals was asked to consider the situation of a divorced woman whose child custody consent decree required that during visitation, neither of the former spouses entertain overnight guests to whom they were not married.²⁸ Mr. Burns contended that Ms. Burns

Liberals and Conservatives Differ in Judicial Activism?, 73 U. COLO. L. REV. 1401, 1401 (2001); see also Leslie R. Weatherhead, *Letting Judges Judge: The Myth of "Judicial Activism,"* 59 OR. ST. B. BULL. 9, 9 (1999) ("Permeating all of these debates is an oft-repeated disdain for 'activist' judges.").

27. 560 S.E.2d 47 (Ga. Ct. App. 2002).

28. *Id.* at 48.

violated that court order by having her children reside overnight in the home she shared with her female partner.²⁹ Ms. Burns countered by arguing, in effect, that the couple's civil union satisfied the requirements of the visitation order because it was essentially akin to a state of marriage.³⁰ Civil unions are quite recent,³¹ so it was unlikely that the Georgia courts would find unequivocal guidance in established sources of its state law (either common law or statutory³²) to aid their conception of this civil union status. As a first line of analysis, however, the Georgia court nonetheless strove to find some guidance in *some* well-settled lex.

The court located an easy answer to the controversy in the Vermont statute itself.³³ As the court of appeals noted, in creating the new category of "civil union" the Vermont lawmakers carefully distinguished that state from "marriage," that is, "the legally recognized union of one man and one woman."³⁴ Moreover, the Vermont legislators indicated that they offered civil unions only to same-gender couples who were "therefore excluded from the marriage laws of this state."³⁵ It was thus a rather straightforward matter for the court to conclude that Ms. Burns was not actually married, in Vermont or any other state. Consequently, in keeping both her partner and her children overnight, she had violated the terms of the Georgia court order.³⁶ The *Burns* opinion went on to consider the status of the same-sex relationship if Vermont *had* purported to create a gay marriage,³⁷ but this dicta is anticlimactic; as the court explains it the purpose of the civil union statutes is clear, the language of the custody decree is unequivocal, and the decision feels easily foreordained by the governing law. Such cases provide little room or reason for courts to engage in complicated examination of legal policy.

29. *Id.*

30. *Id.*

31. The Vermont civil union statutes, VT. STAT. ANN. tit. 15, §§ 1201-1207 (2004), were passed on July 1, 2000.

32. The story is not quite as simple as I make it, however, since arguably there was statutory guidance in Georgia in the form of its state DOMA. GA. CODE ANN. § 19-3-3.1 (2004). But perhaps because the constitutional status of that law remained unclear, the thrust of the *Burns* court's opinion rests on its analysis of the Vermont Act.

33. VT. STAT. ANN. tit. 15, § 1201.

34. *Id.* § 1201(4) (quoted in *Burns*, 560 S.E.2d at 48).

35. *Id.* § 1202(2) (2005).

36. *Burns*, 560 S.E.2d at 49.

37. *Id.*

In fact, as is their obligation, courts will hew closely to their understanding of binding legal authority even when it leads to results with which they are unsatisfied. The Connecticut Superior Court in *Lane v. Albanese*, for example, seemed decidedly displeased with its own conclusion that Connecticut courts had no jurisdiction to annul a same-sex marriage entered in Massachusetts.³⁸ Prior to *Lane*, however, the Connecticut Appellate Court had concluded that Connecticut had no jurisdiction under its domestic relations law to dissolve a same-sex couple's Vermont civil union.³⁹ The *Lane* court relied upon the prior opinion's assertion that the acknowledgment by legal dissolution of gay relationships was a matter of public policy best left for the legislatures,⁴⁰ and that the Connecticut General Statutes provided that "the current public policy of the State of Connecticut is now limited to a marriage between a man and a woman."⁴¹ This explicit legislative act, coupled with the clear precedent established in *Rosengarten*, led the *Lane* court inexorably to determine that it lacked jurisdiction to dissolve a same-sex marriage.⁴² Yet the court's language in its

38. See No. FA044002128S, 2005 WL 896129 (Conn. Super. Ct. Mar. 18, 2005). This decision is unpublished, but is readily available on Westlaw. I have gathered and used several unpublished decisions for this research because their presumed unavailability as precedent does not alter my analysis of their content. Though perhaps it should. At least one respected jurist has suggested that unpublished opinions may not be as precisely reasoned, or as carefully drafted, as those intended for publication. Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW. 43, 43-44 (2000).

Yet others contend that unpublished opinions may be a backhanded way of addressing controversial issues without raising a fuss. Suzanne O. Snowden, Note, *"That's My Holding and I'm Not Sticking to it!": Court Rules that Deprive Unpublished Opinions of Precedential Authority Distort the Common Law*, 79 WASH. U. L.Q. 1253, 1256 (2001). If true, this could mean that cases dealing with LGBT rights are particularly susceptible to being decided in unpublished opinions. In any case, commentators are increasingly questioning whether unpublished opinions ought to remain uncitable, and some even suggest that the current practice of issuing non-precedential opinions is unconstitutional. See, e.g., Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Firth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. KAN. L. REV. 195, 211-223 (2001).

39. *Rosengarten v. Downes*, 802 A.2d 170, 184 (Conn. App. Ct. 2002).

40. *Lane*, 2005 WL 896129, at *3.

41. *Id.* (quoting CONN. GEN. STAT. § 45a-727a(4) (2004)).

42. *Id.* at *4. The court did go on to discuss a further basis for denying jurisdiction, which was the questionable legitimacy of the marriage even under Massachusetts law. Massachusetts statutes prohibit marriages to non-residents if the marriage would not be legal in the participants' home state. MASS. GEN. LAWS ch. 207, § 11 (2004). Since Connecticut law and public policy made it likely that

concluding comment seems to inject a note of regret: "Unless and until our legislature enacts legislation that reflects a public policy favoring recognition of civil unions or marriage between same-sex couples, this court has no choice but to dismiss this case for lack of subject matter jurisdiction."⁴³

It seems apparent, and not especially surprising, then, that in defining (or not defining) LGBT families, courts will try to follow what they conceive to be binding law regardless of their ideas on the matters before them. But this is no easy task. In a society that only in 2003 overturned laws criminalizing homosexual sex,⁴⁴ the advent of the open and celebratory queer family seeking legal consideration is a relatively recent phenomenon. It stands to reason that most legislatures drafting, and courts interpreting, statutes related to marriage, divorce, adoption, custody and other intimate familial topics did not consider the possibility of the queer family. As the New York Supreme Court observed when deciding in *Langan v. St. Vincent's Hospital*⁴⁵ whether a surviving same-sex partner whose relationship had been solemnized in a Vermont civil union qualified as a "spouse" for the purpose of bringing a wrongful death claim on behalf of his deceased partner, "[t]he court acknowledges that at the time the wrongful death statutes were written, the use of the term spouse did not envision inclusion of a same-sex marital partner."⁴⁶

Given this absence of direction as to how to treat these newly-emerging families, the courts must find some way of "filling in" the law on point. Even as they try most meticulously to seek direction from mandatory authority, the comparative newness of these family forms gives courts wide discretion in determining which theories and analogies most closely hew to the jurisdiction's established policies and "lex." Consequently, even when they strive to adhere closely to statutory language and established precedent, different courts can come to quite different conclusions.

the same-sex marriage would not be legally recognized in Connecticut, it may, under Massachusetts law, have been null at the outset. See *Lane*, 2005 WL 896129, at *4.

43. *Lane*, 2005 WL 896129, at *4.

44. *Lawrence v. Texas*, 539 U.S. 558 (2003).

45. 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003). Since the writing of this article was completed, the Supreme Court of New York, Appellate Division, reversed *Langan*. 802 N.Y.S.2d 476 (N.Y. App. Div. 2005). The reversal was handed down too late for analysis of it to be included in this Article before publication.

46. *Langan*, 765 N.Y.S.2d at 420.

Some of the divergences we find in these cases must be attributed to significant variations in each jurisdiction's body of law. Every state that has enacted a defense of marriage act,⁴⁷ for example, will necessarily look at gay relationships differently from states that have not done so.⁴⁸ Additionally, states having public policies favoring the legitimatization of same-sex unions will have quite yet another set of potential directions. In asking whether it has jurisdiction to dissolve a same-sex union entered into in Vermont, for example, the Massachusetts Superior Court in *Salucco v. Alldredge* agreed with the Connecticut analysis that a civil union is not a marriage, and that consequently the state's divorce statutes were inapplicable.⁴⁹ But Massachusetts is the state that brought us same-sex marriage in *Goodridge v. Department of Public Health*.⁵⁰ Thus the *Salucco* court did not end its work with its conclusion that divorce statutes were inapplicable.⁵¹ Instead it found that *Goodridge* offered binding precedent establishing that Massachusetts law and policy require that same-sex couples be afforded the same legal protections as opposite-sex couples.⁵² Thus the court determined that its general equity jurisdiction entitles it to fashion a remedy for the dissolution of a civil union.⁵³

There is certainly no other jurisdiction besides Massachusetts that currently has the precedent of gay marriage to guide its consideration of civil unions. But does that make it similarly true that no other state can find a way lawfully to recognize civil union status? Even without the assistance of *Goodridge*, the New York court in *Langan* did not believe itself so constrained. Acknowledging that "the concepts of marriage evolve over time," and that "public

47. As of August 31, 2005, at least thirty-nine states had DOMAs, constitutional amendments banning same-sex marriage, or both. For a map illustrating the status of anti-gay family measures in the various states, see National Gay and Lesbian Task Force, Anti-Gay Marriage Measures in the U.S. (2005) <http://www.thetaskforce.org/downloads/marriagemap.pdf> (last visited Dec. 27, 2005).

48. In fact, had the *Burns* analysis not rested comfortably on the question of whether a civil union was a marriage, the court would likely have found Georgia's DOMA dispositive. See *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (commenting that recognizing foreign same-sex marriages would violate GA. CODE ANN. § 19-3-3.1 (2004)).

49. *Salucco v. Alldredge*, No. 02E0087GC1, 2004 WL 864459 (Mass. Super. Ct. Mar. 19, 2004).

50. 798 N.E.2d 941 (Mass. 2003).

51. *Salucco*, 2004 WL 864459, at *3-4.

52. *Id.* at *4.

53. *Id.* at *4-5.

opinion regarding same-sex unions" was undergoing a similar change,⁵⁴ the court concluded that Langan was his deceased partner's spouse for the purpose of the state's wrongful death statutes.⁵⁵ Although it remarked that a court must be "certain of its ground"⁵⁶ before categorically changing the meaning of a statute (here, section 10 of the New York Domestic Relations Law, defining marriage), the *Langan* court examined the purposes, privileges and function of civil unions and determined that "[t]he civil union is indistinguishable for societal purposes from the nuclear family and marriage."⁵⁷

The differing decisions about the legal status of foreign civil unions in Massachusetts and Connecticut seem nearly predetermined by Massachusetts' gay marriage rulings. But what accounts for the divergence between Connecticut and New York?

It could be argued that the New York case is predicated on the uniqueness of the state's holding in *Braschi* that gay partners may be considered family members for the purpose of succession in rent-controlled apartments.⁵⁸ And the *Langan* opinion does liberally reference *Braschi*.⁵⁹ But the *Langan* court appears far more directly bound by *Raum v. Restaurant Associates*, in which the New York Appellate Division held that despite *Braschi*, a same-sex partner did not qualify as a spouse for the purpose of New York wrongful death law.⁶⁰ Nonetheless, the court determined that there was no mandatory authority addressing the rights of civilly united partners under the wrongful death statutes, and found compelling reasons why they ought to be included.⁶¹ It hardly seems, then, that New York precedent required the *Langan* finding. Rather the opposite—it was only by carefully distinguishing the legal status of same-sex marriages in Massachusetts from same-sex unions in Vermont that the New York Supreme Court escaped the conclusion that its own precedents required a contrary result.

Unless we conclude that either *Langan* or *Lane* is actually

54. *Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d 411, 420 (N.Y. Sup. Ct. 2003), *rev'd*, 802 N.Y.S.2d 476 (N.Y. App. Div. 2005).

55. *Id.* at 422.

56. *Id.* at 421 (quoting *In re Paris Air Crash*, 622 F.2d 1315, 1319 (9th Cir. 1980)).

57. *Id.*; see N.Y. DOM. REL. LAW § 10 (McKinney 1999) (defining marriage).

58. *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49, 53-54 (N.Y. 1989).

59. *Langan*, 765 N.Y.S.2d at 415-16.

60. *Raum v. Rest. Assoc.*, 675 N.Y.S.2d 343 (N.Y. App. Div. 1989).

61. *Langan*, 765 N.Y.S.2d at 420-21.

categorically wrong,⁶² then, these cases help illustrate that courts have wide latitude in deciding how to envision the queer families that have not previously been imagined by legislators and judges. Something *beyond* the narrow dictates of direct legal authority influences, and perhaps in some instances underlies, their determinations. The remainder of this Article seeks to theorize about what that "something" might be.

Before moving past the topic of "lex" reasoning, however, it is important to reflect that the authority the courts are grappling with in LGBT family cases can be either direct statutory instruction, or common law interpretation, or more often, both. There are certainly important differences in the ways these disparate legal sources operate and in their level of authority over judicial action. In fact, this is an understatement. There is a wealth of scholarship devoted to discussing the way that courts should interpret statutes,⁶³ and though there is a wide array of opinions about how much discretion judges have in statutory interpretation,⁶⁴ there is little question that unless unconstitutional, legislative acts carry greater weight than judicial interpretations.

Even leaving aside the inherent differences among the states'

62. As indicated *supra* in note 45, the Appellate Division has decided just that: *Langan*, according to the majority, was categorically wrong. 802 N.Y.S.2d 476 (N.Y. App. Div. 2005).

63. A search of law reviews and academic journals in the Westlaw database shows almost 300 articles with "statutory interpretation" in the title. Amazon.com lists more than 100 books with the words "statutory interpretation" in the title. The Library of Congress catalog lists 9976 entries under the keywords "statutory interpretation."

64. It may be a gross oversimplification of a vast intellectual field, but scholars of judicial interpretation of legislative acts have been divided roughly into two camps: "textualists," such as Justice Antonin Scalia, and proponents of "dynamic interpretation," such as William Eskridge. Both groups may be hard to define, and the borders between them can be amorphous. In general, though, textualism can be thought of as urging judges to follow the commonly understood meaning of enacted texts, rather than searching for the intent of the drafters or for any other interpretive realm beyond the words on the page. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3-47 (1997). "Dynamic interpretation," conversely, assumes that legislation must be assumed to be multilayered, culturally-specific, and evolving over time. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 48-60 (1994).

One debate between these poles centers around the question of whether, in the absence of explicit legislative direction, courts may, or may not, do substantive reading of the law. This Article need not wade deeply into that discussion because my point sidesteps it; I contend that in the uncharted waters of queer family law definition, at least, whichever side the courts choose requires a "substantive" determination.

collective bodies of family law, then, the different prominence and methods usually afforded the interpretation of statutes and common law ("plain meaning" and canons of construction vs. comparison and distinction of material facts and reasoning) might suggest that it may not be possible to meaningfully compare judicial opinions interpreting or relying on differing sources of authority.⁶⁵ And in the most basic way, it is not. It would certainly be unhelpful to try to draw absolute conclusions by placing decisions based on such disparate sources next to one another.

But when courts are addressing the novel questions of law with profound cultural implications, and their extant body of law does not give direct guidance (which it rarely does in these first impression cases of family definition), their choices of what topics to consider or which legal concerns to bring to the forefront are particularly significant. Regardless of whether the court grounds its analysis in divorce statutes or common law definitions of "spousal" relationships, a court seeking to decide whether it can act on a same-sex civil union must grapple with the relationship between civil union and marriage, as well as meaning and significance of a non-marriage adult affiliation. The convergence of many of the central inquiries in these cases makes their frequent contrasts telling. At the very least, these comparisons are fascinating, even if not analytically definitive.

I start, then, with the premise that most courts, most of the time, strive mightily to apply the laws of their jurisdictions as they understand them. But LGBT family definition cases can rarely be resolved only by referencing direct authority. Where existing statutory definitions of family do not bind the courts, and they cannot glean legislative intent requiring a particular definition of family for the purpose at bar, there exists a wide sea of interpretive

65. Though in a surprising number of instances such differences may be less significant than the categorical boundaries between common law and statutory interpretation may suggest. The same operative question may often be at issue for courts grappling with statutes as for those applying common law. When dealing with custody and visitation for children, for example, almost all states apply the "best interest of the child" standard. But the origins and meaning of that standard may be derived either from statutory or common law, or in many instances, both. That is, in some states the standard was introduced through common law, and in others, adopted by legislatures. In either case, moreover, the accumulation of case law commenting on the meaning of the "best interest" standard has significantly shaped and perhaps clarified the term. Despite these disparate and possibly multiple sources, however, each state purports to consider the same general question: What best serves the child's welfare?

opportunity. Amid such leeway the court may construe its mandate broadly (or practically), so as to include a new queer family within its collection of human relationships of which the law must be aware. Or it may restrain itself from entering the fray, thus rendering the relationships before it purely informal and without legal weight. If the extant enactments, regulations and judicial determinations fail to tell the courts which choice is preferable, they will have to stretch beyond pure "lex" if they are to decide what to do with the queer litigants before them.

Once courts are reaching into the realms of uncertain interpretation, their work cannot consist solely of applying generic legal rules. Instead, the court's understanding of "law" (in the "lex" sense of the word) becomes commingled with its interpretation of the facts of the case before it.

III. FRAMING THE ISSUES: FACTUAL REASONING

When a court cannot find precedent resolving a given controversy, or at least no precedent that seems precisely on point, it must attempt to compare the case before it with something already familiar. If the direction offered by prior jurisprudence is minimal, as it often is in LGBT family-recognition cases, courts frequently find themselves looking for comparable family structures in order to make sense of what they are seeing. Their intention is to work out whether the family form before them can map comparatively neatly onto pre-existing shapes or categories. If that is not possible, then they must decide whether to analogize the new facts before them to older ones that they already understand.

How they frame these facts—as a somewhat novel but patently recognizable nuclear family, as a radical change to everything we know and understand about the basic social unit or as something in between—will dramatically shape the court's legal analysis. As linguists such as George Lakoff suggest, differences in the way we frame ideas—that is, the way we describe them to ourselves and others—have real and discernable consequences.⁶⁶ Rather than being merely semantic variations, differences in framing can connect to archetypal (and consequently comprehensible)

66. See GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT! 3-34 (2004). Indeed, Lakoff suggests that the way issues are framed can sway, and even determine, national elections. See *id.* (suggesting that in the 2004 elections conservatives were successful in adopting metaphors that resonated with national values).

metaphors, or can simply wash over us without resonance.⁶⁷ Simply stated, “metaphorical thought is unavoidable, ubiquitous, and mostly unconscious,” but nonetheless “we live our lives on the basis of inferences we derive via metaphor.”⁶⁸ So in order to understand one part of courts’ work in reasoning through LGBT family law cases, we must look closely at the way they conceive of gay families, particularly to how closely or distantly they imagine those families to match the traditional norms.

A. *Thinking By Analogy—The Power of Categories*

We can see this process of matching the unfamiliar with the familiar in cases addressing marriages in which one of the partners is transsexual. Despite having been certified through state-issued marriage licenses, marriages between transgendered persons and their now-opposite sex husbands and wives can nonetheless be subject to collateral attack.

The decisions in these cases are often constructed around a simple categorization question; what is the legal gender of the transsexual partner? The cases present a straightforward dichotomy—either the court accepts the transsexual partner as the sex he or she identifies with, or it does not.⁶⁹ In theory, official

67. George Lakoff and Mark Johnson make the point that metaphors are conceptual, not merely linguistic. That is, they embody ideas that may be culturally-specific, but are so widely held that they shape our very thoughts. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 3-6, 245-46 (2d ed. 2003).

Lakoff and Johnson are but two of many linguists, literary theorists, psychologists, philosophers and other scholars who have examined the importance of metaphor in human understanding. For a foundational examination of the centrality of metaphor in abstract thinking, see PAUL RICOEUR, *THE RULE OF METAPHOR: MULTIDISCIPLINARY STUDIES OF THE CREATION OF MEANING IN LANGUAGE* (Robert Czerny trans., 1975). For groundbreaking work on the importance of metaphor in law, see the writings of Steven L. Winter. See, e.g., STEPHEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001); Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

68. LAKOFF AND JOHNSON, *supra* note 67, at 272-73.

69. Although the resolution of this question is hardly an easy one, and courts often struggle mightily with the significance of their decisions. In fact, courts may find the gender complexities these cases present to be so complicated that they make logical rhetorical moves inconsistent with their basic findings. For example, it seems to be increasingly common for courts finding no gender change to nonetheless refer to transsexuals by their preferred (that is, *new*) pronouns. See, e.g., *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999) (“Throughout this opinion [plaintiff] will be referred to as ‘She.’ This is for grammatical simplicity’s

records should make this fairly easy. In many of these cases, the trans⁷⁰ spouse has changed her or his name, been issued new identifying documents (driver's license, social security number, etc.), and has had her or his birth certificate altered to reflect the new gender. If courts accept these documents as accurately representing the person identified within them, then the relationship they see is a heterosexual marriage whose difference from the norm is isotopic. That is to say, the basic substance is the same, but the marriage may have somewhat different physical properties. If not, then the relationship in question will be elementally different, and probably not cognizable.

An early case dealing with a marriage between a transsexual woman and her biologically male husband illustrates the easy way in which a court may view a sex change operation as constituting a complete change in legal gender.⁷¹ The plaintiff, M.T., applied in New Jersey family court in 1975 for support and maintenance from her soon-to-be-ex husband, J.T.⁷² The husband claimed that he was not obliged to pay, because M.T. was transsexual and therefore not a woman, making their marriage void.⁷³ M.T. had identified as female since her early teens, and in 1971 underwent gender-

sake, and out of respect for the litigant. . . . It has no legal implications."); *see also In re Marriage of Simmons*, 825 N.E.2d 303, 307 n.1 (Ill. App. Ct. 2005) (noting its first pronoun reference to petitioner to explain that the court uses "He" out of "respect for petitioner," but that the term is not legally significant).

70. The appropriate nomenclature for those whose gender identity does not correspond with their biological sex at birth is a complicated one. Medical literature and most court decisions generally use the term "transsexual" to refer to those who have begun or completed sex reassignment. But the term is sometimes spelled "transexual," which can be a simple spelling variant, or can be intended to distance the word from the psychological and medical connotations that the former spelling may have. NATIONMASTER.COM, TRANSSEXUAL, <http://www.nationmaster.com/encyclopedia/Transsexual> (last visited Dec. 27, 2005). Others use the term "transgender," which was introduced and adopted for a variety of reasons, including the notion that gender may be complex, and that transgender-identified people may, or may not, identify solely with one biological sex. WIKIPEDIA, TRANSGENDER, <http://en.wikipedia.org/wiki/Transgender> (last visited Dec. 27, 2005). Because none of these terms has been fully accepted, and all are deemed to have some conceptual problems, the umbrella term "trans" has been introduced, and adopted most often by activists. *Id.*

This Article uses the more current term "trans" interchangeably with the other descriptors used by the various courts and litigants to describe those seeking to have their changes of gender legally recognized.

71. *M.T. v. J.T.*, 355 A.2d 204, 208-09 (N.J. Super. Ct. App. Div. 1976).

72. *Id.* at 205.

73. *Id.*

reassignment surgery.⁷⁴ In 1972 she and the defendant, a man with whom she had lived since the mid-1960s (before M.T.'s surgery) married in the State of New York before moving to live in New Jersey.⁷⁵

The family court's opinion examined at length the actual surgery M.T. underwent, and recited expert opinion on the psychological and social ramifications of transgender identity.⁷⁶ The court used its review of M.T.'s medical procedures to determine whether she was male or female, since, "we accept—and it is not disputed—as the fundamental premise in this case that a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female."⁷⁷

As the court observed, in the early 1970s there was very little case law concerning transgendered people.⁷⁸ Thus, the court looked to a British case from 1970 as the closest analogue.⁷⁹ But the New Jersey court came to a conclusion different from the British one, which held that a person "cannot 'affect her true sex.'"⁸⁰ The New Jersey court concluded that M.T. was doing everything in her power to present herself as, live as, and *be* a woman.⁸¹ Ultimately, therefore, the court held that if M.T. was "by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female . . . , we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated."⁸² M.T. was a woman, hence her marriage was valid and she was entitled to maintenance and support.⁸³

If, on the other hand, a court does not accept that one can change sex or gender categories regardless of how one lives, what one is called, or how much documentation one has, then heterosexual marriage and the union between a biological man and transsexual woman (or vice versa) cannot be understood as a

74. *Id.*

75. *Id.*

76. *Id.* at 205-07.

77. *Id.* at 207.

78. *Id.* at 208.

79. *Id.* (analyzing *Corbett v. Corbett*, [1970] 2 W.L.R. 1306 (P.).

80. *Id.* at 209 (quoting *Corbett*, 2 W.L.R. at 1323).

81. *Id.* at 211.

82. *Id.* at 210-11.

83. *Id.* at 211.

normative marriage. It is of a different substance altogether. Courts reaching such a conclusion refuse the validity of this marriage, often claiming that what they are *really* looking at is a form of same-sex marriage.

Thus in *Estate of Gardiner*, the son of Marshall Gardiner, who died intestate, challenged the right of his father's wife, a post-operative transsexual woman, to inherit Gardiner's estate.⁸⁴ The son claimed that J'Noel Gardiner was not legally a woman and that her marriage was invalid.⁸⁵ J'Noel Gardiner previously underwent sex reassignment and was issued an amended birth certificate in Wisconsin; she and Marshall Gardiner met and married in Kansas, where he died a year later.⁸⁶ Declining to recognize in the State of Kansas any change in J'Noel's legal gender, the court granted the son's petition.⁸⁷ The court held that the plain meaning of the Kansas marriage statutes and defense of marriage act was that a marriage was valid only between two people who were of the opposite sex at birth.⁸⁸ The court stated unambiguously that "the words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals. . . . A male-to-female post-operative transsexual does not fit the definition of a female."⁸⁹

These two cases raise an important question: How does the court *know* either that a formerly male litigant "should be considered a member of the female sex for marital purposes"⁹⁰ or that she "does not fit the common meaning of female"?⁹¹ Despite the fact that the cases turn on such a determination, the answer to the question can be surprisingly opaque.

In *In re Nash*, an Ohio court of appeals refused the application for a marriage license between a biological woman and a post-operative transsexual man.⁹² Jacob Benjamin Nash, born Pamela

84. 42 P.3d 120, 121 (Kan. 2002).

85. *Id.*

86. *Id.* at 123.

87. *Id.* at 121.

88. *Id.* at 126. In fact, though, that is not precisely what the statute says. It reads, "[t]he marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void." KAN. STAT. ANN. § 23-101 (2001).

89. *Gardiner*, 42 P.3d at 135.

90. *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976).

91. *Gardiner*, 42 P.3d at 135.

92. Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003).

Ann Nash, had amended his Massachusetts birth certificate to include a change of his name, and to alter his designated gender from female to male.⁹³ But the Ohio court refused to accept the validity of the revised birth certificate and determined that Nash had not thereby legally changed his sex.⁹⁴ Defining sex by reproductive function (quite different from the court in *M.T. v. J.T.*, which defined sex by sexual function), the court held that the category “male” simply cannot include a female-to-male transsexual.⁹⁵ If Nash cannot be male, then the marriage cannot be valid, and to validate it would be, as the court says “placing our ‘stamp of state approval’ on an actual marriage that is directly contrary to Ohio’s public policy on same-sex marriages.”⁹⁶

But why can Nash not be male? Certainly, one answer is that the court defined male as “the sex that has organs to produce spermatozoa for fertilizing ova,”⁹⁷ which categorically excludes Nash. But this begs a larger question—why is the ability to reproduce the operative definition in *Nash*, rather than the sexual function definition in *M.T. v. J.T.*? The *Nash* court provided no reasoning to explain that this definition is more convincing than any other; it simply laid out the definition as self-evident, and moved on from there.⁹⁸ And the dissenting opinion in *Nash*, although sharply disputing the majority’s conclusion, applied

93. *Id.* at *1.

94. *Id.* at *7.

95. It’s no accident, given the era, that the primary nonreligious argument against gay marriage is not reproduction itself but the possibility of reproduction.

96. *Nash*, 2003 WL 23097095, at *6. It seems more than coincidental that courts have become increasingly conservative on the issue of transsexual marriage, and have begun linking it to chromosomal sex rather than sexual performance. In many of these decisions, the threat of gay marriage looms large, and the courts are doing everything possible to defer even a hint that they approve of or want to make possible same-sex marriage. If there is the slightest doubt that a transsexual person might be in any way the same sex as her/his partner, the courts reiterate the prohibitions against gay marriage and equate validating marriages of transsexual people to partners of the other sex and same-sex marriage, which must be prevented.

97. *Id.* This reliance on reproduction to define gender echoes the increasing reliance foes of same-sex marriage have placed on the (at least theoretical) likelihood of reproduction in heterosexual unions as grounds for giving them different legal status from homosexual ones. See, e.g., Peter Sprigg, *Questions and Answers: What’s Wrong with Letting Same-Sex Couples “Marry?”*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/get.cfm?i=IF03H01> (last visited Dec. 27, 2005) (explaining that the hypothetical possibility of reproduction makes heterosexual couples the only “structural type” that should be favored and protected, even if its members do not want, or cannot have, children biologically).

98. *Nash*, 2003 WL 23097095, at *6.

analogous reasoning.⁹⁹ The dissent concluded quite simply that Nash's gender change was apparent.¹⁰⁰ In its forthright appeal to common sense, it asserted without citation that taking Nash's gender on faith is one of those issues that "[is] so obvious, and [the results of the case] so clearly wrong, that we must look back and, like Dr. Phil, wonder 'What were they thinking?'"¹⁰¹

The legal persuasiveness of Dr. Phil aside, what is so striking about both opinions in this case is the shared assumption of a transparent worldview requiring little support from other sources. For the *Nash* majority, sex equals reproductive capacity—that conclusion is self-evident and demands no further debate. Yet for the dissent, such a way of imagining sex is "so clearly wrong," and accepting Nash's declaration of his gender is "so obvious," that it equally speaks for itself. While these questions of gender identification may seem knotty, both sides in this case comfortably assert that the answers are easily apparent, despite the fact that the court's presumably thoughtful and carefully considered opinions wholly diverge on this point.

The Texas Court of Appeals in *Littleton v. Prange* found itself similarly untroubled about a transsexual's true gender.¹⁰² In this case Christie Littleton, a male-to-female transsexual, brought a wrongful death suit against Dr. Mark Prange, who had treated her husband before he died.¹⁰³ Prange challenged Littleton's right to sue, arguing that since she was transsexual her marriage could not be legally recognized.¹⁰⁴ In asking whether Littleton had standing to sue for the loss of her husband the court laid out the legal issue plainly: "[C]an a physician change the gender of a person with a scalpel, drugs and counseling . . . ?"¹⁰⁵ The opinion opens with a statement that the case presents "the most basic of questions. When is a man a man, and when is a woman a woman?"¹⁰⁶ So this

99. See *id.* at *10-12 (Christley, J., dissenting).

100. See *id.*

101. *Id.* at *12.

102. 9 S.W.3d 223 (Tex. App. 1999).

103. *Id.* at 225.

104. *Id.* (challenging suit on a motion for summary judgment that surviving spouse's status was not a proper wrongful death beneficiary).

105. *Id.* at 224. The rest of the quote may presage the answer, however: "[O]r is a person's gender immutably fixed by our Creator at birth?" *Id.* Even if the religious reference suggests no specific political or philosophical orientation, posing the question as one of human intervention versus divine plan does tend to give the latter the advantage.

106. *Id.* at 223.

court, too, was asking whether surgery can alter someone's gender from male to female. While the court did go into considerable detail in its decision, citing cases from around the country and around the world, its answer to this question is ultimately arrestingly simple: Christie just *is* a man, by dint of her chromosomes and her original birth certificate.¹⁰⁷ ("Biologically a post-operative female transsexual is still male."¹⁰⁸) In the concluding words of the opinion, "[t]here are some things we cannot will into being. They just are."¹⁰⁹

Such an assurance is nearly tautological. And for those who would disagree, it is nearly impossible to respond to. It encompasses an entire worldview about the immutability of gender. Yet the court's confidence in its belief that "some things . . . just are" is not, as we have seen in *Nash* above, necessarily ideologically linked. After all, both the majority and the dissent in that case argued from the self-evidence of their positions. Both sides agree that one is either male or female and that someone has to be either one or the other. They simply categorically disagree with one another about which group the applicant before them falls into.

As there is a dearth of legal precedent on this issue, courts must determine for themselves what and who they are dealing with. Most importantly, though, despite the complexities and ambiguities of gender that people on all sides of these decisions seem to acknowledge, the court must make a clear and unambiguous determination attaching a certain gender to a person, because the categories the court must work with are absolute.¹¹⁰ But since the medical, social, and legal guidance for the courts seeking to determine the transsexual litigants' gender are not seen as dispositive, these various courts have little room to support their positions, or even to reason carefully through them. Rather, to avoid an irresolvable quagmire, they must make a leap of

107. See *id.* at 224.

108. *Id.* at 230.

109. *Id.* at 231.

110. Or at least the courts assume so. Feminists and gender activists might critique the assertion that the construction of gender is absolutely binary. See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990). However, courts do not seem willing to entertain any notion of murkiness or complexity in gender identity. It is probably difficult enough for them to decide whether trans people are "male" or "female"; asking them to entertain the possibility that one could be consciously, let alone *legally*, "both" or "neither" is unrealistic, and may in any case not be legally advantageous for trans litigants.

intuition, or of faith.¹¹¹

The language of intuition, and even more so, of faith, makes an uncomfortable fit with legal analysis. After all, discussions of legal decisions take for granted that courts' determinations are entirely analytical and reasoned from precedent (or, alternatively, critics lambaste decisions as being inadequately reasoned).¹¹² Cases dealing with transsexuals' marriages tend not to operate that way, however. Rather, the courts' conclusions seem to issue from a flash of insight, a powerful belief about the way the world works and should work. Certainly, the means by which courts generate these beliefs are not preordained. This is not least because well-meaning courts faced with essentially the same question (that is to say, what gender is this person?) can occupy polar opposite positions. More strikingly, so can judges sitting on the same court, analyzing the same statutes and precedents. Neither side offers proof for its conclusion; on the contrary, statements like "some things . . . just are" defy legal authority, or, rather, stand *as* authorities, as statements of indisputable fact.

Such a belief is not achieved by a process of methodical analysis. It is achieved instantaneously—either you see it or you don't. But this is not to denigrate this mode of thinking. As Malcolm Gladwell suggests, intuitive thinking—the leap of faith—may be as important, and in some instances, an even more reliable intellectual process than considerations arrived at more methodically or meticulously.¹¹³ At the same time, it is important that we identify this kind of thinking for what it is, and differentiate it from the reasoning processes by which we assume law usually

111. As St. Augustine succinctly describes it, "[f]aith therefore is to believe that which you do not see, truth is to see what you have believed." ST. AUGUSTINE, ON THE GOSPEL OF JOHN XL, at 9.

112. Take for an example the persistent critique of *Roe v. Wade*, 410 U.S. 959 (1973). Though the debate over abortion may be one of politics or morals, the legal criticism of the Court's opinion in *Roe* has been grounded in argument that the decision lacks legal foundation. See, for but one example, ROBERT BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 103 (2003) ("Whatever one's feelings about abortion, [*Roe*] has no constitutional foundation, and the Court offered no constitutional reasoning.").

113. MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 13-14 (2005). Gladwell asserts that even though "we are innately suspicious . . . of rapid cognition," decisions reached intuitively and near-instantaneously "can be every bit as good as decisions made cautiously and deliberately." *Id.* Some of Gladwell's methods and broad conclusions have been critiqued, but the success of his work has put the idea of instantaneous decision-making in the public consciousness, and his notions resonate at least somewhat with most of his readers.

operates.

Although these transsexual marriage cases are quite different from each other in terms of content (inheritance, the granting of a marriage license, standing in a wrongful death suit), they all share this leap of faith. All demand statutory interpretation, and their core issue is the same; if marriage is legal only between people of opposite gender, is there a valid marriage on the facts at bar, or not? If the court determines that the marriage contains two partners of different genders, then marital law kicks in and whatever rights and responsibilities accord to that law are in force. If the court decides instead that, whatever the state Vital Records Officers and the Division of Motor Vehicles say, the transsexual spouse is still the sex on his or her original birth certificate, then none of the rights and responsibilities of marriage can attach.¹¹⁴

Ultimately, then, the courts represent the factual content of the cases as straightforward, and the decisions they came to as easy.¹¹⁵ What the courts do not make visible is the fact that the ease of the decision is linked directly to the power of the courts' faith in determining gender. If it is easy to work out whether someone is male or female—if that determination "just is"—then everything else follows.

B. *Thinking Laterally—Are Queer Families Like Straight Ones?*

While courts can apply a straightforward "is s/he or isn't s/he" categorization to cases concerning transsexual people, many other types of LGBT family cases require more than a choice between two clear possibilities. Instead, the cases ask judges to construct broader analogies between existing family forms and the queer families seeking legal acknowledgement.

In the Florida case of *Peterman v. Meeker*,¹¹⁶ for example, a gay

114. Unless, of course, the State is willing to open the status of marriage to partners of the same gender. It is not hard to imagine that the fear of opening the door for gay marriage may underlie the rigidity with which some of these courts determine gender. In fact, the comparative ease with which the New Jersey court accepted M.T.'s gender change in 1975 might be connected to the fairly limited ramifications a court of that time could imagine such a decision having.

115. This is not to say that discovering the factual content is easy. *Littleton* spends many pages poring over every possible precedential or related case before deciding on the actual facts of the case. *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999). But once it has determined *how* to determine sex, the work that sex does in these cases is the same.

116. 855 So. 2d 690 (Fla. Dist. Ct. App. 2003).

man sought an injunction against his same-sex partner on the charge of domestic violence. A couple for thirteen years, John Peterman and Nute Meeker's relationship was dissolving, and Meeker sought an injunction against Peterman to protect himself from violence.¹¹⁷ Peterman's attorney opposed the restraining order, contending that the Florida statutes concerning domestic violence applied only to heterosexual couples.¹¹⁸ In a remarkably brief and untroubled opinion the court dismissed Peterman's claim.¹¹⁹ Pointing out that the domestic violence statute states explicitly that "[n]o person shall be precluded from seeking injunctive relief . . . solely on the basis that such a person is not a spouse,"¹²⁰ the court held that the gender of the two partners had no relation to the applicability of the statute.¹²¹ The court observed that the case presented a wholly new issue for Florida, but that the analogy to similar cases in other states, and to unmarried heterosexual partners, was sufficiently compelling to convince the court that the statute should include same-sex partners.¹²²

But even if the analogies between unmarried hetero- and homosexual partners seem fairly direct in cases of domestic violence (one adult romantic partner is alleged to be harming another), when parenting relationships are involved it becomes significantly more complicated to frame queer family relationships as analogizable to commonly-understood straight ones. The reasons why such an analogy can be harder to draw can be seen in what have become known as second-parent adoptions. These are legal adoptions by a nonbiological parent of the biological child of his or her gay partner without the termination of parental rights of the birth parent, so that the child will have two legal parents of the same sex.¹²³

117. *Id.* at 690.

118. *Id.* (arguing that FLA. STAT. § 741.30 (2002) does not protect homosexuals against domestic violence). The statutes define family or household members as "spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as if a family, and persons who are parents of a child in common regardless of whether they have been married." FLA. STAT. § 741.28(3) (2002).

119. *Peterman*, 855 So. 2d at 691.

120. *Id.* (citing FLA. STAT. § 741.30(1)(e)).

121. *Id.*

122. *Id.*

123. See Emily C. Patt, *Second Parent Adoption: When Crossing the Marital Barrier is in a Child's Best Interests*, 3 BERKELEY WOMEN'S L.J. 96, 98 (1987); Elizabeth Zuckerman, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of*

It is a basic fact of biology that two people of the same sex cannot produce a child together,¹²⁴ and a legal fact that they can rarely adopt children jointly.¹²⁵ If they do seek joint adoption, as genetic strangers to the child, a gay or lesbian couple will be biologically, and perhaps legally, on the same footing as a heterosexual couple.¹²⁶ But where one partner in a gay couple is already a biological or adoptive parent of a child and the other seeks legal parenting status, the question becomes one that straight couples do not face; can the other intended parent be legally recognized without severing the legal rights of the first? Adoption laws are predicated on the assumption that the new parents replace the old, whose parental rights are terminated. The original (biological) mother is substituted with the new (adoptive) mother, and the same for the father, if known. Obviously, an adoption cannot work quite the same way for two parents of the same gender. So the couple must petition for a second-parent adoption, asking a court to declare that the child has a new mother or father, in addition to, rather than instead of, the existing one.

Gay couples seeking second-parent adoptions imagine themselves as presenting a straightforward request. They are simply asking that courts legally recognize the reality of two people, one legally related to the child and the other not, choosing to raise a child together.¹²⁷ For the courts, however, the question can carry

the Other Mother, 19 U.C. DAVIS L. REV. 729, 733 (1986).

124. Of course, neither can some heterosexual couples. In fact, much of the technology that queer parents use to conceive—assisted insemination, in vitro fertilization, surrogacy—was developed to help infertile heterosexual couples produce children. Nonetheless, the importance and centrality of procreation is often given as a primary reason why the government can or should promote heterosexual marriage but prohibit legal marriages by persons of the same sex. See Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653, 667-68 (2004).

125. Most states only allow joint adoptions to legally married couples. Lynne Marie Kohm, *Moral Realism and the Adoption of Children by Homosexuals*, 38 NEW ENG. L. REV. 643, 651 (2004) (though the author observes that some courts “circumvent this by interpreting ‘person’ in the statute as ‘persons’”).

126. Some jurisdictions or adoption agencies may have a preference for heterosexual couples over homosexual ones, and adoptions by gay people may be prohibited altogether. *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005). But if joint adoption by two parents is allowed, then the status of both adoptive parents will be precisely equivalent.

127. Consequently, a great deal of resources for gay families are devoted to finding ways to legally recognize both biological and non-biological parents. For a frequently-updated example of advice to such families, see *Gay Parenting*,

with it a dizzying array of ramifications. Does caring for a child have the same status as being biologically related to that child? Does the state's law permit a child legally to have two mothers or two fathers? What does this say about the relationship status of the parents?

In fact, in comparable heterosexual situations, that last question might be enormously important. There is a longstanding assumption that parentage within heterosexual marriage is shared. One of the rights of marriage is that if a married woman delivers a child, the law generally takes for granted (in the absence of evidence to the contrary) that her husband is the child's father and she is the child's mother, even if that child is the result of donated eggs and/or sperm.¹²⁸ And for similar reasons, in many states a stepparent can adopt her or his spouse's child without displacing the parental rights of the child's biological parent of the same sex.¹²⁹

With neither biology nor lawful marriage to easily determine the legal status of the legally non-recognized gay or lesbian parent's connection to the child, courts face a more exacting task in second-parent adoption cases than they do (or at least, than they imagine they do) in the trans marriage cases. Now they must weigh a complex array of considerations including the intention of the

<http://www.gay.com/families/parenting/> (last visited Dec. 27, 2005). Even the American Academy of Pediatrics has issued a report supporting the legalization of such ties, noting that second-parent adoption has "important psychologic and legal benefits." Ellen C. Perrin et. al., *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (2002).

128. See LESLIE J. HARRIS & LEE E. TEITELBAUM, FAMILY LAW 995 (2d ed. 2000) ("Today, all states, by statute or common law, provide that a married woman's husband is at least rebuttably presumed to be the father of her children."). For a concise history of the marital presumption of paternity, see Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 12-13 (2004).

129. In fact, if state statutory schemes or common law permit second-parent adoptions for unmarried heterosexual stepparents (and a few do), the problem of gay or lesbian non-biological parents will probably be resolved by "lex" extension, rather than broader analogy. See *In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001). That is, the position of the non-marital partner of one legal parent can be seen as a "third" parent whose rights may be recognized because of his/her relationship to the child, rather than any specific relationship with the child's parent. *Id.* But few states offer stepparent adoptions to unmarried partners, so for the cases discussed here, the operative questions present the courts with more vexing issues, requiring more searching evaluations of the status of non-married gay partners. For a general summary of state laws on stepparent adoption, see TIM O'HANLON, STEPPARENT ADOPTION: A RESOURCE BOOK (2004).

family to create a two-parent household, the lack of legislative provisions for formalizing the relationship between the two parents, the significance of any provisions allowing heterosexual stepparents to adopt children in their homes, and, always, what is in the best interests of the child[ren] in question. They must reach to decide whether, even if statutes do not specifically provide for such a scenario, they can frame their understanding of same-sex parents so that their family relationships are analogizable to straight ones, and consequently legally recognizable.

*In re Adoption of M.M.G.C.*¹³⁰ is a typical second-parent adoption case, and operates as a clear model for the kinds of decisions courts can make if they are inclined to construct analogies in favor of queer families. A lesbian couple, Shannon and Amber Crawford-Taylor, petitioned the Indiana trial court to adopt jointly three children, two from Ethiopia, and one from China, whom Shannon had already adopted singly.¹³¹ The county's Division of Family and Children Services endorsed all three adoptions, describing the family as "relaxed and comfortable."¹³² The trial court, citing the state's limitation of joint adoption to married couples and the Indiana DOMA, which states "[o]nly a female may marry a male. Only a male may marry a female,"¹³³ denied the couple's petition.¹³⁴

The Indiana Court of Appeals took a different approach. The court immediately connected Amber's status with that of a stepparent, and explicitly equated "second-parent adoption" with the adoption of a child by a stepparent.¹³⁵ Since Indiana law allowed a stepparent to adopt a stepchild without terminating the parental rights of the biological parent of the same sex, the court reasoned that an analogous process could work for same-sex couples.¹³⁶

To the extent that the appellate court referred to statutes, it invoked the flexibility and humanity of statutory rule. Since the right of adoption was "unknown at common law," the purpose of Indiana adoption statutes, the court reasoned, has been to adjust to changing family forms—married couples, stepparents, and single

130. 785 N.E.2d 267 (Ind. Ct. App. 2003).

131. *Id.* at 268.

132. *Id.*

133. IND. CODE § 31-11-1-1 (1998).

134. *In re Adoption of M.M.G.C.* 785 N.E.2d at 269.

135. *Id.* at 270.

136. *Id.*

people.¹³⁷ Moreover, the overriding principle for adoption statutes has been the best interest of the child.¹³⁸ Throughout its decision the court did not question that Shannon and Amber Crawford-Taylor constitute a family, or that their joint legal parentage is in the best interest of their children.¹³⁹ And in case it was not clear from its decision, the court ends its opinion by citing a series of cases that insist upon the mutability and social responsibility of both common and statutory law, as well as the need for the courts to work in concert with the legislature.¹⁴⁰ Accordingly, despite the fact that the Indiana legislature had explicitly prohibited same-sex marriage,¹⁴¹ the *M.M.G.C.* court maintained:

Consonant with our General Assembly's policy of providing stable homes for children through adoption, we conclude that Indiana's common law permits a second parent to adopt a child without divesting the rights of the first adoptive parent. Allowing a second parent to share legal responsibility for the financial, spiritual, educational, and emotional well-being of the child in a stable, supportive, and nurturing environment can only be in the best interest of that child.¹⁴²

Unspoken but clear in this short and untortured decision is the ease of analogy between the lesbian parents in the case and their not-quite-equivalent heterosexual counterparts. For the Indiana court, Shannon and Amber Crawford-Taylor are parents. Although their family might be different from the statistical norm it can be effectively analogized in order to fit into the statutory and common law requirements of Indiana adoption law. The absence of marriage or mutual biological relationship with the child is, for the court, beside the point. Amber's relationship to her children is assumed to be like that of a married parent or stepparent, since it can be framed as similar, at least from the children's perspective.

However, just because the Indiana court found the analogy between lesbian co-parents and stepparents easy to make does not

137. *Id.* at 270.

138. *Id.*

139. *Id.*

140. *Id.* at 270-71 (citing *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 7 (Ind. 1993); *Sandy Ridge Oil Co. v. Centerre Bank Nat'l Ass'n*, 510 N.E.2d 667, 670 (Ind. 1987); *Brooks v. Robinson*, 284 N.E.2d 794, 797 (Ind. 1972)).

141. In 1998 the Indiana State Legislature passed Indiana Code section 31-11-1-1, entitled "Same Sex Marriage Prohibited."

142. *In re Adoption of M.M.G.C.* 785 N.E.2d at 270-71.

mean that other courts, in other jurisdictions, find such an equation equally effortless. In *In re Adoption of Doe*, for example, the Ohio Court of Appeals with equal ease came to precisely the opposite conclusion.¹⁴³ The *Doe* court rejected the stepparent analogy, and by defining the biological mother's partner as "an unmarried adult" rather than the equivalent of a spouse, concluded that her partner could not adopt their child without terminating the legal rights of the biological mother.¹⁴⁴ The concurrence to the opinion invoked the limitation of marriage to heterosexuality and "the legal reality that two individuals of the same sex cannot marry under existing Ohio law and therefore cannot be spouses to each other,"¹⁴⁵ but neither the opinion nor the concurrence took the additional step of looking for recognized (and recognizable) family structures to which this family could be compared.¹⁴⁶

Of course, one of the differences between these two cases is the willingness or unwillingness of each court to make the kind of leap of faith that we saw in the trans cases.¹⁴⁷ One assumes that *of course* same-sex parents can be analogizable to heterosexual families; the other, that *of course* people who cannot marry cannot be like stepparents, let alone like heterosexual biological parents. These opposite stances arise from the same set of conditions—same-sex couples just do not have children the same way that heterosexual couples do. So any comparison between these gay and lesbian families and straight ones will be some kind of a stretch. The question becomes how far the courts are willing to extend that stretch before it breaks apart. And their inclination to do so ultimately depends at least in part upon untheorized beliefs about the validity of queer families.

C. *Thinking Sensibly—Avoiding Absurdity*

The ideological (although not necessarily politically partisan) divide between those courts viewing LGBT families and heterosexual ones as comparable and those not doing so plays itself out in the ways each describe the inevitability of their decisions. It can also be found in the ways the courts characterize the alternative

143. 719 N.E.2d 1071 (Ohio Ct. App. 1998).

144. *Id.* at 1072.

145. *Id.* at 1073.

146. *Id.*

147. See *supra* Part III.A.

positions. If each side views its own understanding of the legal status of the queer family before it as not just rational but *obvious*, then it is only a short logical step to conclude that any contrary interpretation must therefore be ridiculous, even absurd.¹⁴⁸ This has important doctrinal implications, because courts take for granted that in construing statutes they want to avoid the absurd, however they define it. Absurdity implicates a very specific rule in the canons of statutory construction; statutes must be interpreted within the limits of what we might call common sense.¹⁴⁹ But additionally, whether done honestly or disingenuously, framing opposing viewpoints as absurd has the effect of putting them on the defensive—conveniently, without having to argue or carefully reason through the point. The examples discussed below suggest that this trope is exceedingly common in LGBT family law cases and can be employed by courts taking either a traditionalist position, or one favoring queer alternative families.

What does it mean when courts dismiss positions they do not agree with as absurd? In *How to Do Things with Words*, philosopher J.L. Austin offers a useful aid in thinking about such claims.¹⁵⁰ Austin describes what he terms “performative language”—language that *does* rather than states, reports, or describes, and enacts through speaking (“I name this ship the *Queen Elizabeth*” or “You’re out!”).¹⁵¹ Given the power of the courts to decide controversies and to construct interpretations of law, their words, at least those which cannot be set aside as mere *dicta*, are nearly always performative.

148. See, e.g., *In re Adoption of Baby Z*, 699 A.2d 1065, 1075 (Conn. Super. Ct. 1996) (stating its holding and noting that “[t]o do otherwise would lead to absurd results.” Such rhetorical moves can be found in many cases in which an implicit worldview is taken for granted, despite the existence of sharply contrasting approaches to the issue at hand. Perhaps the most well-known such maneuver is the U.S. Supreme Court majority’s characterization of the appellant’s claims in *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) as “facetious” even in the face of a strong dissenting views (one drafted by Justice Blackmun, and joined by Justices Brennan, Marshall and Stevens; another drafted by Justice Stevens and joined by Justices Brennan and Marshall), and despite sufficient opposition to the case to lead to its being overturned less than two decades later in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

149. For an extensive and thoughtful examination of “absurdity” in statutory reading, see generally John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

150. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975) (compiling a series of lectures originally delivered in 1955).

151. *Id.*

But performative language requires an agreement by all parties that the words spoken mean and do a particular thing, that the person uttering them is entitled and qualified to say them, and that once the words are spoken everyone involved will behave accordingly.¹⁵² Consequently, there are any number of ways in which performative language can derail.¹⁵³

Austin terms inaccuracies or inexactitude in performative language, or performative language by persons without power to execute the act, “infelicities.”¹⁵⁴ Even more infelicitous, though, is the category that the courts imagine as absurd—utterances that are impossible, travesties of actual performatives “where there is not even a pretence of capacity or a colourable claim to it . . . no accepted conventional procedure.”¹⁵⁵ These utterances are unhappy not because the speaker has no right to perform the act, or because the affected parties refuse to cooperate in the performance,¹⁵⁶ but because under any circumstances the performative could not be successful. It is in Austin’s terms, “a mockery, like a marriage with a monkey.”¹⁵⁷

Certainly for many jurists and legislators marriage between two women or two men is not far removed from marriage with a monkey, and is legally just as possible.¹⁵⁸ That cartoonish image of unbelievable silliness seems to be precisely the way that courts invoking the language of the absurd would like to characterize any countervailing positions. Similarly (or perhaps conversely), for other courts, *denying* the existence and legitimacy of queer families is quite apparently equally silly, or absurd.

Consider a second-parent adoption case from Nebraska, *In re Adoption of Luke*.¹⁵⁹ In its opinion, the Nebraska Supreme Court first observed uncontrovertibly that “[w]hen construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting a

152. *Id.* Lecture 2 at 14-15.

153. *Id.* at 17-18.

154. *Id.* at 14. Austin considers such infelicities to be any “sin” against one or more of the rules he enumerates for language to be understood as truly performative.

155. *Id.* at 20.

156. “I pick Ruth for my team.” “No thanks, I don’t feel like playing.” Despite the initial performative language, Ruth is *not* now on the team. *See id.*

157. *Id.* at 24.

158. Indeed, if we are to believe Justice Scalia, it may be a small step from the decriminalization of sodomy to gay marriage to marriage with a monkey.

159. 640 N.W.2d 374 (Neb. 2002).

statute."¹⁶⁰ On the heels of this pronouncement the court noted that the state's adoption statutes spell out procedures for co-parent adoption by legally-married stepparents.¹⁶¹ In light of this statutory provision the court determined that requiring the same-gender biological parent to relinquish parental status when a stepparent adopts would be "an absurd result."¹⁶² But the court was patently unwilling to analogize such a situation to the circumstances faced by a same-sex couple.¹⁶³ Instead, the court concluded with little trouble (and without citation) that the "parents' parental rights must be terminated or the child must be relinquished in order for the child to be eligible for adoption."¹⁶⁴

For this court then, the impossibility of extending the stepparent exception to same-sex parents was not merely self-evident. By inserting the notion of absurdity into its discussion of the meaning of the Nebraska stepparent adoption statute, the court strongly implied that any suggestion that the statute could be stretched to include the lesbian petitioner was itself inconceivable.

But the assumption of absurdity is not inevitably linked to one particular stance. For example, in *In re Adoption of Baby Z*, a case very much like *In re Luke*, the Superior Court of Connecticut introduces comparable rules of construction: "the adoption statutes can be construed 'in a manner that will not thwart [their] intended purpose or lead to absurd results. . . . We must avoid a construction that fails to attain a rational and sensible result that bears directly on the purpose the legislature sought to achieve.'"¹⁶⁵ But using this very similar interpretive tool, the Connecticut court came to a position exactly opposite of Nebraska's.¹⁶⁶

Deciding to remand the case to the probate court so that the adoption could take place without terminating the biological mother's rights, the Connecticut court concluded that to do otherwise "would lead to absurd results and thwart the legislative intent of the adoption statutes which is to promote the best

160. *Id.* at 382.

161. *Id.*

162. *Id.*

163. *Id.* at 382.

164. *Id.* at 382-83.

165. 699 A.2d 1065, 1073 (Conn. Super. Ct. 1996), *rev'd*, 724 A.2d 1035 (Conn. 1999) (quoting *Turner v. Turner*, 595 A.2d 297 (Conn. 1991)). Though the decision was reversed, the superior court's reasoning is still relevant to the point under discussion.

166. *Id.* at 1073-74.

interests of the child.”¹⁶⁷ Moreover, the court cited an earlier New Jersey case using almost identical language: “[T]he stepparent exception to the natural parent’s termination of rights should not be read literally and restrictively where to do so would defeat the best interests of the children and would produce a wholly absurd and untenable result.”¹⁶⁸

Ironically, despite such repeated imprecations against construing statutes to the point of absurdity, when faced with the task of applying statutory schemes to anomalous family constructions courts can on occasion push the bounds of credulity. Indeed, even when statutes encourage courts to interpret liberally, judges seem so constrained by the limits of the analogy required to understand queer families that they cannot expand their sense of what a family might be. Two cases—one dealing with the dissolution of a marriage between a woman and her transsexual husband (*In re Marriage of Simmons*), the other a second-parent adoption (*In re Angel Lace M.*)—illustrate this problem.

*In re Angel Lace M.*¹⁶⁹ is somewhat different from other second-parent adoption cases in that Annette G., the biological mother of the child, was legally married to the child’s biological father Terry M. when the child was conceived.¹⁷⁰ Later, she and her female partner Georgina G. petitioned to allow Terry to relinquish his parental rights (which Terry was willing to do) in favor of Georgina.¹⁷¹ The Wisconsin adoption statute is quite clear that it should be construed as broadly as necessary “to affect the objectives contained in this section. The best interests of the child shall always be of paramount consideration, but the court shall also consider the interest of the parents or guardian of the child.”¹⁷² In light of this directive to construe adoptions liberally, and given that all three parents concurred that it was in Angel’s best interest that Terry give up his parental rights and that Georgina adopt, it is somewhat surprising that the Wisconsin Supreme Court did not find the proposed adoption legally permissible.¹⁷³ The court instead injected a series of slippery slope concerns, claiming that if

167. *Id.* at 1075.

168. *Id.* (quoting *Adoption of Two Children by H.N.R.*, 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1995)).

169. 516 N.W.2d 678 (Wis. 1994).

170. *Id.* at 680.

171. *Id.* at 681.

172. *Id.* at 681 n.3 (quoting WIS. STAT. § 48.01 (1993)).

173. *Id.* at 686.

Georgina be allowed to adopt, any random unrelated adult could disrupt families with spurious adoption claims.¹⁷⁴ More ominously, the court mused that if "the trial court had the power to make any order it pleased so long as the order could somehow be justified by recitation of the rubric 'in the best interests of the children,' the limits the legislature placed on the court's exercise of power in custody matters would be meaningless."¹⁷⁵ By the end of its opinion, the court held out the troubling vision of a child accumulating parents *ad infinitum*.¹⁷⁶

For the Wisconsin court, to construe the adoption statute broadly, as the statute itself says it ought to be, would produce on these facts "an absurd result."¹⁷⁷ It stated firmly that it would "not construe a statute so as to work absurd or unreasonable results."¹⁷⁸ The idea that a biological father could give up his rights as a parent to benefit his ex-wife's lesbian partner was inconceivable to the court: in a word, absurd.¹⁷⁹ Even though the petitioners pointed to various provisions in the statute that would make such a ruling possible, the court itself refused the possibility.¹⁸⁰ Having introduced the "absurd result" of a multiply-parented child, the court insisted that despite the statutory exhortation toward reading adoption rules permissively it was "harmoniz[ing] the rules of statutory construction" by determining that Georgina would have to lose her parental rights if Annette adopted Angel.¹⁸¹

This anxiety about unfamiliar family forms and the attendant refusal to take statutory directives about liberal interpretation at their word appears even more strikingly in *In re Marriage of Simmons*, an Illinois divorce and custody case between Jennifer Simmons and her husband Sterling, a female-to-male transsexual.¹⁸² Jennifer and

174. *Id.* at 682-83.

175. *Id.* at 681.

176. *Id.* at 684.

177. *Id.* at 682.

178. *Id.* at 683.

179. *Id.*

180. *Id.* at 683-84.

181. *Id.* at 684. It is worth noting that despite the fact that *In re Angel Lace M.* still stands as good law from the highest court in the state, more than thirty-five gay or lesbian second-parent adoptions have been granted in Wisconsin since the decision was handed down. Mary Zahn, *Adoptions for Same-Sex Couples Caught in Legal Limbo*, MILWAUKEE JOURNAL SENTINEL, Sept. 26, 2005, at A1, available at <http://www.jsonline.com/news/state/sep05/358630.asp>.

182. 825 N.E.2d 303 (Ill. App. Ct. 2005).

Sterling were married in Illinois in 1985.¹⁸³ In 1991 Jennifer underwent artificial insemination, which resulted in the birth of a child.¹⁸⁴ As Jennifer's husband, Sterling was listed on the birth certificate as the father.¹⁸⁵ In 1994, the Illinois State Registrar issued Sterling a new birth certificate with the gender designation of "male."¹⁸⁶

When the couple split up, Jennifer contended that their marriage had been invalid and that Sterling's consequent paternity of their child, legally conferred not through genetic ties but through his status as Jennifer's husband, was similarly void.¹⁸⁷ Under the Illinois Parentage Act, if "a wife is inseminated artificially with semen donated by a man not her husband, the husband shall be treated in law as if he were the natural father of the child thereby conceived."¹⁸⁸ As with many of these cases, the court determined that Sterling was not male but female, and hence agreed to nullify the Simmons' marriage.¹⁸⁹ The court then went on to nullify Sterling's relationship with his child—if Sterling was not legitimately Jennifer's husband, how could he be the child's father?¹⁹⁰

However, the Parentage Act seemed to explicitly provide for this eventuality by declaring that a husband is presumed to be the father of his wife's child "even though his marriage is or could be declared invalid, and the child is born or conceived during such marriage."¹⁹¹ But in spite of the statute's language, the court stripped Sterling of parental rights by working backwards from its denial of his male gender.¹⁹² Concluding that "petitioner is not a man within the meaning of the statute," the court found that the section of the parentage statute regarding invalid marriages did not apply to *his* now dissolved marriage.¹⁹³ As in *In re Angel Lace M.*, the court here seemed to ignore the plain meaning of the statute, which appears directly to require liberal construction of extant parent-child relationships. Yet such a result was *not* considered by

183. *Id.* at 307.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. 750 ILL. COMP. STAT. 40/3 (1984).

189. *Simmons*, 825 N.E.2d at 309-10.

190. *Id.* at 313-14.

191. *Id.* at 311 (quoting 750 ILL. COMP. STAT. 45/5 (a)(1), (2) (1984)).

192. *Id.* at 311-12.

193. *Id.* at 312.

the court to be absurd.

So what do all of the invocations of strict construction and the risk of absurdity tell us about the ways in which courts approach these cases? Well, one of the things the court has to ask itself when deciding whether to recognize a queer family is simply *what* it is looking at. This is true whether the court is making a judgment of category, as in the trans marriage cases, or a more complicated analogy, as in the second-parent adoption cases. And many of the courts that are making determinations are ultimately basing them not on methodical reasoning, but by a seemingly irrefutable internal compass telling them what a family looks like, or at least what they assume the legislature thinks a family looks like. This sense that it "knows what a family is when it sees it"¹⁹⁴ may explain why, no matter how difficult or easy the court imagines its decision to be, another set of judges asking comparable questions can find it equally straightforward or complicated to reach precisely the opposite conclusion.

The fact that some courts find the answer to that question to be easy and, not coincidentally, resolvable within a few pages, while other courts examine the question at length, does not change the fact that all of them are searching for ways to understand proposed new forms of family. As with any truly novel situation in the law, when facing LGBT family law cases the courts must ask themselves how far and how hard they would have to push existing law in order to extend it to cover these alternative families. The more attenuated they see the analogies between the queer families and those that are legally recognized, the more they must ask whether they do, or do not, have the authority to legitimize such families at all.

IV. THE METHODOLOGICAL INQUIRY

The final strand of judicial thinking that I see in the lesbian, gay, bisexual, and transgender family law opinions involves the

194. This sentiment may be employed frequently in queer family law cases, but the dissent in *In re Blanchflower*, 834 A.2d 1010, 1015 (N.H. 2003) (New Hampshire adultery case) goes so far as to cite it directly. Quoting Justice Stewart's hoary observation about the indefinability, yet obviousness, of pornography, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), the dissent supports its conclusion that the majority's limitation of the term "intimate extramarital sexual activity" to heterosexual sex was overly narrow and defied common sense. *Branchflower*, 834 A.2d at 1015 (Brock, C.J., dissenting).

courts' consideration of their own roles and power. When a court tries to answer any question in law it faces a series of decisions about how it will answer that question, and whether it ought, in fact, to be answering it at all. I call this process of almost self-reflective evaluation and decision-making the court's "methodological inquiry." This methodological inquiry can take many forms, including extensive meditations on the meaning of the judiciary or passing asides about how the court performs its duties. The most significant of these inquiries raise explicit substantive questions about the separation of powers among branches of government, and implicitly assume or even explicitly examine the authority of the judiciary itself.

A. Thinking About Rules; Thinking About Roles

The simplest and probably most unexceptional form of methodological inquiry can be found in jurists' commentary informing the reader of the court's intellectual process. In such instances the court is staking out for itself, and announcing to its readers, the way it has proceeded in reasoning through its decision. When we look at LGBT family law cases, for example, we find (not surprisingly) that many of the questions raised by these cases require the interpretation of statutes. Accordingly, a court will remind itself how it should set about doing that work. It may invoke timeless principles of statutory language such as, "[w]e first look to the language of the statute itself and, where terms are not defined therein, 'we ascribe to them their plain and ordinary meanings'"¹⁹⁵ or, "[e]ach undefined word in [a] statute must be ascribed its ordinary and popularly understood meaning."¹⁹⁶ Given the complex and sometimes contradictory array of interpretive canons and guidelines traditionally available for such work,¹⁹⁷ it

195. *Blanchflower*, 834 A.2d at 1011 (quoting *Wegner v. Prudential Prop. & Cas. Ins. Co.*, 803 A.2d 598, 599 (N.H. 2002)).

196. *Simmons*, 825 N.E.2d at 311.

197. For a classic critique of the indeterminacy of the accepted canons of construction see Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950), reprinted in 5 GREEN BAG 2D 297 (2002). See also Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805-18 (1983). But see, William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671 (1999) (arguing for an empirical analysis of the normative defenses of canons); John F. Manning, *Legal Realism & the Canons' Revival*, 5 GREEN BAG 2D 283 (2002) (arguing that canons can be useful as

makes sense that judges would seek to explain and justify their reasoning by describing how, precisely, they went about reading and understanding the relevant statutes.

But courts may also expand this methodological exploration beyond their means of reading statutes to incorporate their examination of their own responsibilities and obligations in a wider array of situations. They might, for example, review their own authority to interpret common law: "[T]his Court should not hesitate to alter, amend, or abrogate the common law when society's needs so dictate."¹⁹⁸ They might also ask and answer questions about what sources they should view as authoritative when reaching their own decisions: "This being a case of first impression, we may consider cases from other jurisdictions that have dealt with this issue."¹⁹⁹

These almost procedural examinations of the court's reasoning process may carry with them embedded notions about the proper relationship between the enactors of law and the interpreters of it: "[I]f we can give effect to the ordinary meaning of the words adopted by the General Assembly, we must apply the statute as written."²⁰⁰ But the kinds of discussions I am referencing here are not *jurisdictional* in any legal sense. Nor do they themselves constitute the outcome or the meaning of the opinion. Rather, they are designed to remind the law-trained reader of a shared understanding of how courts ought to do their jobs. Such comments tell us something about the process of the court's reasoning—its methodology. They function as signposts, making sure that the court and the reader share a common understanding of the rules of the road.

Signposts can be illustrative and informational ("7th Avenue"), but they can also be directive and restrictive ("No Passing"). Similarly, courts' broader methodological inquiries are not merely informational, but substantive and even determinative. In such instances, while asking by what means it can reach its decision, the court is also asking *whether* it can. That is, the court is examining its role in creating law, both as a supplement to and in contrast to the

organizing principles for statutory interpretation).

198. *In re the Adoption of M.M.G.C.*, 785 N.E.2d 267, 270 (Ind. Ct. App. 2003) (quoting *Sandy Ridge Oil Co. v. Centerre Bank Nat'l Ass'n* 510 N.E.2d 667, 670 (Ind. 1987)).

199. *In re Parentage of L.B.*, 89 P.3d 271, 282 (Wash. Ct. App. 2004), *rev'd on other grounds*, 122 P.3d 161 (Wash. 2005).

200. *In re Adoption of T.K.J.*, 931 P.2d 488, 492 (Colo. Ct. App. 1996).

role of other governmental bodies. It is defining the limits of its own authority. When courts question their authority to render decisions, the very holding of the opinion may be bound into the court's quest to determine how it ought to function.

In *In re Guido*, for example, Frank Joseph Guido, Jr. petitioned New York Civil Court for a change of name to Cynthia Alexandria Frank.²⁰¹ Guido was just beginning the process of transitioning to a female gender, and, without having yet begun sex reassignment surgery, was trying to start living full-time as a woman.²⁰² Acting pro se, Guido requested a name change to facilitate the new identity.²⁰³ The court twice refused the application, asking for a new petition certifying completed sex change surgery²⁰⁴ and clarifying Guido's marital status.²⁰⁵ At the time of the petition Guido was legally married to a woman, and the court concluded that it could not grant the name change because it would "permit the applicant to appear and represent himself as female, while in fact he remains in a legal relationship with his wife premised on being male."²⁰⁶

When Guido applied for a name change for the third time with the assistance of counsel, the civil court took a very different approach.²⁰⁷ Granting the application, the court maintained that in the previous decisions it had "concerned itself with matters outside the scope of the court's jurisdiction and beyond the scope of the inquiry necessary to avoid lending the court's assistance to fraud."²⁰⁸ The judge hearing this new petition²⁰⁹ was persuaded that Guido was requesting only a name change, not a change in legally-recognized gender.²¹⁰ Accordingly, the only issue before the court was whether the name change was legitimate—that is, whether or

201. 771 N.Y.S.2d 789 (N.Y. Civ. Ct. 2003).

202. *Id.* at 789-90.

203. *Id.* at 789.

204. Previous courts examining this application seemed convinced that the name change could only take place upon a doctor's certification that sex reassignment was completed, while Guido's physicians maintained that the name change was integral to the beginning of the sex reassignment process. *Id.* at 790.

205. *Id.*

206. *Id.* Once again, it is worth noting that a legal action which had previously been considered fairly mundane, changing names to accommodate a sex change, has been problematized by the specter of gay marriage.

207. *Id.*

208. *Id.*

209. It is unclear from the opinion whether this is the same judge who had reviewed the earlier applications. *See id.*

210. *Id.* at 791.

not it encouraged fraud.²¹¹ The significance of the name Frank Guido chose to adopt, though clearly female-identified, was legally irrelevant since "[t]he law does not distinguish between masculine and feminine names, which are a matter of social tradition."²¹²

Through its methodological determination that examining any question other than Guido's freedom to adopt a new name was irrelevant and thus beyond its scope, the *Guido* court cut off any possible debate about the legitimacy of sex changes, or whether a married transsexual should be viewed as having a heterosexual or homosexual relationship.²¹³ It diverted attention solely to technical concerns, and expressed its indifference to the social world of gender.²¹⁴ The approach resonates with the New Jersey court's conclusion that the fact that two women's wish to share the same last name has only to do with nomenclature, and nothing to do with gay marriage.²¹⁵ As a matter of jurisprudence, such a determination may make enormous sense. But in the context of swirling controversies over what even Justices of the U.S. Supreme Court dub a "*Kulturkampf*,"²¹⁶ these moves may also seem disingenuous.

Frequently, a court's examination of its authority in queer cases means asking itself how much of the social context surrounding a particular issue is appropriate for the court to grapple with. If it is true that issues related to LGBT families, or even LGBT persons, are always controversial,²¹⁷ then it becomes incumbent on the court to decide how much or how little of that controversy is relevant when deciding the case before it.²¹⁸ As an

211. *Id.* at 790.

212. *Id.* at 791.

213. *See id.*

214. *Id.* at 790-91.

215. *In re Bacharach*, 780 A.2d 579, 585 (N.J. Super Ct. App. Div. 2001).

216. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

217. The politicized nature of these topics can make any public discussion of them enormously complicated. In an attempt to be "fair," media representatives frequently attempt to give "both sides" of any issue involving LGBT families, infuriating queer activists who argue that doing so lends credence to bigotry. And both queer and anti-gay activists are quick to critique media representations of LGBT issues that omit their perspectives. *See, e.g.*, Peter LaBarbera, *Associated Press Says Story Celebrating Lesbian Students is "Fair,"* CONCERNED WOMEN FOR AMERICA, Jan. 16, 2003, <http://www.cultureandfamily.org/articledisplay.asp?id=3079&department=CFI&categoryid=cfreport> (criticizing AP's defense as "fair and balanced" of an article that it ran about two lesbian high school students voted "cutest couple," without offering any disapproving commentary).

218. *See* Beth Barrett, *Defining Queer: Lesbian and Gay Visibility in the Courtroom*,

Ohio case, *In re Bicknell*²¹⁹ demonstrates, the court may choose to put the social ramifications of queer families aside, and find that the only issue before it is strictly statutory.

The lesbian couple appealing in *Bicknell* asked the court to certify a change in their surnames to a combination of both partners' last names, so that the partners could unify their joint family name before the birth of their first child.²²⁰ The Ohio Supreme Court's opinion deliberately separated the social issue of a lesbian family seeking to present itself as such from the narrow legal question presented by name change requests.²²¹ For the court, the only question at issue was whether the petitioners were misrepresenting themselves.²²² Since their desire for a name change does in fact accurately represent their situation—they are two adults expecting a child and desiring to have a surname in common—there was no fraud, and their applications were therefore reasonable and proper.²²³

Perhaps not surprisingly, the *Bicknell* dissent countered this approach by explicitly invoking the social context of the name change.²²⁴ The dissenting opinion charges that allowing the petitioners to change their names lends “the stamp of state approval” to their relationship, which is “directly contrary to the state’s position against same sex and common-law marriages.”²²⁵ That petitioners’ inability to legally marry in Ohio is unchallenged is irrelevant. For the dissent, not only are they taking a step toward portraying themselves as “married,” but the majority opinion is by default making social policy in allowing them to do so.²²⁶ With such hotly-contested social policy at issue, then, the dissent concluded that the majority had stepped beyond its role and rendered a decision which “should clearly be made by the General Assembly after a full public debate and discourse, not by judicial legislation.”²²⁷

In the majority opinion, by contrast, the social context of gay

12 YALE J.L. & FEMINISM 143, 176 (2000) (arguing that gay litigants tend to succeed when their experiences are manifest in the courtroom).

219. 771 N.E.2d 846 (Ohio 2002).

220. *Id.* at 847.

221. *Id.* at 848-49.

222. *Id.* at 848.

223. *Id.* at 849.

224. *Id.* at 849 (Stratton, J., dissenting).

225. *Id.*

226. *Id.*

227. *Id.*

marriage was irrelevant.²²⁸ The court observed that

appellants' only stated purpose for changing their names is to carry the same surname to demonstrate their level of commitment to each other and to the children that they planned to have. Both acknowledge that same-sex marriages are illegal in Ohio, and it is not their intention to have this court validate a same-sex union by virtue of granting the name-change applications.²²⁹

More importantly, the court removed itself from commenting on the public policy implications of its decision, because "any discussion . . . on the sanctity of marriage, the well-being of society, or the state's endorsement of nonmarital cohabitation is wholly inappropriate and without any basis in law or fact."²³⁰ There is a certain common sense in the majority's approach: when the question before the court is an uncontested issue of nomenclature, and in the absence of fraud (in which case the law allows a great deal of liberty in changing one's name), it could seem excessively zealous or even petty to refuse to allow the *Bicknell* appellants to do so.

While that may be true, though, it is hard to say honestly that the social context does not hang heavily over the questions before this court. It may be appropriately put aside jurisprudentially, but we can see that in doing so the court is (deliberately or not) sidestepping the policy facet of the case. The litigants themselves recognize this—were it not for their desire to be recognized as a family—a social category as well as a legal one—they would not likely be seeking the name change in the first place.²³¹

One could argue that the Ohio court effectively dodged the methodological question by claiming that the name change was both private (solely about this couple and their potential child[ren]) and statutory rather than public and legislative. Yet whether it says so or not, the court *was* making a methodological argument by taking for granted that it is within its power to grant the name change. Doing so required the court to *assert* that it was proper to limit the inquiry to questions of fraud and misrepresentation. When the courts in *Guido* and *Bicknell* set aside the social issue to focus on the purely legal, they may be doing

228. *Id.*

229. *Id.* at 849.

230. *Id.*

231. *See id.* at 847.

something that is both legally and socially correct, but that literalism can feel naïve to the opponents of gay rights, and certainly can be read as not simply legal but also strategic.

More importantly, when questions of LGBT families arise in more legally complicated or politically fraught contexts, courts are under even more pressure. The discounting of social policy in an area of law where petitioners have broad leeway seems complicated enough. But the thorny questions of judicial role in policy-making (or at least, in crafting legal decisions that *arguably* shape important social policy) become even more complicated in cases affording litigants fewer liberties, or demanding more exacting interventions by the courts. It is exactly that question of the relevance of social policy that can make courts ask, just as the *Bicknell* dissent does, whether they ought to be deciding these questions at all.

B. The Dance of Deference

Queer family law cases are hardly unique in raising questions of policy, but as a category they do pose a unique challenge to the judiciary. Though the gay or transgendered litigants seeking recognition of their families may pose their questions to the court narrowly, presenting them simply as questions of legal application,²³² opponents of alternative families see such cases as arenas of vital social, cultural and even moral significance.²³³ Courts taking differing views on the cultural consequences of these cases will naturally have different views on their own roles in deciding them.

The accepted legitimacy of judge-made law is foundational in a common law system.²³⁴ Nevertheless, within the legal system of the United States, the cliché is that the power given to the judiciary is

232. Litigants may pose such questions whether or not they themselves actually believe this, or have simply adopted it as a rhetorical strategy.

233. For example: "The evidence demonstrates incontrovertibly that the homosexual lifestyle is inconsistent with the proper raising of children. Homosexual relationships are characteristically unstable and are fundamentally incapable of providing children the security they need." Timothy J. Dailey, *Homosexual Parenting: Placing Children at Risk*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/get.cfm?i=IS01J3> (last visited Dec. 27, 2005); see also Peter S. Sprigg, *Defending the Family: Why We Resist Gay Activism*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/get.cfm?i=PD01L1> (last visited Dec. 27, 2005).

234. For a foundational and still-relevant rumination on the role of judges in crafting common law, see BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

to interpret law, not to initiate it.²³⁵ At the infancy of the American court system John Marshall observed that "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society."²³⁶ It is incumbent upon courts, then, to know their place—to leave to elected lawmakers the job of making new law. It is therefore not surprising to find in judicial opinions addressing seemingly novel questions about the legal recognition of queer families a fair amount of rumination about whether doing so is a matter of *interpreting* law or *making* it.

The line between the interpretation and the creation of law is hard to discern, however, and we have never achieved national consensus on where that line might lie. In fact, the debate over exactly that point informs Supreme Court decisions regarding controversial social questions such as school busing,²³⁷ abortion,²³⁸ and more germane to this project, gay marriage.²³⁹ Volumes of commentary have been produced regarding differing judicial philosophies, their alignment with political affiliations, and their jurisprudential consequences.²⁴⁰ This contentiousness regarding

235. Even *Marbury v. Madison*, 5 U.S. 137, 175-77 (1803), in which the Supreme Court established for itself the right to interpret the meaning of the Constitution, is careful to reserve only for Congress the right to enact legislation.

236. *Fletcher v. Peck*, 10 U.S. 87, 136 (1810).

237. Though *Brown v. Board of Education*, 347 U.S. 483 (1954), is nowadays generally regarded as correctly decided and well-settled, it does not similarly follow that the subsequent implementation of decisions beginning with *Brown II*, 349 U.S. 294 (1955), and extending through such decisions as *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Keyes v. School District. No. 1*, 413 U.S. 189 (1973), are accepted with equal equanimity. The latter have been more widely criticized as examples of overreaching by the judiciary. See, e.g., DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* (1995).

238. There can be no doubt that the national debate over the Court's legalization of at least some abortions in *Roe v. Wade*, 410 U.S. 959 (1973), led in great part to the differing notions of privacy rights articulated in *Roe* and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

239. The Massachusetts Supreme Court has been widely derided as inappropriately "activist" by opponents of its decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). See, e.g., President George W. Bush, Remarks at the 2004 Republican National Convention (Sept. 2, 2004), available at <http://www.whitehouse.gov/news/releases/2004/09/20040902-2.html> ("I support the protection of marriage against activist judges. And I will continue to appoint federal judges who know the difference between personal opinion and strict interpretation of the law.").

240. See JOHN MAKDISI, *INTRODUCTION TO THE STUDY OF LAW: CASES AND MATERIALS* 1-238 (2d ed. 2000) (introducing commonalities and differences of some of the varying schools of jurisprudence); see also PETER SUBER, *THE CASE OF THE SPELUNCEAN EXPLORERS: NINE NEW OPINIONS* (1998) (reprinting Lon Fuller's classic law review article offering six fictional judicial opinions representing

the proper role of the courts generates methodological pronouncements about what questions are and are not appropriately within the judicial purview. It is a short distance from awareness of the social implications of a case to a methodological inquiry constituting the substantive determination of a question before the court.

Of course some LGBT family law cases do pose straightforward questions of judicial authority, making their methodological inquiries unquestionably necessary. In *Bacalod v. Superior Court*, for example, the California Court of Appeal was asked to order a change in the recorded sex on the birth certificate of a plaintiff who had been born in the Philippines and completed gender reassignment in Canada.²⁴¹ California statutes establish procedures for recognizing the change in gender of a person born within the state, but the *Bacalod* court found no authority permitting it to revise the birth certificate issued by a foreign jurisdiction.²⁴² Since “it is not the role of this court to expand the statutory scheme to accommodate the circumstances of this case,” the opinion suggested that *Bacalod*’s concerns were “properly directed to the Legislature.”²⁴³ Such statements, which are essentially the substantive holdings of their decisions, intuitively make sense to legal readers who understand the restraint that courts must show.

But when the limitations of courts’ interpretive role are invoked because of the policy debate surrounding the status of gay families, the significance of the methodological inquiry becomes more apparent, more controversial, and more stark. This can be seen in *Littleton v. Prange*, the case in which a transsexual woman brought a wrongful death suit against a doctor who treated her husband.²⁴⁴ The *Littleton* court was careful to point out not only that the case was one of first impression, but also that it involved “important matters of public policy for the state of Texas.”²⁴⁵ The policy question at issue in the case was to “determine what guidelines should govern the recognition of marriages involving

different philosophies of law, and adding new opinions to capture contemporary strains of legal philosophy).

241. *Bacalod v. Superior Court*, No. B175091, 2005 WL 712316, at *1 (Cal. Ct. App. Mar. 30, 2005).

242. *Id.* at *2-3.

243. *Id.* at *3 n.5.

244. *Littleton v. Prange*, 9 S.W.3d 223, 225 (Tex. App. 1999).

245. *Id.* at 230.

transsexuals.”²⁴⁶ Framed that way, it is not difficult to see why this should be the work of the legislature rather than the judiciary.

It stands to reason, then, that throughout its decision, the *Littleton* court indiscriminately cast the issue before it as biological, sociological (even when those categories contradict each other) and legislative, but not at all judicial.²⁴⁷ The opinion maintained that “this court has no authority to fashion a new law on transsexuals,” suggesting that *Littleton* was a case about “transsexuals” rather than about giving credit to the marriage license that was issued to the couple in Kentucky, or about the wrongful death of Littleton’s husband.²⁴⁸ The court aligned the questions before it with “metaphysical arguments . . . involving desire and being, the essence of life and the power of mind over physics,” and defined Littleton’s assertions about her marriage and her claims against the doctor as belonging to “the misty fields of sociological philosophy.”²⁴⁹ The court then found that “[m]atters of the heart do not always fit neatly within the narrowly defined perimeters of statutes.”²⁵⁰ After such pronouncements it is not hard to conclude that determining Littleton to have legally altered her gender would require the court to venture into the realm of lawmaking.

Nonetheless, in disavowing its authority to decide in Littleton’s favor, the court cannot be said to have remained neutral in matters of policy. After all, the *Littleton* decision does firmly settle some rather debatable points. First, Christie Littleton is still legally male in the State of Texas, and second, even if she is no longer a man, she is a transsexual, which is not the same thing as a woman.²⁵¹ This is significant because according to the court, it is up to the legislature to decide whether transsexuals can qualify as lawful spouses.²⁵² By deeming the case to be about the gender status of a transsexual, Littleton’s claim that as her husband’s widow she is entitled to sue for wrongful death suddenly exceeds the court’s

246. *Id.*

247. *Id.* at 227, 230-31.

248. *See id.* at 230.

249. *Id.* at 231.

250. *Id.*

251. In an enumerated series of conclusions, the court states its most pivotal finding baldly, and without citation: “Biologically a post-operative female transsexual is still a male.” *Id.* at 230. In this breathtakingly simple syllogism, the court embraces the language and concept of transsexual gender identity and sex-reassignment surgery, while soundly rejecting the viability of actual change in sex.

252. *Id.*

interpretive responsibility. Despite its allusions to the legislative prerogatives of metaphysics and sociology, though, the *Littleton* court is not really sidestepping larger philosophical questions. Its refusal to recognize Christie Littleton as a woman (something that the court in *M.T. v. J.T.*²⁵³ in New Jersey in 1976 had no trouble doing) is a de facto policy decision. Since the court frames the issues as gender status and judicial deference, it may methodologically absolve itself from overstepping its authority, but it can not fairly deny that its conclusion ripples the pond of cultural debate over gender and marital status.

It is important to note, too, that like other interpretative or rhetorical strategies a court may adopt, a methodological inquiry regarding a specific question does not always lead to a predetermined answer. However unimpeachable any particular court's methodological determination of its proper role may seem, there are likely to be alternative ways to define that same court's authority. This can be seen in the numerous cases in which comparable courts facing comparable questions have ended their own methodological examinations with entirely divergent conclusions. The Ohio and Indiana courts of appeals, for example, grappled with second-parent adoption cases within a few years of each other and ended up on opposite sides of the fence, even though both courts followed very similar processes of examining their own authority.

In the Ohio case, *In re Adoption of Doe*, the nonbiological mother of a child sought to adopt her daughter without the surrender of the parental rights of her partner, the child's biological mother.²⁵⁴ The lower court rejected the petition, and Court of Appeals of Ohio affirmed.²⁵⁵ The appellate court found that adoption in Ohio is "a creature of statute. Therefore, the general rule that issues not available at common law but subject to statutory creation must be strictly construed must be applied."²⁵⁶ This is a clear methodological move, defining the case as statutory and delimiting the court's role to strictly applying the statute as written. Since the statutes generally demanded the termination of prior parental rights before a new parent of the same gender could adopt a child, the court's hands were tied—it had to follow the

253. *M.T. v. J.T.*, 355 A.2d 204, 210-11 (N.J. Super. Ct. App. Div. 1976).

254. *In re Adoption of Doe*, 719 N.E.2d 1071, 1071 (Ohio Ct. App. 1998).

255. *Id.* at 1071, 1073.

256. *Id.* at 1072.

letter of the law, and accordingly deny the petition.²⁵⁷

The petitioner's assertion that the second-parent adoption was in the child's best interests had no place in the proceedings, according to the court.²⁵⁸ Since the best interests of the child standard "pertains to the adoption process, not to the legal effects of the adoption," arguing for the child's interests in order to change the status of the parents is, in the words of the court, putting "the cart before the horse."²⁵⁹ Framed this way, the court's decision is not really about the child at all, but about the legal status of the parents, or, rather, what Ohio law has to say about who qualifies as a parent.²⁶⁰

While one may or may not like the conclusion reached by the Ohio court, it nonetheless seems to make sense. Adoption is a statutory matter, the statute is quite clear about the termination of parental rights in the case of adoption, and other issues do not apply. But the opinion feels murkier when we consider that the Indiana Court of Appeals, looking at a nearly identical case, interpreted its obligations under its own statutes quite differently in *In re Adoption of M.M.G.C.*²⁶¹ There, a woman also petitioned for second-parent adoption of the children she and her partner were raising, and the lower court also denied the petition as not specifically allowed under Indiana family law.²⁶² But its own

257. *Id.* at 1073.

258. *Id.*

259. *Id.*

260. Unspoken in the opinion, but explicit in Judge John W. Wise's concurrence to the decision, is the social policy element of the case. *See id.* (Wise, J., concurring). Judge Wise argues that underlying the case is:

the legal reality that two individuals of the same sex cannot marry under existing Ohio law and therefore, both cannot be spouses. Until such time as the General Assembly of Ohio changes the law pertaining to same-sex marriages or rewrites the adoption statutes to specifically allow the requested legal relationship, I cannot interpret the existing adoption statute as contemplating a spousal relationship between two individuals of the same sex such as to create a stepparent relationship in a legal context.

Id. What is interesting here is that although the concurrence does raise social policy and legislative questions, the decision itself does not, instead leaning exclusively on statutory construction for its argument.

261. 785 N.E.2d 267 (Ind. Ct. App. 2003).

262. *Id.* at 269. The only difference between the two cases is that in this case the children were adopted rather than born to the initial mother. *Id.* at 268. The court makes this distinction, maintaining that its decision does not "reach the question of whether a second-parent adoption would divest all rights of a biological parent with respect to the child where the child's prospective adoptive parent and the child's biological parent are not married to each other." *Id.* at 270.

methodological examination led the Indiana court to reverse the lower court's finding and remand the case for reconsideration of the adoption.²⁶³

Like the court in Ohio, the Indiana court looked closely at the adoption statutes to determine what course of action it should take.²⁶⁴ And as in Ohio, the statute did not provide any explicit guidance as to how to treat such a new issue.²⁶⁵ Still further following the Ohio pattern, the court consequently held that Indiana statutes did not recognize the possibility that an unrelated person would seek to adopt a child without divesting the initial parent of her parental rights.²⁶⁶ In Ohio, this absence of specific permission for second-parent adoption was taken to mean that none was allowed: no statute, no adoption.²⁶⁷ The Indiana court decided instead that it must look next to common law, i.e. to questions purely within its own purview.²⁶⁸ Of course, this itself raised questions since for most of American history, adoption lay outside the stream of common law.²⁶⁹ But a brief look at the history of adoption in Indiana's jurisprudence demonstrated to the court's satisfaction that the overriding concern in adoption has been the best interests of the child.²⁷⁰ The court then concluded without reservation that formalizing the children's legal relationship with both of the parents who were raising them would be in their best interest.²⁷¹

This final foray into common law is a very different methodology from that of the Ohio court. Turning to common law removes any question about the court's competence to decide the issue. Moreover it shifts the methodological focus from strict construction to a more flexible way of understanding law, since, as the court claims, "[t]he strength and genius of the common law lies in its ability to adapt to the changing needs of the society it governs."²⁷² In Indiana, the absence of statutory guidance, then,

However, methodologically, the court follows the same procedure as the Ohio court.

263. *Id.* at 271.

264. *Id.* at 270.

265. *Id.*

266. *Id.*

267. *See In re Adoption of Doe*, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998).

268. *In re Adoption of M.M.G.C.*, 785 N.E.2d at 270.

269. *Id.* (citing *In re Perry*, 148 N.E. 163, 166 (Ind. Ct. App. 1925)).

270. *Id.*

271. *Id.*

272. *In re Adoption of M.M.G.C.*, 785 N.E.2d at 270 (quoting *Brooks v.*

does not foreclose a judicial determination on the merits of the adoption.²⁷³ On the contrary, it makes space for a broader, more generous interpretation of the law, based upon the potential for the "financial, spiritual, educational, and emotional well-being of the child in a stable, supportive, and nurturing environment."²⁷⁴

The larger question here is not how, but in what contexts these two contrasting courts invoke their methodological inquiries. What are the circumstances that lead courts to choose one approach over another? In the main it seems that courts search for a solid methodological foundation for their decisions when the issue before them appears imbued with a social significance. The more important, far-reaching, and potentially controversial their decision seems, the more appropriate it might be to leave it to the political process.

But even though all sides of an issue can use methodological examination of their roles and responsibilities to frame or even commend their positions, this strategy is not employed equally by all sides. Courts are far more likely to discuss the parameters of their power when they are asserting that they *do not* have authority on a particular point, then when they conclude that they *do*. In some ways this is self-evident. When a court takes its authority for granted it does not need to proclaim its right to adjudicate a given

Robinson, 284 N.E.2d 794, 797 (Ind. 1972)).

273. Nor does it necessarily open up that possibility either. In a similar adoption case in Colorado, *In re Adoption of T.K.J.*, 931 P.2d 488 (Colo. Ct. App. 1996), the petitioners claimed that because the statutes were silent about the termination of parental rights in the case of a second-parent adoption, and because previous decisions had determined that in ambiguous cases courts should read statutes liberally, the court should read the adoption statute broadly. *Id.* at 492. The Colorado court disagreed, stating that "liberal construction does not permit a court to rewrite the statute; instead, this principle may be used only to uphold the beneficial intent of the General Assembly when the wording of the statute creates a doubt." *Id.* Even when presented with the possibility of shaping the statute in favor of the petitioners, the court tossed the responsibility of decision-making back to the legislature in intent if not in action. By contrast, in a New Jersey case, *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995), the statute itself commands that adoption law "be liberally construed to the end that the best interests of children be promoted." *Id.* at 538 (quoting N.J. STAT. ANN. 9:3-37 (1999)). For this court, the absence of an explicit statutory prohibition on second-parent adoption, coupled with the mandate to read the statute liberally, leads to the decision that "the stepparent exception to the natural parent's termination of rights should not be read literally and restrictively," and that the second mother should be awarded the rights of adoption. *Id.* at 538-39.

274. *In re Adoption of M.M.G.C.*, 785 N.E.2d at 271.

issue. The fact that the court comes to a decision is itself an assertion of its authority to do so. However even this tacit and unexamined assumption of authority in LGBT family cases is itself a trace of an occluded authoritative moment. In the wake of fierce political and cultural debate over queer family forms in general, and gay marriage in particular, cases asking for legal recognition of LGBT families almost inevitably raise methodological questions as courts wrestle with the intersection of judicial, political, and social spheres. Even silence about the methodological role of the court can be interpreted as a strategic decision either to normalize queer families or to suggest their utter marginality to pre-existing family forms.²⁷⁵ And if a case includes a dissent, an explicit methodological inquiry in one part of the opinion makes the absence of a corresponding analysis in the other seem quite deliberate.²⁷⁶

All this is to say that courts are acutely conscious of the policy implications of the decisions they make about queer families. Whether they say so openly or not, this consciousness leads to a closer, more explicit examination by the courts of their role in determining the meaning of “family” as a social phenomenon *and* as a legal structure. This brings us back to the question of how the family relationships before the court are framed. As we have seen,

275. See, e.g., *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151 (Me. 2004) (holding that the lesbian former partner of a biological mother was a de facto parent to the child that the two had raised and could be considered for an award of parental rights). The court’s decision is grounded in equity and a consideration of the child’s best interests, and thus predicated almost entirely on factual conclusions. Though the concurring opinion offers further support for the decision in Maine’s family law statutes, these legal interpretations were not incorporated in the court’s main opinion. It is difficult to read the opinions and fail to conclude that the Supreme Judicial Court had deliberately focused on the facts of the case and sidestepped any potential controversy over the statutory of common law bases for finding there to be potentially two parents of the same gender.

276. The Pennsylvania Supreme Court in *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001), for example, permitted a lesbian parent to sue for partial custody and visitation of a child she had raised with her former partner, the child’s biological mother. *Id.* at 920. With almost no methodological inquiry, the majority concluded that there was a common law basis to conclude that petitioner stood “in loco parentis,” and therefore had standing to proceed with her petition. See *id.* The dissent not only disagreed and found substantial statutory support for its position, but determined that the majority opinion conflicted with “an express legislative design,” hence exceeding the authority of the court. *Id.* at 922 (Saylor, J., dissenting). The methodological examination in the dissent makes the majority opinion, which lacks a correlating examination, read quite differently than it would if it stood on its own.

a court's understanding of the closeness or distance between queer family forms and traditional ones is integrally connected to that court's understanding of the limits of its interpretive authority. Courts can negotiate the intensity of social and political debate over queer families by drawing close analogies to those already legally recognized. In so doing, they essentially represent decisions in favor of LGBT litigants as minor interpretive tinkering with extant legal doctrine. Conversely, the courts can say that LGBT families are a whole different animal from their heterosexual counterparts, and use methodological arguments to conclude that it is not appropriate to confer legitimate status on them through common law.

Either way, it is quite common for these same courts to deny the link between their legal holdings and the social phenomena that generated the cases in the first place. Courts on both sides of the divide frequently insist that the LGBT family law cases before them are *not* about sexuality, the legality of gay marriage, or whether queer people make good parents, but are solely about some narrow question of legal interpretation. In *Blanchflower*, the case in which the court concluded that a lesbian extramarital relationship could not be defined as adulterous, the court insisted that "this appeal is not about the status of homosexual relationships in our society or the formal recognition of homosexual unions. The narrow question before us is whether a homosexual sexual relationship between a married person and another constitutes adultery within the meaning of [the New Hampshire statute]." ²⁷⁷

Similarly, when several sets of lesbian and gay parents were granted new Virginia birth certificates for children who had been co-adopted in Washington, D.C. in *Davenport v. Little-Bowser*, the majority sternly reprimanded the dissent that

it is important to state what this case is not about. There was much discussion in the trial court, and some before this Court, concerning homosexual marriage. This case is about issuing birth certificates under the provisions of Virginia law; it is not about homosexual marriage, nor is it about "same-sex" relationships, nor is it about adoption policy in Virginia. ²⁷⁸

And again (although more concisely), the court granting the lesbian couple's name change in *In re Bicknell* declared that "in

277. *In re Blanchflower*, 834 A.2d 1010, 1011 (N.H. 2003).

278. *Davenport v. Little-Bowser*, 611 S.E.2d 366, 369 (Va. 2005).

spite of the unique circumstances involved, the only issue before us is whether the appellants' request to change their surnames is reasonable and proper under [the statute]."²⁷⁹

Whether courts find for or against queer litigants, this anxiety about whether they are dealing with legal or social issues (why can they not be both?) permeates the decisions. The courts aggressively, even defensively, insist upon the legal grounding of their decisions. Yet despite this insistence, the rich variety of ways different courts can discuss, define, and use their own interpretive authority suggests that the realm of the "purely legal" is far-reaching indeed. So we might ask a corollary question: What is it that pushes courts towards a broader or a narrower interpretation of family law, particularly when the broader analysis usually favors queer families? Why does what is ostensibly the same methodological process lead to such differing judicial opinions?

Ultimately, the answer seems to be not statutory but cultural. That is to say, when courts believe that the social ramifications of finding for queer litigants are too radical, they use methodological explanations to support their unwillingness to venture into such controversy. Conversely, a court that is comfortable with broadening the definitions of family can offer simple justifications for its authority to do so, or omit them entirely and proceed directly to its reasoning. This may seem self-evident, but in fact it is a crucial insight into the courts' interpretive workings. It demonstrates that the issue in gay family cases is not simply whether a court cleaves to or distances itself from a strict statutory reading, or even whether the court is "conservative" or "liberal."

Rather, the courts' rulings have their source in a much more amorphous grounding—their definition of their own authority and the tangled intersection between redefining family forms and judicial power. Meanwhile, it is no doubt true that when a court claims the power to interpret statutes to permit recognition of LGBT families it is implicitly arguing for its own authority in shaping the American family. But it is equally true that when a court maintains that such authority redounds to the legislature it is *also* shaping the American family. The difference is that the second court is shaping public policy by omission rather than by commission. While the courts continue to insist that their decisions are only about statutes and not about "same-sex

279. *In re Bicknell*, 771 N.E.2d 846, 847-48 (Ohio 2002).

relationships," "gay marriage," "homosexual rights," and "transsexuals," their declarations show even more clearly how inseparable legal interpretation can be from social phenomena. Ultimately, the methodological is intertwined with the cultural, the analogical with the ideological, the statutory with the social, and the precedential with the political.

V. CONCLUSION.

When courts maintain that they do not have the authority to apply statutes to new definitions of family, they end up affirming the status quo. In fact, that is exactly what such opinions mean to do—whether through concern purely for the proper function of the branches of government, out of political conviction, or from some combination of the two—a court concluding that "this isn't our job," says implicitly, "let's leave things the way they are unless someone else wants to change them."²⁸⁰ Meaning, of course, that legally recognizing the family at issue will have to wait for a later time, or another process. Intentional or not, the consequence of such a determination by the courts is that queer families lose—children, marriages, inheritances, even identities.

So when do courts wash their hands of such questions? Obviously the unique legal schemes of the various states may make such a conclusion more, or less necessary. Specific jurisdictions may have distinctive precedents or accepted means of statutory interpretation that push courts more or less strongly toward or away from such a conclusion. But leaving aside for a moment jurisdictional idiosyncrasies, the times when a court is most likely to say that it does not have the authority to do what proponents of LGBT families are asking are likely to be when the court is most acutely conscious of what it perceives to be the sea change in social policy that such recognition would entail.

In other words, the more the gay family is framed as being

280. Which may be unlikely given the popular support for gay families. Conventional wisdom suggests that the fear of gay marriage was responsible for substantial Republican victories in the 2004 elections, and an immediate backlash of eleven state DOMAs enacted by popular vote. Commentators have criticized the rather reductive conclusion that the gay marriage issue was the primary explanation for the election results, but there is general agreement that the issue is a galvanizing one for social conservatives. See Susan Ryan-Vollmar, *The Blame Game: Marriage Wins Didn't Cause DOMA Losses*, BAY WINDOWS ONLINE, Nov. 11, 2004, <http://www.baywindows.com> (search for the article from Bay Windows website).

foreign, new, and carrying with it a huge social weight, the more conscious the court is of the political controversy of what it is doing, and the more questions are raised about whether the court is empowered to render a decision. If a court believes that allowing lesbians and gay men to be parents to children within a nuclear-style family, rather than resembling the heterosexual family, renders it more alien, then judges will shy away from what they see as *creating* a new family form. However, if lesbian parents with children, or a transsexual man and his wife, seem fairly indistinguishable from their biologically gendered, heterosexual counterparts, a court imagines itself as *applying* the law, not constructing a new social category.

So the factual framing of the case becomes inextricably bound up with its methodological reasoning. The way the courts see the cases before them cannot be separated from the way they understand their role in deciding these cases. These factors work synergistically—the bigger the reach of the factual framing, the more the question of authority is implicated, and the converse is equally true. Deciding that Christie Littleton is “really” a man is part and parcel of deciding that a court cannot rule on the issue of “transsexual marriage,” and vice versa. If the court were not inclined to delegitimize transsexual gender identification, then the question of “transsexual marriage” would not even emerge, since Littleton would simply be a lawfully-certified widow petitioning to sue her late husband’s doctor. Similarly, the concept of “transsexual marriage” raises the issue of possible marriage structures outside the status quo, an issue that has been explicitly addressed by various state DOMAs.

This, then, is what I mean by the term “authoritative moment.” It is a turning point in which a decision’s substantive reasoning, factual framing, and methodological inquiry meet.²⁸¹ It may sometimes be clearly marked in an opinion, and other times may be an underlying predicate to the court’s opinion, obscured as the decision is written. It is my contention, however, that the authoritative moment is not simply a signpost speeding the court along its way, but can instead be the court’s destination. It emerges

281. Because it is almost impossible to talk about such a concept spatially—that is, it can be difficult, if not impossible, to locate it precisely in the text of the opinion—I use a temporal metaphor to suggest that at some point these factors all come together, even if the text of the opinion does not itself show us precisely where that point is.

when courts are engaged in defining their role in a given case.²⁸² It is the sum of the array of sub-determinations which must come together before a court can know how to handle a new queer family—legal, factual, and methodological. What in any given decision may seem like throat clearing is actually a court's act of orienting itself so that it can get down to the serious business of weighing the facts and coming to a determination.

The authoritative moment is discernable in statements like this one in *Parentage of L.B.*, granting a non-biological non-adoptive second parent the right to sue for custody and visitation of a child she and her former partner planned and raised together: "In sum, recognition of de facto parentage, in appropriate circumstances such as those alleged in this case, is in accord with existing Washington family law and reflects the evolving nature of families in Washington."²⁸³ Such a statement cannot exist without simultaneous determinations that: 1) a two-mother household is cognizable in Washington law; 2) such a family is analogizable to already understood and legally sanctioned family forms; 3) even though no statute or prior case law expressly permits recognizing a parenting relationship in such circumstances, the fact that none prohibits one permits or requires the court to determine whether recognizing one in this case makes sense; and finally, 4) here, under these facts, such a parenting relationship can be found. All of these conclusions, intertwined, *articulated explicitly or not*, must underlie the court's holding, so that it can be legitimately set forth in the subsequent sentence.²⁸⁴

As a metaphorical, perhaps merely *theoretical* moment in time, the complex set of analyses I am referring to may only rarely be expressly spelled out in a given opinion. Perhaps the interconnectedness of some of these issues will not even be developed with full consciousness by the court. Nonetheless, this authoritative moment is, at least for these queer family law

282. I have argued earlier that "recourse to the language of methodological authority often defines the parameters of what a court believes an issue is about (or wants to insist it is about)." Kris Franklin, *The Rhetorics of Legal Authority: Constructing Authoritativeness, the "Ellen Effect," and the Example of Sodomy Law*, 33 RUTGERS L.J. 49, 101 (2001).

283. *In re Parentage of L.B.*, 89 P.3d 271, 285 (Wash. Ct. App. 2004), *rev'd on other grounds*, 122 P.3d 161 (Wash. 2005).

284. "Accordingly we hold that a common-law claim of de facto or psychological parentage exists in Washington such that Carvin can petition for shared parentage or visitation with L.B." *Id.*

opinions, a crucial site of decision making even when it does not represent itself as such.²⁸⁵

In fact, a significant number of these decisions do not ruminate upon procedural or jurisdictional issues, but rather take for granted that they either are or are not qualified to rule on the question at hand, often with little discussion and little or no support. In the New York second-parent adoption case, *Alison D. v. Virginia M.*, for example, the court simply concludes that Section 70 of the Domestic Relations Law allows parents of children to seek visitation after the dissolution of their relationships with the children's custodians.²⁸⁶ Despite the dissent's searching examination of the court's power to interpret Section 70 liberally, the majority quite simply "decline[d] petitioner's invitation" to do so.²⁸⁷ No explanation needed; no further inquiry entertained. However, such an assumption that potentially new questions in family law are beyond the ken of the court has clear consequences and is *itself* an authoritative choice. Bound up into it are notions about what the statute means, how the petitioner's relationship to the child can be understood, and how the law ought to operate. Tied together, these considerations make up an unspoken authoritative moment making possible, and comprehensible, the court's rather abrupt conclusion.

This moment, whether developed and examined at length, skimmed through with little reflection, or even seemingly taken for granted, presages the court's analysis of the case because its conceptualization of the issue at hand is informed by the inextricable interweaving of the substantive law, analogical framing, and sense of its own authority to intervene. The metaphor of the

285. In fact, when reading some of these opinions it is possible to discern the outcome from methodological cues long before the court begins its substantive analysis of the facts and law. When the *Bicknell* court announces early on that "in spite of the unique circumstances involved, the only issue before us is whether the appellants' request to change their surnames is reasonable and proper," there seems little doubt that the court will find the question of gay marriage irrelevant and accordingly permit the lesbian petitioners to change their surnames. *In re Bicknell*, 771 N.E.2d 846, 847-48 (Ohio 2002). Less obviously methodological, but no less telling, is the *Littleton* court's musing about whether gender is "fixed by our Creator at birth." *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. Ct. App. 1999). Positioned as a question of divine plan, the court's conclusion that it ought not involve itself in altering the sex designated for the plaintiff at birth, *id.* at 230-31, seems foreordained.

286. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991).

287. *Id.*

braid takes on especial meaning here. In a braid, the twining of the different strands in relation to each other constructs a fiber much stronger and more resilient than a single thread. A court's interweaving of inherited law, fact, and methodology fashions a determination that is far more difficult to fray than simple dependence upon precedent alone. At the very least, precedent is never alone in these cases—it always depends upon some kind of framing of the facts and statement of the court's authority in order to determine whether queer families are legible within legal frameworks.²⁸⁸

The imagery in the braid analysis suggests that it is almost impossible to look at one of these strands in isolation. Focusing on one element's effect on a judicial opinion raises the question of how another element is also in play, rendering the discussion unidimensional and oversimplified. That is not to say that I am arguing that politicized social forces are solely responsible for shaping judicial decisions. Rather, I am arguing for the simultaneity of the social, the legal, the methodological, the factual, and the precedential, and it is this simultaneity that shapes what courts do and how judges think. Certainly, queer family law is inherently politicized, so the relationship between the judicial and the political is particularly highlighted, since these cases push at the boundaries of established statutory and common law.

I began this Article speculating about how one might map the mind of the court. Of course, we cannot map the mind of any court entirely. But if we can start to untangle the threads in the judicial opinions and examine the shape, color, and texture of each one individually, then at the very least we can begin to understand how they are woven together. This understanding can arm not just litigators but judges themselves with a better vocabulary and a richer conceptual sense of the options available to them in reviewing precedent, framing the facts, and defining their authority. At best, judges will face the decision-making process with more self-consciousness and more honesty about what it is they are

288. And just as strands of differing girths may be braided to one another, so, too, can the varying analytical strands that I am discussing have differing weights in any given opinion. Which explains why the weights of each strand may be at least somewhat inversely related; where the analogical framing in a particular case suggests that there is a long way to go to find in favor of the queer litigants, for example, it is far more likely that a strong methodological analysis (and consequent conclusion that the court ought not weigh in on the matter) will resolve the issue.

doing.

Thus, in many ways this analysis complicates the by-now clichéd distinction between “activist” and “conservative” judges, since all judicial decisions reflect *both* political outlook and legal structures; indeed, they do so inevitably and inextricably. The rhetoric of “judicial activism” obscures the ways in which all judges deploy precedent, facts, and methodological inquiry in ways that mirror or even amplify their sense of the social order, if only to affirm the status quo.