Incessant Discrimination of Same-Sex Couples: A Case Study of Varying Interpretations of “Family,” Second-Parent Adoptions, and the Legal Rights of Non-Biological Parents

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INCESSANT DISCRIMINATION OF SAME-SEX COUPLES: A CASE STUDY OF VARYING INTERPRETATIONS OF “FAMILY,” SECOND-PARENT ADOPTIONS, AND THE LEGAL RIGHTS OF NON-BIOLOGICAL PARENTS

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INTRODUCTION

“Faggot.” “Dyke.” “Queer.” “Lesbo.” “Homo.” “Butch.” “Queen.” These pejorative expressions have been used to describe and humiliate the Lesbian, Gay, Bisexual, and Transgender (“LGBT”) community historically, and unfortunately, even today. Perhaps these degrading illustrations of LGBT individuals provide reasons for incessant discrimination from officials in the executive, legislative, and judicial branches of the American system of government.²

Most recently, newspapers and television stations have been inundated with media clips displaying unconstitutional legislation affecting lesbians and gay men.³ For example, Proposition 8, which banned same-sex marriage in California, and congressional legislation on “Don’t Ask, Don’t Tell”⁴ (“DADT”) have highlighted the animus toward the lesbian and gay community.⁵ Although DADT was repealed by the Don’t Ask, Don’t Tell Repeal Act of 2010⁶ on

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¹ Please note that throughout this article I may use lesbian, gay, bisexual, and transgender (“LGBT”) interchangeably with “gay” and/or “lesbian.” It is not, however, my intent to convince the reader that these groups are synonymous with individuals who define themselves as gay or lesbian. Additionally, this paper intends to focus on only gay and lesbians communities, and not bisexual and transgendered communities.
² See, e.g., 28 U.S.C. § 1738(C) (explaining the federal government’s position on marriage as “a legal union between one man and one woman.” Under the Defense of Marriage Act, no state may be required to recognize the same-sex marriage relationship from another state).
³ PRESTON D. MITCHUM, SAME–SAME COUPLES AND THE RIGHT TO ADOPT IN NORTH CAROLINA, unpublished paper delivered to Family Relations, North Carolina Central University School of Law, Durham, North Carolina (November 25, 2011).
⁴ 10 U.S.C. § 654 (a) (15). “Policy Concerning Homosexuality in the armed forces.” The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability; but see H.R. 2965 and S. 4023 (establishing the legal process for the ending of discrimination in the military).
⁵ See MITCHUM, supra note 3.
September 20, 2011, it is still necessary for the government to recognize the discriminatory laws that once existed and that continue to affect the LGBT community. Otherwise, lesbians and gay men will encounter a deprivation of equitable rights in family law jurisprudence.

The Fourteenth Amendment to the United States Constitution provides that, “[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”\(^7\) In essence, United States citizens’ are presumptively entitled to equal treatment under federal and state law.\(^8\) If the government is infringing upon a fundamental right, the government needs to have a narrowly tailored, compelling state interest to uphold its law.\(^9\) As such, this paper will explore two central issues: (1) what are the legal rights of same-sex couples and non-biological parents when seeking to adopt their children that were agreed upon pre-conception;\(^10\) and (2) whether the government is actively discriminating against lesbians and gay men by denying equal legal rights in adoption and custody proceedings?

Unfortunately, in many jurisdictions, lesbians and gay men are discriminated against when they attempt to adopt children, solely because of their sexual orientation.\(^11\) Prohibitions against same-sex couples adopting have been established by case law and statutory law.\(^12\) Despite attempts by the legislative and judicial branches to prevent discriminatory family laws, many same-sex couples and non-biological parents are not being afforded equal treatment as

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\(^7\) U.S. CONST. AMEND. XIV, § 1.
\(^8\) Id.
\(^9\) See generally Korematsu v. United States, 323 U.S. 214 (1944) (discussing fundamental rights and the first application of the strict scrutiny standard concerning the exclusion and internment of Japanese Americans during World War II. The Court analyzed that for laws to be constitutional under a strict scrutiny judicial standard, the government must provide a compelling state interest that is narrowly tailored to achieve its purported objective).
\(^10\) In this paper, pre-conception does not refer to the birth of the child, but rather, prior to the actual pregnancy of the mother.
\(^12\) See id.
they seek to adopt children because of archaic notions of the “traditional” or “nuclear” family.\textsuperscript{13} An important issue that state and federal courts have to reconcile is the ever-changing interpretation of family.\textsuperscript{14} Traditionally, the ‘typical’ American family consisted of one man, one woman, and two children, but currently, the modern trend is imprecise.\textsuperscript{15} Without a modernization of the traditional definition of family, non-traditional families will be unable to receive the benefits that recognized families are entitled.\textsuperscript{16} Furthermore, the sole recognition of traditional families as normal and non-traditional families as \textit{taboo} creates judicial partiality in favor of “mom” and “dad” as opposed to the child’s best interest.\textsuperscript{17}

Decades ago, the traditional method of conceiving a child was one man and one woman engaging in sexual intercourse.\textsuperscript{18} However, because of innovative reproductive technologies, such as artificial insemination, in-vitro fertilization, and surrogacy, parenting possibilities have greatly expanded.\textsuperscript{19} But this expansion of modern technologies has also increased the complication of parental rights of children, or lack thereof for same-sex couples and non-biological parents.\textsuperscript{20} Regardless, adoption is not a second-class option and should be considered within the definition of family, irrespective of the adoptive or non-biological parents’ sexual orientation.\textsuperscript{21}

This article expounds its central claim in three parts. Part I of this article examines historical interpretations of familial arrangements. This section explores, and ultimately supports

\begin{footnotesize}
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\item Frances H. Foster, Individualized Justice in Disputes over Dead Bodies, 61 VAND. L. REV. 1351 (2008).
\item Gonzalez, supra note 13, at 294.
\item Foster, supra note 14, at 1398 (discussing the difficulty of deciding trusts and estates cases for unmarried individuals, particularly same-sex couples, due to the lack of changes when defining family in some jurisdictions).
\item Id. at 1399 (“The mere mention of individualized justice conjures up images of lengthy proceedings, excessive expense, and judicial bias in favor of “traditional” family members.”)
\item Id.
\item Id.
\item Id.
\item Id. note 3.
\end{itemize}
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the proposition that the legislature should change antiquated laws as societal standards change. Part I analyzes *Vill. of Belle Terre v. Boraas*22 and *Delta v. Dinolfo*23 to provide an overview on the varying interpretation of family.

Part II of this article focuses on unmarried cohabitation and whether a legal status should extend to same-sex couples based on the law changing for unmarried cohabitants. This section rejects the social ostracism of unmarried cohabitation, and recognizes it as an illustration of changing societal standards. Part II analyzes *Marvin v. Marvin,*24 *In re Guardianship of Sharon Kowalski,*25 and *Vasquez v. Hawthorne,*26 and hypothesizes that those legal standards involving lesbians and gay men as closely associated to unmarried cohabitants.

Part III of this article explores how sexual orientation being considered in any circumstance to determine who is ‘fit’ to adopt a child is unconstitutional and will not lead to the child’s best interest. This section also discusses *Boseman v. Jarrell,*27 a same-sex adoption case that decided the parental rights of a non-biological parent in the Supreme Court of North Carolina in 2010.

Lastly, this article will conclude with a discussion of the best interest of the child standard and provide guidance to the judiciary and legislature that although many laws have been improved to benefit lesbians and gay men, more statutes and regulations need to be created to avoid discrimination of same-sex couples and non-biological parents in family law jurisprudence.

27 364 N.C. 537 (2010).
I. CHANGING ARCHAIC LAWS: THE HISTORICAL INTERPRETATION OF FAMILY STRUCTURES

Like many modern American families, lesbian and gay parents do not fit the prototype of a traditional heterosexual relationship. Yet, lesbians and gay men are becoming parents, through adoption or other reproductive methods, in increasing numbers. Unfortunately, family law jurisprudence does not parallel changing societal norms, and resultantly, outdated rules that govern adoption, custody, and visitation are problematic for non-traditional families. Both statutes and common law recognize a biological parent’s constitutional rights to his or her child. However, non-biological parents, particularly those involved in same-sex relationships, are not completely within the realm of those legal rights, although they have continued to demand relationships with their children.

If the court system can determine that a parent is unfit because of his or her sexual orientation, then this has the potential of opening Pandora’s Box to many constitutional infringements. Affording same-sex couples fewer rights than heterosexual couples regarding adoption would open an evil, impossible to be undone. Moreover, many jurisdictions have

29 See Nicole Berner, Child Custody Disputes Between Lesbians: Legal Strategies and Their Limitations, 10 BERKELEY WOMEN’S L.J. 31, 32 (1995) (citing ABA estimate that six-to-ten million children are raised by lesbians or gay men).
30 Eric G. Andersen, Article, Children, Parents, and Nonparents: Protected Interests and Legal Standards, 1998 BYU L. REV. 935, 936 (highlighting a major concern in modern trends of family when a family breakdown occurs – “[the non-biological parent] may play many roles in the child’s life such as grandparent, stepparent, prospective adoptive parent, or a parent’s non-marital parental . . . [Y]et a common element is important: an adult who is not a parent seeks legally enforceable relationship with the child against the wishes of the parent.”)
31 Rompala, supra note 28, at 1934.
32 Id. (Adoption, de-facto parentage, and parent-by-estoppel are some of the ways in which a non-biological parent can create a permanent legal relationship with his or her child).
33 Pandora’s Box is an artifact in Greek mythology. This artifact had several ‘evils’ of the world contained therein. When Pandora opened up this artifact, the contents within were released. The only artifact remaining in the jar was hope.
34 See generally Patricia M. Logue, Article, The Rights of Lesbian and Gay Parents and Their Children, 18 J. AM. ACAD. MATRIM. LAW. 95, 100 (2002), for a discussion on how the evil would be undone if courts would continue to use constitutional justifications when deciding adoption and custody (i.e., not taking into parent’s sexual orientation in determining who should have custody, but rather, there is any evidence of harm to the children.
determined that it is in the public interest to encourage adoptions that will “[p]rovide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.”

Oftentimes, this is referred to as the “best interest of the child” standard.

A. “Best Interest of the Child” and the Varying Interpretations of “Family”

The best interest of the child analysis is “[a] standard by which the court determines what arrangements would be to a child’s greatest benefit, often used in deciding child-custody and visitation matters and in deciding whether to approve an adoption or guardianship.” There is a rebuttable presumption that the parents’ interests are the children’s best interests as well. However, when the parent has acted inconsistent with a constitutionally protected right, then the child’s interest and parent’s interest are no longer parallel. For example, in Bottoms v. Bottoms, the Supreme Court of Virginia determined that Sharon Lynne Bottoms (“mother”) was no longer fit to raise her child after evidence of the child’s cursing and being emotionally upset. Thereafter, custody was given to Pamela Kay Bottoms (“grandmother”) to raise the child.

Determining the legal status of non-biological and same-sex parents is difficult considering the changing definitions of “family.” Generally, a family was described as “[t]ies created by marriage and blood,” and “the typical family was a husband, wife, and as many

35 See, e.g., N.C. GEN. STAT. § 48-100 (A).
36 MITCHEM, supra note 3 (citing to BLACK’S LAW DICTIONARY 181 (9th ed. 2009)).
37 Andersen, supra note 30, at 951.
38 Id. at 950.
40 Id. at 107. (But see dissenting opinion that explains the incorrect application of the majority opinion – “[a]lthough there is no evidence in this record showing that the mother’s homosexual conduct is harmful to the child, the majority improperly presumes that its own perception of societal opinion and the mother’s homosexual conduct are germane to the issue whether the mother is an unfit parent.”)
41 Id. at 109.
42 Andersen, supra note 30.
children as possible. Legal recognition of same-sex and non-biological parents is the best way to further the meaning of family. This changing meaning of family will simultaneously broaden the success of parentage policies for same-sex non-biological parents. Overall, the varying interpretation of family should always preserve the importance of the best interest of the child standard. In the Vill. of Belle Terre v. Boraas, the traditional definition of family was determined to bear a rational relationship to a legitimate state objective.

B. Vill. of Belle Terre v. Boraas

In Boraas, the Court upheld a zoning ordinance that limited the number of unrelated persons living in the same residence, but did not restrict the number of related persons. The zoning ordinance defined ‘family’ as: “[o]ne or more persons related by blood, adoption, or marriage, living and cooking together . . . but not exceeding two (2) living and cooking together as a single housekeeping unit not related by blood, adoption, or marriage . . . .” The zoning ordinance was challenged as a deprivation of liberty and property interests without due process of law, pursuant to the Fourteenth Amendment of the United States Constitution. The Court sustained the zoning ordinance after determining that the classification in the statute was rational, and not wholly arbitrary.

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44 Gonzalez, supra note 13, at 312.
45 Id.
46 See Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951 968 (Vt. 2006) (discussing “[t]he paramount concern in the issue of parentage among all the states should become ‘the effect of our laws on the reality of children’s lives.’”)
47 See generally Boraas, 416 U.S. 1.
48 Id.
49 Id at 2.
50 Id. at 4; see also U.S. Const. Amend. XIV, § 1.
51 See Reed v. Reed, 404 U.S. 71 (1971) (discussing how economic and social legislation where the legislature have drawn laws should be “reasonable and not arbitrary” or will be a violation of the Equal Protection Clause). But see Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) where the Court held that owners of a building could without consent for arbitrary or capricious reasons.
The respondents asserted that the zoning ordinance was unconstitutional for several reasons. First, they maintained that the ordinance was entrenched with social preferences of the Village’s residents for groups that were agreeable to them. Second, the respondents contended that the ordinance was violative of the right to privacy embedded in the Constitution. Third, the respondents defended that the ordinance was not a lawful concern to the State of whether its residents were unmarried or married. Lastly, the respondents asserted that the ordinance was filled with animus toward unmarried couples who lived together since they were not within the framework of a ‘family.’

Deciding not to answer the respondent’s concerns in each part, the Court responded with one quote: “[i]t is ample to lay out zones of family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”

In Boraas, our nation’s highest Court upheld an ordinance that vigorously maintained the traditional notions of family as “blood, marriage, or adoption.” However, this zoning ordinance had the potential of unintentionally affecting same-sex couples, especially in jurisdictions where same-sex marriage was illegal. Since Boraas was decided in 1974 and an unsurprising number of zero states permitted same-sex marriage, only a maximum of two unrelated persons could live within the same residence. However, the Court was not unanimous in its decision.

In his dissenting opinion, Justice Thurgood Marshall believed that zoning ordinances could control the number of persons living in a particular residence; however, he stated, “zoning authorities [cannot] validly consider who those persons are, what they believe, or how they

52 Boraas, 416 U.S. at 7.
53 Id.
54 Id.; see also Griswold v. Connecticut, 381 U.S. 479 (1965), for a discussion on how the First, Third, Fourth, and Ninth Amendments contain a penumbra of rights that defend the right to privacy.
55 Id.
56 Id. at 8.
57 Id. at 9.
58 See generally id. at 10-20.
chose to live . . . married or unmarried.” Justice Marshall opined that the choice of household companions is a deeply personal consideration and should not be intruded upon by the State unless it has rational reasons for the interference.

State and federal legislatures heavily rely on socially accepted norms and beliefs to interpret the meaning of “family.” This interpretation leads courts to only recognize long-standing approved families while non-traditional families battle to reach that level. Regulations like in Boraas perpetuate the notion of a theoretical American family. But this perpetuation is wholly incorrect because it does not reflect modern realities of families. Rather than attempting to force families to fit within a “favored model,” legal resolutions should be created to include more non-traditional families. This interpretation will help settle constitutional protections of familial privacy and familial integrity while simultaneously helping to determine the legal rights of non-biological parents.

Though many family law statutes continued to define ‘family’ as similar to the zoning ordinance in Boraas, state courts began to question the validity of these statues. Specifically, courts began to question whether the traditional interpretations of family were rationally related to a purported state concern or whether the statutes were arbitrarily created. In Delta v. Dinolfo, the Supreme Court of Michigan determined that an ordinance limiting the number of

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59 Id. at 15 (Marshall, J., dissenting) (Marshall furthermore states that had ordinance could not decide whether the person is “Negro or white, Catholic, or Jew, Republican or Democrat . . . .”)
60 Id. at 16.
62 Id.
63 Id.
64 Gonzalez, supra note 13, at 317.
65 Id.
66 See Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family has Failed, 70 VAL. L. REV. 879, 902 (1984).
67 See, e.g., Dinolfo, 351 N.W. 2d 831.
68 Id.
unrelated persons in a residence were unreasonable and arbitrary, thus violating the Due Process Clause of the Michigan Constitution.69

C. Delta v. Dinolfo

In 1977, the Sierawski and Dinolfo “families” moved into the Charter Township of Delta in Eaton County, Michigan.70 One year later, they received notices for violating Delta Township zoning ordinance § 2.2.20 (28), which prohibited having more than one unrelated individual residing in a home.71 In pertinent part, § 2.2.20 (28) defined family as: “an individual or a group of two or more persons related by blood, marriage, or adoption . . . together with not more than one additional person not related by blood, marriage or adoption, living together as a single housekeeping unit in a dwelling.”72 Though the defendants challenged the validity of the zoning ordinance, the court held that the plaintiff had authority under the Township Rural Zoning Act, M.C.L. § 125.271 et seq., to define the word “family.”73 Pursuant to § 125.271, as long as the definition of family was reasonable and rational to a purported state interest, the statute would be upheld as constitutional.74

Defendants argued that the zoning ordinance interfered with their chosen lifestyles, and was therefore an infringement on their fundamental rights of privacy and association.75 Defendants argued for an expanded interpretation on the meaning of family within the zoning ordinance.76 The Court opined that although the plaintiff had admirable goals, their fear was

69 Id. at 834.
70 Id. at 833.
71 Delta Township Zoning Ordinance, § 2.2.20 (28).
72 Id.
73 Dinolfo, 351 N.W. 2d at 834.
74 Township Rural Zoning Act, M.C.L. § 125.271 ET SEQ.
75 Dinolfo, 351 N.W. 2d at 835.
76 Id. at 836. (See, e.g., Carmichael v. Northwestern Mutual Benefit Ass’n, 51 Mich. 494, 16 N.W. 871 (1883) and Boston-Edison Protective Ass’n v. Paulist Fathers, Inc., 306 Mich. 253, 10 N.W. 2d 847 (1943), for discussions on the varying interpretations of family in the context of insurance policies and restrictive covenants, respectively).
wholly unreasonable. During the plaintiff’s arguments, they discussed varying interpretations of family, and more specifically, that unrelated persons will have behavior different from traditional families. For example, the plaintiff’s anticipated that “[t]he potential for occupancy by one ‘nuclear family’ together with any number of unrelated and unruly individuals who view regular late night parties as a common bond and a proper function of child rearing.” Therefore, the plaintiff’s believed that non-traditional families would corrupt the role of a traditional family.

The plaintiff’s asserted that § 2.2.20 (28) had three significant goals: (1) to preserve traditional family values; (2) to maintain property values; and (3) population control. The court determined that the classification of limiting the number of unrelated persons was not reasonably related to any of the purported interests. Though noting Delta Township’s objectives as commendable, the court held that the limitation of unrelated persons was not rationally related to its purported goals, and thus, was unconstitutional.


Five years later, in 1989, the Court of Appeals of New York answered a similar question on the varying interpretation of family in Braschi v. Stahl Assocs. Co. Braschi was one of the first cases that specifically focused on the issue of whether unmarried lifetime partners were covered under a family ordinance, particularly when one partner was deceased. The lower court held that because the two men were in a same-sex relationship, and not legally married, the
living partner was not entitled to continue occupying the apartment as a typical ‘family member’ would.\(^{85}\)

However, the Appellate Division reversed the lower’s court decision and ultimately held, “[t]he determination as to whether an individual is entitled to noneviction protections should be based upon an objective examination of the relationship of the parties.”\(^{86}\) The court further determined when deciding on the meaning of family, the following factors should be examined by the courts: (1) the length of the relationship; (2) financial and emotional commitment; (3) how they held their relationship out to the community; and (4) their reliance upon one another.\(^{87}\) These factors would encourage the judiciary to interpret a zoning ordinance in a functional way as opposed to a strict-biological interpretation.

Though many courts still interpret family as “those related by blood, marriage, or adoption,” the holding in \textit{Braschi} and other state court decisions have expanded the meaning of family to reflect modern realities.\(^{88}\) Constitutional norms of family need a paradigm shift from genetic-based interpretations to nurture-based definitions that focus on how the family functions. Until this change is recognized, non-traditional families can be adversely affected in two ways. First, society’s negative perception of non-traditional families, particularly same-sex couples, can continue to have a deleterious effect on court’s decisions.\(^{89}\) Second, and more troublesome, only recognizing genetic-based interpretations could unintentionally reinstate the second-class legal status historically imposed on all children born to unmarried women.\(^{90}\)

\(^{85}\) \textit{Id.} at 786. (The Appellate Division determined that non-eviction only applied to family members that are traditionally recognized).

\(^{86}\) \textit{Id.} at 790.

\(^{87}\) \textit{Id.}

\(^{88}\) Gonzalez, supra note 13, at 317.

\(^{89}\) Nancy D. Polikoff, Article, \textit{A Mother Should Not Have To Adopt Her Own Child: Parentage Laws for Children Of Lesbian Couples In The Twenty-First Century}, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 212 (2009).

\(^{90}\) \textit{Id.}
II. **UNMARRIED COHABITATION AND THE POWER OF CONTRACT: AN ILLUSTRATION OF CHANGING SOCIETAL STANDARDS**

In jurisdictions that do not recognize same-sex marriage, lesbians and gay men are *technically* living under one roof as “unmarried cohabitants.”\(^91\) Family law jurisprudence, particularly in the area of unmarried cohabitation, has changed since the 1970s.\(^92\) As such, this section rejects the social ostracism that unmarried cohabitants once encountered, and recognizes that unmarried cohabitation is an example of changing societal standards.

Lesbians and gay parents have created a variety of family arrangements.\(^93\) In 1990, an estimated ten million children were raised by lesbian and gay families.\(^94\) During this past decade, court systems have recognized lesbian and gay parents\(^95\) and many researchers began to educate members of the public about sexual orientation.\(^96\) For example, in the late-1980s, the *National Association of Social Workers* released a policy statement, concluding that sexual orientation was not relevant to parenting ability and should not be taken into consideration during adoption and custody proceedings.\(^97\) Nonetheless, it would be remiss to fail to highlight the substantial room for improvement needed in the area of lesbian and gay unmarried cohabitation.

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\(^92\) See, e.g., Marvin, 134 Cal.Rptr. 815.


\(^94\) Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to meet the Needs of Children in Lesbian-Mother and other Non-Traditional Families*, 78 GEO. L.J. 459, 461 (1990).


\(^96\) For more information on sexual orientation not being considered in adoption and custody proceedings, please see Charlotte Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD. DEV. 1025, 1036 (1992) (reporting that children raised in lesbian or gay households and those raised in heterosexual households have similar psychosocial developments). See also John J. Confer, *Proceedings of the American Psychological Association, Incorporated, for the Year 1976: Minutes of the Annual Meeting of the Council of Representatives*, 32 AM. PSYCHOLOGIST 408, 432 (1977).

Extending legal rights of unmarried cohabitants will help many lesbians and gay men who are unable to establish a legal union as “man and man” and as “woman and woman.” Since gay marriage is illegal in most states, many benefits are repeatedly denied to same-sex couples. According to gay rights scholar, William N. Eskridge, Jr., some of the legal rights that lesbians and gay men will not receive are:

- Priority in being appointed guardian of an incapacitated spouse or in being recognized as [making health-care decisions for that spouse].
- Preference in being appointed the personal representative of an intestate decedent.
- A right to priority in claiming human remains and to make anatomical donations on behalf of deceased spouse.
- Survivor’s benefits on the death of a veteran’s spouse.

These are only a few of the benefits married heterosexual (and some homosexual) couples receive as a result of marriage. Therefore, unless lesbians and gay men can create those rights via contract or claim rights as an unmarried cohabitant like in *Marvin*, they will completely lose legal status. Since *Marvin*, there has been a substantial increase in the number of couples living together without marrying. Such non-marital relations have also increased controversy and created legal impediments when the couple separates or when one partner dies. Oftentimes, this dilemma is highlighted when the court is confronted with determining property distribution for unmarried cohabitants.
A. Marvin v. Marvin

In *Marvin*, plaintiff and defendant lived together for seven years as unmarried cohabitants. The plaintiff and defendant entered an oral agreement in which the parties agreed to four critical points: (1) to combine the plaintiff and defendant’s efforts and earnings equally as well as any property accumulations; (2) to hold themselves out as “husband” and “wife” to the general public; (3) to have plaintiff render her services as companion, cook, and housekeeper to the defendant; and (4) to have plaintiff give up her career as an entertainer and singer in order to fully dedicate her time and attention to the defendant.

During the course of the parties’ cohabitation, all real and personal property was taken in defendant’s name. When plaintiff and defendant separated, plaintiff sued to enforce an oral contract entered in October of 1964. However, “[t]he trial court granted judgment on the pleadings for defendant, thus leaving [defendant] with all property accumulated by the couple during their relationship.” Plaintiff challenged the trial court’s holding based on her and defendant’s unmarried cohabitation and express oral agreement.

In *Trutalli v. Meraviglia*, the California courts established the principle that “[n]on-marital partners may lawfully contract concerning the ownership of property acquired during the relationship.” Furthermore, in *Vallera v. Vallera*, the Supreme Court of California concluded that “[i]f a man and woman (who are not married) live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will

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106 Id.
107 Id. (“Defendant agreed to provide for all of plaintiff’s financial support and needs for the rest of [plaintiff’s] life” if she agreed to render services to him as housekeeper, cook, and companion).
108 Id. at 820 (It would be remiss to fail to note that after defendant compelled plaintiff to leave his household, he continued to support plaintiff until November of 1971, but thereafter refused to provide further support).
109 Id. at 819
110 Id.
111 Id.
112 Trutalli, 12 P.2d 430 (1932).
protect the interests of each in such property.”

However, defendant alleged that the contract was unenforceable because of the close relation to the ‘immoral’ character of the relationship between plaintiff and himself. Defendant asserted that a contract between non-marital partners was unenforceable if it was involved in an illicit or meretricious relationship, or made in contemplation of that illicit relationship.

The Supreme Court of California, however, determined that state jurisprudence concerning contract rights for unmarried cohabitants was not as broad and ambiguous as defendant alleged. On the contrary, the court held “a contract between nonmarital partners is unenforceable only to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual services.” Ultimately, the court ruled in favor of plaintiff and enforced the express contract between her and defendant to the extent the contract was explicitly founded on the consideration of sexual services. Lastly, the court held that the fact that an unmarried man and woman live together, and engage in sexual intercourse, does not in itself invalidate an express agreement.

Following the trilogy of Marvin cases, the complication of legal rights for unmarried cohabitants became clearer. Although this problem decreased slightly for unmarried men and women, same-sex couples still encountered problems under various state statutes. Even the

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113 Vallera, 134 P.2d 761, 763 (1943).
114 Marvin, 134 Cal.Rptr. at 821.
117 Marvin, 134 Cal.Rptr. at 821.
118 Id.
119 Id. at 822.
120 Id. (“Thus, the rule asserted by defendant, that a contract fails if it is ‘involved in’ or made ‘in contemplation’ of a non-marital relationship, cannot be reconciled with the decisions.”)
122 See In re Guardianship of Kowalski, 478 N.W.2d at 790; see also Hawthorne, 994 P.2d at 240.
language in Vallera, which promoted a “man” and a “woman,” illustrated the difficulty of same-sex couples who lived in an unmarried cohabitation.\footnote{Id.} In many jurisdictions, same-sex couples living as unmarried cohabitants presented an issue of first impression in many states, particularly Minnesota and Washington.\footnote{Id.}

When unmarried couples use contracts to create family structures like in marriage, courts engage in substantive review of the contract terms, which has resulted in various outcomes.\footnote{Id.} Whether the court is considering an implied contract for parental determination of same-sex partners or an express agreement between parents, courts often disregard the mental state of the contracting parties.\footnote{Id.} As seen in Marvin, In Re Guardianship of Kowalski, and Hawthorne, this conflates the rules of establishing parental rights for non-biological parents and the legal rights of unmarried cohabitants for heterosexual and same-sex couples.\footnote{Id.} Since the late-1990s, various statutes have caused state courts to reach different conclusions with respect to unmarried cohabitation for same-sex couples.

**B. In re Guardianship of Sharon Kowalski**

On November 13, 1983, Sharon Kowalski (“Kowalski”) suffered severe injuries in an automobile accident.\footnote{In re Guardianship of Kowalski, 478 N.W.2d at 791.} This accident impaired Kowalski’s ability to speak and caused severe loss of short-term memory.\footnote{Id.} Kowalski was living in St. Cloud, Minnesota with her lesbian partner, Karen Thompson (“Thompson”), at the time of the accident.\footnote{Id.} Kowalski and Thompson were in a committed relationship for many years.\footnote{Id.} The couple had “exchanged
rings, named each other as insurance beneficiaries, and had been living together as a couple for four years.”132 One major problem – Kowalski’s parents were not aware of the lesbian relationship that existed between Kowalski and Thompson.133

In March of 1984, both Thompson and Sharon Kowalski’s father, Donald, cross-petitioned for guardianship of Kowalski.134 After expecting to have visitation rights and input into medical decisions, Thompson agreed to the appointment of Mr. Kowalski as the guardian of her life partner.135 The court’s guardianship’s order, however, left complete authority to Mr. Kowalski to determine custody, visitation, and medical decisions.136 Subsequently, Mr. Kowalski terminated Thompson’s visitations rights.137

In 1988, due to his own medical problems, Mr. Kowalski removed himself as the guardian of his daughter.138 As such, Thompson filed a petition for appointment as the successor guardian of Kowalski.139 Thereafter, Karen Tomberlin, a friend of the Kowalski family, submitted a letter to the court to suggest herself as an alternative guardian.140 On April 23, 1991, the trial court denied Thompson’s petition for guardianship, and instead, appointed Tomberlin as guardian.141 However, the trial court failed to conduct a separate hearing into Tomberlin’s qualifications, perhaps because having an unqualified guardian was better than a qualified,
Thompson challenged the trial court’s decision of Tomberlin’s guardianship appointment.\textsuperscript{142} The appointment of a guardian is within the discretion of the probate court.\textsuperscript{143} However, in \textit{In re Guardianship of Stranger}, the court determined that “the reviewing court shall not interfere with the exercise of this discretion except in the case of clear abuse.”\textsuperscript{145} Pursuant to Minnesota Statute § 525.551, the probate court is required so make specific findings-of-fact regarding the necessity of the guardian as well as the qualifications of the guardian.\textsuperscript{146} When determining who is most qualified to be appointed guardian, the courts apply the “best interests of the ward” standard.\textsuperscript{147} To decide guardianship, the court considers the following factors: (1) who the ward prefers as his or her guardian; (2) the positive interaction with the ward; and (3) who has a commitment to promoting the ward’s welfare.\textsuperscript{148}

In reaching its conclusion, the Court of Appeals of Minnesota reiterated that though the trial court had discretion when deciding guardianship, the discretion was not unlimited.\textsuperscript{149} According to Minnesota’s statutory provisions regarding guardianship, the trial court must create factual findings about the qualifications of the potential guardian.\textsuperscript{150} Since the trial court failed to find Thompson unqualified to be Kowalski’s ward, it abused its discretion by naming Tomberlin as the guardian instead.\textsuperscript{151}
First, medical testimony established that Kowalski had the capacity to express who she preferred as her ward, and she chose Thompson on numerous occasions. Second, the court concluded that Thompson and Kowalski had a “family of affinity” and it should not be disrespected by the court. Third, evidence was introduced regarding Tomberlin’s ability to care for Kowalski, besides her being a “family friend.” Ultimately, the court determined that appointing Thompson as guardian would be in the best interests of Kowalski. Though some state courts respected the “family of affinity” of same-sex couples, other states were not as progressive. In Hawthorne, the inability of lesbians and gay men to legally marry contributed to the court’s refusal to grant a share of community property to a living life partner.

C. Vasquez v. Hawthorne

In Hawthorne, the Court of Appeals of Washington held that a meretricious relationship is “[a] quasi-marital relationship, and because persons of the same sex may not be legally married, a meretricious relationship cannot exist between members of the same sex.” In Washington, “meretricious relationship” is interpreted as a word of art, and has been defined as “a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.” Frank Vasquez (“Vasquez”) asserted that because him and his life partner, Robert Avery Schwerzler (“Schwerzler”), were unmarried cohabitants that they were involved in a meretricious relationship in Washington. The court, however, did

152 Id.
153 Id.
154 Id.
155 Id.
156 Hawthorne, 993 P. 2d. at 240.
157 Id.
159 Hawthorne, 993 P.2d. at 243.
not find a legal basis for extending the protections and benefits of marriage to same-sex couples.\textsuperscript{160}

Vasquez and Schwerzler lived together from 1967 to 1995 in an apartment in the State of Washington.\textsuperscript{161} When Schwerzler died, he had a life insurance policy, two vehicles, a checking account, and a house he and Vasquez shared, in his name.\textsuperscript{162} Upon Schwerzler’s death, Vasquez contended that he and Schwerzler had been life-partners, and thus, was entitled to a division of property because of their meretricious relationship.\textsuperscript{163} After determining that a meretricious relationship is a “quasi-marital” relationship,\textsuperscript{164} and that members of the same-sex may not legally marry in Washington, the court concluded that Vasquez was not entitled to a share of Schwerzler’s community property.\textsuperscript{165}

In \textit{Connell v. Francisco}, to be ‘meretricious,’ a relationship must satisfy the following elements: (1) stability; (2) must be “marital-like;” and (3) the parties must “cohabit with knowledge that a lawful marriage between them does not exist.”\textsuperscript{166} From the court’s definition, it is difficult to comprehend how Vasquez and Schwerzler did not satisfy each element; however, the court had an interesting approach in determining “marital-like” marriages.\textsuperscript{167}

The court examined Vasquez and Schwerzler’s relationship \textit{had they been married}.\textsuperscript{168} After analyzing that the only legal precedent that existed regarding distribution of community property was following the separation or death of a “man” or a “woman” in a heterosexual

\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id. at} 241.
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{See, e.g.}, Zion Const., Inc. v. Gilmore, 78 Wash.App. 87, 89, 895 P.2d 864 (1995) (“The task of courts in cases involving long-term cohabitation is to determine if the relationship is sufficiently similar to a marriage to warrant treating it as a marriage for purposes of property distribution.”)
\textsuperscript{165} Hawthorne, 994 P.2d at 243.
\textsuperscript{166} Connell, 127 Wash.2d at 346, 898 P.2d 831.
\textsuperscript{167} Hawthorne, 994 P.2d at 243.
\textsuperscript{168} \textit{Id. at} 242.
relationship, the court determined that the parties could not have been married even if they wanted. As such, the court held that same-sex couples cannot have a meretricious relationship, and therefore, their relationship was not a quasi-marriage.

Since community property laws only applied to opposite sex relationships, this presented yet another impediment toward legal equality for lesbians and gay men. Although this was aware to many judges, they often asserted that the proper forum to resolving these disputes were with state and federal legislators. For example, in Connell, the court explained: “until the legislature, as a matter of public policy, concludes meretricious relationships are the legal equivalent of marriages, we limit the distribution of property following a meretricious relationship to property that would have been characterized as community property had the parties been married.”

Following Hawthorne and other state court decisions, many same-sex couples began to realize that being an unmarried cohabitant could have a detrimental effect on vital issues for lesbians and gay parents, including: adopting children, custody, and visitation. Though progress has been made for same-sex and opposite sex couples, largely due to changing societal standards, more improvements are necessary for gay rights to be recognized as parallel to all other rights.

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169 Id.
170 Id. at 243.
171 Id.
172 Id. at 242.
173 Id. (quoting Connell, 127 Wash.2d at 350, 898 P.2d 831 (emphasis added)).
174 See, e.g., Logue, supra note, 34 at 95.
III. NON-BIOLOGICAL PARENTS AND THE LEGAL STANDARDS FOR SAME-SEX ADOPTIONS

Custody and visitation statutes across the nation protect the legal rights of married couples and parents. These same statutes also protect lesbians and gay men who had children in a prior marriage. But for lesbians and gay men who are unmarried and who may also be a biological or non-biological parent, positive law has not been fully developed in family law jurisprudence. Though advancements have been made to secure parent-child relationships, without regard to sexual orientation, many states have declined protections for children and adults for lesbians and gay men.

A. Second-Parent (“Stepparent”) Adoptions

Litigation has increased in the area of custody and visitation rights for lesbians and gay men. This litigation continues to concentrate on the intimate and personal relationships with same-sex partners. Like other Americans, lesbians and gay men are intentionally planning to raise children and have a family. For these families, adoption appears to offer the most legal rights and protections for non-biological parents. Specifically, “second-parent adoption”

175 Swift, supra note 98, at 957 (This paper agrees with the author’s contention: “The same-sex partner of a biological partner is referred to here as the “nonbiological parent,” although using the term “parent” assumes one of the points in question. This is intentional. These partners are parents inasmuch as they intend, with the biological parent, to bring a child into the world or at least to rear the child. Some courts have referred to these partners as “functional parents,” “psychological parents,” or “de facto parents” because they fulfill the role of parent despite their lack of a biological or legal connection. The term used here is similar, but “nonbiological parent” or “same-sex parent” is more specific.”)
176 Logue, supra note 34, at 96.
177 Id.
178 Id.
179 Id. at 97.
180 See generally Elizabeth Trainor, Annotation, Custodial Parent’s Homosexual or Lesbian Relationship with Third Person as Justifying Modification of Child Custody Order, 65 A.L.R. 5TH 591 (2000).
181 Id.
182 Logue, supra note 34, at 107.
183 Id.
offers the most security for the protection of the parent-child relationships of lesbian and gay parents and their children.\textsuperscript{184} When a couple is legally married, if all other requirements are fulfilled, they may adopt a child jointly, or one spouse may adopt the other spouse’s child through second-parent adoption.\textsuperscript{185} Second-parent adoptions, or “stepparent adoptions,” occur when the non-biological parent adopts the biological parent’s child, without the biological parent having his or her parental rights terminated.\textsuperscript{186} Many modern cases, such as Boseman, have considered whether a child is benefited from one legal parent-child relationship or if there is a practical benefit with a bond from their second parent.\textsuperscript{187} This is often determined by the court considering the child’s best interest.\textsuperscript{188}

The child’s best interest is often limited to the relationship that the child had with an adult.\textsuperscript{189} The best interest of the child standard is typically defined in two ways.\textsuperscript{190} First, the child’s own desires are taken into consideration, and second, the court examines the responsibilities of the adult to raise the child.\textsuperscript{191} However, both biological and non-biological parents form close relationships with the child.\textsuperscript{192} The courts assume that non-biological parents have no independent interest of the child except a derivative interest of the biological parents.\textsuperscript{193} The notion that non-biological parents do not have an interest to his or her child creates problems within second-parent adoptions.\textsuperscript{194}

\textsuperscript{184} Id.
\textsuperscript{185} Id. at 109.
\textsuperscript{186} Id.
\textsuperscript{187} See id.; see also Boseman, 364 N.C. at 537.
\textsuperscript{188} Andersen, supra note 30, at 939.
\textsuperscript{189} Id. at 940.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at 945.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
Lesbian and gay parents who have used second-parent adoptions encounter complications with “[p]rovisions relating to consent to adopt, voluntary relinquishment or involuntary termination of parental rights (‘cut-off’ provisions) and related stepparent exceptions.”

Courts are often accustomed to applying termination literally, so it is certain that a biological parent wants to end a parent-child relationship.

In some states, such as Colorado, a child will not be the subject of an adoption petition unless parental rights have already been voluntary or involuntarily relinquished. In other states like Ohio, however, parental rights are not stripped until the adoption is finalized because courts contemplate complete finality with adoptions. Two questions remain unanswered – what happens when state courts interpret their statutes to permit second-parent adoptions, even though the statute does not have that literal meaning? Moreover, what happens to the adoption decree of same-sex partners once they separate? The Supreme Court of North Carolina inquired into these two concerns in Boseman.

B. Boseman v. Jarrell

Julia Boseman (“Boseman”) and Melissa Ann Jarrell (“Jarrell”) were involved in a domestic partnership in Wilmington, North Carolina. In May of 2000, the parties initiated the process of having a child, and decided that Jarrell would bear the child. Before the child was conceived, Boseman and Jarrell took several steps. First, they chose an anonymous sperm donor and researched available options. Second, they attended necessary medical

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195 Id. at 111.
196 Id.
198 See, e.g., OHIO REV. CODE. § 3107.15 (A) (1) (2002).
199 Boseman, 364 N.C. at 539.
200 Id.
201 Id.
202 Id.
appointments to impregnate Jarrell and to address prenatal care concerns. Third, Boseman read into the womb of Jarrell and played music for their soon-to-be child. Lastly, Boseman cared for Jarrell during the pregnancy and was present in the delivery room when the child was born. Boseman and Jarrell gave birth in October of 2002, and jointly decided on the child’s first name.

Following the birth of their child, the parties gave him a hyphenated last name and introduced him into the public as “the parents of the child.” Boseman and Jarrell’s parenting skills were determined to be “very attentive, very loving, hands on and fun.” Furthermore, the child had a relationship with Boseman and Jarrell, and even referred to the parties as “Mom” and “Mommy.” In 2004, the parties discussed Boseman adopting their minor child. After researching adoption statutes in North Carolina, Boseman told Jarrell that “she had ‘found a way’ to adopt” their child. In June of 2005, Boseman adopted their child while not terminating Jarrell’s parental rights.

To accomplish the goal of adopting their child, Boseman and Jarrell asked the adoption court in Durham County, North Carolina to not comply with N.C.G.S. § 48-3-606 (9) and N.C.G.S. § 48-1-106 (c), which requires adoptive parents to terminate the biological parent’s rights and also “severs the relationship of the parent and child between the individual adopted

203 Id.
204 Id.
205 Id.
206 Id. at 240.
207 Id.
208 Id.
209 Id.
210 Id.
211 Id.
212 Id.
and that individual’s biological or previous adoptive parents.”

Subsequently, the adoption court agreed with Jarrell’s limited consent and entered an adoption decree.

One year later, however, Boseman and Jarrell ended their relationship. Though Boseman continued to provide financial support for their domestic partnership and their minor child, Jarrell limited her contact following the separation. As such, Boseman filed a complaint in the trial court, seeking custody of their minor child. The trial court ultimately granted the parties joint legal custody, but did not reach the merits of the adoption decree. The Court of Appeals, on the other hand, reached the decision of the merits, and held that the adoption decree was valid. Jarrell challenged the lower’s court decision regarding the grant of joint custody and adoption decree.

The Supreme Court of North Carolina determined that the adoption decree issued in Durham County, North Carolina was void ab initio, and therefore, Boseman was not a legally recognized parent of the minor child. Following the interpretation of Peoples v. Norwood, the court held that the adoption petition filed by Boseman was seeking a relief unknown to North Carolina’s adoption law. In essence, Boseman and Jarrell were attempting to usurp the requirements of parental termination required by N.C.G.S. § 48-1-106(c). Accordingly, the adoption decree was declared void pursuant to case and statutory law. However, the court’s

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213 N.C.G.S. § 48-1-106(c).
214 Boseman, 364 N.C. at 541.
215 Id.
216 Id.
217 Id.
218 Id.
219 Id. at 542.
220 Id.
221 Void ab initio, as indicated here, means “to be treated as invalid from the outset.” In other words, the courts treat the adoption as if it never existed.
222 Id. at 553.
223 94 N.C. 144, 94 N.C. 167, 172 (1886).
224 Boseman, 364 N.C. at 547.
inquiry of custody was not complete simply because the adoption was declared void. One question remained: is Boseman still entitled to joint custody of their minor child? The Supreme Court of North Carolina emphatically answered in the affirmative.

In Price v. Howard, the court held that a parent has an “interest in the companionship, custody, care, and control of [his or her children that] is protected by the United States Constitution.” But a parent may lose this interest if he or she acts inconsistent with the protected parental status. Under Price, when a parent brings a non-biological parent into the family unit and voluntarily gives custody of the child to the non-biological parent, the parent has acted inconsistent with his or her protected status.

After analyzing Boseman and Jarrell’s intent for their minor child, the court determined that as the “parent,” Jarrell acted contrary to her constitutionally protected status. Jarrell, as the natural parent, intentionally created a family unit with Boseman, the non-biological parent. Boseman and Jarrell shared decision-making authority of their minor child, provided financial and emotional support, and even presented themselves to the community as the parents of their minor child. As such, Jarrell had the intent to create a joint relationship with Boseman as the “other parent” of their minor child.

Unfortunately, Boseman is similar to many cases where someone involved in a same-sex or opposite sex relationship becomes upset after the breakdown of a relationship. As a result,
one of the former partners attempts to use the child as a clutch during litigation. This is not serving the best interest of the child. As Justices Timmons-Goodson and Hudson eloquently stated in the dissenting opinion, “we must put the minor’s ‘needs, interests, and rights’ above of either Boseman or Jarrell.” The most effective way the court could have assured this was to uphold the adoption decree granted in Durham County, North Carolina.

**CONCLUSION**

First, as stereotypes regarding the LGBT community are dispelled and as the legislature and judiciary create new laws that are parallel to changing societal standards, lesbian and gay families can gain more acceptance in family law jurisprudence. As times change, so should the archaic notion of the nuclear and traditional family. It is important to recognize that a family is more than those who are related by “blood, marriage, or adoption.” Because of a full-time emotional support and possible financial interdependence, the interpretation of family should be considered under the modern/functional definition like in *Dinolfo*.

Second, although gay parentage is at the forefront of the legal field, courts and legislatures should be persuaded to stray away from only recognizing traditional notions of family. Understanding alternative forms of family will help the court system to respect same-sex families while simultaneously erasing the belief that heterosexual families are the “norm.” Since the 1990s, the number of same-sex couples conceiving via reproductive technologies, including in-vitro fertilization and artificial insemination, have continued to increase and must be recognized in the area of family law.

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233 Id. at 556.
234 Logue, *supra* note 34, at 128.
235 See generally Boraas, 416 U.S at 1.
236 Dinolfo, 351 N.W.2d at 831.
238 Id.
Lastly, courts should consider the best interest of the child in custody, visitation, and adoption proceedings, and refuse to make sexual orientation a consideration in determining those matters.\textsuperscript{239} Recognizing a weakness in the American marital system will alleviate the problem of legal issues that flow from that problem. As future scholars, we are responsible for \textit{calling out} the complications, inconsistencies, and inadequate body of law for non-biological parents.\textsuperscript{240} After all, what kind of country would America be if we recognized “liberty and justice for all,” with the exception of lesbians and gay men?

\textsuperscript{239} Andersen, \textit{supra} note 30, at 939-42.
\textsuperscript{240} Gonzalez, \textit{supra} note 13, at 323.