

Talking Back: The Discursive Role of the Dissent in LGBT Custody and Adoption Cases

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I. INTRODUCTION

“[D]issenting opinions may be the symptom of life in the law of time.”

—Roscoe Pound¹

“A dissent . . . is an appeal to the brooding spirit of the law, to the intelligence of a future day.”

—Charles Evan Hughes (1928)²

Recent sociolegal scholarship has focused on the role of narratives and storytelling in law, whether in jury settings,³ day-to-day life,⁴ or

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1. HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 223 (7th ed. 1998) (citation omitted).

2. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928).

3. *See, e.g.*, BENJAMIN FLEURY-STEINER, *JURORS’ STORIES OF DEATH: HOW AMERICA’S DEATH PENALTY INVESTS IN INEQUALITY* (2004) (analyzing narratives and interviews of jurors about the criminal justice process).

4. *See, e.g.*, PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* (1998) (analyzing narratives of citizens involved in judicial process); LAURA BETH NIELSEN, *LICENSE TO*

official language, such as legislation and judicial decisions.⁵ This spate of sociolegal narrative analysis, especially in the former two categories, adds a new twist on the legal tradition of doctrinal analysis scholarship by decentering the privilege of official discourse, such as case law, and focusing on both the “hegemonic tales” and the “subversive stories” of citizens interacting with the law rather than relying on the “law in the books.”⁶ It is thought that a grounded analysis of the role of law in the social world, and vice versa, must focus not on judges, but ordinary people’s understandings of the law in action and in their day-to-day lives, which sometimes may contradict, resist, or subvert the “official” renderings of law.⁷ Yet, such oppositional stories may also be found in the official language itself—there, it is called “dissent.”

In this Article, I investigate the role of dissenting opinions in one of the most rapidly changing and publicly dissentious legal issues of our time: gay and lesbian family rights. While jurisprudential scholars have studied dissents generally in the context of the Supreme Court or those of famous judges such as Oliver Wendell Holmes, their role in family law or sexuality and law is less studied. As an institutionalized and readable form of proof of the flux and unsettled nature of law, it is not surprising that dissents might play a role, or at least be present, in cases dealing with the changing family form. Several scholars have noted that the “gayby boom” of the 1990s, together with the increased visibility of gay and lesbian couples in law and—most recently in the debate over same sex marriage—have translated into increased attention to the intersection of sexuality, family, and law, and a focus on the ability of the law to shift to accommodate the needs of these “nontraditional” families.⁸ Given the

HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH (2004) (analyzing narratives and interviews of women about their experiences with harassment).

5. See, e.g., Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529 (2002) (applying narrative techniques to the text of appellate opinions); David Ray Papke & Kathleen H. McManus, *Narrative and the Appellate Opinion*, 23 LEGAL STUD. F. 449 (1999) (applying narrative techniques to the text of appellate opinions); Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 LAW & SOC’Y REV. 285 (2002) (applying narrative techniques to judicial decisions in the family law context).

6. See Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC’Y REV. 197, 211, 217 (1995); NIELSEN, *supra* note 4.

7. See Patricia Ewick & Susan Silbey, *Narrating Social Structure: Stories of Resistance to Legal Authority*, 108 AM. J. SOC. 1328, 1329-31 (2003); NIELSEN, *supra* note 4, at 12-16.

8. See, e.g., Kristine L. Burks, *Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve*, 24 GOLDEN GATE U. L. REV. 223 (1994); Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. GENDER & L. 175 (1995); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining*

public disagreement as to the legal position of gay- and lesbian-headed families, it seems only natural that this dissention has been manifested in judicial records in the form of widely varying majority and dissenting opinions in appellate cases involving such families.⁹ Thus, I aim to analyze the discursive role of the dissent in judicial narratives of gay and lesbian parenthood and would-be parenthood. In previous work, I have argued that the judicial decision, as a narrative, is a meaning-making device, relevant in both the law and the social world.¹⁰ In this Article, I explore its counterpart—the judicial dissent—whose discursive significance and meaning-making capacity, I suggest, may be as potent as, although distinct from, that of the majority judicial decision. Not only do dissents reflect the flux, instability, and eventual change of gay and lesbian family law, in certain instances, I argue, it may actually play a role in catalyzing that change.

This analysis is based on a larger scale narrative analysis of the 318 recorded appellate cases involving gay, lesbian, and bisexual parents or would-be parents in a custody, visitation, or adoption dispute. This dataset represents the entire population of such cases whose decisions were published from 1952-2004. Of these, seventy-eight contained dissents that were then isolated and studied for the purpose of this Article (cases including dissents ranged from 1975-2004, as no published dissents were found in cases from 1952-1975). Such a series of data spanning over fifty years offers both temporal and topical diversity, and certainly the types of cases likely to be heard in the courts changed over time (for instance, there were no cases involving disputes between same-sex couples, and only one outside the context of heterosexual divorce, before the year 1990). The cases are analyzed here thematically rather than chronologically, with a focus on the practical and discursive roles played by the dissents. As Professor Overcash notes, narrative research analyzes “discourse [that] may or may not be linear in time and place.”¹¹ Additional data were gathered in the form of interviews with thirty-six litigants, attorneys, and family court judges, many of whom were involved in the cases included in the dataset. The interviews served to

Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L. J. 459 (1990); Tsippi Wray, *Lesbian Relationships and Parenthood: Models for Legal Recognition of Nontraditional Families*, 21 HAMLINE L. REV. 127 (1997).

9. See, e.g., *In re Adoption of Baby Z*, 724 A.2d 1035 (Conn. 1999).

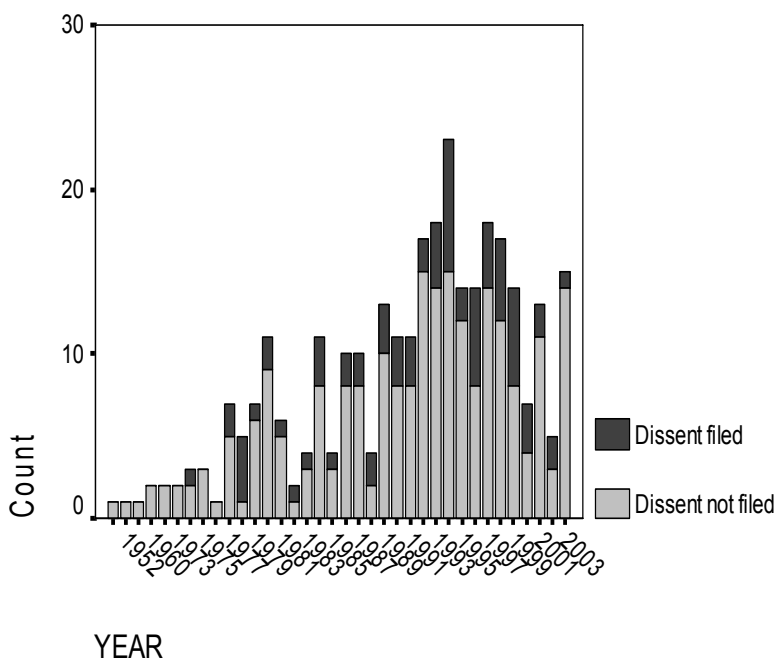
10. See Richman, *supra* note 5; see also Kimberly D. Richman, *Judging Knowledge: The Court as Arbiter of Social Scientific Knowledge and Expertise in LGBT Custody and Adoption Cases*, 35 STUD. L., POL. & SOC'Y 3 (2005).

11. Janine A. Overcash, *Narrative Research: A Review of Methodology and Relevance to Clinical Practice*, 48 CRITICAL REV. ONCOLOGY/HEMATOLOGY 179, 180 (2003).

supplement the narrative analysis of the cases, as well as to provide contemporary attorneys' and judges' candid and casual assessments of the role of dissents.

Table 1:

Cases with Dissent by Year, 1952-2004



In what follows, I first review the general literature on the relevance of the dissent in practical, symbolic, and ideological terms. I then begin my analysis of dissents in gay/lesbian custody and adoption cases over the last fifty years. These data expose the dissent as a revelatory aspect of lawmaking and decisionmaking concerning gay and lesbian parents not readily apparent elsewhere, as well as its ability to mark and even potentially contribute to legal and social change in family law and gay rights. This is followed by an in-depth analysis of the discursive or conversational role of the dissent, its transformative potential for law, as well as legally relevant definitions of family and sexuality, and particularly its role in the sedimentation and institutionalization of law and sociolegal meanings. I conclude with the assertion that the dissent helps us understand that the law is a dialogue, and that it is best viewed as

a window into the dynamic processes of law and a counterhegemonic device engaged in the struggle over power and meaning.

The custom of writing and recording dissenting opinions in appellate courts, when appraised objectively, would seem to be an odd practice in law. The dissent is, in essence, a completely institutionalized mode of rebellion, what Justice Potter Stewart called “subversive literature.”¹² Professor Douglas has commented that it is an “unusual rhetorical feature of the high-court opinion: that as a document, it presents rival readings of the Constitution side by side in the form of majority and dissenting opinions.”¹³ He goes on to note that “the law presents its efforts at constitutional exposition in a rhetorical form that orchestrates this performance through *measured subversion* . . . by presenting a majority opinion along with its systematic refutation in the form of a dissent.”¹⁴ This practice, Douglas notes, might be compared to a professor “trashing” all of his or her own concepts and arguments at the end of a class—at the least, counterintuitive, and at most, perhaps, counterproductive.¹⁵

Symbolically, dissent is a form of “institutional disobedience,” analogous to civil disobedience at the judicial level, a “quiet, symbolic act . . . aim[ed] . . . at peaceful revision of attitude.”¹⁶ At the same time, it is an almost tangible manifestation of the indeterminacy of law—particularly evident in the notoriously vague area of family law.¹⁷ Judge Altimari notes, despite the norm of *stare decisis*, that, “[a] reasoned dissent is proof positive that the law is not an accumulation of worn concepts and beliefs.”¹⁸ Dissents, it might be argued, are an inevitable marker of the dynamic and indeterminate nature of court-made law; as Chief Justice Simmons notes, “The law is not static. It grows—and the dissenting opinion is one of the processes that aids in that development

12. ABRAHAM, *supra* note 1, at 224.

13. Lawrence Douglas, *Constitutional Discourse and Its Discontents: An Essay on the Rhetoric of Judicial Review*, in *THE RHETORIC OF LAW* 225, 257 (Austin Sarat & Thomas R. Kearns eds., 1994).

14. *Id.* at 258 (emphasis added).

15. *Id.*

16. Edward C. Voss, *Dissent: Sign of a Healthy Court*, 24 ARIZ. ST. L.J. 643, 654 (1992) (citing J. Louis Campbell, III, *The Spirit of Dissent*, 66 JUDICATURE 304, 306-07 (1983)); Virginia Black, *The Two Years of Civil Disobedience*, 1 SOC. THEORY & PRAC. 17, 22 (1970).

17. See, e.g., *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 3d ed. 1998); Stephen Parker, *The Best Interests of the Child: Principles and Problems*, in *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS* (Philip Alston ed., 1994).

18. Frank X. Altimari, *The Practice of Dissenting in the Second Circuit*, 59 BROOK. L. REV. 275, 277 (1993).

as the law meets and solves new situations.”¹⁹ Judge Voss adds, “[d]issent is simply normal and inevitable in a court . . . that resolves such emotionally and politically charged issues.”²⁰ This is certainly the case in child custody and adoption matters involving gay and lesbian parents.

But what purpose do dissents serve? One might argue that it is the majority opinion, not the dissent that is important, because the former is what makes the precedent and decides what is law, while the dissent, it could be argued, “merely reflect[s] the autonomous minds of the justices—an official vanity press.”²¹ But the dissent is an important source of judicial narratives—obviously at least one judge felt that these opinions were consequential enough to put in print and attach to the decision. In fact, certain dissents are more interesting than the majority opinion in that there seems to be a different set of norms governing their expression of often controversial and ardent opinions. Moreover, as I will argue in this Article, they may even affect majority opinions and the future of law.

This potential for change can happen in subtle ways; for instance, dissents add to the collective of jurisprudential thinking by “infusing different ideas and methods of analysis into judicial decision-making.”²² In doing so, they add vitality and provide a “unique source of energy and cogency in the law.”²³ As Justice Ruth Bader Ginsburg has written, “The prospect of a dissent . . . pointing out an opinion’s inaccuracies and inadequacies strengthens the test [and] . . . heightens the opinion writer’s incentive to ‘get it right’”;²⁴ and Justice Antonin Scalia adds, “It forces [judges] to think systematically and consistently about the law”²⁵

Yet, these effects can be more concrete and dramatic as well. For example, “[t]he majority exercise all the powers of the Court, but the minority have a curious concurrent jurisdiction over the future. For a dissent is a formal appeal for a rehearing by the Court sometime in the future, if not on the next occasion.”²⁶ Simply by virtue of their recording, dissents can preserve an issue or argument for future consideration, or

19. Robert G. Simmons, *The Use and Abuse of Dissenting Opinions*, 16 LA. L. REV. 497, 498 (1956).

20. Voss, *supra* note 16, at 653.

21. *Id.* at 648.

22. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 436 (1986).

23. Voss, *supra* note 16, at 676.

24. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 139 (1990).

25. Antonin Scalia, *The Nineteenth Annual Lecture: Dissenting Opinions*, 42 J. SUP. CT. HIST. 33, 42 (1994).

26. Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 239 (quoting CHARLES CURTIS, *LIONS UNDER THE THRONE* 74-75 (1947)).

“salvage for tomorrow the principle that was sacrificed or forgotten today.”²⁷ More directly, they may even set the stage for future majority opinions. As Mr. ZoBell, an attorney, notes, “There have been dissenting opinions which have provided an impetus for changes in the positive law of the United States, and there have been dissents which have become translated into majority opinions after a change in personnel, or even in attitude.”²⁸ He goes on to assert, “[I]t is not open to serious doubt that dissents do tend to have an effect upon the development of the law.”²⁹

Finally, dissent may actually be functional and important in its capacity to show the unsettled nature and flux of law.³⁰ This is particularly important for the purposes of a longitudinal study such as this, and in the context of an area of law as rapidly changing as gay and lesbian family law, because this flux reveals an elasticity in the law that allows it to respond to and grow with changes in the social world, including the emergence of new family forms. The appearance of dissents is evidence that “the law is undergoing adjustment to social and economic conditions and new conditions of life to which the legal precepts of our formative era are ill adapted and require reshaping.”³¹ Certainly, the profound changes in the family as both a legal and a social entity, analyzed in this work, require such adaptation. Quoting an anonymous law professor, Evans writes:

Law must perform the paradoxical function of providing both stability and elasticity to the web of society: stability to furnish a reasonable degree of certitude and continuity; elasticity, to promote progress. Law is stable at points where intelligent opinion agrees as to what it is. . . . The dissenting opinion performs the function of rationalizing the elastic element in the law.³²

As Herman Pritchett notes, “A legal system cannot be static in a dynamic world.”³³

27. Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 928 (1962) (quoting William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUD. SOC’Y 104, 107 (1948)).

28. Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 211 (1959).

29. *Id.* at 212.

30. See Evan A. Evans, *The Dissenting Opinion: Its Uses and Abuses*, 3 MO. L. REV. 120, 128 (1938).

31. Michael A. Musmanno, *Dissenting Opinions*, 6 U. KAN. L. REV. 407, 410 (1958) (citation omitted).

32. Evans, *supra* note 30, at 128.

33. C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947*, at 47 (3d ed. 1969).

II. THE RELEVANCE OF THE DISSENT IN LGBT FAMILY LAW: AN ANALYSIS

Thus, it becomes clear that despite their lack of precedential value, in any study of judicial language and legal change, dissents cannot be ignored because of their practical and symbolic impact and their unique perspective on the analysis of legal discourse. So poignant and deeply felt are the dissents in some cases in this study, that on occasion, the minority opinion is the only one published—as in the Georgia visitation case of *In re R.E.W.*³⁴ Moreover, dissents, when read with the majority opinion, are uniquely revealing because they give insight into the range of judicial thought and the judicial process itself—an observation made by several attorneys interviewed across the country for this research. In supplying a counternarrative, they reveal something about the whole of the judicial panel deciding the case; as attorney Paula Ettelbrick noted, “[W]hat a dissent usually indicates is that the judges have all had a discussion about it too. . . . You know for a fact they had the conversation.”³⁵ She went on to comment, “[D]issents play a very critical role for lawyering and litigating . . . they give you an insight into . . . a range of judicial thinking on the court, so if you are a lawyer . . . it gives you some guidance.”³⁶ Thus, because of their ability to reveal something about the deliberation process not included in the majority, dissents are able to lay bare the workings of the law in a way that unified decisions often do not. In that sense, they are helpful to lawyers in strategizing future cases. As Ettelbrick went on to comment:

[I]t gives you a sense and depending on who else joins the dissent . . . you have a sense of what the judges are thinking and how, what might be helpful the next time around if the case comes up later on [D]issents . . . are very important because the judges are staking out their own views, which are very helpful for the next cases that come around.³⁷

Beyond that, the dissent can be a valuable source of new information about the case or legal issue at hand. Pennsylvania Supreme Court Associate Justice Michael Musmanno notes, “a dissenting opinion

34. 472 S.E.2d 295, 297 (Ga. 1996) (Carley, J., dissenting). In this case, the dissenting justice objected to the majority’s removal of certain visitation restrictions that had been placed on the gay father by the trial court. This judge argued vehemently that the sodomy law existent at that time in Georgia forbade such a ruling, and proclaimed, “Hopefully, another case soon will present this court with the opportunity to overrule this erroneous precedent.” *Id.* Before this could happen, however, Georgia’s sodomy law was overturned in 1998. *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

35. Telephone Interview with Paula Ettelbrick, Attorney (Mar. 5 and Apr. 10, 2002).

36. *Id.*

37. *Id.*

can serve an excellent purpose in revealing facts not covered by the majority opinion, thus contributing to a better understanding of what the court intends.”³⁸ Indeed, in more than a quarter of all of the cases with recorded dissents in the current study, new information not included in the majority’s opinion was revealed in the dissent. In the divorce case of *Hertzler v. Hertzler*, for example, the dissenting opinion discusses and quotes at length the testimony of an expert who had been chosen, then rejected, by the heterosexual father.³⁹ The dissent, in fact, includes a two-page portion of the trial transcript, in which this expert is questioned regarding her opinion about the children’s welfare and contact with their lesbian mother.⁴⁰ The expert is never cited by name, nor is her testimony quoted or paraphrased in the majority opinion.⁴¹ Were it not for the dissent, the public and scholars of family law would not know of this expert’s existence.

In another divorce case, *Weigand v. Houghton*, the majority ruled against the gay father’s custody bid, and instead granted continued custody to the child’s mother and stepfather, despite allegations that the stepfather was abusive to the mother and had been arrested twice (for simple assault and domestic disturbance).⁴² The dissent, however, revealed that, aside from these two events (which the majority found less significant than the father’s homosexual relationship), the stepfather had been convicted of violent and drug-related misdemeanors and felonies, abused alcohol and drugs, beat the mother repeatedly in the child’s presence, and threatened to kill the child.⁴³ Thus, not only did the dissent reveal relevant facts of the case not included in the opinion of the court, it also cast new light on the majority opinion, allowing one to understand in greater depth the fortitude of the Court’s disapproval of homosexual parents.

In some cases, the dissent is actually longer than the majority opinion, as in the case of *Nickerson v. Nickerson*.⁴⁴ In *Schuster v. Schuster*, the dissent and partial dissent account for over two-thirds of the length of the final decision in the case.⁴⁵ In the groundbreaking case of *In re Adoption of Baby Z.*, in which the majority denied the right of the

38. Musmanno, *supra* note 31, at 415.

39. 908 P.2d 946, 952-56 (Wyo. 1995) (Golden, C.J., dissenting).

40. *See id.*

41. *See id.*

42. 730 So. 2d 581, 584 (Miss. 1999).

43. *See id.* at 588-89 (McRae, J., dissenting).

44. 605 A.2d 1331, 1335-39 (Vt. 1992) (Dooley, J., dissenting).

45. 585 P.2d 130, 133-34 (Wash. 1978) (Dolliver, J., concurring in part, dissenting in part); *id.* at 134-36 (Rosellini, J., dissenting).

nonbiological mother in a lesbian parenting dyad to legally adopt the child, one judge wrote a twenty-page dissent, which, among other things, listed the twenty-four submitted amicus curiae briefs that were never mentioned by the majority.⁴⁶ That dissent also gave a detailed constitutional analysis of why the state's adoption statute should be construed to allow second-parent adoptions such as this one.⁴⁷

III. DISSENT AS FORESHADOW AND CATALYST OF CHANGE

Among the most intriguing and important functions served by dissenting opinions are foreshadowing and playing a role in legal (and perhaps social) change itself. In the current study of LGBT parenting cases, despite their lack of precedential value, dissents were sometimes cited in subsequent majority opinions.⁴⁸ It is admittedly relatively rare that the text of a dissent reappears verbatim in a subsequent opinion, directly effecting a change in law. But upon close inspection, it is revealed that many of the significant shifts in judicial opinion and family law pertaining to gay and lesbian divorced parents' rights and second parents' visitation and adoption rights, in particular, were foreshadowed in particularly cogent and memorable dissents in previous cases. Abraham notes that Justice Cardozo, himself a frequent dissenter, viewed the contents of dissents as "the best inspiration of the time" for information and instruction on sociopolitical viewpoints and issues not yet generally accepted.⁴⁹ Attorney Paula Ettelbrick concurred, stating in an interview that "dissents have their way of working into being a majority opinion over time, particularly on major social issues [such as LGBT parenting]."⁵⁰ Indeed, eleven of the seventy-eight dissents in this study were later cited verbatim in majority decisions adopting their reasoning;⁵¹ and six majority opinions in this time period cited and adopted reasoning from dissents in other family law cases, not involving LGBT parents.⁵² Furthermore, approximately one-third of the dissents in the current study either noted or marked the need for significant legal, social, or legislative change regarding the rights of LGBT parents and would-be parents.⁵³

46. See 724 A.2d 1035, 1064-84 (Wash. 1999) (Berdon, J., dissenting).

47. See *id.* Despite the failure in this case, the state of Connecticut subsequently adopted an explicit policy of legally recognizing second-parent adoptions.

48. See, e.g., *In re Custody of H.S.-K.*, 533 N.W.2d 419 (Wis. 1995).

49. ABRAHAM, *supra* note 1, at 205.

50. Telephone Interview with Paula Ettelbrick, *supra* note 35.

51. See *infra* Table 2.

52. See *id.*

53. See *id.*

One illustrative example of this is *In re Interest of Z.J.H.*, which involved a lesbian second parent's claim challenging the denial of custody and visitation.⁵⁴ A dissenting justice implicitly urged both the legislature and the court to adopt a legal change that would allow her these rights.⁵⁵ The dissent was one of the first published decisions (including majority decisions) to articulate a strong argument in favor of recognizing "nontraditional" families.⁵⁶ At the Wisconsin Supreme Court, the dissenting justice argued:

The legislature could not have intended such an absurd and cruel result, but that is what the majority of this court has determined. . . . The legal façade adopted by the majority cannot withstand scrutiny. . . . Accordingly, I cannot accept the majority's opinion as a prediction of what the holdings of this court will be in future cases involving children of non-traditional relationships. . . . I would also urge the legislature to act to rectify the unjust disparity created by today's decision, a disparity that will victimize children who have had nothing to do with their lot.⁵⁷

Indeed, four years after this decision, the same court adopted the rationale put forth in this dissent, and ruled in favor of nonbiological mothers' visitation rights (recognizing their status as de facto parents) in the landmark case *In re Custody of H.S.H.-K.*⁵⁸ The ruling was the first in the state of Wisconsin (and one of the first in the nation) to grant such rights to a lesbian nonbiological mother.⁵⁹ Moreover, the justices in *H.S.H.-K.* cited not one, but two previous dissents—both *Z.J.H.*, discussed above, and the dissent written for *In the Interest of Angel Lace M.*⁶⁰

A similar reversal was seen in the divorce case *In re Marriage of Cabalquinto*, where the court placed visitation restrictions on the father based on his homosexuality.⁶¹ Here, the dissenting justice found that "the majority has given judicial condonation to the personal feelings of the trial judge. . . . The State [of Washington] may not restrict a parent's reasonable visitation rights merely because that parent's lifestyle is not within the societal mainstream."⁶² Three years later, this dissent was

54. 471 N.W.2d 202, 203-04 (Wis. 1991).

55. *See id.* at 215 (Bablitch, J., dissenting).

56. *See id.* at 214-15.

57. *Id.* at 215.

58. 553 N.W.2d 419 (Wis. 1995).

59. *See id.*

60. 516 N.W.2d 678, 687-94 (Wis. 1994) (Heffernan, C.J., dissenting) (dissenting against the denial of the right to visitation of a nonbiological mother).

61. 669 P.2d 886 (Wash. 1983).

62. *Id.* at 889-90 (Stafford, J., concurring in part, dissenting in part).

vindicated when the case was remanded to the Court of Appeals of Washington, and the visitation restrictions were overturned.⁶³ In Missouri, analogous dissents were filed in the divorce cases of *J.P. v. P.W.*⁶⁴ and *G.A. v. D.A.*,⁶⁵ challenging visitation restrictions and denials imposed on gay and lesbian parents. In *J.P.*, the dissenting justice stated, “As I read the majority opinion, no homosexual parent should ever have unsupervised custody of his child even for a relatively short period.”⁶⁶ Citing as evidence the outcome in the earlier case, *G.A. v. D.A.*, he went on to say, “This is the type of generalization that courts should not make, although that appears to occur in this type of custody matter.”⁶⁷ Both dissents argued for the abandonment of the “per se” presumption that gay and lesbian parents are unfit.⁶⁸ Nine years later, this position was finally officially adopted by the Missouri Court of Appeals, Western District, in the case of *DeLong v. DeLong*.⁶⁹ In the *DeLong* decision, the judges quoted the dissents from both of these prior cases at length.⁷⁰ First, the *DeLong* majority quoted the dissenting justice in *G.A. v. D.A.* verbatim:

“If there has been any doubt as to the issue of homosexuality being an absolute or conclusive presumption of detriment, the result in this case on these facts dispels that doubt. . . . To say it is in the best interests of this little boy to put him in the sole custody of the [heterosexual] father, who was pictured leering at a girly magazine, solely on the basis of his [lesbian] mother’s sexual preference, would be and is a mistake.”⁷¹

The decision then went on to include the quote excerpted above from the dissent in *J.P. v. P.W.*, and cited its conclusion that “[e]ach custody case, whether a parent is homosexual [or not], is different and should be determined on its own facts”—a conclusion that was reached and made law.⁷²

Some judges have even established a legacy as dissenters who later saw their minority opinions become the majority opinion and the law of the land.⁷³ Alan Barth has called these judges “Prophets with Honor,”⁷⁴

63. See *In re Marriage of Cabalquinto*, 718 P.2d 7 (Wash. Ct. App. 1986).

64. 772 S.W.2d 786 (Mo. 1989) (Prewitt, J., dissenting).

65. 745 S.W.2d 726 (Mo. Ct. App. 1987) (Lowenstein, J., dissenting).

66. 772 S.W.2d at 795 (Prewitt, J., dissenting).

67. *Id.* (referring to *G.A.*, 745 S.W.2d at 726 (Lowenstein, J., dissenting)).

68. See *id.*

69. See No. WD52776, 1998 WL 15536, at *8 (Mo. Ct. App. Jan. 20, 1998).

70. See *id.* at *9-11.

71. *Id.* at *9 (quoting *G.A.*, 745 S.W.2d at 728-29 (Lowenstein, J., dissenting)).

72. *Id.* at *10 (quoting *J.P. v. P.W.*, 772 S.W.2d 786, 795 (Mo. App. S.D. 1989) (Prewitt, J., dissenting)).

73. ZoBell, *supra* note 28, at 211.

for their ability to prophesize social change and the need for corresponding legal change, writing “what the law ought to be, or what it might someday be.”⁷⁵ Oliver Wendell Holmes, for example, is famous for having written dissents, several of which later became majority opinions.⁷⁶ In the context of recent LGBT family law, New York’s Chief Justice of the Court of Appeals of New York, Judith Kaye, who delivered opinions in many of the most significant New York cases in the current study, is thought by some to be the contemporary corollary of these “Prophets with Honor.”⁷⁷ In the first case to be decided at a state’s highest court dealing with visitation or parental rights for the nonbiological mother in a lesbian parenting dyad, Justice Kaye wrote a powerful dissent underscoring the need to decide such matters with an eye toward the “modern day realities” of the family, thus laying the groundwork for later decisions across the country that would adopt a more reflexive definition of “parenthood” and “family.”⁷⁸ Indeed, the attorney who represented the nonbiological mother in *Alison D. v. Virginia M.*, noted in an interview:

Knowing that Judge Kaye in the *Alison D.* case had set out a very different framework . . . was very critical, I mean, we knew where Kaye stood, we know that she’s obviously very influential to the court because she’s chief judge now and . . . she hasn’t won on everything she’s wanted but she has been very consistent over the years in sort of striking out on different grounds. . . . [Later] the court did support the interpretation of Judge Kaye, who wrote . . . the majority opinion in the second-parent adoption case of *In re Jacob*.⁷⁹

In her own jurisdiction, Judge Kaye’s dissent in *Alison D.* was later cited in the case establishing second-parent adoption rights in New York,⁸⁰ as

74. See ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT 203 (1974).

75. ZoBell, *supra* note 28, at 203.

76. See *id.* at 211.

77. Vincent Martin Bonventre, *New York’s Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163 (1994).

78. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 30-33 (N.Y. 1991) (Kaye, J., dissenting); see also *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (using parallel rationale in granting visitation rights for a child’s nonbiological mother where visitation was in child’s best interest); *V.C. v. M.J.B.*, 725 A.2d 13, 26-32 (N.J. Super. Ct. App. Div. 1999) (Wecker, J., dissenting) (granting visitation rights for child’s nonbiological parent using parallel rationale to find a parent-like relationship).

79. Telephone Interview with Paula Ettlbrick, *supra* note 35 (referring to *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995)).

80. See *In re Jacob*, 660 N.E. 2d at 399-400.

noted in the interview above, as well as in at least two other cases' majority opinions.⁸¹

In other cases, the dissenting opinion was not applied in as direct a manner as above in subsequent appellate decisions, yet its effect was still significant in regards to future law. In the case of *In re Appeal in Pima County Juvenile Action*, the dissent challenged the majority's finding that a bisexual man could be barred from adopting a child in the state of Arizona, based on his sexual orientation.⁸² The presiding judge claimed in an ardent dissent:

It is clear from the record that both the trial judge and the majority of this department have no intention of ever letting a bisexual adopt a child. I refuse to participate in such a decision. I, therefore, set forth the facts which merit a reversal of the trial court's order. . . . While there is no case law particularly applicable to the situation at hand, I believe the proper rule to be that homosexuality or bisexuality standing alone does not render an applicant unfit as a matter of law to adopt children.⁸³

While this dissent has not yet been directly incorporated in a majority opinion in Arizona specifically articulating adoption rights for LGBT individuals, it did point out the inconsistency between the court of appeal's decision and the adoption statute for the state, which holds that adults may adopt regardless of their sexual orientation.⁸⁴ By highlighting the inconsistency, the dissent pointed the way toward legal adoption rights in the future for gay men and lesbians.⁸⁵

This influence and transformation can happen in more subtle and indirect ways, by virtue of dissents' language circulating generally in the legal community as a source of education and ideas, as well as the fodder they sometimes supply for possible appeals. Several interviewees noted that, just as courts are not bound by the precedents established in other states, but nevertheless often adopt their language or reasoning, the

81. See *id.* at 398; *In re Adoption of Caitlin*, 622 N.Y.S.2d 835 (N.Y. Fam. Ct. 1994); see also *In re J.C. v. C.T.*, 711 N.Y.S.2d 295, 298 (N.Y. Fam. Ct. 2000); *V.V. v. M.J.D.*, 725 A.2d 13 (N.J. Super. Ct. App. Div. 1999).

82. 727 P.2d 830, 835-42 (Ariz. Ct. App. 1986) (Howard, J., dissenting).

83. *Id.* at 835-40.

84. See ARIZ. REV. STAT. ANN. § 8-105 (1995).

85. Because of the intricacies and inconsistencies that arise by virtue of the U.S. hybrid civil law-common law tradition, and because of the indeterminacy of family law and great degree of discretion granted to family law judges, the discrepancy between this ruling and the adoption statute allows for no clear course for future rulings. While no other such case has since been heard in Arizona's appellate courts, it is entirely possible that different judges in different jurisdictions in Arizona decide the issue in differing ways—depending on their deference to either the Court of Appeals decision or the statute, as well as their own predilections and the individual circumstances of the case. It is known that adoptions by gay and lesbian parents have happened in Arizona, but it is not known how many or through what specific legal mechanism.

content of dissents can likewise affect later cases in other jurisdictions simply by making their language available. As attorney Nancy Polikoff noted, “theoretically it can [have an effect] because in another state, neither the majority nor the dissent is binding on a judge. So, you can say to a court, ‘Look, I know this was a dissent, but the majority was wrong and I want you to go with the language there.’”⁸⁶ The supervising judge in one California jurisdiction, who had previously practiced as a family law attorney, similarly commented, “I’m not necessarily bound by a Court of Appeals decision in [another jurisdiction in California], if the issue hasn’t been decided by my district. So in some cases, I could use a dissenting opinion from another district.”⁸⁷

Another interviewee, a nonbiological mother who had lost custody of her child and subsequently became an activist for lesbian parents’ rights in Ohio, pointed to the educative function of dissents from Ohio as well as other states in leading to social and legal change: “[They] will certainly play a part in that [legal change] because that is educating our politicians to understand that people’s mindset is no longer staid on the fact that a child has to have a mother and a father. . . . I think ultimately yes, it will have an effect.”⁸⁸ In still other cases, the dissent could have an effect on the reasoning of the next court to hear the case. In the case of *Thomas S. v. Robin Y.*, a New York case in which a sperm donor challenged two lesbian mothers for paternity rights,⁸⁹ the two mothers commented in an interview that the dissent from a lower appellate court “definitely had an impact at the Court of Appeals,” and that, as a consequence of the strong dissent, they “didn’t have to beg for an appeal.”⁹⁰ Furthermore, after the court did grant Thomas S. paternity rights, the litigants found that the dissent was imperative in the grant of a stay on that order, because, as they said, “the judge who granted the stay had read both decisions.”⁹¹

As suggested in the interview above, dissents may also have a role in the likelihood (and possible success) of an appeal in a particular case or on a particular issue. Legal scholars have noted that in general dissents may embolden counsel in later cases to try again, even signaling

86. Interview with Nancy Polikoff, Attorney, Washington, D.C. (Mar. 13, 2002).

87. Interview with family law attorney, San Francisco, Cal. (Mar. 18, 2002).

88. Telephone Interview with lesbian parent, Ohio (Feb. 28, 2002).

89. 599 N.Y.S.2d 377 (N.Y. Fam. Ct. 1993).

90. Telephone Interview with lesbian coparents, N.Y. (June 24, 2002).

91. *Id.*

on what grounds their efforts at reprisal will be most effective.⁹² Indeed, interviews with lawyers in the current project suggest that this may in fact be the case. As attorney Paula Ettelbrick noted in an interview, “when you have one of their own peers raising it that’s a very good thing, even if they don’t win in that particular case.”⁹³ Furthermore, a long time family court judge stated that “family court decisions get appealed a lot, because of the high stakes and the emotions involved.”⁹⁴ The previously cited case, *In re Marriage of Cabalquinto*, in which the dissent’s reasoning was later adopted on appeal, illustrates very aptly the potential impact of dissents on appeals.⁹⁵ The case *In re Adoption of Charles B.*, illustrates the same point; the Ohio Supreme Court reversed the decision of an appeals court to not allow adoption by a gay man.⁹⁶

92. See Voss, *supra* note 16 (highlighting the positive effect of dissent on future litigation); see also Brennan, *supra* note 22 (commenting on the important role dissents play within the legal system).

93. Telephone Interview with Paula Ettelbrick, *supra* note 35.

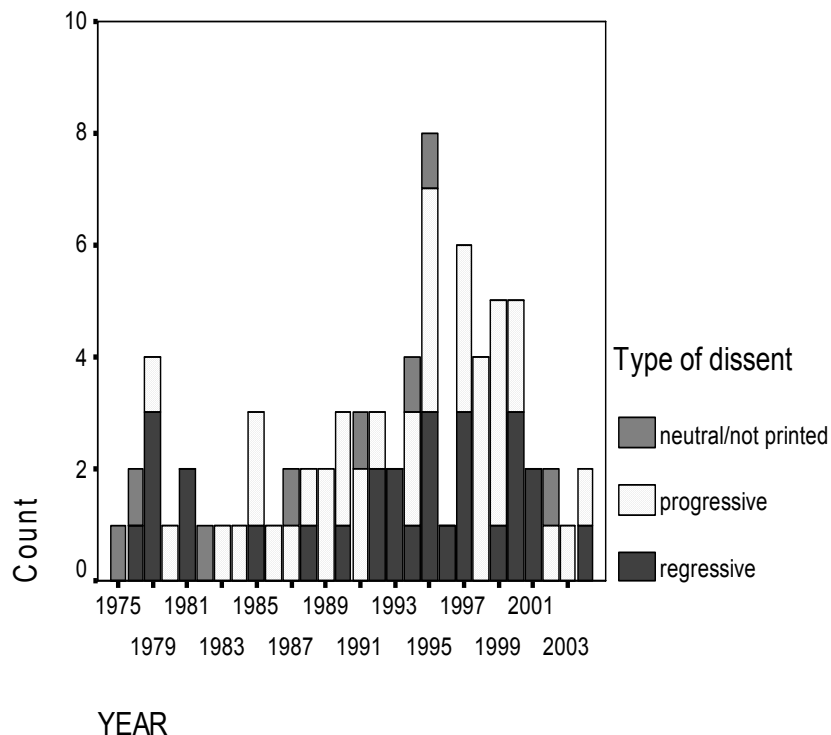
94. Interview with a family court judge, San Diego, Cal. (Apr. 22, 2002).

95. 669 P.2d 886 (Wash. 1983).

96. 552 N.E.2d 884 (Ohio 1990).

IV. RESISTING CHANGE: REGRESSIVE DISSENTS

Table 2: Type of Dissent by Year



While some dissents, such as those discussed above, call for, and sometimes lead to, legal and social change in the recognition and treatment of LGBT parents, other dissents are written with the purpose of resisting such changes.⁹⁷ These dissents, while perhaps thought of as regressive rather than progressive, are consistent with other dissents in their range of length, fervor and tenacity. While progressive majority decisions inspire regressive dissents in somewhat fewer instances than the reverse, the tendency to write very strongly worded dissents was nearly equal. One judge's dissent in the divorce case of *Chicoine v. Chicoine* that differed from the majority's ruling argued that the lesbian mother should have no visitation rights, rather than restricted visitation, and asserted:

97. See *supra* Table 2.

Lesbian mother has harmed these children forever. To give her rights of reasonable visitation so that she can teach them to be homosexuals, would be the zenith of poor judgment for the judiciary of this state [South Dakota]. Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination . . . she should be totally estopped from contaminating these children. . . . There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. Even the pagan "Egyptian Book of the Dead" bespoke against it.⁹⁸

In other cases the dissent's language was perhaps less flamboyant, but equally resistant to change. In *E.N.O. v. L.M.M.*, the first decision in Massachusetts to recognize the parental rights of a nonbiological mother in a former lesbian parenting dyad, the dissenting justice wrote, "In light of the denigration of [biological] parental rights and the judicial infringement on the province of the Legislature effected by the court's decision, all without an acknowledgement of the novelty of that decision, I must respectfully dissent."⁹⁹ In a similar case, one of the first of its kind in New York, Judge Judith Kaye (discussed earlier) wrote for the *In re Jacob* majority, which allowed two second-parent adoptions by a lesbian couple.¹⁰⁰ The dissenting justice in *Jacob* cited the majority opinion in the previously discussed case *Alison D. v. Virginia M.*, in which Judge Kaye had written an ardent and powerful dissent rejecting the majority's "expansionist judicial definition of 'de facto parent' or 'functional family,'" and asserted that, "we derive a diametrically different lesson from [*Alison D.*]" She continued, "Yet, today's majority, only four years later, revives and applies that rejected de facto methodology [from *Alison D.*] using another nonstatutory, undelineated term, 'second parent adoption.'"¹⁰¹

This resistance to change was articulated in a number of ways in the dissent, as suggested above, and was generally no more or less forceful in its articulations than those arguing for progressive change. For instance, the *Jacob* dissent appealed to the principle of stare decisis, arguing that the holding in former cases must be adhered to strictly.¹⁰² In other cases, the dissents argued that the court should defer to the judgment of the trial judge rather than enact change. This happened in approximately thirteen

98. 479 N.W.2d 891, 896-98 (S.D. 1992) (Henderson, J., concurring in part, dissenting in part).

99. 711 N.E.2d 886, 894 (Mass. 1999) (Fried, J., dissenting).

100. 660 N.E.2d 397 (N.Y. 1995).

101. *Id.* at 409 (Bella Cosa, J., dissenting).

102. *See id.* at 406.

percent of the cases with a dissent,¹⁰³ and generally merely argued that the majority's decision is wrong because (1) the trial judge is vested with wide or broad discretion in matters of child custody and parental visitation; (2) the credibility of the witnesses is within the province of the trier of fact; or (3) the trial court's findings are entitled to a presumption of correctness unless the preponderance of the evidence is otherwise, as in the case of *Eldridge v. Eldridge*.¹⁰⁴

Another common tactic for resisting social and legal change urged in the dissents (as well as in majority opinions) was to argue that such issues are the responsibility of the legislature, rather than the courts, to decide. In one of the first second-parent adoption cases in the country and the first in Massachusetts, *Adoption of Tammy*,¹⁰⁵ the dissenting justices argued that the coparent adoption approved by the majority should not be allowed because Massachusetts' adoption statute does not allow for it. The dissent claimed that its views were "not motivated by any disapproval of the two petitioners here or their life-style. . . . [A] litigant's expression of human sexuality ought not to determine the outcome of litigation" They argued, "[The children's] interests can be accommodated without *doing violence* to the statute. . . ."¹⁰⁶ In the previously cited New Jersey visitation case *V.C. v. M.J.B.*, one dissenting justice argued even more explicitly:

In my view, evaluating changes in social mores and how those changes are to impact our social policy as reflected in our statutes, is more properly addressed by the Legislature as opposed to the courts. . . . Applying the factors set forth by the Wisconsin Supreme Court, as the majority does here, undermines the rights of all natural and adoptive parents and leads to more litigation concerning the rights of individuals claiming to be parents. This is an issue for our Legislature and not our courts.¹⁰⁷

103. See *supra* Table 2.

104. No. 01A01-9808-CV-00451, 1999 WL767792, at *8 (Tenn. Ct. App. Sept. 29, 1999) (Highers & Farmer, JJ., concurring in part, dissenting in part).

105. 619 N.E.2d 315, 321-23 (Mass. 1993) (Lynch, J., dissenting).

106. *Id.* at 321-22 (emphasis added).

107. 725 A.2d 13, 24-26 (N.J. Super. Ct. App. Div. 1999) (Brathwaite, J., concurring in part, dissenting in part). Interestingly, a second dissent was filed in this case, arguing that the nonbiological parent should be given not just visitation, but full joint custody rights. This dissenting justice relied on the reasoning that,

[w]hile it would be appropriate for the Legislature to address the issues raised by this case, these children cannot wait. It is the function of the courts to address those interstitial areas where no statute literally controls. . . . When social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment.

Id. at 28 (Wecker, J., concurring in part, dissenting in part).

The citation here to “factors set forth by the Wisconsin Supreme Court” is a reference to the previously discussed case of *In re Custody of H.S.H.-K.*, which also involved visitation rights for a nonbiological mother.¹⁰⁸ In *H.S.H.-K.*, a similarly resistant dissent was written, drawing on both the principle of *stare decisis* and the responsibilities of the legislature:

Neither marriage nor blood ties justifies this courts’ [sic] creation of an arrangement not recognized until today. There was no marriage—the “ceremony” gone through by the mother and the former companion is a nullity—it is completely unrecognized in our law. To give any importance to the “ceremony” by these two women should require an act of the legislature, not an aberrant opinion by this court. . . . [The court] create[s] its new vision of family law in a way that should only be done by the legislature. . . . Changes in family law as drastic as those created here should only be done by the legislature following full hearings and debate¹⁰⁹

An additional dissenting justice added:

A state court functions at its lowest ebb of legitimacy when it not only ignores constitutional mandates, but also legislates from the bench, usurping power from the appropriate legislative body and forcing the moral views of a small, relatively unaccountable group of judges upon all those living in the state. Sadly, the majority opinion in this case provides an illustration of a court at its lowest ebb of legitimacy. . . . The legislators of this state, representing the views of their constituents, have consciously decided not to protect or promote non-traditional, non-legally binding relationships, apparently believing that such relationships are not basic to morality and civilization. . . . The majority disagrees with this legislatively declared social policy and, therefore, rewrites the law to reflect its own moral views and to facilitate its predetermined legal conclusion. . . . apparently, the . . . majority does not place much stock in the doctrine of *stare decisis*.¹¹⁰

These cases demonstrate not only the vast differences of opinion that are revealed by dissents, but their power to facilitate as well as retard social and legal change.

108. 533 N.W.2d 419 (Wis. 1995).

109. *Id.* at 438-42 (Bablitch, J., dissenting).

110. *Id.* at 442-48 (Day, J., concurring in part, dissenting in part).

V. SEDIMENTATION, SETTLING, AND “TALKING BACK”: AN ANALYSIS OF CONVERSATION IN LAW

These dissenting opinions, in their resistance to change, can sometimes be shown to have a sedimenting or cementing effect on the law—while seemingly resisting the necessity of change to adapt to new family forms. Nevertheless, they illustrate a push and pull that is perhaps not surprising in an area of law subject to such flux and contestation. But this sedimentation and eventual settling of gay and lesbian family law, in part through the vehicle of dissent, can also be seen in other patterns or mechanisms. Over time, the dissent serves as an avenue for the settling of law by reflecting the societal differences in opinion and debates regarding parental recognition for LGBT parents, through the offering of legal and discursive compromises, and by simply “talking back” to the majority. Because of their responsive nature and positioning as fundamentally different, dissents can be instructively thought of as one half of a conversation in law, wherein the other half of the conversation is the majority opinion. In other words, if the judicial decision is a statement of what the law is, the dissent is a counterstatement, a potential corrective offered in response, of what the law should be. In some instances, this conversation is drawn out over decades, where the issue at hand remains persistently unsettled.

This is frequently seen in situations involving nontraditional family forms, where the legal issue to be settled is a novel one that was not considered in the drafting of applicable statutes, and the judges must interpret the law with little guidance. In the second-parent adoption case of *In re Angel Lace M.*, for instance, the dissenting justice observed, “Much has been written about the nature of the canons of construction and the fact that contradictory canons exist that would lead to opposite results if applied to the same statute.”¹¹¹ The author added that the common wisdom and guiding principle in such cases is to construe the adoption statute broadly in order to serve the best interest of the child.¹¹² As has been noted elsewhere, however, what exactly the “best interest of the child” is and what interpretation of the law best serves it are also persistently unsettled issues. Therefore, while this particular dissenting justice argued that “[a]lthough strict construction of a statute is often seen as an exercise in judicial restraint, in the present case such construction [not allowing the adoption] is precisely the opposite and

111. 516 N.W.2d 678, 687 (Wis. 1994) (Heffernan, C.J., dissenting).

112. *See id.* (citing WIS. STAT. § 48.01(3) (1995)) (amending statute to expressly state a child’s best interest is the principal consideration when constructing adoption statutes).

flouts the legislative will,”¹¹³ other justices strictly construe adoption statutes, reading them as inapplicable to dual lesbian-headed households, as entirely appropriate.¹¹⁴ Indeed, this point is aptly made in the case of *In re Custody of H.S.H.-K.*, where three dissents were written, each offering solutions different from the majority and each other.¹¹⁵

Across the United States, furthermore, this particular issue remains unsettled and continues to provoke strong dissents in both directions—encouraging as well as discouraging second-parent adoption.¹¹⁶ Indeed, there are just as many dissents calling for liberal construction of adoption statutes, so that the law can grow to include nontraditional families, as there are arguing against such inclusivity. In the case of *Adoption of Baby Z.*, for example, the dissenting justice argued that “a reasonable construction of the statutory scheme governing adoptions”¹¹⁷ must, in fact, allow for the two mothers in such a situation to be legally recognized, and went on to assert that

the majority’s narrow interpretation of the relevant statutes creates grave constitutional infirmities with the statutory scheme regulating adoptions in the state of Connecticut, and the disingenuous reasons advanced to justify the refusal to reach these constitutional issues cannot withstand scrutiny. . . . [This sort of] hypertechnical eighteenth century analysis . . . has no place in the jurisprudence of the twenty-first century. Future generations will look back upon the majority’s decision today with the same opprobrium with which we regard the draconian absurdities of the early English common law. Unfortunately, this observation will provide little solace to young Baby Z., his family, or those who are similarly situated.¹¹⁸

This type of progressive dissent speaks back not only to the majority, then, but also to the dissents offered above, who argued for a cementing of traditional notions of family in law. In doing so, it sediments yet another layer of legal thought, which draws on traditional notions of justice and common historical references to put forth a new vision of family law.

113. *Id.* at 693.

114. *See id.* at 694.

115. 533 N.W.2d 419 (Wis. 1995).

116. As of January 2005, twenty-five states and the District of Columbia had approved and granted second-parent adoptions, either in the courts or by legislative action. In addition, four states had expressly disapproved of such adoptions and had ruled them illegal in appellate court opinions. National Gay and Lesbian Task Force, Second Parent Adoption in the U.S., <http://www.thetaskforce.org/downloads/secondparentadoptionmap.pdf> (last visited Nov. 1, 2006).

117. 724 A.2d 1035, 1064 (Conn. 1999) (Berdon, J., dissenting).

118. *Id.* at 1065.

In some instances, the progression and settling of law can be seen in quite literal legal conversations, where the majority and the dissent speak back to each other. Also in *Adoption of Baby Z.*, for instance, the dissent critiqued the majority, as quoted above, regarding its strict construction of the adoption statute.¹¹⁹ However, the critique cut both ways—the majority also offered a prologue critique of the dissent.¹²⁰ In fact, the majority spent three pages of its analysis responding to the dissent, point for point, beginning with the assertion that “rhetoric aside, the dissent’s arguments do not hold water.”¹²¹ Refusing to give up the last word, the dissent then concluded with a lengthy footnote:

In a lengthy discussion at the end of its opinion, the majority struggles to either dodge or deflect the force of my dissent. I feel that I have addressed adequately the majority’s efforts to poke holes in my arguments. Nevertheless, I will in the interest of clarity address these claims once again

¹²²
.....

The dissenting judge then went on to address each of the majority’s responses to the dissent’s own claims.¹²³ This can be understood in the context of judicial deliberation, where judges circulate their opinions to the rest of the panel before the decision is rendered. Here, it is clear that the dissent and the majority were familiar with each other’s arguments, and felt compelled to respond to them in their respective opinions—thus shaping and making explicit the processes of reaction and dialogue in the law.

VI. SETTLING THROUGH COMPROMISE

These conversations and reciprocal influences happen in other less explicit ways as well. In *Liston v. Pyles*, for example, a case involving the custody, visitation, and child support claim of a nonbiological mother, the dissent attempted to compromise with the majority opinion denying Marla Liston custody, visitation, or *in loco parentis* status by focusing on her desire to pay child support.¹²⁴ In other words, the dissent expressed a nontraditional vision of family, one not accepted by the majority, but emphasized the benefit the child would enjoy by allowing Liston to pay child support, rather than focusing solely on the custody

119. *See id.* at 1069.

120. *See id.* at 1060-63.

121. *Id.* at 1060.

122. *Id.* at 1081 n.48.

123. *See id.* at 1081-84 n.48.

124. No. 97 APF01-137, 1997 WL 467327, at *9-16 (Ohio Ct. App. Aug. 12, 1997) (Tyack, J., concurring in part, dissenting in part).

issue, which the majority clearly rejected. Although the opinion in this case clearly did not accept the dissent's vision, its intermediary move provides flexibility for future rulings.

Similarly, in *In re Adoption of Charles B.*, like the majority, the dissenting justice "just as strongly as [his] colleagues, announce[d] that [he did] not sanction, encourage, or look with favor on homosexual adoption, and . . . agree[d] that 'it is not the business of the government to encourage homosexuality.'"¹²⁵ Instead, he compromised by emphasizing the best interest and wishes of the adoptive child in refuting their conclusion that the homosexual man in question, who is also a social worker and the child's foster father, may not adopt.¹²⁶ In doing so, the dissenting justice set the case up for an appeal at the Ohio Supreme Court, in which the court overturned the decision and allowed the adoption.¹²⁷

VII. SETTLING THROUGH PENDULUM SWINGS

Dissents also talk back by embodying a pendulum-swing approach, in many cases, to judicial language and ardor. In other words, because they are explicitly by definition an oppositional force, dissents often employ very strong and often blunt or unpopular language, providing an antidote for, and an opposite pull from, the often measured and negotiated language of the majority opinion. This is true of the vast majority of cases with dissents in the current study. In the divorce case of *Ex Parte D.W.W.*, for example, where visitation restrictions and a denial of custody were affirmed against a lesbian mother, the dissent began with the following reproach:

Because the main opinion seems to be more interested in providing social commentary than in protecting the best interests of these parties' two children, I dissent. In an apparent attempt to play to public opinion, the main opinion has ignored the sound reasoning of the Court of Civil Appeals and has mischaracterized much of the evidence presented in this case. . . . I cannot support a judgment that appears to be influenced more by prejudice than by the facts.¹²⁸

Similarly, in the case of *White v. Thompson*, where a lesbian mother was challenged successfully for custody by the children's paternal grandparents, the dissenting justice charged the majority with arriving at

125. No. 3382, 1988 WL 119937, at *7 (Ohio Ct. App. Oct. 28, 1988) (Wise, J., dissenting).

126. *See id.*

127. *See In re Adoption of Charles B.*, 552 N.E.2d 884 (Ohio 1990).

128. 717 So. 2d 793, 797 (Ala. 1998) (Kennedy, J., dissenting).

its conclusion on the basis of “prudish prejudice,” rather than “positive proof.”¹²⁹ In *Titchenal v. Dexter*, the dissent unabashedly responded to the majority’s critique that it (the dissent) “stretch[ed] the doctrine . . . beyond recognition in an effort to provide relief to this particular plaintiff”¹³⁰ by suggesting the majority’s position regarding the nonbiological mother’s visitation claim was so archaic as to be irrelevant: “These are the same old stale and discredited charges that ‘law’ has brought against ‘equity’ since the days of Henry II.”¹³¹ In the previously cited divorce case of *Weigand v. Houghton*, the dissenting justice began by bluntly pointing to the inequities of the majority’s custody decision:

The chancellor and majority believe a minor is best served by living in an explosive environment in which the unemployed stepfather is a convicted felon, drinker, drug-taker, adulterer, wife-beater, and child-threatener, and in which the mother has been transitory, works two jobs, and has limited time with the child. . . . The chancellor and majority are blinded by the fact that [the child’s] father is gay. . . . The issue is that [the child] is living in a psychologically and physically dangerous environment from which he should be saved, not blindly forced to remain. I dissent.¹³²

He continued that the majority’s decision to deny the gay father custody “boggles the mind,” and was “contrived by the majority for the purpose of punishing [the father] for his lifestyle.”¹³³

This type of extreme candor is also seen in dissents that were not arguing for a progressive view of gay and lesbian parental rights, but on the contrary, in cases where the majority chose to recognize these rights and to expand definitions of family. In the previously discussed second-parent adoption case of *In re Jacob*, for instance, where the court allowed the adoption, the dissent chastised the majority’s interpretation of the adoption statute: “[T]he majority in the instant [case] violates the very canon it invokes. It ultimately also transgresses another overriding canon, that courts should not legislate under the guise of interpretation.”¹³⁴ In the divorce case of *Chicoine v. Chicoine*, the dissenting justice harshly criticized not the majority’s statutory construction, but its acceptance, albeit marginal, of homosexuality *per*

129. 569 So. 2d 1181, 1186 (Miss. 1990) (Robertson, J., dissenting).

130. 693 A.2d 682, 689 (Vt. 1997) (Morse, J., dissenting).

131. *Id.* at 693.

132. 730 So. 2d 581, 588 (Miss. 1999) (McRae, J., dissenting).

133. *Id.* at 588.

134. 636 N.Y.S.2d 716, 732 (N.Y. 1995) (Bellacosa, J., dissenting).

se.¹³⁵ The justice ended his dissent with the statement, “There is hope for our Nation.”¹³⁶

The pendulum-swing effect of dissents is also seen in the propensity of dissenters to make unlikely or unpopular arguments that most likely would not have withstood the scrutiny of other judges as part of the majority decision. For example, in some cases judges actually argued against the nearly universally accepted guiding principle of “best interest of the child” in their dissents.¹³⁷ Such is the case in *Adoption of Tammy*, where the dissenting justice argues, “the court’s decision [allowing the adoption], which is inconsistent with the statutory language, cannot be justified by a desire to achieve what is in the child’s best interests.”¹³⁸

In other cases, the dissenting opinions made morally or religiously based arguments that, were they majority opinions, might have been deemed inappropriate and in violation of the separation of church and state. In the divorce case of *Hassenstab v. Hassenstab*, for example, the dissent referred to the “practice of homosexuality” as “morally wrong,” and stated that “[a]t school and at home, [the child] will eventually be taught that her mother’s [lesbian] conduct was morally wrong. . . . With regard to this family’s moral code, [the mother] has obviously set a horrible example.”¹³⁹ The dissent in *Schuster v. Schuster* is similar in this regard, admonishing, “The state ought to be concerned that if allegiance to traditional family arrangements declines, society as a whole may well suffer.”¹⁴⁰ In perhaps the most blatantly religious and morally charged argument, the dissent in *Chicoine* expressed its condemnation of the lesbian mother in no uncertain terms: “It appears that homosexuals, such as Lisa Chicoine, are committing felonies, by their acts against nature and God. . . . [E]ven the pagans, centuries ago, before the birth of Jesus Christ, looked upon it as total defilement.”¹⁴¹ The dissent went on to argue:

Every judicial decision of consequence, in my opinion, reflects a moral judgment. For those who advocate that exercising a moral judgment is a violation of separation of “church and state,” may I express: Those advocates would turn the First Amendment on its head proposing, in effect,

135. 479 N.W.2d 891, 896-98 (S.D. 1992) (Henderson, J., concurring in part, dissenting in part).

136. *Id.* at 898.

137. *See* *Adoption of Tammy*, 619 N.E.2d 315, 322 (Mass. 1993) (Lynch, J., dissenting).

138. *Id.*

139. 570 N.W.2d 368, 374-75 (Neb. Ct. App. 1997) (Hannon, J., dissenting).

140. 585 P.2d 130, 135 (Wash. 1978) (Rosellini, J., dissenting).

141. *Chicoine v. Chicoine*, 479 N.W.2d 891, 896-97 (S.D. 1992) (Henderson, J., dissenting).

that any belief can be fully exercised except religious belief. Judges have values, or should have. We need not be value-neutral.¹⁴²

Whether conservative or progressive, these candid, fervent, and often outspoken dissents extend the scope of judicial reasoning by providing counterpoints to the majority opinions, which are often not as strongly stated, by stretching the limits of acceptable legal discourse, and by injecting the opinions (and the law) with a dose of candor and audacity.

The same can be said of dissenting opinions that reflect, as most do, the deeply felt convictions and duties of their writers. As Kelman proclaims, “Deep conviction is the fuel that drives dissent past the limits of hope, beyond appeal to the intelligence of a future day, and into the realm of the quixotic.”¹⁴³ Thus, for example, in the previously discussed case of *Weigand v. Houghton*, in which the dissent objected to the grant of child custody to the mother and abusive stepfather, the dissent concluded by remarking, “justice *requires* that I dissent” (emphasis added).¹⁴⁴ In the equally impassioned dissent in the case of *In re Marriage of Cabalquinto*, the dissenting justice asserted, “In making the father’s homosexuality its primary consideration, the trial court lost sight of the duties owed both to the child and to his father. . . . I cannot agree with the majority’s disposition of the visitation issue [against the father]. I therefore must dissent.”¹⁴⁵ In the high profile case of *Alison D. v. Virginia M.*, discussed previously, Judge Judith Kaye wrote in her oft-cited dissent, “The majority’s retreat from the courts’ proper role—its tightening of rules that should in visitation petitions, above all, retain the capacity to take the children’s interests into account—*compels* this dissent.”¹⁴⁶

This latter opinion also exemplifies the deeply felt appeals to the best interests of the child in many impassioned dissents. In *In re Angel Lace M.*, the dissent argued resolutely for a liberal construction of the adoption statute that would allow for the second-parent adoption sought by the two mothers:

The majority . . . ignores the legislature’s clear statement that the best interests of the child are paramount. . . . Given the shrinking percentage of children that are raised in two-parent families, and the shrinking percentage of children who receive even minimally adequate care regardless of family structure, the public interest is enhanced by granting legal recognition to

142. *Id.* at 896 nn.1-2.

143. Kelman, *supra* note 26, at 257.

144. 730 So. 2d 581, 593 (Miss. 1999) (McRae, J., dissenting).

145. 669 P.2d 886, 889 (Wash. 1983) (Stafford, J., concurring in part, dissenting in part).

146. 569 N.Y.S.2d 586, 589 (N.Y. 1991) (Kaye, J., dissenting) (emphasis added).

two-parent families that do further the express objective . . . of “providing children in the state with permanent and stable family relationships.”¹⁴⁷

The case of *V.C. v. M.J.B.*, which involved a nonbiological mother’s custody and visitation claim, raised similar issues.¹⁴⁸ Here, the dissenting justice countered both the majority and the other dissent, arguing, based on a similar framework, that the nonbiological mother should enjoy not only visitation but also possibly joint custody rights.¹⁴⁹ Accordingly, she asserted:

The controlling best interest standard has never been applied to the facts of this case, because the trial judge concluded, contrary to the overwhelming weight of the evidence, that V.C. was not a psychological parent. . . . In my view, granting V.C. visitation and remanding for consideration of custody would effect a reasonable application of existing statutes and common law to reality; families today take many forms, and we must protect all relationships between parents and children.¹⁵⁰

Thus, through bold moves, impassioned pleas, and appeals to future wisdom such as this, the dissent is able to respond to majority judicial decisions, illustrate the pendulum-like process of settling law, and reveal, in effect, the other half of the legal conversation.

VIII. DISCUSSION AND CONCLUSIONS: DISSENT AND THE PROCESS OF LEGAL DIALOGUE

It has been argued in the past that what the law says is not necessarily what it does or means in practice. This is what is often referred to in sociolegal studies as the “gap” between law in the books and law in action.¹⁵¹ Likewise, written judicial opinions, as manifestations of law, may not be entirely reflective of the sentiments behind them.¹⁵² The study of dissents offers a valuable opportunity to further explore this gap. Dissents offer a rare glimpse of judicial panel decision-making at work and narratives that may reflect the law in

147. 516 N.W.2d 678, 689-90, 693 (Wis. 1994) (Heffernan, C.J., dissenting).

148. 725 A.2d 13 (N.J. Sup. Ct. 1999).

149. *Id.* at 26 (Wecker, J., concurring in part, dissenting in part).

150. *Id.* at 26, 28.

151. See, e.g., EWICK & SILBEY, *supra* note 4; JOHN R. SUTTON, *LAW/SOCIETY: ORIGINS, INTERACTIONS, AND CHANGE* (2001) (examining law from a sociological perspective the author highlights the divergence of theory and substance in the historical jurisprudence of the United States).

152. See PETER GOODRICH, *LEGAL DISCOURSE* (1987) (lamenting that the complexities of legal scholarship generate an inevitable divide between those who interpret the law professionally and those with only common understanding, causing the reasoning behind judicial opinions to often be lost in practice).

action—or, perhaps more accurately, the action behind the law in the books. They add nuance to our understanding of judicial decision-making by showing us the range of opinions on the judicial panel and what ideologies and legal arguments the majority may have been responding to. What's more, precisely by virtue of the fact that they are *not* law, dissents often are more expressive in their language, providing an important source of narrative. Pritchett notes, "Dissenting opinions . . . have a way of better pleasing those who read as well as those who write them. They are apt to be more individual and colorful. Opinions which must meet the ideas of many minds may in comparison seem dull and undistinguished."¹⁵³ Indeed, this is certainly evident in the majority of the cases discussed above, such as *Chicoine v. Chicoine* and *Adoption of Baby Z.*¹⁵⁴

The dissent also serves the important role of helping to clarify and define the boundaries of law by explicating what it is not. As Altimari claims, "if attorneys want to know what the law is not, then they should read the dissent. . . . Dissents clarify what the law is and, in so doing, can provide a signpost to lawyers in subsequent cases . . . using the dissent as a springboard."¹⁵⁵ It can also, as Brennan notes, "emphasize the limits of a majority decision that sweeps . . . unnecessarily broadly."¹⁵⁶ This function, delineating the borders of law, can be seen explicitly in the conservative dissents of cases such as *In re Custody of H.S.H.-K.*, which openly critiqued the majority for stepping beyond the bounds of what it considers to be law.¹⁵⁷ Similarly, in *In re Interest of Z.J.H.*, the dissent argued persuasively for a shifting of the law's boundaries, pointing out the inadequacies of the current framework and paving the way for a new paradigm of family law.¹⁵⁸ In this sense the dissent can be seen as both a tool of functionalism from a Durkheimian perspective, marking boundaries and defining what is by showing what is not, and also as catalyst for change, in a Kantian sense, planting the seeds of a paradigm shift.

This dual role is particularly explicit in the existence of both progressive and regressive dissents. The former, such as *In re Interest of*

153. PRITCHETT, *supra* note 33, at 50 (quoting Robert H. Jackson, *The Law Is a Rule for Men To Live By*, 9 VITAL SPEECHES 664, 665 (1943)).

154. *Chicoine v. Chicoine*, 479 N.W.2d 891 (S.D. 1992); *Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999).

155. Altimari, *supra* note 18, at 284.

156. Brennan, *supra* note 22, at 430.

157. 533 N.W.2d 419, 438-52 (Wis. 1995) (Day, J., Steinmetz, J., Wilcox, J., concurring in part, dissenting in part).

158. 471 N.W.2d 202, 214-15 (Wis. 1991) (Bablitch, J., dissenting).

Z.J.H. and *Adoption of Baby Z.*, represent the inertial pull—or perhaps more accurately, the mutually constitutive resonance—of a paradigmatic shift in legal and social understandings of family.¹⁵⁹ The latter, in contrast, such as *E.N.O. v. L.M.M.* and *Matter of Dana*, represent the flipside of the same process—what might be thought of as a “de-constitutive” move.¹⁶⁰ As Professor Calavita has posited, “It seems reasonable that law may be both constitutive and deconstitutive—just as it is both ‘hegemonic and oppositional’ . . . for ‘law’ is not of one piece.”¹⁶¹ Certainly, the potential of dissents to not only contradict the law as represented by the majority and show another way, but to alternatively act as both a catalyst and an opponent of legal change, is evidence of this proposition. The fact that Calavita contends that such de-constitutive moments are most likely to occur in “unsettled cultural periods” makes the argument particularly compelling in the context of a cultural and legal institution—family—that is so unmistakably in flux.¹⁶² Yet, at the same time, dissents such as that written by Justice Kaye in *Alison D.* manage to act as catalysts in the process of redefining laws to respond to the changing family form—it is notable that, although there were twenty-eight dissents arguing against such change, none of these were cited by later majorities. That is, while progressive and regressive dissents may be seen as bids for different futures, those bidding for a future involving change, or an expansion of gay and lesbian parental rights, seemed somewhat more likely to be aimed for future redemption.¹⁶³

Thus, dissents can also be seen as emblematic of the indeterminacy and the settling process in law. Professors Phillips and Grattet note, “The term indeterminacy means that legal rules and concepts are inherently open to multiple and sometimes contradictory interpretations.”¹⁶⁴ By offering the contradictory interpretation, dissents show the law as an unsettled, dynamic process, permitting the “maturing of alternative

159. See *id.*; *Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999).

160. See 711 N.E.2d 886 (Mass. 1999); *Matter of Dana*, 660 N.E.2d 397 (N.Y. 1995); Kitty Calavita, *Blue Jeans, Rape, and the ‘De-Constitutive’ Power of Law*, 35 LAW & SOC’Y REV. 89, 109 (2001) (suggesting that in times of cultural dispute the law can sabotage the very ideologies it involves due to endorsement of obsolete moral ideals).

161. Calavita, *supra* note 160, at 109.

162. See *id.*; see also Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273 (1996).

163. This is consistent with the findings of Primus, who argues that those arguing in favor of the “underdog” or less powerful group tend to be more likely to become “canonical,” or “redeemed” dissents, later turned into law. See Richard Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 276 (1998).

164. Scott Phillips & Ryken Grattet, *Judicial Rhetoric, Meaning-Making, and the Institutionalism of Hate Crime Law*, 34 LAW & SOC’Y REV. 567, 596 (2000).

constitutional and legal theories which, though held by the minority today, may in time prove their greater vitality and become the majority view.¹⁶⁵ In a sense, the dissent is a “refusal to allow any intrinsic or essentialist definition of law [that] opens the way to a view of law as a [social] process or set of processes.”¹⁶⁶ The dissent plays a necessary role in this process, by making possible “the widest possible canvassing of alternative judicial policy constructs,” allowing the dialectical legal process to emerge and continue.¹⁶⁷ Indeed, as this Article has shown, in many instances a dissenting opinion has foreshadowed or even catalyzed changes to come in legal reasoning and standards, as in the cases of *In re Angel Lace M.* and *J.P. v. P.W.*, and with the powerful dissent of Judge Kaye, which went on to become law, shifting judicial theories of parenthood, adoption, and “best interest.”¹⁶⁸

Beyond its role in explicating the processes and settling of law, the dissent reveals the law as a dialogue, with contradictory and complementary elements constantly speaking back to one another. It allows the law to be understood as “a dynamic, dialectical process of continuing unfolding and development of legal principles and rules in accord with changing societal conditions and needs.”¹⁶⁹ In some cases, this dialogue between alternative visions of law is explicit, as in *In re Adoption of Baby Z.*¹⁷⁰ in other cases, it is more subtle but nonetheless identifiable, as in *In re Adoption of Charles B.*¹⁷¹ But the dialectic of law is emergent over time and across decisions, as well, in cases where the dissent represents a “pendulum swing” whose aim and eventual result is to destabilize existing assumptions about law, family, parenthood, and sexuality by presenting a strongly stated and often extreme alternative vision, as in *Weigand v. Houghton* and *G.A. v. D.A.*¹⁷² These pendulum-swing dissents impel the consideration of competing theories and, inevitably, the eventual settling of new meanings. As Justice Brennan has noted, “Through dynamic interaction among members of the present Court and through dialogue across time with the future Court we ensure

165. PRITCHETT, *supra* note 33, at 52.

166. GOODRICH, *supra* note 152, at 159 (emphasis in original).

167. EDWARD McWHINNEY, SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW 40 (1986).

168. See 516 N.W.2d 678, 687-94 (Wis. 1994) (Heffernan, C.J., dissenting); 772 S.W.2d 786, 794-95 (Mo. 1989) (Prewitt, J., dissenting).

169. McWHINNEY, *supra* note 167, at 40.

170. 724 A.2d 1035 (Conn. 1999).

171. No. 3382, 1988 WL 119937 (Ohio Ct. App. Oct. 28, 1988).

172. 730 So. 2d 581, 588-93 (Miss. 1999) (McRae, J., dissenting); 745 S.W.2d 726, 728-30 (Mo. Ct. App. 187) (Lowenstein, J., dissenting).

the continuing contemporary relevance and hence vitality of our fundamental charter.”¹⁷³

Just as previous work has revealed the negotiation of identity in family law, this Article reveals judicial opinions themselves as negotiated documents, “forged from ideological divisions in the court,” and by extension, in the law as a whole.¹⁷⁴ This is evident in cases where the dissent suggested a compromise position that would nevertheless shift the law’s take on gay and lesbian parenting, as in *Liston v. Pyles*.¹⁷⁵ The same is apparent in those appealing for a liberal construction of statutes that would negotiate spaces for recognizing nontraditional parenthood and family forms, while still working with foundations of law already in place, such as in *Titchenal v. Dexter* and *V.C. v. M.J.B.*¹⁷⁶ Contrasted with the majority opinion, which is most often the result of compromise and negotiation but “conceals the internal disputes, the competing arguments, the battles and the bargains,” the dissent lays bare the raw materials, so to speak, of negotiation and institutionalization in law.¹⁷⁷

The dissent is also, then, revealing of the power struggles that occur over meaning-making in law. Indeed, Goodrich refers to written law as, “a specific exercise of power and of *power over meaning*”—and this could not be more true for judicial opinions specifically.¹⁷⁸ In some ways, the publication of dissents can be thought to play a role in an almost Marxian “rhetoric of legitimation” that empowers the court, by demonstrating that it recognizes its own fallibility and can be trusted to expose alternative viewpoints.¹⁷⁹ Douglas points to the irony of such a function, calling the dissent an “attempt to anchor a concept of authority in a genre that by its very terms seems to deconstruct its possibility. . . .”¹⁸⁰ More explicitly, however, the dissent represents an act of resistance, a “serious form of counterattack, [and] a response to perceived instability.”¹⁸¹ Strategically conceived, “[b]y acting on the basis of his own counterdoctrine, the dissident may imagine that he is

173. ABRAHAM, *supra* note 1, at 225.

174. DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 266 (4th ed. 1996); see Richman, *supra* note 5, at 303-16.

175. No. 97APF01-137, 1997 WL 467327, at *9-16 (Ohio Ct. App. Aug. 12, 1997) (Tyack, J., concurring in part, dissenting in part).

176. 693 A.2d 682, 690-94 (Vt. 1997) (Morse, J., dissenting); 725 A.2d 13, 26-32 (N.J. Super. Ct. App. Div. 1999) (Wecker, J., concurring in part, dissenting in part).

177. Bonventre, *supra* note 77, at 1167.

178. GOODRICH, *supra* note 152, at 2 (emphasis added).

179. See Douglas, *supra* note 13, at 257.

180. *Id.* at 260.

181. Kelman, *supra* note 26, at 257.

preventing the official position from settling into a marmoreal hardness that will defy future displacement.”¹⁸²

Symbolically, the dissent is a challenge to the hegemonic meanings and definitions imposed by the majority. Brennan notes, “A dissent challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority’s reasoning can continue to be evaluated, and, perhaps, in time, superseded.”¹⁸³ By resisting the pull of *stare decisis* and traditional formulations of family and sexuality, by sometimes resisting change propelled by the emergence of new family forms and alternative sexualities, and by arguing for a different vision of law than that which prevails at the moment, the dissent presents a discursive act of rebellion—a counter-hegemonic strategy of meaning making. As Kelman proclaims, and the cases analyzed here show:

The dissenter speaks in his own unmistakable voice, says what he thinks the law ought to be, and wields his vote in conformity to that vision. . . . He . . . shows the world that that the issue remains in dispute . . . and in this way he encourages litigants to mount fresh assaults on the official position, creating new opportunities for reconsideration and hastening the “intelligence of a future day.”¹⁸⁴

It compels a recognition of the dynamic nature, indeterminacy, and multiplicity of law. To this end, it fulfills Foucault’s vision:

[W]e must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between the dominant discourse and the dominated one; but as a multiplicity of discursive elements that can come into play at various strategies.¹⁸⁵

182. *Id.*

183. Brennan, *supra* note 22, at 435.

184. Kelman, *supra* note 26, at 254.

185. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 100 (Robert Hurley trans., Vintage Books 1990) (1976).