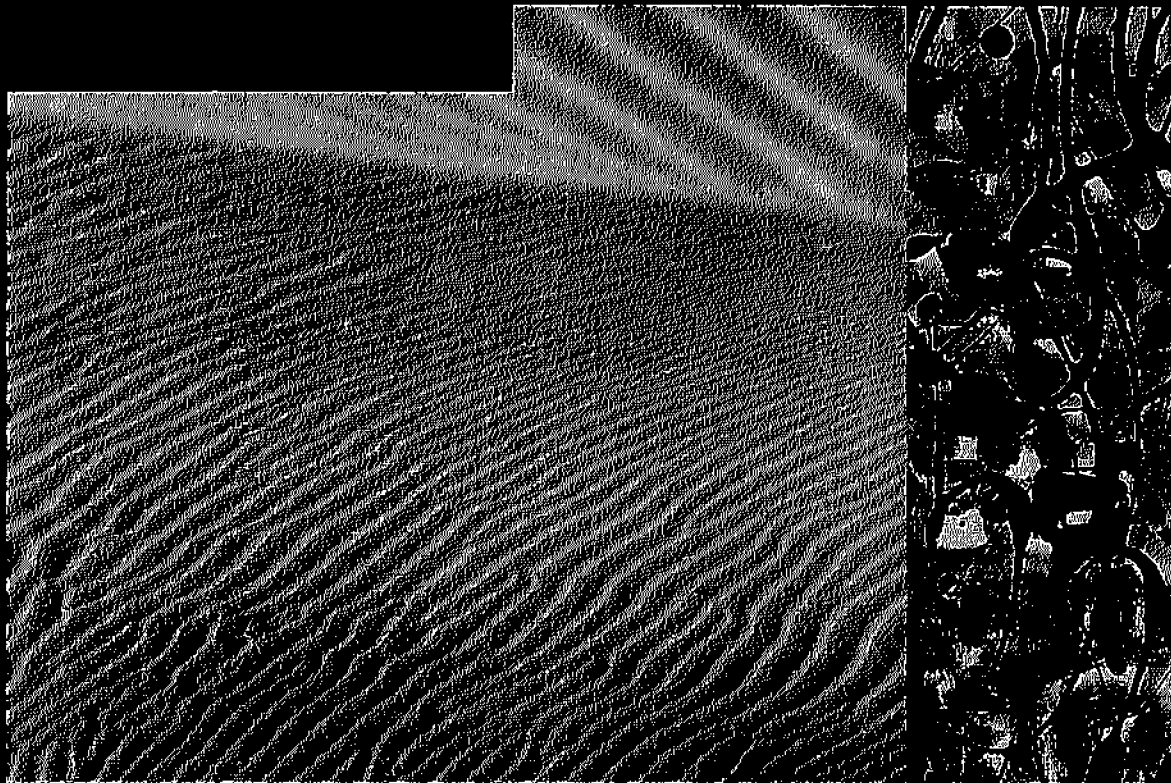


# New Perspectives on Deviance

THE CONSTRUCTION OF DEVIANCE IN  
EVERYDAY LIFE



EDITED BY LORI G. BEAMAN

# **NEW PERSPECTIVES ON DEVIANCE**

## **The Construction of Deviance in Everyday Life**

*Edited by Lori G. Beaman*  
*University of Lethbridge*

Prentice Hall Allyn and Bacon Canada  
Scarborough, Ontario

(2000)

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# "LEAVING

# NORMAL"

C h a p t e r

## Constructing the

## Family at the

## Movies and in

## Law

Rebecca Johnson

### INTRODUCTION

Families have long been viewed as among the most essential and universal units of society. This sense of the shared experience of family has led to an often unexamined consensus regarding what exactly constitutes a family. Thus, while we speak of families as though we all know what family [are], we see no need to define the concepts embedded within the term. [footnotes omitted]

(Franklin 1990–91: 1051–52)

Ian Hacking argues that some things, like bacteria, seem to exist independent of description. Other things, particular things that humans do, seem to be intimately connected to our descriptions of those things (Hacking 1986: 230). As Franklin points out in the quotation which opened this section, people often function as if families (like bacteria?) existed independent of description. As she puts it, "the family is often regarded in law as a private social force, the existence of which the law must respect and take into account, rather than as an entity which is defined by the law itself." (Franklin 1995: 1051–52) However, when one is called upon to provide an account of either the content of the family, or of its social significance, the "unexamined consensus" falls apart. One is then forced to confront the ways in which our notions of family are indeed intimately tied to the ways in which we describe the family, and purposes for which we construct our definitions.

In this paper, I explore the ways in which "normal" and "deviant" families are constructed, both in popular culture and in law. From popular culture, I examine the portrayal of normal family life in the movie, *Leaving Normal*. From law, I examine the judgment of the Supreme Court of Canada in *Mossop v. Canada*.<sup>1</sup> In both instances, I explore the ways in which popular and legal discourses participate in shaping societal visions of the normal family. I will suggest that while these discourses often construct a narrow description of the normal family, this description is not monolithic. Indeed, within both popular culture and law, one encounters counter-hegemonic moments, that is, moments where the discourses suggest room

for other ways of thinking about how the concepts of normalcy and deviance apply to life within the family.

## POPULAR CULTURE AND THE "NORMAL" FAMILY

Our descriptions of the world around us are intimately tied to our beliefs about that world. Indeed, as John Berger argued in the BBC production "Ways of Seeing," the very way we see things is affected by what we know or what we believe. (Berger, 1972). And the way we see things matters because, as Richard Dyer puts it, "How we are seen determines in part how we are treated; how we treat others is based on how we see them; such seeing comes from representation." (Millbank 1996: 452).

All societies construct symbolic boundaries, boundaries that establish the limits of acceptable and unacceptable identity and behaviour. The boundaries are policed and maintained in part through representations of normalcy and deviance. Some of these representations emerge in society's formal mechanisms of control, such as law. So the law, for example, represents certain kinds of families (and family behaviours) as normal, and prescribes a variety of punishments for families whose behaviour deviates from that which is represented within law as normal. In this way, law's representations of the family serve to delineate that which is safe/normal and that which is dangerous/deviant.

But these formal mechanisms of control are not the only ones operational within society. Formal mechanisms always run alongside a series of informal mechanisms of social control, such as norms, standards, beliefs, and expectations (Gavigan, 1986). These informal norms can be just as powerful as the formal mechanisms. Indeed, as Foucault reminds us, power's success is often proportional to its ability to hide its own mechanisms (Foucault, 1990; 1978: 86). Thus, it is useful to examine the ways that informal mechanisms of social control such as popular culture participate in the production and maintenance of certain visions of the family as normal or deviant.

Certainly, the average evening of television viewing confirms that popular culture does indeed reflect a certain range of family forms as "normal." In general, the norm is of a middle-class heterosexual couple with children. While other kinds of families are also present in popular culture (e.g., the single-parent family, the working mother, the poor family), families that do not conform to the standard are often treated as humorous, anomalous, as failures, as unfortunate. In the popular media, such families are all too often vilified, and held responsible for a number of social woes (Rivers, 1996).

However, while popular cultural representations of the family often serve to maintain the current order, culture is never simply order-maintaining. Because culture operates at the level of symbolic representation, it not only constructs and maintains social order, it also bears the seeds of social transformation (Eisenstadt, 1992). Thus, any examination of popular culture should be attentive to the ways in which particular texts maintain or subvert the current order. It is this capacity to change things that makes certain texts (be they books, movies, or legal judgments) so important. As bell hooks says,

Movies make magic. They change things. ... [G]iving audiences what is real is precisely what movies do not do. They give the reimagined, reinvented version of the real. It may look like something familiar, but in actuality it is a different universe from the world of the real. That's what makes movies so compelling. (hooks, 1996: 1)

Some texts, be they books, movies or judgments, are particularly compelling in this way. As writer Jeanett Winterson puts it, "Strong texts work along the borders of our minds and

alter what already exists. They could not do this if they merely reflected what already exists." (hooks, 1996: 2). The movie *Leaving Normal* is one such strong text.

The movie begins with a close-up of Marianne as a small girl, singing and drawing a picture: a mother, a father, and two children, standing happily in front of a house. Her singing gradually is drowned out by other sounds: adults yelling at each other, and a young girl crying. As Marianne continues drawing and singing "Twinkle, Twinkle, Little Star" quietly to herself, we understand that her picture is not a family portrait, but is a wish: the wish for a different kind of family. The picture represents not the family she is part of, but the family of her imagination: a "normal" family — a family with proper roots. As the opening credits begin to roll by, we see the family in a van, on the road at night and on the move again, the young Marianne sitting in the back, looking up at the stars and wishing. Her childhood drawing of the normal family is the ideological background against which the remaining action in the film takes place.

The action moves to the present, where an adult Marianne (played by Meg Tilly) is in a bus and on the road again. Through a series of snapshot conversations she holds with various passengers, we learn that she has just married a man she doesn't really know, and is moving to a town named Normal to start a life with him. Will theirs be the normal family she has been searching for all this time? We next see Marianne happily arranging things in the kitchen of a small house. Her husband enters the room, and within seconds, slaps her across the face for "yapping, and messing with my stuff." A stunned looking Marianne grabs her coat and walks out the door. The action shifts to the local bar, where the hardened and smart-mouthed waitress Darly (Christine Lahti) is bidding farewell to the local drunks, and attempting to apologize to a fellow waitress for having slept with the woman's husband ("twice ... a week ... for two years"). Darly is ecstatic over news that her ship has come in: her ex-husband has died, and she has re-inherited the house in Alaska that the two of them had started building during their short marriage 15 years earlier. Darly is quitting her job, and heading for Alaska.

As Darly leaves the bar she passes Marianne, who is sitting (penniless) at the bus stop weeping. Darly, in high spirits, offers to drop Marianne off a few states away at her older sister's house. They arrive at Marianne's sister's house. At this point in the movie, Marianne's childhood drawing again emerges as a ghostly overlay. Indeed, her sister seems to have found the normal family of Marianne's imagination: a husband, a child, an upper-middle-class home. And yet, as viewers, we do not feel an affinity with this superficially normal family. Darly is invited to spend the night, while the sister and brother-in-law attempt to intervene in Marianne's life, offering to get her a normal job, so she can start a normal life. In the middle of the night, this vision of fearful normalcy becomes too much, and Marianne decides not to stay with her sister and her "normal" family, but rather to follow Darly to Alaska. The two women sneak out of the house in the early morning, and make their escape.

But the road trip takes a catastrophic turn: Darly's car first breaks down, and then is destroyed by vandals. The women hitch a ride with an odd trucker named Leon, and his emotional and sensitive novel-reading nephew Harry. The women sneak off at a truck stop, sticking Harry and Leon (who thinks he is going to get some action) with the bill. They then end up on the road with the truck stop's talkative and rotund waitress "CC." CC, who has a car and mobile home, quits her job and joins the women in their road trip in order to return to her search for true love ("It must exist, because I have spent so much time looking for it!"). And though Darly mocks the concept of true love, it is not long before true love does indeed find CC. The very skinny millionaire Dan Earl Spicy Jones ("the third largest spice and herb farmer in western Canada") falls in love with CC at first sight. CC gives her car and

trailer to Darly and Marianne as a parting gift, saying gently, "You are not the best friends I have ever had, but you are certainly the most recent."

And so the two women continue towards Darly's dream home in Alaska. On the way, details of Darly's family life emerge as the two women share stories about each other's pasts. It is clear that Darly's life did not conform to a vision of normal. She met her husband while she was a dancer in a strip club. Worse yet, she finally reveals to a shocked Marianne, "I split on my kid when she was two days old. One thing I'm in the hospital, next thing I know, I'm on the road." The two women finally arrive in Alaska. However, like everything else along the way, it turns out differently than expected. The home Darly expects to see, and that Marianne hopes to share, turns out to be no more than an abandoned shell. Darly's ex-husband abandoned work on it the day she abandoned him 15 years earlier. The house is a mere frame, no walls, only a hint of roof. Further, it is littered with garbage from two homeless illiterate teenaged Inuit boys who are squatting there.

The two women, in shock but tired from their travels, decide to stay there for a short while. They let the two boys (whose father is in jail) continue to live around the house in exchange for their help in cleaning up the site. The two women find jobs in town, Marianne begins teaching the boys to read, Darly confronts the past she has left behind, and Marianne begins confronting the dreams she has been chasing. Harry comes to Alaska to find Marianne, but Marianne decides not to follow love on the road, but to stay in Alaska. Darly fills out forms that might someday enable her abandoned daughter to find her. Having travelled as far from Normal as one can, the women find some kind of peace in Alaska. The movie ends with a scene of the strangely configured foursome (Marianne, Darly, and the two Inuit boys), sitting at the dinner table in the house without walls. We hear Darly saying "get your elbows off the table," and "eat your vegetables." This is the familiar language of the family dinner table. The language brings to memory Marianne's childhood drawing of the family of her dreams. As the camera pulls back and the picture begins to fade away, we hear Darly saying grace: "Please bless this home and family, whatever the hell it is ... and please help us to keep going somehow."

*Leaving Normal* is a strong text that works along the borders of the mind. The movie creates an eclectic world, a reimagined, reinvented version of the real. One can see order-transforming elements in the movie in the ways that it plays explicitly with the notion of "normal" in the context of family relationships. Indeed, in its very title, the movie announces its challenge to societally held assumptions about normal and deviant families. The title, "Leaving Normal" is both pun and road map. The film is a road movie that starts in the town of Normal. It follows the adventures of Marianne and Darly as they leave Normal, and head for Alaska. But on a more complex level, the movie raises a series of continually emerging questions: What is normal? What does it mean to leave normal behind? What might lie at the end of the road for those who do leave normal behind? The movie asks us to question the meaning of "normal" as it is currently constructed.

To situate its challenge, the movie begins by foregrounding its opponent: the ideological stronghold of the normal family. The movie does not explicitly articulate all the norms that make up the social representation of the normal family. It relies on the "unexamined consensus regarding what exactly constitutes a family," and the norms that make up this consensus are captured and suggested in Marianne's initial drawing. Marianne is driven by the dream of a normal life, with a normal family and normal roots. It is this search that brings her to the town of Normal. Here, the movie is suggestive. What is not normal in the situation? Is it the speed with which Marianne enters her short-lived marriage, or is it the violence

she encounters there? Is the violence an aberration, or is it normal? Certainly, Marianne's husband justifies himself by explaining his reaction as the normal one of a husband whose wife has yapped and messed with his stuff. If this is so, in running from the marriage, is Marianne running to or from normalcy? Normal or not, this violence is far from the stuff of Marianne's childhood dreaming. In leaving Normal, she is continuing her searching for the ideal family and home.

Darly, though less idealistic than Marianne, has also lived her life in the shadow of images of normalcy. The difference is that while Marianne has been running towards the ever elusive ideal family and home, Darly has been running away. She chose to abandon husband and child, perhaps attempting to avoid what she saw as the prison of normalcy. But whether running towards or running away from, both Marianne and Darly's lives have unfolded against the ever present (though rarely articulated) vision of the normal family.

The search for normal continually leaves the women coming up short. In the end, it is only once the women have driven as far from Normal as one can go, that an authentic family begins to emerge. It is in Alaska that Marianne and Darly stop searching and running, and start constructing. The family at the end of the movie is not the "mother, father, two children, and house" of Marianne's drawing. Nonetheless, as viewers we see it as a family. Watching Marianne, Darly, and the Inuit boys, the viewer is left with a sense of "rightness," a sense that the women (and the boys) have constructed a family that, for all its oddness, is nonetheless "normal." If anything is flawed, it is the ideology of normalcy, and not the family that has been constructed.

The movie plays with the vast chasm between the unexamined consensus regarding the normal family, and the lives of the main characters. Though the main characters do not conform to the norms, we are drawn to sympathize and identify with them. The movie does not focus on their deviance, but rather serves to destabilize the social consensus that would characterize these people as deviant. The movie offers to the viewers a stream of alternative representations of relationships and families. It characterizes the supposedly normal life of Marianne's sister as nightmarish, and we cheer when the women sneak out and escape to the road. It also decentres notions of romantic love by illustrating them in unexpected and bizarre contexts: the very obese waitress CC and the skinny and strange-looking millionaire Canadian herb farmer fall in love during a single dance. Harry tries to find Marianne by sending form letters to every woman with her name in every state. Very little in the movie manages to replicate traditional views of normalcy. Indeed, the movie is peopled almost entirely with characters and situations that are "deviant." And yet, as viewers we come to see these characters positively: though they do not fit well with the stereotypical norms, there is something about their behaviours that seems fitting, that seems right.

In the end, the movie both assumes and challenges common assumptions about what makes a normal family. Marianne's search for family ends only once she has left Normal behind. And the movie manages to highlight the constructedness of the family. For very clearly, the family Marianne ends up with is a construction: it is less something found, than something achieved. It is something pieced together out of scraps and remnants from the fabric of divergent lives. But the movie does not simply show us that Marianne and Darly's family is a construction. It hints that all families are just such constructions. That a family is a construction does not diminish the value of that family. Marianne had been attempting to construct a family all along. However, her attempts to find something of value were continually subverted by her adherence to a set of ideas about what a normal family was supposed to look like. It was only once she set aside those images that she found herself in the middle

of the thing she had been searching for. As she put it, "I didn't choose this, it chose me. We were just making it up as we went along."

One of the interesting things about movies is that they explicitly allow for multiple viewpoints. In a movie like *Leaving Normal*, we can see how informal mechanisms of social control both identify the dominant representations of family, and allow for challenges to those representations. In the section that follows, I turn my attention to one of the more formal mechanisms of social control: the law. I will examine how the law represents the family as normal or deviant. I will argue that legal judgments (just like movies), reveal the presence of multiple and sometimes conflicting representations of normalcy and deviance within the family.

## LAW AND THE "NORMAL" FAMILY

Laws never tell the whole story. Yet they matter. They allow and sometimes even instigate change."

(Eisenstein 1994: 50)

Law matters. And for those interested in the construction of normal and deviant families, the law matters in complex ways. It functions as an instrument both of coercion, and of persuasion. While discussions about the law often focus on the explicitly coercive potential of law, it is important not to underestimate the persuasive power of law. A large measure of law's persuasive power lies in the power of naming. As Pierre Bourdieu tells us, the law, through its judgments, confers identity, status, and powers upon various actors. "Law is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular." (Bourdieu 1987: 838). One of the social groups that law participates in creating is the family.

Of course, as I pointed out in the section above, the law is not alone in this creative venture. There are dialectical relationships between various interpretations existing in popular culture and law. To return to Bourdieu's analysis of the power of law, "[i]t would not be excessive to say that [law] creates the social world, but only if we remember that it is this world which first creates the law." (Bourdieu 1987: 839). But while both popular culture and law contain representations of normalcy, it is important to remain attentive to significant differences in the enforcement of those representations. The law can back up its representations with coercive force. It can use this coercive force to compel individuals to act in accordance with law's description of the world. The law's power to define the normal and deviant family matters in important ways because the law can allocate benefits to those whose lives match the law's dictates, while reserving punishments for those who deviate from the law's norms. Indeed, in support of its representations, law has the power to restrain, hurt, render helpless, even kill (Cover 1986).

But the law not only coerces, it also attempts to persuade. Indeed, the legitimacy of law's coercive force depends in some measure on the ability of legal discourse to convince those who hear its pronouncements, that those pronouncements are justified in light of some social reality. As Robert Gordon reminds us,

The power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live (Gordon, 1984: 109).

How then does the law describe the normal family, and attempt to persuade us of the legitimacy of its description? First, it is important to remain aware that the law does not provide a single monolithic definition of family. Although most people have an image of what constitutes a "traditional" family, neither legislation nor the common law reflects a consistent definition. The legal definition of family changes somewhat from context to context. So, for example, some individuals may be a family for the purposes of income assistance under welfare legislation, but not a family for the purpose of income tax legislation (Freeman, 1994: 58).

But while there is some flexibility in definition, the law has consistently defined some kinds of families as deviant. In particular, the law has revealed its general unwillingness to see same-sex couples as families. Jody Freeman articulates the problem as follows:

[T]he field of "family" law is implicitly based on a heterosexual norm. Although no statute explicitly defines "family" for all purposes, and despite the fact that one can find inconsistency in the definition if one searches for it, an impressive variety of legislation, legal holdings, rules, and omissions, taken together, nonetheless reinforce the notion that a "normal" family comprises two heterosexual parents and their children (Freeman, 1994: 44–45).

Even where laws have prohibited discrimination based on sexual orientation, law has at the same time continued to represent the same-sex relationships as deviant through definitions of spouse that require the parties to be of the opposite sex. This requirement means that same-sex marriage is definitionally impossible.<sup>2</sup> Through such definitions and exclusions, the law constructs a vision of the normal family that places same-sex couples into the category of deviant. Such a vision is evident in the Supreme Court of Canada decision in *Mossop v. Canada*.

Brian Mossop and his partner, Ken Popert, had known each other since 1974, and had lived together since 1976 in a jointly owned and maintained home. Each was the beneficiary of the other's will, and they were known to their friends, family, and acquaintances as a couple. In 1985, Mossop was employed as a translator for the Secretary of State. In June of that year, Popert's father died, and Mossop took a day off work to attend the funeral. Under the terms of his collective agreement, he was entitled to up to four days of bereavement leave upon the death of a member of his immediate family. The day after the funeral, Mossop applied for bereavement leave. His request was turned down on the basis that a member of his immediate family had not died. The collective agreement defined "immediate family" as:

... father, mother, brother, sister, spouse (including common-law spouse resident with the employee), child (including child of common-law spouse), or ward of the employee, father-in-law, mother-in-law, and in addition a relative who permanently resides in the employee's household or with whom the employee permanently resides.

In the definition section of the collective agreement, the term "common-law spouse" was given more precise meaning:

... a "common-law spouse" relationship is said to exist when, for a continuous period of at least one year, an employee has lived with a person of the opposite sex, publicly represented that person to be his/her spouse, and lives and intends to continue to live with that person as if that person were his/her spouse.

Mossop and Popert fell squarely within the definition of "common-law spouse" except for the requirement that they be of the opposite sex. Thus, as far as the collective agreement went, Brian Mossop and Ken Popert were not part of each other's immediate family.

As such, the employer argued, Ken's Popert's father was even more surely not a member of Brian Mossop's immediate family.

Brian Mossop then lodged a complaint with the Canadian Human Rights Commission.<sup>3</sup> According to the 1985 *Canadian Human Rights Act*, employers were prohibited from discriminating against employees on the basis of "race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted." Mossop argued that his employer, by adopting a collective agreement which only recognized a spousal relationship where the parties were of the opposite sex, had discriminated against him on the basis of his family status. The Human Rights Tribunal agreed, concluding that the undefined term "family status" in the *Canadian Human Rights Act* could include same-sex couples, and that the opposite sex requirement was a form of discrimination based on family status.

The employer appealed, and the Federal Court of Appeal reversed the decision of the Tribunal. The Court found that family status meant legal status, and that no such status had been recognized for gay or lesbian couples. Further, they were of the opinion that the "real" issue was sexual orientation and not family status. That is, if there was any discrimination, it was discrimination on the basis of sexual orientation, and the *Canadian Human Rights Act* did not at that time prohibit this form of discrimination.<sup>4</sup>

The Supreme Court of Canada then granted leave to appeal, and heard the case.<sup>5</sup> The majority concluded that the term "family status" in the *Canadian Human Rights Act* did not include a homosexual relationship between two individuals, and that the employer had thus not discriminated. Three judges dissented. They concluded that the term "family status" was broad enough to include same-sex couples living together in long-term relationships, and that the employer was guilty of discriminating against Mossop.

The legal system, Gabel tells us, works at many different levels to shape popular consciousness toward accepting the political legitimacy of the status quo. (Gabel and Harris, 1982-83) Through its interpretive power, the law constructs the normal family as the heterosexual family. In this section, I will explore law's persuasive means. Certainly, the coercive power of the law was brought to bear since the law denied a family-based benefit to Mossop and Popert. Turning though to the persuasive power of law, I will explore how the majority judges attempt to persuade the reader that the "normal family" excludes same-sex couples, and how the dissenting judges attempt to persuade the reader of the opposite proposition. What kinds of justifications do the majority judges use to explain why their interpretation of the normal family should have social force? At the same time, what kinds of challenges to the status quo can be seen in the dissenting judgment?

### **The Majority (Chief Justice Lamer, Justice La Forest, Justice Sopinka, Justice Iacobucci)**

Two judges wrote decisions for the majority. Those reasons are slightly different. The first was written by Chief Justice Lamer, who begins by stating that the only issue before the Court was the proper interpretation of the phrase "family status." The Court was to determine who was currently included within the family. The Court was not to decide whether or not the government *should* extend benefits to same-sex couples. Chief Justice Lamer's first technique of persuasion is to evoke a boundary between neutral observation of the world, and political decision-making. Here, he portrays the Court as a neutral decision-maker, called upon to neutrally cast its gaze outwards in order to tell us "what is." Such language tends to imply the existence of some existing reality called "family."

But before telling us what this objective reality is, Chief Justice Lamer introduces a second technique of persuasion: the language of choice and blame. Chief Justice Lamer informs the reader that Mossop had been invited to amend the action to bring an equality claim under s. 15 of the *Canadian Charter of Rights and Freedoms*.<sup>6</sup> He had been asked to argue that the *Canadian Human Rights Act* violated the *Charter* by failing to include protection on the basis of sexual orientation. That is, rather than deciding whether the employer had committed family status discrimination against Mossop under the *Canadian Human Rights Act*, Chief Justice Lamer wanted to discuss whether or not Parliament's failure to prohibit sexual orientation discrimination in the *Canadian Human Rights Act* was a violation of the equality provisions of the *Charter of Rights and Freedoms*.<sup>7</sup> Put simply, Chief Justice Lamer wanted to discuss the case in terms of sexual orientation, and not in terms of family status. Mossop, however, wanted the focus to be on the meaning of family and not the meaning of sexual orientation. He was not asking the court to tell Parliament to amend the *Canadian Human Rights Act* to prohibit sexual orientation discrimination. Rather, he was asking the court to conclude that the actions of his employer already constituted discrimination on the basis of family status. Thus, Mossop declined to amend his claim. Chief Justice Lamer informs the reader of this decision, and takes Mossop to task for insisting that the court focus not on sexual orientation, but on family status. He suggests that Mossop's eventual loss is thus Mossop's own fault. According to Chief Justice Lamer, if the case must be examined using the lens of family rather than the lens of sexual orientation, the Court has no choice but to rule against Mossop.<sup>8</sup>

How does he come to this conclusion that the refusal of the bereavement leave benefit could not constitute discrimination on the basis of family status? First, Chief Justice Lamer finds that the meaning of the phrase "family status" cannot be discerned without considering the relevance of sexual orientation. In 1983, Parliament chose to prohibit discrimination on the basis of "family status." They did not, however, prohibit discrimination on the basis of "sexual orientation." This action, he concludes, shows that Parliament intended that family status protection be reserved exclusively for heterosexual families. An attempt to include same-sex couples within the term "family status" would be a way of indirectly introducing protection based on sexual orientation, and Parliament had specifically chosen not to extend such protection. Further, Chief Justice Lamer commented, such an interpretation would lead to anomalous results: "while homosexuals who are not couples would receive no protection under the Act, those who are would be protected" (Mossop, 673).<sup>9</sup> In short, if discrimination involves sexual orientation, it cannot also involve discrimination on the basis of family status. Family status must somehow be free from the taint of sexual orientation. Given the absence of sexual orientation protection, sexual orientation must be used to interpret the scope of family status. The two categories are, he concludes, mutually exclusive.

The second of the two majority judgments was written by Justice La Forest. He, like Chief Justice Lamer, focuses on the meaning of "family status." He relies on his observation that the dominant conception of the family is what he calls the "traditional family." While he does not provide a definition of the traditional family, it is clear that, as he uses the term, it does not include "relationships dependent on a same-sex living arrangement" (Mossop, 676). Like Chief Justice Lamer, Justice La Forest states that it may well be that Parliament should grant bereavement leave to homosexual couples as it does to heterosexual couples. However, he adds, that is an issue for Parliament to address, not an issue for the courts. On his interpretation of the language, Parliament did not intend that same-sex couples should receive this kind of benefit, and it is not for the courts to overturn this legislative intention. According to Justice La Forest, Parliament has clearly defined the meaning of "family status." The Court's job,

according to him, is not to substitute its own vision for that of Parliament, but is only to declare what Parliament's vision is. In short, it is the government, and not the courts, who have determined the meaning of the phrase "family status." The Court's job is not to determine the meaning, but only to enforce the meaning which was given to the term by Parliament.

It is interesting that both majority judgments use language which suggests that the Court is constrained: they don't necessarily think that the phrase "family status" should exclude same-sex couples, but they state that such an interpretation is the one adopted by the government. It is not the place of the courts, they argue, to overturn the clear intention of Parliament. This argument is compelling on one level. Certainly, there is value to a division of powers between the government and the judiciary. One would be concerned if an unelected judiciary were to regularly overrule the decisions of elected decision makers. However, the majority assertion that Parliament expressly chose to exclude same-sex couples begins to seem a bit suspicious when one looks more closely at comments made by various governmental officials. Indeed, the evidence seems to be that, in the face of debate on this very issue, Parliament chose *not* to provide a statutory definition of the phrase "family status." Rather, Parliament determined that the task of giving meaning to the phrase should be left to the human rights tribunals who would be administering the *Canadian Human Rights Act*. Indeed, the Minister of Justice said, "It will be up to the commission, the tribunals it appoints, and in the final cases, the courts, to ascertain in a given case the meaning to be given to these concepts"<sup>10</sup> He added, "These words are being interpreted by the Canadian Human Rights Commission. We trust them to interpret and issue regulations."<sup>11</sup> In light of such comments, it looks suspiciously as though the majority judges are inventing a Parliamentary intent that did not otherwise exist. Indeed, despite their protestations to the contrary, the majority do in fact put forward their own interpretation of the phrase "family status," but do so in a way that suggests that the decision is made by Parliament, and not by themselves. In the end, they tell us, they are bound by an objective reality. Family status cannot be used to extend protection designed for normal families to same-sex couples. Without telling the reader exactly what is included in the family, they tell the reader what is *not* included. In effect, this is negative interpretation. A quite different approach is taken by the judges in dissent.

### **The Dissent: (Madam Justice L'Heureux-Dubé, Justice Cory, Madam Justice McLachlin)**

Madam Justice L'Heureux-Dubé begins by stating that the meaning of highly controversial terms (such as "family") cannot be settled by linguistic fiat. Indeed, she argues, if one examines the purpose of the *Canadian Human Rights Act*, the text itself, and the intent of Parliament in extending protection, it is clear that "family status" must mean something more than simply the traditional family. She suggests that any sense of consensus as to the meaning of family may well be illusory. Indeed, the unexamined consensus begins to fall apart as soon as one examines it more closely. To persuade the reader of the ambiguity of the term "family status," she provides a number of differing definitions of the family. It is useful to review these definitions, as they do illustrate the difficulty of finding a working definition.<sup>12</sup>

Census Canada defines family as "a husband and wife (with or without children who have never been married, regardless of age) or a parent with one or more children never married, living in the same dwelling. A family may consist, also, of a man or woman living with a guardianship child or ward under 21 years of age for whom no pay was received."<sup>13</sup>

The American Home Economics Association (AHEA) defines a family as "two or more persons who share resources, share responsibility for decisions, share values and goals, and have commitments to one another over time."<sup>14</sup> Kenneth G. Terkelson defines a family as a "small social system made up of individuals related to each other by reason of strong reciprocal affections and loyalties, and comprising a permanent household (or cluster of households) that persists over years and decades."<sup>15</sup> M. Stuart says there are five critical attributes to the concept of family: 1. The family is a system or unit; 2. Its members may or may not be related and may or may not live together; 3. The unit may or may not contain children; 4. There is commitment and attachment among unit members that include future obligation; 5. The unit care-giving functions consist of protection, nourishment, and socialization of its members.<sup>16</sup> Dr. Margrit Eichler suggests that attempts to define the family invariably result in exclusion and that it is more appropriate to talk about families, or familial interaction. She states that this interaction occurs in several dimensions: the procreative dimension; the socialization dimension; the sexual dimension; the residential dimension; the economic dimension; and the emotional dimension.<sup>17</sup> Lorraine M. Wright and M. Leahey comment:

Designating a group of people with a term such as "couple," "nuclear family," "single parent family," specifies attributes of membership, but these distinctions of grouping are not more or less "families" by reason of labelling. It is the attributes of affection, strong emotional ties, a sense of belonging and durability of membership that determine family composition. We have found the following definition of family to be most useful in our clinical work: the family is who they say they are.<sup>18</sup>

The variety in the definitions gives one a clear sense of how contested the notion of family really is. By providing this host of definitions, Madam Justice L'Heureux-Dubé illustrates the weakness of the majority's interpretation of family status. It is interesting to recall that the majority judges argued that they were not defining the meaning of family, but were merely articulating the definition intended by Parliament: the court was not "creating" the family — the family was a creation of society (Parliament). Such a position evokes Bourdieu's comment about the relationship between law and society. In the dissent, Madam Justice L'Heureux-Dubé also invokes the relationship between law and society, but this invocation leads her to a different conclusion. She reminds the reader, "the family is not merely a creation of law ... the changing nature of family relationships also has an impact on the law." (Mossop, 706). Rather than asserting a definition allegedly constructed by society (Parliament), she looks at the changing nature of family relationships within society in order to arrive at the most apt legal definition of the family.

In examining the changing nature of family relationships, Madam Justice L'Heureux-Dubé alerts the reader to the distance that sometimes exists between ideological visions and reality. While the "traditional family," captured in reruns of "Ozzie and Harriet," may exert an ideological force on the public imagination, Madam Justice L'Heureux-Dubé relies on current statistics to reveal that a very large number of Canadians do not live within the boundaries of that ideologically rooted traditional family. Indeed, the evidence brought forward in the case established that the traditional family form co-exists with numerous other family forms. The form taken by the family, be it traditional or otherwise, may be a choice for some. But for others, she says, the structure of the family may be part of a natural response to changing social and political pressures. The definition of family, she concludes, must be capable of adapting to the changed family structures which are the result of these pressures.

In order to define the scope of protection for family status, Madam Justice L'Heureux-Dubé argues that it is essential not to look at specific family forms, but rather at the values

that lie at the base of societal support for the family. After reviewing a number of these values, she quotes Jane E. Larson, who said, "It is the social utility of families that we all recognize, not any one proper form that 'the family' must assume; it is the responsibility and community that the family creates that is its most important social function and its social value" (Larson, 1992: 1014). Madam Justice L'Heureux-Dubé concludes that, "if there is value in encouraging individuals to form stable and emotionally intimate relationships, such relationships can be forged and maintained in a wide variety of family forms." (Mossop, 710). In her judgment, she suggests that the definition should focus on the functions filled by the grouping, and draws the conclusion that Mossop and Popert were no less a family for being of the same sex than other couples would be for being of the opposite sex. That is, there was no reason to define the same-sex couple or family as anything other than normal.

In the majority and the dissenting judgments, we see quite different techniques of persuasion, techniques designed to garner support for quite different interpretations of the boundaries of the normal family. The majority engage in definition by negative implication: we don't learn what the family "is," but we are told what the family "is not." The majority obscures its own participation in the construction of this definition: making reference to undefined terms like "traditional family," and to the intention of elected representatives, the majority relies on a division between the legal and the political.

The dissenters, who are seeking to displace the above definition, attempt to persuade by emphasizing the relationship between law and society. Making significant reference to societal factors, they seek to establish that a narrow legal definition must give way in the face of a changed social reality. Rather than making reference to a narrow vision of Parliamentary intent, the dissenters rely on a broader vision of social values: values which suggest the necessity of a broader vision of family.

Of course, the dissenters remain just that: dissenters. The majority view prevailed, and the coercive power of law was used to deny benefits to Mossop and Popert. But what are the implications of the case for the question, "what is the normal family?" While Mossop did not win, it is not clear the case should be seen as a loss. First, compared with many other cases of this nature, there was relatively little at stake economically. Indeed, there was really no money at stake. Mossop had taken one day off work and, while his employer did not want to call it bereavement leave, they did offer him a day of "special leave." The issue was not a monetary one as much as a symbolic one: it was about the recognition and acknowledgment of Mossop and Popert's "family." It was an attempt to have the law see that they were there, and that they were "normal" rather than "deviant." The majority was not prepared to give them this symbolic win. However, on another front, there were some gains. Three of the judges used the language of normalcy rather than deviance. They looked at Mossop and Popert and saw a family, not just a collection of unconnected individuals. Further, the case served to raise questions in the larger community. Why *should* this relationship be treated differently than other common-law relationships? Was bereavement important only to heterosexuals? Should society assume that same-sex couples do not suffer when their loved ones die?

The close split on the court illustrates the increasing weakness of a representation of the family which portrays it as an exclusively two-parent heterosexual union with children. The persuasive power of this representation becomes even weaker as the courts address questions about "why"? Why is it important socially that the family assume a certain form? What functions do we expect the family to fill? Is form as important as substance? If a given form fills the functions of family, should we treat it as family? Even within a single legal judgment, the reader is exposed to both order-maintaining and order-transforming

representations of the family. At the end of the day, the question is: which representations are more persuasive to the reader?

## CONCLUSION

How should one describe the boundary of the normal family? Whatever way one chooses to describe the boundaries, it is clear that not all families will negotiate the boundaries in ways that are satisfactory either to their members, or to the larger society of which they are a part. Nonetheless, whether looking at popular culture or law, a close examination of the family requires us to ask why it is necessary to define the family in the first place. For what purposes do we define families as normal or deviant? The answer to this question depends in part on what we think families are, or what we think they should be. Is the normal family a matter of form or of function? That is, are we concerned with "who" makes up a family, or with "what" a family should do?

What then is the normal family? In both *Leaving Normal* and *Mossop v. Canada*, we see how a focus on deviance takes attention off the hard work of constructing and deconstructing that is continually going on. Indeed, both film and legal judgment suggest that we may participate in maintaining current visions of deviance and normalcy through the simple act of neglecting to critically examine our assumptions about the family. Film and law are two arenas of representation where one cannot only participate in stabilizing a status quo, but can also attempt to re-configure what is. Film does this by encouraging the watcher to create new subject positions, to imagine the subject differently. In *Leaving Normal*, we imagine a different kind of family. Legal discourse functions in a very similar fashion, and encourages the reader to believe that the family is a specific kind of objective reality. In *Mossop v. Canada*, the majority and dissent present us with different visions of the family, one excluding the other including same-sex couples.

Our notions of what is a normal or deviant family are part of a larger symbolic system. And, as Bourdieu reminds us, symbolic systems are not something that, like bacteria, simply exist. They are living and changing social constructions. This is important to acknowledge since, as Bourdieu puts it:

if we grant that symbolic systems are social products that contribute to making the world, that they do not simply mirror social relations but help constitute them, then one can, within limits, transform the world by transforming its representation (Bourdieu and Wacquant, 1992: 14).

## ENDNOTES

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1. *Mossop v. Canada* (1993), 100 D.L.R. (4th) 658. All quotations used in this article will refer to the D.L.R. version of the case, and will be cited simply as "Mossop" with the page number following.
2. For a classic example, consider the case of *Layland v. Ontario* (1993), 104 D.L.R. (4th) 214. In this Ontario case, two men wanted to get married, and attempted to get a marriage licence. The clerk refused the license. The court upheld a challenge to this refusal, saying that there was a common law prohibition against the marriage of same-sex couples. In this case, the judge said that this requirement did not discriminate on the basis of sexual orientation. The requirement did not prevent gays and lesbians from

marrying — it only prohibited them from marrying someone of the same sex. So, for example, a lesbian would be granted to marriage license as long as she intended to marry a man. One can't help but raise a quizzical eyebrow at the notion that this requirement does not discriminate. The judge seems to assume that sexual orientation (or rather, sexual orientation for gays and lesbians) is irrelevant to one's choice of life partner. Certainly, one doubts that the judge would have been so sanguine if the legislation had prohibited people of the opposite sex entering into marriage with each other.

3. In Canada, complaints about discrimination in the workforce are dealt with under provincial and federal human rights acts. These acts generally prohibit employers from discriminating against their employees on the basis of things such as race, religion, sex, disability, etc. Where an employee believes that his/her employer's behaviour has been discriminatory, the employee can make a complaint to the relevant human rights commission. Since Mossop was employed by the federal government, his complaint was made to the federal Canadian Human Rights Commission (which deals with the government as an employer). When a person complains to a human rights commission, the commission will first try to resolve the problem through discussion and mediation with the parties. If the matter cannot be resolved, the parties will appear before a human rights tribunal. These tribunals are somewhat like courts, but they deal only with complaints of discrimination under the human rights acts. Each party will present his/her argument to the tribunal, and the tribunal will then make a decision. If one of the parties feels that the tribunal made a mistake in applying the law, an appeal can be made to the Court of Appeal. Similarly, if the Court of Appeal makes an error in the law, then a party can seek leave to appeal to the Supreme Court. If the Supreme Court is of the opinion that the problem is a matter of national concern, they may grant an appeal, and hear the case. That is exactly what happened in Mossop.
4. A bit of history may be in order here. While the various provincial and federal human rights codes are similar in many respects, there are some differences. For example, while each of these pieces of legislation prohibit discrimination on the basis of race, only some of them prohibit discrimination on the basis of political opinion. At the time the Mossop case was brought, only Quebec prohibited discrimination on the basis of sexual orientation. Thus, if Mossop had complained that he was suffering discrimination on the basis of sexual orientation, there would have been no remedy: the *Canadian Human Rights Act* did not prevent employers from discriminating on that basis. Things did change significantly, however, during the 1980s and 1990s. Currently, each of the provincial and federal human rights codes in Canada has been amended (either by legislatures or by courts) to include a prohibition on sexual orientation discrimination. Further, many employers have, on their own initiative, modified their benefits packages to ensure that similar benefits are provided to their employees regardless of sexual orientation.
5. When the Supreme Court hears a case, they sit in a panel with an uneven number of judges (5, 7, or 9, depending on a number of factors including the seriousness of the case). Where the judges all agree about the resolution of the case, they write a single judgement (sometime referred to as a "unanimous judgement"). Of course, the judges do not always agree. In such cases, the side that "wins" is the one that gets the support of a majority of the judges. The winning side is called the majority, and the other side is called the dissent. Sometimes the judges disagree not about the outcome of the case,

but rather about the reasons for the outcome. They then write separate judgements explaining the reasons for their disagreement. These reasons are important, because they explain how the judge would resolve future similar problems where the facts were slightly different. So, in a single case, there may be more than one judgment on the majority side, or more than one dissenting judgement. Indeed, in rare cases, there are nearly as many sets of reasons as there are judges who listened to the case.

6. Section 15(1) of the *Charter* says: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The section does not contain any explicit reference to sexual orientation. However, in an earlier case called *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, the court concluded that the list of enumerated grounds in section 15 was not exhaustive. Because the language of the text says "and, in particular," the Court had concluded that the government would also be prohibited from discriminating against citizens on grounds that were analagous to those that were listed. In the *Andrews* case, the court had concluded that "citizenship" was analagous to the enumerated grounds. At the time the *Mossop* case was being argued, there were several cases where lower courts had concluded that "sexual orientation" was also an analagous ground of discrimination. However, none of those cases had yet come before the Supreme Court of Canada, so there had been no occasion for a definitive statement confirming or rejecting this conclusion.
7. To clarify the distinction between the case *Mossop* brought and the case Chief Justice Lamer *wanted* *Mossop* to bring, it is useful to keep in mind that s. 15(1) of the *Charter* does not apply directly to relationships between individual citizens. It only applies to the relationship between the citizen and the government. Section 15(1) of the *Charter* does not prohibit one citizen from discriminating against another citizen, or an employer from discriminating against an employee. The relationship of citizens to each other is regulated by provincial and federal human rights codes, such as the *Canadian Human Rights Act*. These codes (or acts) do prevent citizens from discriminating against other citizens, but they do so on more limited terms than those set out in the *Charter*. Thus, an employer may be allowed to continue with a discriminatory employment practice if there is a good reason for the practice. For example, consider an employer who requires all employees on a construction site to wear hard hats. People who do not wear these hard hats are fired. This requirement would have the effect of discriminating against Sikh employees, who would be unable to wear a hard hat because of their religious commitment to cover their hair in a turban. However, under a human rights act, the employer could nonetheless insist on the hard hats because of safety issues on construction sites. Even though the hard hat requirement does have an unintended discriminatory effect, it is also a bona fide occupational requirement. For more on this, see *Bhinder v. C.N.R.*, [1985] 2 S.C.R. 561. In this way, human rights codes mediate between various competing interests (ie. equality and safety) in relationships between individual citizens. The *Charter* guarantee of equality is a rather different beast, as it regulates the constitutional status of governmental action. Here, Chief Justice Lamer does not wish to examine the dispute between employer and employee over

the meaning of family. Rather, he is interested in a possible constitutional dispute between the government and the courts involving the scope of the analogous grounds in s. 15 of the *Charter*.

8. At the time the *Mossop* judgement was issued, many activists suggested that this was a positive note in the judgement. It suggested, they argued, that Chief Justice Lamer would have ruled in favour of Mossop had the case been brought as a s. 15 *Charter* challenge. Two years later, in the case, *Egan and Nesbit v. Canada*, [1995] 2 SCR 713, two men brought the very kind of challenge that Chief Justice Lamer had punished Mossop for not bringing. Egan and Nesbit argued that Parliament was discriminating against them on the basis of sexual orientation by restricting certain pension benefits to exclusively opposite-sex couples. On the basis of comments made in *Mossop*, one might have expected Chief Justice Lamer to be sympathetic to this claim. However, in an interesting about face, Chief Justice Lamer concluded that the pension benefit could legitimately be withheld from same-sex couples. With the benefit of hindsight, is it difficult not to see Chief Justice Lamer's comment in *Mossop* as rather disingenuous.
9. This is interesting logic. The implication is that, for example, lesbians or gays who are also black should not be able to argue that they have suffered discrimination based on race.
10. "Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs," Issue No. 114, December 20, 1982, at p. 17.
11. "Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs," Issue No. 115, December 21, 1982, at p. 73.
12. These definitions appear in the Mossop dissent, on pages 704–706.
13. Jean E. Veevers, *The Family in Canada*, 1971 Census of Canada, Vol. 5, Pt. 3, Catalogue 99–725, bulletin 5.3–3 (1977) at p. 3.
14. Irene Diamond, ed., *Families, Politics and Public Policy: A Feminist Dialogue on Women and the State* (New York: Longman, 1983), at p. 8.
15. Kenneth G. Terkelson, "Toward a Theory of the Family Life Cycle," in B. Carter and N. McGoldrick, eds., *The Family Life Cycle: A Framework for Family Therapy* (New York: Gardner Press, 1980), p. 23.
16. M. Stuart, "An Analysis of the Concept of Family" in Ann L. Whall and Jacqueline-Fawcett, eds., *Family Theory Development in Nursing: State of the Science and Art* (Philadelphia: F.A. Davis, 1991), p. 40.
17. Margrit Eichler, *Families in Canada Today: Recent Changes and Their Policy Consequences*, 2nd. 3d. (Toronto: Gage, 1988).
18. Lorraine M. Wright and M. Leahey, *Nurses and Families: A Guide to Family Assessment and Intervention*, 2nd ed. (Philadelphia: F.A. Davis, 1994) at 3–3, 3–4.

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