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Keywords

Same-sex marriage, Same-sex couples, Children of Same-sex couples, Child welfare, Marriage rights and benefits

THE IRRATIONALITY OF A RATIONAL BASIS: DENYING BENEFITS TO THE CHILDREN OF SAME-SEX COUPLES

By Sam Castic*

Three weeks after Quintin was born to Sherri Kokx and Johanna Bender, he had difficulty breathing. Alarmed, his parents took him to see his doctor, who, understanding the urgency of the situation, promptly called an ambulance. When the paramedics arrived at the doctor's office, critical time slipped away as the forms the paramedics had to fill out did not recognize that a child could have two parents of the same sex. Critical moments slipped by as the ambulance sat in the parking lot as the paramedics refused to accept that Johanna and Sherri were both Quintin's parents. The doctor's urgent declarations that both women were Quintin's parents did not hasten the paramedics' actions as the infant Quintin awaited essential medical attention. The paramedics could not understand that a child could have parents of the same sex. Quintin was eventually hospitalized for several days and fortunately survived, but the episode demonstrated to Sherri and Johanna the effect that the lack of legal protection can have on the families of same-sex couples and their children.¹

Recent high court decisions in New York and Washington have upheld the exclusion of same-sex couples from the rights and benefits of marriage. In their decisions, each court essentially found that marriage statutes were created for the benefit of children. The courts reasoned that the state interest in child welfare was furthered by restricting the benefits of marriage to opposite-sex couples, irrespective of whether the couples had children. Assuming that the benefits and protections provided in marriage statutes serve a legitimate state purpose, this article examines the effects that exclusionary provisions in those statutes visit directly upon the children of same-sex couples. That is, to the extent that marriage rights enable couples to better rear their children, the children of same-sex children are disadvantaged. Accordingly, I argue that it is wholly irrational to deny the children of same-sex couples the rights and privileges purportedly created to benefit all children.

In Section I of this article, I address the exclusive nature of the rights and benefits extended by marriage. The section examines how marriage statutes operate for the intended benefit of children, and demonstrates how public and private law offer no equivalent protection to families headed by same-sex couples. Finally, the section will show how the exclusive nature of marriage disadvantages children being reared by same-sex couples. In Section II, I argue that it is irrational to use the sex of a child's parents to determine the rights and privileges that will be extended to the child. The section will examine how the exclusion of same-sex couples from marriage primarily focuses on the cou-

ples, and how this focus is irrelevant to the actual fostering of child welfare. The section will examine the recent New York, Washington, and New Jersey marriage decisions, and will argue that decisions in the former states misapplied the relevant rational basis tests in reaching their decisions.

LEGAL RIGHTS AND PROTECTIONS ARE EXTENDED ONLY TO SOME COUPLES REARING CHILDREN

THE RATIONALE FOR MARRIAGE RIGHTS AND PROTECTIONS IS TO PROMOTE CHILD DEVELOPMENT

A key contemporary rationale for governmental extension of rights and benefits to couples that marry is that such protections promote child welfare. This is the view that best justifies the extension of rights and benefits by the state, as a solely religious institution would lack a legitimate state interest for promotion, and a purely romantic relationship would logically include same-sex couples. Importantly, proponents of state marriage laws embrace this perspective and reject describing marriage as the codification of a life-long romantic relationship.² This child development rationale is grounded in the belief that by adding to the stability of the family unit, the children of married couples are better provided for, and have increased chances of developmental success. Under the rationale, the government extends rights and benefits to married couples acting on the notion that couples are better able to rear children than single individuals. The belief is that the presence of two parents is most likely to result in a financially stable family unit equipped with the resources necessary to fulfill the obligations of child rearing. Rights and benefits provided with marriage are tailored to support the family unit, correspondingly maximizing child welfare by providing children with the best family and household in which to be reared. The rights and benefits created in marriage laws can thus be seen as a set of inducements for couples with children to marry and stay together, which arguably ensures the optimal circumstances for the child's development.³

In addition to benefiting from an intuitively logical appeal, the two-parent model finds support in social science. Social science data are uniformly in agreement that family structure affects child development and that the rights conditioned upon marital status help to benefit children.⁴ Both proponents and opponents of extending the rights of marriage recognize that the status of marriage benefits the children that the couple rears. However, there is no consensus on the degree to which it is the status of marriage as opposed to the presence of two parents that

The paramedics could not understand that a child could have parents of the same sex.

contributes to a child's development.⁵ Maggie Gallagher's survey of the social science data helpfully groups the benefits marital family structure offers to children into six categories: psychological adjustment, physical health and longevity, crime and delinquency, child abuse, education and socioeconomic attainment, and family formation.⁶ According to Gallagher, studies show that the psychological well-being of children reared by married parents is stronger, that divorce disrupts children's mental development, and that youth suicide is correlated to divorce and being reared by single parents.⁷ As to physical health and longevity, infant mortality rates are significantly higher when the mother is unmarried, health problems increase for children reared by single parents, and the child's life expectancy is reduced by divorce.⁸ With respect to crime and delinquency, boys reared by divorced or single parents are significantly more likely to become delinquent or engage in criminal behavior. Teens in single parent households are generally more attached to their peer groups and subsequently are more inclined to be delinquent.⁹ Child abuse is more prevalent in households with single mothers, and the presence of a mother's boyfriend or a stepfather increases the likelihood that a child will be abused.¹⁰ Children in divorced or unmarried households do not perform as well in school, are more likely to be held back, and are less likely to go to college.¹¹ Subsequent family formation by children reared by a divorced or unmarried parent are more likely to be characterized by divorce and unwanted pregnancy.¹²

Gallagher's survey of the data was employed to demonstrate that family structure is important to child development, and that extending the state rights and benefits of marriage to opposite-sex couples is the best way of promoting the formation and continuation of a family structure conducive to optimal child development.¹³ As Gallagher admits though, there is no social science consensus about the extent to which the data show that households with married parents are better settings for rearing children than are those with unmarried parents.¹⁴ While there is much consensus among social scientists that having two parents is generally better than having one, the consensus about the advantage that married parents offer seems to be limited to the benefits of the legal and social rights extended in marriage, and not the fact of having opposite-sex parents.¹⁵

**EXISTING LAW DOES NOT UNIFORMLY EXTEND
RIGHTS AND PROTECTIONS TO SAME-SEX
COUPLES REARING CHILDREN**

The government extends a wide array of legal rights and privileges to married couples rearing children. The rights and privileges given at the federal, state, and local levels benefit both the couple and the children they rear. These rights and privileges are extended regardless of whether the child is biologically related to either spouse. The same rights and privileges are extended whether the child was naturally conceived or whether

their life began with the assistance of artificial reproductive methods. Thus, the goal is the fostering of a family unit irrespective of biology.

Both federal and state governments guarantee rights that directly and indirectly benefit the children of opposite-sex married couples. At the federal level, over 1,000 benefits, rights, and privileges are available to married couples.¹⁶ At the state level, the rights can be categorized into those that protect the spousal relationship, enforce spouses' obligations to one another, treat spouses as a single financial unit, and extend protections to the children of married couples.¹⁷ These rights are meant both to bind the couple together and to benefit the children they rear, and as marital rights, they are unavailable to the children of unmarried couples. Lewis A. Silverman enumerates the benefits extended legally and socially to married couples and their children, organizing them into the following categories: government benefits, tax benefits, immigration privileges, employer benefits, and other benefits.¹⁸ While a complete examination of these benefits is beyond the scope of this article, a brief summary reveals the extent and importance of the rights of marriage to couples rearing children.

Tax benefits are extended to families at the federal and state levels. The right to file federal taxes jointly often results in lower marginal tax rates for a married couple in addition to lower overall tax liability.¹⁹ Married couples are not taxed on benefits, such as health care, that are extended by their spouse's employer, though any comparable benefits extended to employees in same-sex unions are.²⁰ With regard to tax on a decedent's estate, partners in a same-sex union do not qualify for the deduction extended to surviving spouses, which "in turn takes away financial resources the surviving parent would be

...the advantage that married parents offer seems to be limited to the benefits of the legal and social rights extended in marriage, and not the fact of having opposite-sex parents.

able to spend on their child."²¹

Immigration law also affords special status to married couples, permitting the couple to reside permanently in the country as long as spouse is a United States citizen. This privilege is not extended to parties to a same-sex union, which may result in the separation of a family unit when both parents are not United States citizens. Importantly, children have no independent status or means to preserve their family unit, which can lead to the child's being separated from one of the legal

parents who is not permitted to enter or remain in the country.²²

Employer benefits are another realm in which the lack of recognition of the same-sex union disadvantages the children of same-sex couples. Employer-provided surviving family benefits are not generally extended to a surviving party of a same-sex relationship or any non-biological child that the couple reared.²³ The practice of exclusion is found both in federal and state employment.²⁴ Employer-provided health care commonly extended to spouses and children of the employee is not re-

quired to be given to the non-biological child of, or partner to, a same-sex union. Employer grants of leave to care for one's family member do not have to cover time away from work to care for a non-biological child or a same-sex partner.²⁵ In addition, there are no national non-discrimination laws in employment, housing, or public accommodations that protect people in same-sex relationships from discrimination on the basis of the sexual orientation or gender identity which characterizes their family. Parties to such relationships who serve in the military cannot cover their partner or non-biological child with cost of living allowances or death benefits should they die.²⁶ The examples above show some of the ways in which employer benefits that are not extended on an equal basis to same and opposite-sex couples, thus resulting in less protection for children in families with same-sex unions. In the absence of state and federal law mandating the contrary, the list could be broadened to include any employee benefit that adds to the security of their family.

The final category of rights and benefits from which same-sex couples are excluded are tangible and intangible privileges. Not being recognized as a family under the law, a same-sex couple that decides to dissolve its relationship faces custody, visitation, and child support questions that are clearly answered for married couples. Custody and visitation are not guaranteed, even for a well-qualified parent, if she or he is not the biological parent. By not recognizing the relationship as a marriage, the law poses greater challenges for courts that seek to impose child support obligations on the parent who does not retain custody, especially if she or he is a non-biological parent. Non-recognition also poses problems for families if one of the parties to a same-sex union dies wrongfully, for the surviving adult, and child if not biological, will not have standing to bring a wrongful death action.²⁷ Intangible benefits include permitting the family to be recognized as a family unit within the cultural understanding of a family, which conceivably helps to reduce the stigma that has historically burdened the children of unmarried parents.²⁸

The rights and privileges that are extended in marriage are only extended to couples that are legally married, a status that is reserved for a socially-sanctioned sexual union.²⁹ Most of the rights emphasize the couple's mutual obligations to each other and operate to bring social and legal recognition to the couple

and children as a family unit. In delineating which family units are recognized under the law, married heterosexual unions are the model, and non-marital arrangements, including families headed by same-sex couples, are deliberately excluded from recognition. Opposite-sex couples are the only relationship uniformly entitled to the status of marriage under the law, and consequently, are the only relationship entitled to the rights and privileges extended in marriage.³⁰ Though marriage is generally understood to be a sexual union, the opposite-sex marital

relationship is entitled to privacy, and the sexual nature of the couple is free from inquiry from the government.³¹ Laws against consanguinity and polygamy implicitly recognize marriage as a sexual union, and restricting marriage to a sexual union model largely forecloses non-traditional or caretaking models of family from being legally recognized.³²

Supporters of the current delineation of legal recognition and exclusion among relationships claim that there are inherent differences in the nature of marital and non-marital relationships, and that the former is generally a stronger relationship than the latter.³³ Some claim that marriage may also be viewed as a social good in and of itself, a perspective used to justify opposition to extending quasi-legal statuses to cohabitating couples who do not marry.³⁴ Obviously, opposite-sex couples are free to partake in the legal benefits and obligations of marriage by choosing to get married, a choice that can be freely made irrespective of the circumstances of their relationship. In spite of

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Same-sex couples are prohibited from marrying in every state except for Massachusetts.

the availability of marriage for opposite-sex couples, some state courts have permitted equitable theories and private contracts to approximate some of the obligations between unmarried parties to a relationship, but the number of such states is small.³⁵ Recognition of equitable theories and private contracts generally involve only obligations between the parties and not specific rights from the state to benefit their children.³⁶ Within non-marital cohabitating relationships with children, biological parents may have rights under the law with respect to their biological child, but the law's recognition of such rights is by virtue of their biological tie to the child rather than the couple's continued relationship. For cohabitating people with non-biological children, most states permit second-parent adoptions, but fewer states permit same-sex couples to secure their family through the process.³⁷

Same-sex couples are prohibited from marrying in every state except for Massachusetts. Massachusetts only permits marriage where one of the parties is a resident of Massachusetts,

or where the couple resides in a state without a well-founded public policy opposed to same-sex marriage.³⁸ Accordingly, few of the nation's same-sex couples are able to marry in Massachusetts. If a couple does marry in Massachusetts, or any other jurisdiction where same-sex marriage becomes legal, the Defense of Marriage Act permits states and jurisdictions to refuse to recognize same-sex marriages or unions, and for federal purposes, same-sex unions are never legally recognized regardless of where they were preformed.³⁹ As a result of the Defense of Marriage Act and the lack of state laws sanctioning same-sex unions, the rights and privileges of marriage are effectively denied to same-sex couples and their children throughout most of the country.

Some states grant a range of the rights of marriage to same-sex couples who enter into domestic partnerships or civil unions. Vermont, Connecticut, New Jersey, and, beginning in 2008, New Hampshire, offer civil unions that extend nearly all of the state recognized rights and benefits of marriage to same-sex couples.⁴⁰ California, Hawaii, Maine, Washington, the District of Columbia, and, beginning in 2008, Oregon, permit domestic partnerships for same-sex couples, and extend differing numbers of the rights and benefits of marriage to same-sex couples.⁴¹ Ultimately, civil unions and domestic partnerships lack interstate recognition pursuant to the Defense of Marriage Act,⁴² and their effectiveness in offering the same degree of protection to family units headed by same-sex couples as state and federally recognized marriages are clearly inferior.⁴³

A child born to or adopted by a married couple is generally presumed to be the child of the couple, and both parties to the couple are legally presumed to be the parents of the child.⁴⁴ When both parties to a couple have parental rights with respect to their child, then they are considered to have a legal relationship with the child. As same-sex couples cannot marry, they have no legal presumption supporting their parental rights and can only obtain such status if they reside in a jurisdiction where joint or second-parent adoption proceedings are available to same-sex couples. Joint adoption by the couple, or second-parent adoption by the partner without parental rights are means of assuring that parties to a same-sex couple both have their parental rights preserved.⁴⁵ Joint or second-parent adoption by a same-sex couple has been judicially permitted in many jurisdictions when it comports with the best interests of the child; however, it is not uniformly available.⁴⁶ Parental status involves a number of legal rights and responsibilities, and benefits the child by bringing security to the parent-child relationship.⁴⁷ The security of the parent-child relationship often becomes critical if the same-sex partner separates; in the absence of parental status, a same-sex partner who has jointly reared a child can see their relationship with the child eliminated without any legal recourse.⁴⁸ Even where parental status is available to preserve

the parent-child relationship, it cannot confer the legal benefits of marriage that are designed to benefit the child of the couple.⁴⁹ Subsequently, the ability of a same-sex couple to obtain parental rights with respect to a child does not eliminate the disadvantage faced by the child.

PRIVATE LAW IS NOT AN EQUIVALENT MEANS FOR SAME-SEX COUPLES TO SECURE RIGHTS

Some of the legal rights and benefits that opposite-sex couples enjoy can be secured for same-sex couples through private contract. The private right to contract is, however, not an equivalent substitute for positive legal rights, such as marital and parental rights, which offer clear legal protection to families. Private contract can only address the obligations between the parties to the contract, and it has no authority to bind non-parties, such as the government. Accordingly, rights of inheritance, power of attorney, and medical decision-making authority, which pertain solely to the rights between the parties, can be granted through private contract. However, rights such as tax-filing status and liability, parental custody, health care coverage, or standing for wrongful death claims cannot be extended through private contract between the parties to a same-sex relationship. Without the benefit of

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Where a couple does seek to secure rights through contract, they will typically have no expertise in the legal requirements to do effectively and often need to hire an attorney. The time and expense of hiring an attorney is considerable for many couples,⁵⁰ and it almost certainly means that many same-sex couples do not avail themselves to the protections of private law. Even where couples believe that they have taken the precautions necessary to protect their family unit, their efforts can be challenged by disapproving relatives in ways that marriages cannot.⁵¹ Unfortunately, such challenges often come at times of family emergency or death, when the family is most likely to need the protections, and when the lack of legal recognition for the family is most devastating.⁵²

SAME-SEX COUPLES ARE REARING, AND WILL CONTINUE TO REAR, CHILDREN

Irrespective of the merits of same-sex couples rearing children, same-sex couples *are* rearing children, and have been for years. The 2000 Census reported that there were more than 160,000 families with children headed by same-sex couples in the United States.⁵³ This is a conservative figure, given the likely of underreporting of same-sex couples in the Census.⁵⁴ Underreporting aside, the figure is almost certainly higher today as the estimated number of same-sex headed households has increased, and a significant portion of gay and lesbian people already are biological or adoptive parents.⁵⁵ Moreover, nearly half of all gay or lesbian people desire to have children.⁵⁶ In

spite of the lack of legal recognition for their families, it is unlikely that there will be any decrease in the number of same-sex couples rearing children.

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While state law can, and often does, disadvantage same-sex couples that seek to become parents, once a child is a legal or biological child of one of the parents, the couple can generally rear the child as long as the legal parent is present.⁵⁷ A ban on a legal parent's cohabitating with someone of the same sex, and choosing to jointly assume parental roles, would likely violate the federal Constitution as parenting is likened to a fundamental right.⁵⁸ Though the Supreme Court's constitutional protection of the parent-child relationship deals largely with biological relationships, its rationale is applicable to all parent-child relationships once established, regardless of whether or not they are biological.⁵⁹ Accordingly, the state would need a compelling interest to disrupt the parent-child relationship, which they would not be likely to demonstrate. In spite of historical efforts preventing gay or lesbian parents from gaining or retaining custody of their child, courts are increasingly finding sexual orientation not to be determinative or even relevant to the determination of a child's best interests.⁶⁰ As same-sex couples continue to rear children, and as the parent-child relationship is constitutionally protected, the families they comprise exist without the rights and benefits of marriage.

IT IS IRRATIONAL TO USE PARENTAL STATUS TO DETERMINE THE LEGAL RIGHTS FROM WHICH CHILDREN BENEFIT

The preceding sections of this article have demonstrated the ways in which the law extends legal rights and benefits to families headed by opposite-sex couples that choose to get married. The sections have also explored the ways in which similarly situated families headed by same-sex couples are largely excluded from the statutory schemes, as well as why private law offers no equivalent substitute for the comprehensive statutory scheme. As the exclusion of same-sex couples from marriage directly impacts the children they rear, the rationality of the system merits a closer evaluation to determine whether the rights purportedly created for the benefit of children are so tailored.

THE JUSTIFICATION FOR EXCLUSION FOCUSES ON THE STATUS OF THE COUPLES REARING THE CHILDREN

The justification for denying the families headed by same-sex couples the protections offered to families headed by opposite-sex couples focuses on the nature of the relationship of the couple heading the family, overlooking the needs of the children they rear.⁶¹ Both proponents and opponents of extending rights to families headed by same-sex couples adhere to the focus on the couple, thus reinforcing the issue as being one of what is owed to the couple and not of what best serves the children reared by the couple.

The proponents of extending rights and protections to same-sex couples often frame the issue as one of discrimination, which ultimately focuses on the couple. Specifically, the denial of recognition is viewed in terms of discrimination against the same-sex couple, the parties to the same-sex couple, and homosexual people in general, as evidenced by recent court decisions and public argument offered by proponents.⁶² To the extent that the plight of the children of same-sex couples is addressed, it is done as a secondary matter. The framing of the issue as one of discrimination tends to overlook the effects on the children⁶³ and reinforces the tactics of the opponents of recognizing same-sex families.

Opponents of granting rights to families headed by same-sex couples can be motivated by a number of different reasons. Often rooted in the belief that sexual orientation is a choice, they may seek to deny legal incentives that promote people acting on homosexual desires, to codify homophobic sentiments into law, or to protect child development by preventing children from being reared by same-sex couples.⁶⁴ All of the aforementioned motivations directly reject the framing of the denial of rights to same-sex couples as discriminatory, but nevertheless focus on the nature of the relationship of the same-sex couple.⁶⁵

Most major psychological and medical organizations reject the notion that sexual orientation is mutable,⁶⁶ and advocates of equal rights for gay and lesbian people vigorously oppose the notion. Nonetheless, the lack of definitive scientific proof that sexual orientation is caused exclusively by biological or genetic factors keeps this debate alive.⁶⁷ The support for the mutability perspective still holds influence for more than those dedicated to the cause of opposing recognition of rights for same-sex couples. For example, in the recent marriage decision by the Washington State Supreme Court, the plurality noted that there was not a sufficient showing to conclude that homosexuality is immutable, and that the "question is being researched and debated across the country."⁶⁸ Those who believe that sexual orientation is a choice may not want to permit children to be reared in families headed by same-sex couples, primarily out of concern with the influence

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that the parents' homosexuality will have on the children.⁶⁹

Opposition to rights for gays and lesbians can also be grounded in a policy theory of non-promotion. Professor William Eskridge refers to such an approach as the "no promo homo" approach to legislating.⁷⁰ Related to the idea that homosexuality is a choice, opponents of granting rights to same-sex couples' families claim that their reasons are rooted in a desire not to promote behavior that they view as undesirable. If the rights granted to couples are meant as incentives for the couples to stay together and rear their children, proponents of the "no promo homo" theory would argue that the same incentives should not be used to promote homosexuality. Advocates of the "no promo homo" theory would not frame the matter as one of discrimination, but rather, would view it as a matter of not extending "special rights" or refusing to create incentives for behavior with which they disagree.

Some who oppose recognizing families headed by same-sex couples express concern with the best interest of the children that same-sex couples rear and claim that inherent differences between same and opposite-sex relationships lead to the latter being the ideal setting in which to rear children.⁷¹ George A. Rekers has argued that children fare less well when reared by same-sex couples because such relationships are less stable, social stigma of homosexuality negatively affects them, and they do not have proper male and female role models.⁷² Maggie Gallagher and Joshua K. Baker take a different approach, restating the social science consensus surrounding the benefit offered to children of married couples and claiming that most all of the social science conclusions supporting the fitness of same-sex parents are premised on studies which have methodological errors, or which do not provide direct evidence that married same-sex couples would be as competent as married opposite-sex couples at rearing children.⁷³ The reasoning continues that since there is not sufficient evidence that same-sex couples would perform as well in marriage, same-sex couples should continue to be denied marriage rights.⁷⁴

At first glance, these reasons for opposing rights for families headed by same-sex couples appear to legitimately consider the interests of the children without letting the status of the couple rearing the children unduly bias its judgment. Unfortunately, a deeper examination shows that the perspective is cut from the same cloth.⁷⁵ Such positions interpret social science data in a way contrary to the mainstream scientific and professional consensus in order to draw the conclusion that children will suffer if reared by a same-sex couple.⁷⁶ George Rekers' argument is typical of this perspective. Rekers' assertion that same-sex couples are less stable than opposite-sex couples is premised on comparing couples that don't have the right to marry with legally married opposite-sex couples, a setup which

predetermines the result.⁷⁷ While Rekers' second assertion that children of same-sex couples may be prone to teasing on account of their parents' relationship, social science data does not support finding any worse psychological consequences.⁷⁸ Rekers' third assertion is essentially what Maggie Gallagher's work is concerned with – the belief that children need mothers and fathers. This too is unsupported in the social science findings as it depends on a conflation of the well supported belief that two married parents matter, with the unfounded notion that were same-sex couples able to marry, they would be less competent than opposite-sex couples at rearing children.⁷⁹ In the end,

...so long as same-sex couples parent, the proper question should focus not on whether the couples are as competent as opposite-sex couples, but whether continued denial of legal recognition of the family serves the child's best interests.

social science offers strong support for the belief that having married parents benefits child development, and a notably uncontradicted, yet not long-studied degree of support for the belief that same-sex couples are as good as opposite-sex couples at rearing children. Nonetheless, so long as same-sex couples parent, the proper question

should focus not on whether the couples are as competent as opposite-sex couples, but whether continued denial of legal recognition of the family serves the child's best interests.

THE NATURE OF THE COUPLE REARING THE CHILDREN IS IRRELEVANT TO RATIONALITY

One of the key contemporary justifications for marital laws is that marriage directly and indirectly benefits the children reared by the couple. That the children of same-sex couples are excluded from these benefits makes it unquestionable that the marriage statutes are underinclusive, and that opposite-sex couples that are unable or unwilling to have children are able to marry makes the statutes overinclusive. This underinclusivity and overinclusivity casts serious doubt on whether child welfare is the real legislative purpose of marriage laws, or merely a contemporary justification for maintaining an exclusive set of statutory benefits for opposite-sex couples. If the goal were truly child welfare, the most direct way of accomplishing the goal would be permitting all couples that have children to marry. Such a policy would be easy to administer, and would acknowledge that all children are equally entitled to the rights and benefits purportedly created for child welfare. Unfortunately, such policy changes have not been forthcoming, and the reality is that there is a large class of children that are not able to have their development assisted by rights purportedly created for their benefit. More than the promotion of child welfare, which necessarily would involve promoting the welfare of the children of same-sex couples, an overriding interest in preserving the exclusively opposite-sex nature of marriage is embedded in our laws.

In failing to fully promote child welfare for all children, the law distinguishes between the children that will and will not

benefit from the rights and privileges it creates on the basis of the child's parents. In doing so, it visits a punishment on the children of same-sex couples by denying them the full scope of opportunity offered to the children of opposite-sex couples. Though irrelevant to the stated goal of child development, the classification rests on the sexual orientation of the child's parents, and discriminates against them for something that they have no control over.

The Supreme Court's treatment of illegitimacy offers an instructive parallel to the broader question of whether it is just to punish a child for the status or actions of their parents. The Court has recognized that the Constitution's Equal Protection and Due Process Clauses are a barrier to statutes created to deter actions or behavior among adults while placing a significant part of the burden on children who bear no responsibility for the adults' actions or behavior. In *Weber v. Aetna Casualty & Surety Co.*, the Court struck down a ban on compensation recovery rights for unacknowledged illegitimate children.⁸⁰ The majority reasoned that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."⁸¹ Noting that laws dissuading non-marital sex were common, the Court concluded that "penalizing the illegitimate child is an ineffectual – as well as an unjust – way of deterring the parent."⁸² The development of the jurisprudence following *Weber* has found that classifications based on legitimacy are to be subjected to heightened scrutiny, and the Court has maintained the view that it is unjust to penalize children in order to deter the behavior of their parents.⁸³

As with statutes that punished children for being born to and reared by families that did not benefit from socially constructed norms of legitimacy, statutes denying children of same-sex couples the benefits of legal rights created to promote child welfare similarly disadvantage children for the conduct of their parents. The disadvantages created through the denial are equally unjust because the children burdened possess no choice in the structure of the family that rears them. However, as long as the debate over extending rights to families headed by same-sex couples focuses on the couples, and not on the children they rear, this injustice will continue, and children will endure the consequences. Lewis A. Silverman argues that the focus on the adult relationship, and not on the independent claim that the children have to these rights, distorts the analysis that should be undertaken when considering whether families with children should be protected by the full scope of the law.⁸⁴ By positing children as people protected by the Constitution and viewing their right to benefits as deriving from their dependent status, Silverman reasons that many of the arguments against recognizing families with same-sex parents are eliminated.⁸⁵ The

fact that courts are finding marriage rights to have been created for the benefit of children provides even more powerful support for viewing the question of extending such rights from the perspective of the child. By not focusing on the needs of the children and the ways in which the lack of rights and protections for the family affects the children, children are being disadvantaged and will continue to be so long as they are denied the child welfare benefits for which marriage statutes were purportedly created.⁸⁶

EXISTING LAW IS THOUGHT TO BE RATIONAL THROUGH A MISAPPLICATION OF RATIONAL BASIS SCRUTINY

The denial of the rights and benefits of marriage to the children of same-sex couples has been upheld as rational in two recent decisions of state high courts, and it has been found to be irrational in one. Though the decisions suffer from a misguided framing by focusing less on the logic of denying rights and responsibilities to families rearing children, and more on the claim same-sex couples have to the rights and responsibilities of marriage, the courts upholding rationality consistently found the legitimate state interest in marriage to be about having and rearing children. With children as the legislative purpose of marriage law, courts find a classification based on the couple rearing the children to be rational only by ignoring the actual presence and needs of the children intentionally excluded by the classification drawn. Recent high court decisions in Washington and New York embody this emerging trend, as both courts, after employing variations of the traditional equal protection analysis, found that it is rational for states to extend benefits to families headed by opposite-sex couples while excluding families headed by same-sex couples. By contrast, the New Jersey Supreme Court found that it is irrational to exclude families headed by opposite-sex couples

Though irrelevant to the stated goal of child development, the classification rests on the sexual orientation of the child's parents, and discriminates against them for something that they have no control over.

from the rights and benefits of marriage. The New Jersey decision demonstrates the central flaw of the Washington and New York applications of rational basis scrutiny; by failing to examine the rationality of how the classification, which focuses on the parents, furthers the state's interest in children, the New York and Washington courts did not meaningfully apply rational basis analysis.

In *Hernandez v. Robles*, the New York Court of Appeals held that the exclusion of same-sex couples from the state marriage laws was constitutional under both the New York Constitution and the Constitution of the United States.⁸⁷ The court found that neither state nor federal Due Process or Equal Protection clauses were violated by the exclusion of same-sex couples, as there was a legitimate state interest in promoting child welfare,⁸⁸ and there were at least two rational bases upon which the legislature could limit marriage to opposite sex couples in order to protect child welfare: promoting familial

stability and ensuring children are reared by a mother and father.⁸⁹ The court noted that both bases were derived from the “undisputed assumption that marriage is important to the welfare of children.”⁹⁰

The court reasoned that extending marriage to opposite-sex couples could rationally promote familial stability if the legislature believed that heterosexual couples, whose sexual union may result in unexpected child birth, require more incentives than same-sex couples to stay together and rear the children they bring into the world.⁹¹ Though admitting that same-sex couples often have children, the court reasoned that the planned nature of having children in same-sex relationships could inform the legislature’s belief that opposite-sex couples need the inducements provided by marriage more than same-sex couples.⁹² This rational basis thus implicitly recognizes some objective societal benefit in having couples that reproduce enter into a marriage. If this basis is unique from the goal of having a mother and father rear a child, which is the second rational basis identified by the court, the societal good must be a recognition that two parents are better able to rear a child than one parent, and that the state is justified in creating incentives for parents to stay together.

Additionally, the court found that it would have been rational for the legislature to believe that it is optimal for children to be reared by a mother and father, a notion which if unsupported by social science, could still be supported by “the common-sense premise that children will do best with a mother and father in the home.”⁹³ The court essentially said that majoritarian societal preferences, as manifested in culture and tradition, are sufficient to merit the state effort at promoting child welfare by extending safeguards and legal protections to opposite-sex couples rearing children while denying the same protections to children reared by same-sex couples. Based on the assumption that opposite-sex couples provide a better upbringing to children, the court concluded that the legislature is rational “to offer a special inducement, the legal recognition of marriage, to encourage the formation of opposite-sex households.”⁹⁴

In *Hernandez*, Chief Judge Kaye challenged the majority’s application of rational basis review. Kaye noted that equal protection’s “rational-basis review requires *both* the existence of a legitimate interest *and* that the classification rationally advance that interest.”⁹⁵ To this end, the proper framing of the question was “whether there exists a rational basis for *excluding* same-sex couples from marriage, and, in fact, whether the State’s interests in recognizing or supporting opposite-sex marriages are rationally *furthered* by the exclusion.”⁹⁶ Kaye found that while child welfare was potentially promoted through the inducement of marriage for couples that have children, none of the state’s interests were furthered by excluding same-sex couples from marriage.⁹⁷

The first rational basis pertains to promoting familial stability for couples that procreate. As discussed previously, to the extent that child welfare is the goal, this amounts to little

more than a state interest in promoting marriage for couples that have children, which is rooted in the belief that two parents are better equipped to rear a child than one parent. What the majority opinion overlooks is that the children of same-sex couples also benefit from having two parents,⁹⁸ and thus are equally included in any state interest that aims to promote children having two legal parents. Having two parents rearing a child, in general, increases the ability to provide for the child’s financial, emotional, and developmental needs. This common sense belief is supported by the social science data on the issue, and is a key justification for why most all of the major professional organizations concerned with child development and welfare support extending comparable rights and benefits to families headed by same-sex couple that rear children.⁹⁹

The second rational basis found in *Hernandez* for advancing the state interest in child welfare was the interest in having a mother and father to rear the child. The court found this rational basis to be rooted in intuition and common sense. Like the first rational basis, the second justification is irrational to the extent that child welfare is the ultimate goal. Indeed in contradiction to the data accumulated thus far which find no adverse consequences for children reared in families headed by same-sex couples,¹⁰⁰ the courts find it rational to allow tradition and societal preference to trump the needs of the children being reared by same-sex couples. As same-sex couples already are rearing children, and will continue to do so, all the while being denied rights and protections for their families, the question is no longer one of whether such children ought to have an upbringing in accord with majoritarian notions of the ideal; rather, the question is whether such majoritarian ideals are a rational justification for punishing the children of same-sex couples by denying them rights and benefits aimed at ensuring child welfare. The answer with respect to the same-sex headed families that have formed is clearly no, unless we are to believe that the inducement lures homosexual people into opposite-sex marriages for the purposes of reproducing — hardly a healthy or stable relationship to rear children in. Since the inducement does not operate with respect to homosexual people, and since children are being reared in homes headed by same-sex couples, the classification cannot be seen to further the state’s interest, but rather, can only be seen as a classification drawn to disadvantage homosexuals and families headed by same-sex couples.¹⁰¹

In *Andersen v. King County*, the Washington State Supreme Court held that the state’s Defense of Marriage Act (“DOMA”), which was passed to deny the ability of same-sex couples to marry, was constitutional under the Washington State Constitution.¹⁰² Applying a form of equal protection analysis,¹⁰³ the court essentially found procreation, familial stability, and traditional nuclear families to be the three legitimate state interests promoted by the DOMA.¹⁰⁴ The court reasoned that encouraging procreation was a legitimate governmental interest, and that couples that marry may be more likely to procreate.¹⁰⁵ The limitation of marriage to opposite-sex couples is related to that interest because “no other relationship has the potential to

create, without third party involvement, a child biologically related to both parents.”¹⁰⁶ Relatedly, the court found that it was rational to believe that encouraging marriage for couples that can naturally procreate would be preferable to having children reared by unmarried parents, an interest which conceivably seeks to protect the best interests of children.¹⁰⁷ The court also found that it was a legitimate state interest to promote having children reared in a home headed by their opposite-sex parents,¹⁰⁸ to the extent that the legislature believed that children thrive in households composed of a father, mother, and their biological children.¹⁰⁹ Thus, the court believed that the legislature was rational to conclude that child welfare was fostered by the encouragement of rearing children in traditional nuclear families, and that the exclusion of same-sex couples from marriage furthered that interest.

In *Andersen*, Justice Fairhurst’s dissent challenged the plurality’s application of the rational basis inquiry, noting that under Washington law, the “requirement that a classification have a rational basis dictates that the issue in [the] case be framed as whether the *exclusion* of same-sex couples from civil marriage is rationally related to a legitimate [state] interest.”¹¹⁰ As the state’s DOMA was the only statute being challenged, the dissent argued that the focus on the rationality of extending rights and benefits to opposite-sex couples was immaterial to the inquiry, for “DOMA in *no way* affects the right of opposite-sex couples to marry – the *only* intent and effect of DOMA was to explicitly deny same-sex couples the right to marry.”¹¹¹

Applying the dissent’s equal protection standard to the first state interest, that of promoting procreation, the exclusion of same-sex couples from marriage would have to be deemed to be rationally related to the interest. On this relationship the dissent noted that “there is no logical way that *denying* the right to marry to same-sex couples will *encourage* heterosexual couples to procreate with greater frequency.”¹¹² Similarly, there seems to be no logical way of concluding that denying the right to marry to same-sex couples would discourage heterosexual couples from procreating. Indeed, it is difficult to see how the ability of same-sex couple headed families accessing the institution of marriage at all relates to the willingness or ability of opposite-sex couples to procreate.

On the second state interest, that of ensuring that children born to opposite-sex couples are reared in the marital context, it is clear that the exclusion of same-sex couples in no way is related to this goal, and in fact, operates in direct contradiction to the goal. The dissent noted that “denying same-sex couples the right to marry also will not encourage couples who have children to marry or to stay married for the benefit of their children.”¹¹³ More importantly, it defies logic to conclude that only the children of opposite-sex couples are the ones that deserve the benefits that marriage provides. Children are being reared in families headed by same-sex couples, and there is no just basis upon which to conclude that the nature of their parents’ relationship, or the circumstances of their birth should rule them ineligible for these state benefits.

The exclusion of same-sex couples from marriage also fails to bear a rational relationship to the third purported state interest in promoting traditional nuclear families. The dissent concludes that “even if such a goal is valid, which seems unlikely, denying same-sex couples the right to marry has no hope of increasing such child rearing.”¹¹⁴ Again, excluding families headed by same-sex couples from marriage does not seem to provide any meaningful incentives for a homosexual person to choose to bring a child into an opposite-sex relationship - the incentive operates only with respect to heterosexuals who seek to reproduce, offering more benefits to them if they choose to marry and fewer if they do not.

In *Lewis v. Harris*, the New Jersey Supreme Court unanimously found the state’s exclusion of same-sex couples from the rights and benefits of marriage to violate the New Jersey state constitution’s equal protection clause although the majority rejected the plaintiffs’ claim that there was a fundamental right for same-sex couples to marry under the New Jersey constitution’s liberty clause.¹¹⁵ The court’s equal protection standard differs in one important respect from New York and Washington’s standard — the New Jersey standard requires a heightened finding of a “substantial relationship to a legitimate governmental purpose.”¹¹⁶ Additionally, the majority did not engage with the possibility that procreation and child rearing were justifications for the disparate treatment of same and opposite-sex couples. The Attorney General intentionally disavowed reliance on those arguments, and the State refused to advance it.¹¹⁷ The minority opinion addressed the procreation and child-rearing argument and noted that its credibility was undermined both by the increasing prevalence of same-sex couples rearing children and the fact that social science data did not support the notion that opposite-sex couples are better at rearing children.¹¹⁸ Seemingly, the only argument advanced by the State was uniformity with the laws of other states. But the court found this to be wholly inadequate in light of the severity of the deprivation of the rights involved and in light of the fact that same-sex couples were rearing children.¹¹⁹

In spite of the different standard of constitutional analysis, the *Lewis* court’s approach appropriately recognizes that any classification drawn must bear a rational relation to the purported state interest. In both *Hernandez* and *Andersen* the courts misapplied the rational basis standards by focusing on the rationality of extending rights to opposite-sex couples rearing children and conflating the appropriateness of providing rights and benefits to such families with the question of whether a classification drawn to deny those rights and benefits to same-sex couples was related to the interest in child welfare. As the court noted in *Lewis*, “children have the same universal needs and wants, whether they are raised in a same-sex or opposite-sex family, yet under the current system they are treated differently.”¹²⁰ Unfortunately, this is precisely what the courts in *Hernandez* and *Andersen* found to be rational.

Even if it were rational to believe that same-sex couples are less capable than opposite-sex couples at rearing children, there

would still be no rational furtherance of the goal of promoting child welfare by excluding families headed by same-sex couples from the rights and benefits of marriage, because there always will be families headed by same-sex couples. The exclusion would have to find its rationality in the belief that children see their welfare enhanced when their same-sex parents do not have the rights and benefits of marriage to secure their relationship and benefit their family. Of course, this does nothing to enhance the child's welfare, and accordingly, defies rationality.

It is not mere under-inclusiveness which makes the justifications made by *Hernandez* and *Andersen* wrong, it is the belief that the denial of rights and benefits to families headed by same-sex couples is related, at all, to the goal of promoting child welfare. Same-sex couples have children, rear children, and will continue to rear children irrespective of the additional rights and benefits the state creates for the couple and the children they rear. With this being the reality of the society we live in, and

with children bearing no responsibility for the actions or sexual orientation of their parents, "there is no rational basis for visiting on those children a flawed and unfair scheme directed at their parents."¹²¹

CONCLUSION

With courts declaring that marriage statutes were enacted to benefit children, any meaningful evaluation of the exclusive nature of marriage statutes must account for the exclusion of the children of same-sex couples from the benefits of marriage. Such exclusion directly disadvantages children who are and who will continue to be reared by same-sex couples, and it does so solely on account of the status of the couples rearing the children. Drawing a classification based on the status of the couple parenting the child in no way furthers the state interest in child welfare, and accordingly, such exclusions cannot withstand an intellectually honest rational basis review.

ENDNOTES

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¹ The story of Johanna, Sherri, and Quintin is told in the declarations filed in marriage suit that Kokx and Bender were parties to in Washington State. Kokx Decl., *Andersen v. Sims*, No. 04-2-04964 (Super. Ct. King County Aug. 4, 2004), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/336.pdf; Bender Decl., *Andersen v. Sims*, No. 04-2-04964 (Super. Ct. King County Aug. 4, 2004), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/332.pdf. Kokx and Bender ultimately lost their suit before the Washington State Supreme Court. *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

² See Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 783-88 (2002) (comparing the conflicting models of marriage, and arguing that it should be viewed as a social institution for rearing children, not as a romantic commitment a couple shares); *Andersen*, 138 P.3d at 979 n.12 (noting that Washington's marriage statute was not written to advance a state interest in loving and committed relationships).

³ See John F. Coverdale, *Missing Persons: Children in the Tax Treatment of Marriage*, 48 CASE W. RES. L. REV. 475, 504-06 (1998) (illustrating how the tax code can promote stable marriage, thus benefiting children reared in the marriage).

⁴ See *id.*; *Missing Persons: Children in the Tax Treatment of Marriage*, 48 CASE W. RES. L. REV. 475, 480-98 (1998) (summarizing the social science consensus on how marriage benefits the children of married couples).

⁵ Compare Judith Stacey, *Legal Recognition of Same-Sex Couples: The Impact on Children and Families*, 23 QUINNIPIAC L. REV. 529, 534-38 (2004) (noting that while there is consensus that two parents are generally better than one, there is less consensus about the extent to which marital status affects child development, though it does extend numerous benefits to children) with Maggie Gallagher & Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 MARGINS 161, 171-73 (2004) (concluding that marriage alone is the optimal setting in which to rear children).

⁶ Gallagher, *supra* note 2, at 783-88.

⁷ Gallagher, *supra* note 2, at 783-84 (Data indicate that children of married couples have better emotional health than those of cohabiting couples, and that serious social, emotional, and psychological problems occur in one out of four children whose parents divorce, as opposed to one out of ten children whose parents stay married. Regarding suicide, data indicate that two thirds of the increase in youth suicide over time are largely attributable to children living with divorced parents).

⁸ Gallagher, *supra* note 2, at 785-86 (Data indicate that unmarried women have an average of a 50% higher infant mortality rate, that children with divorced

parents are up to 50% more likely to have health problems, and that a child's life expectancy, on average, is reduced by four years when their parents divorce).

⁹ Gallagher, *supra* note 2, at 786 (Data indicate that boys reared in single parent families are twice as likely to commit a crime by their early thirties).

¹⁰ Gallagher, *supra* note 2, at 786-87 (Data indicate that preschoolers living with stepfathers are 40 times more likely to be sexually abused, and that mothers' boyfriends commit half of all non-parent child abuse).

¹¹ See Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 783-88 (2002).

¹² Gallagher, *supra* note 2, at 788 (Data indicate that daughters reared in unmarried households are about three times more likely than the daughters of married couples to become young unwed mothers, and that parental divorce doubles the chances that a child's marriage will end in divorce.).

¹³ Gallagher, *supra* note 2, 782 (2002).

¹⁴ See Gallagher & Baker, *supra* note 5, at 174 (noting that there is disagreement about the extent to which married parents benefit children, though there is consensus that family structure is important).

¹⁵ Stacey, *supra* note 5, at 534-36.

¹⁶ Stacey, *supra* note 5, at 442 (citing a General Accounting Office report, reprinted in 1997 WL 67783). But see Joshua K. Baker, *1,000 Federal Benefits of Marriage? An Analysis of the 1997 GAO Report*, Institute for Marriage and Public Policy (2004), available at <http://www.marriedebate.com/pdf/iMAPP.GAO.pdf> (last visited Oct. 7, 2007) (arguing that many of the rights are duplicative).

¹⁷ Liz Seaton, *The Debate over the Denial of Marriage Rights and Benefits to Same-Sex Couples and Their Children*, 4 MARGINS 127, 138-40 (2004).

¹⁸ Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411, 446-50 (1999).

¹⁹ Silverman, *supra* note 18, at 436-38 (Silverman notes that by requiring same-sex couples to file separately, they are denied lower marginal tax rates that joint filers enjoy. He provides an example of a married couple with a combined taxable income of \$60,000, who would have had \$11,204 tax due in the 1999 tax year, in contrast to a same-sex couple with one working adult and one who stayed at home to care for their child who, by being denied the ability to jointly file, would have had \$13,453 in taxes for the year).

²⁰ Silverman, *supra* note 18, at 437.

²¹ Silverman, *supra* note 18, at 439.

²² Silverman, *supra* note 18, at 441 (citing 8 U.S.C. § 1153(a)(2) (2007)).

²³ Silverman, *supra* note 18, at 443.

²⁴ Silverman, *supra* note 18, at 443.

²⁵ Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411, 444-45 (1999).

²⁶ *Id.* at 445-46.

²⁷ *Id.* at 442.

ENDNOTES CONTINUED

- ²⁸ See Vincent C. Green, Note, *Same-Sex Adoption: An Alternative Approach to Gay Marriage in New York*, 62 BROOK. L. REV. 399, 426-27 (1996) (outlining the societal benefit that marriage would offer to the children of same-sex couples). Cf. Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. Fam. Issues 53 (1995) (examining, in part, the different social and familial treatment of family units headed by unmarried couples).
- ²⁹ See Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*, 145-76 (1995) (providing an overview of how society has defined family as dependent on a heterosexual sexual union, and has privileged such unions with the ability to obtain the legal benefits of marriage).
- ³⁰ *Id.*
- ³¹ See *id.* at 145 (noting that the social and cultural understanding of a marriage is of a sexual union); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (marriage is constitutionally protected by the right of privacy, and married couples have the right to use contraceptives). See also Michael H. v. Gerald D., 491 U.S. 110 (1989) (likely biological father has no constitutional right to assert parental rights when doing so would challenge the presumption that a child reared in a marriage is the child of both parties to the marriage).
- ³² Fineman, *supra* note 29, at 145-47 (mentioning historical punishment of extramarital sexual relationships, and addressing lack of comprehensive extension of legal status to non-marital caregiving relationships).
- ³³ See generally William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001 (2003) (arguing that non-marital cohabitating couples are less stable, and demonstrate less commitment to their relationship than marital couples).
- ³⁴ *Id.* at 1026-30 (rejecting the arguments for granting legal status to cohabitating couples, and arguing that marriage itself is an objective social good worth protecting).
- ³⁵ *Id.* at 1019 (noting that seventeen states recognize private contract or equitable theories to enforce obligations between unmarried parties to an opposite-sex relationship); see, e.g., Watts v. Watts, 405 N.W.2d 303 (Wis. 1987) (equity requires recognition of obligations between unmarried parties to an opposite-sex relationship); Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (finding that contract obligations between parties of an unmarried opposite-sex relationship could be enforceable).
- ³⁶ Duncan, *supra* note 33, at 1019-20.
- ³⁷ Duncan, *supra* note 33, at 1021-22 (noting that courts in nine states have permitted joint adoption for same-sex couples).
- ³⁸ See Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623 (2006) (upholding constitutionality of state law preventing marriages for residents of states where the marriage would otherwise be prohibited); Katie Zezima, *Rhode Island Couple Win Same-Sex Marriage Case*, N.Y. Times, Sept. 30, 2006, at A9 (indicating that Rhode Island same-sex couples are the first non-Massachusetts residents permitted to marry in Massachusetts).
- ³⁹ 28 U.S.C. § 1738C (2007).
- ⁴⁰ VT. STAT. ANN. tit. 15, § 1204 (2006); CONN. GEN. STAT. § 46b-38nn (2007); N.J. ANN. STAT. § 37:1-31 (2007); H.R. 437, 2007 Sess. (N.H. 2007) (to take effect on Jan. 1, 2008).
- ⁴¹ See CAL. FAM. CODE § 297.5 (2006); HAW. REV. STAT. § 572C-6 (2006) (referred to as reciprocal beneficiaries); ME. REV. STAT. ANN. Tit. 22, § 2710 (2005); S. 5336, 60th Leg., Reg. Sess. (Va. 2007); Gay and Lesbian Activists Alliance, *Rights and Responsibilities of Domestic Partners in the District of Columbia*, (April 3, 2006), available at <http://www.glaa.org/resources/dprightsandresponsibilitiesindc.shtml> (last visited Oct. 7, 2007); H.R. 2007, 74th Leg. Assem., Reg. Sess. (Or. 2007).
- ⁴² 28 U.S.C. § 1738C.
- ⁴³ See *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (Rejecting civil unions as equivalent to marriage); Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1 (2004) (analyzing the difficulty faced by same-sex parents without uniform recognition of their family rights).
- ⁴⁴ See, e.g., Michael H. v. Gerald D., 491 U.S. 110 (1989).
- ⁴⁵ See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 344-45 (2002).
- ⁴⁶ See Human Rights Campaign Foundation, *Second Parent/Stepparent Adoption Laws in the U.S.*, available at http://www.hrc.org/Template.cfm?Section=Your_Community (follow "Parenting Laws in the U.S." link) (April 2006) (noting that nine states and the District of Columbia permit second parent adoption, jurisdictions in fifteen other states have permitted second parent adoption for same-sex couples, and four states ban second parent adoption for same-sex couples); Eleanor Michael, Note: *Approaching Same-Sex Marriage: How Second Parent Adoption Cases can Help Courts Achieve the "Best Interests of the Same-Sex Family"*, 36 CONN. L. REV. 1439, 1445-46 (2004).
- ⁴⁷ Jacobs, *supra* note 45, at 346-47; Silverman, *supra* note 18, at 427-28 (enumerating the ways in which having two legally recognized parents benefits the child).
- ⁴⁸ Jacobs, *supra* note 45, at 348-50.
- ⁴⁹ Michael, *supra* note 46, at 1459-60.
- ⁵⁰ Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 Am. Psychol. 607, 615 (Sept. 2006).
- ⁵¹ *Id.*; Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 335-37 (2001) (noting that private contracts to secure same-sex relationships often result in case by case judicial determinations, and that some states are unwilling to recognize rights for cohabitating couples).
- ⁵² See Herek, *supra* note 50, at 615-16; Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31, 39-53 (2002) (providing an overview of the challenges that face surviving same-sex partners following the death of the other partner).
- ⁵³ Jim Finkle, *U.S. Gay Couples Struggle To Adopt*, Reuters, Sept. 12, 2006 <http://www.alertnet.org/thenews/newsdesk/N10331415.htm>.
- ⁵⁴ See Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1570 n.72 (2004) (examining the likely underreporting of same-sex couples in the 2000 census).
- ⁵⁵ Gary J. Gates, *Same-Sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey*, (Williams Inst., UCLA School of Law), Oct. 2006, at 1-2, available at <http://www.law.ucla.edu/williamsinstitute/publications/SameSexCouplesandGLBpopACS.pdf> (last visited Oct. 7, 2007) (noting that the number of same-sex headed households has increased more than 30% since the 2000 census); Gary J. Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, (Williams Inst., UCLA School of Law & Urban Inst., Wash. D.C.), Mar. 2007, at 5-6, available at http://urbaninstitute.org/UploadedPDF/411437_Adoption_Foster_Care.pdf (last visited Oct. 7, 2007) (indicating that 16% of gay men and 35% of lesbian women currently have a biological or adoptive child).
- ⁵⁶ Gates et al., *supra* note 55, at 5 (indicating that over 41% of lesbian women and 51% of gay men desire to have children).
- ⁵⁷ See John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 333-35 (2004) (discussing right of gay and lesbian parents to rear their biological children).
- ⁵⁸ See Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (noting that the Fourteenth Amendment protects parental right to rear children); Stanley v. Illinois, 405 U.S. 645 (1972) (recognizing substantial interest of biological father in custody determination of child and finding that unmarried status could not bar father's claims); Santosky v. Kramer, 455 U.S. 745, 747 (1982) (holding that due process requires the state to establish with clear an convincing evidence its legitimate reasons prior to severing parental status) see also Strasser, *supra* note 53 at 842-47 (providing an overview of the development of the Supreme Court's recognition of the fundamental right to parent).
- ⁵⁹ See Finstuen v. Edmondson, 497 F. Supp. 2d 1295 (Okla. 2006) (finding that state ban on recognizing adoptions by same-sex couples, as distinguished from ban on same-sex couples adopting, violated the Full Faith and Credit Clause, equal protection, and due process).
- ⁶⁰ See, e.g., In re Marriage of Wicklund, 932 P.2d 652 (Wash. Ct. App. 1996) (overturning court order in custody determination that barred homosexual father from displaying affection with his same-sex partner while in presence of his child); Pryor v. Pryor, 709 N.E.2d 374 (Ind. Ct. App. 1999) (homosexuality not determinative in child custody determination); A.C. v. C.B., 829 P.2d 660, (N.M. Ct. App. 1992) (same-sex partner has standing to bring claim for custody and visitation, sexual orientation not determinative); Packard v. Packard, 697 So. 2d 1292 (Fla. Dist. Ct. App. 1997) (reversing and remanding custody order premised on non-traditional nature of mother's same-sex relationship, and requiring an actual harm to the child's best interests for sexual orientation to be a valid consideration); see also Mark Strasser, *Fit To Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 863-90 (1997) (discussing various justifications used to terminate parental rights of lesbian and gay parents).
- ⁶¹ Fineman, *supra* note 29, at 148.
- ⁶² See, e.g., Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (concluding that the denial of marriage licenses to same-sex couples discriminates on the basis of sex); Hernandez v. Robles, 855 N.E.2d. 1, 10 (N.Y. 2006) (noting that plaintiffs claimed that the exclusion of same-sex couples from marriage discriminated on

ENDNOTES CONTINUED

- the basis of sex, and sexual orientation); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 958, 967 (2003); *Baker v. State*, 744 A.2d 864, 890 (1999) (J. Dooley concurring) (stating that the exclusion of same-sex couples from marriage has a discriminatory effect); *Andersen*, 138 P.3d at 973, 980-81 (noting that exclusion of same-sex couples from the marriage statute is an issue of discrimination, and that the plaintiffs so pleaded the case); Sarah Wildman, *Facing Up: Wedding-Bell Blues; It's Possible that Democrats Could Have Fought This One to a Draw if They Had Emphasized Discrimination*, AM. PROSPECT, Dec. 2004 at 39 (arguing that framing the issue as one of discrimination increases support for same-sex relationship rights); Vincent Price, Lilach Nir & Joseph N. Cappella, *Framing Public Discussion of Gay Civil Unions*, 69 PUB. OP. Q. 179 (2005) (studying the effect that the framing of marriage or civil unions for same sex couples has on their debate and support).
- ⁶³ Silverman, *supra* note 18, at 411-13.
- ⁶⁴ See, e.g., Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 LAW & SEX. 1, 46-50 (2003) (describing how opposition to gay rights is rooted in a belief that homosexuality is a choice, and can be changed); Timothy J. Dailey, Family Research Council, *The Slippery Slope of Same-Sex Marriage*, at 13-15 (2004), available at <http://www.frc.org/get.cfm?i=BC04C02> (last visited Oct. 8, 2007) (arguing that upholding traditional marriage is not about discrimination) (arguing that homosexuality is unnatural, and opposition to equal rights for same-sex couples is rooted in "the subconscious realization of what is normal and what is not").
- ⁶⁵ See, e.g., Timothy J. Dailey, Family Research Council, *The Slippery Slope of Same-Sex Marriage*, at 9-10 (2004), available at <http://www.frc.org/get.cfm?i=BC04C02> (last visited Oct. 7, 2007) (arguing that upholding traditional marriage is not about discrimination).
- ⁶⁶ See, e.g., Policy Statement, Am. Psychological Ass'n, *Appropriate Therapeutic Responses to Sexual Orientation*, (Aug. 14, 1997), available at <http://www.apa.org/pi/lgbcc/policy/appropriate.html> (last visited Oct. 8, 2007); Policy Statement, Am. Medical Ass'n, *AMA Policy Regarding Sexual Orientation*, available at <http://www.ama-assn.org/ama/pub/category/14754.html> (last visited Oct. 8, 2007).
- ⁶⁷ Knauer, *supra* note 64, at 10-12.
- ⁶⁸ *Andersen*, 138 P.3d at 974 & n.6.
- ⁶⁹ See, e.g., Dailey, *supra* note 65, at 7 (indicating that same-sex couples are inappropriate role models for children, and that the homes they provide are "dangerous and unstable environment[s] for children").
- ⁷⁰ See William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1328-30 (2000).
- ⁷¹ See George A. Rekers, *An Empirically-Supported Rational Basis For Prohibiting Adoption, Foster Parenting, and Contested Child Custody by Any Person Residing in a Household that Includes a Homosexually-Behaving Member*, 18 ST. THOMAS L. REV. 325 (2005); Gallagher and Baker, *supra* note 5.
- ⁷² Rekers, *supra* note 71, at 326-29.
- ⁷³ Gallagher and Baker, *supra* note 5, at 176-90.
- ⁷⁴ See, e.g., Brief of Amicus Curiae Families Northwest, at *4, *Andersen v. King County*, No. 75934-1, 2005 WL 901983 (Wash. Feb. 14, 2005) (arguing that the relative recentness of same-sex marriage means that there has not been enough study of the children of same-sex couples to justify a change in marriage law).
- ⁷⁵ See Stacey, *supra* note 5 (reviewing the social science literature, and pointing out the methodological flaws of commentators such as Gallagher who conclude that same-sex couple headed households are less ideal settings to rear children).
- ⁷⁶ *Id.*; see also Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191 (1995) (reviewing social science data and concluding that there is no basis upon which to believe that children do less well when reared by same-sex couples).
- ⁷⁷ Rekers, *supra* note 71, at 342; Herek, *supra* note 50, at 609-10 (noting that since same-sex couples cannot marry, comparisons of the relative stability between married and same-sex couples must control for the variable).
- ⁷⁸ Judith Stacey and Timothy J. Biblarz, *(How) Does Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 171-72 (2001).
- ⁷⁹ Stacey, *supra* note 5, at 533-34.
- ⁸⁰ 406 U.S. 164 (1972).
- ⁸¹ *Id.* at 175.
- ⁸² *Id.*
- ⁸³ See *Clark v. Jeter*, 486 U.S. 456, 467 (1988) (finding statute of limitations on paternity suits to fail the heightened scrutiny required in illegitimacy cases); see also Laurence C. Nolan, "Unwed Children" and Their Parents Before The United States Supreme Court From *Levy to Michael H.: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1 (1999) (providing an overview of the constitutional jurisprudence surrounding illegitimate children); Rebra Carrasquillo Hedges, Note, *The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. REV. 833 (2000) (arguing that a comparison to the Court's jurisprudence on illegitimate children supports finding an equal protection violation in disadvantaging the children of same-sex couples).
- ⁸⁴ Silverman, *supra* note 18, at 432-36.
- ⁸⁵ Silverman, *supra* note 18, at 434-35.
- ⁸⁶ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 964 (2003) (noting that the exclusion of same-sex couples from marriage directly disadvantages the children they rear by depriving the families of legal rights and benefits).
- ⁸⁷ 855 N.E.2d 1 (N.Y. 2006).
- ⁸⁸ *Id.* at 9-12.
- ⁸⁹ *Id.* at 7-8.
- ⁹⁰ *Id.* at 7.
- ⁹¹ *Id.*
- ⁹² *Id.* at 7-8.
- ⁹³ 855 N.E.2d 1, 8 (N.Y. 2006).
- ⁹⁴ *Id.*
- ⁹⁵ *Id.* at 30 (Kaye, C.J. dissenting) (emphasis in original).
- ⁹⁶ *Id.*
- ⁹⁷ *Id.* at 30-32.
- ⁹⁸ See *id.* at 22 (Grafano, J. concurring) (Noting that "It is also true that children being raised in same-sex households would derive economic and social benefits if their parents could marry.")
- ⁹⁹ See Seaton, *supra* note 17, at 156-58 (indicating that the American Academy of Pediatrics, American Academy of Family Physicians, Child Welfare League of America, National Association of Social Workers, National Council on Adoptable Children, American Psychiatric Association, and American Psychoanalytic Association all support parenting rights for lesbian and gay parenting); Policy Statement, Am. Psychological Ass'n, *Sexual Orientation, Parents, and Children*, (Jul. 30, 2004), available at <http://www.apa.org/pi/lgbcc/policy/parents.html> (last visited Oct. 8, 2007); cf. Policy Statement, Am. Med.Ass'n, *AMA Policy Regarding Sexual Orientation*, available at <http://www.ama-assn.org/ama/pub/category/14754.html> (last visited Oct. 8, 2007) (supporting co-parenting rights and basic domestic partnership rights for same-sex couples).
- ¹⁰⁰ See Patterson, *supra* note 76 (reviewing social science data and concluding that there is no basis upon which to believe that children do less well when reared by same-sex couples); Stacey, *supra* note 32 (reviewing the social science literature and showing why it does not demonstrate that families headed by same-sex couples are less ideal settings to rear children).
- ¹⁰¹ *Hernandez*, at 30-32 (Kaye, C.J. dissenting).
- ¹⁰² *Andersen*, 138 P.3d at 968.
- ¹⁰³ *Id.* at 980 (noting that the state constitutional analysis is "coextensive with that under the equal protection clause").
- ¹⁰⁴ *Id.* at 982-85.
- ¹⁰⁵ *Id.* at 982.
- ¹⁰⁶ *Id.*
- ¹⁰⁷ *Andersen*, 138 P.3d at 982 (citing *Morrison v. Stadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005) for the proposition that opposite-sex marriage promotes stable relationships, and the preservation of such relationships after children are born).
- ¹⁰⁸ *Id.* at 983.
- ¹⁰⁹ *Id.*
- ¹¹⁰ *Andersen*, 138 P.3d at 1016 n.15 (Fairhurst, J. dissenting) (emphasis in original).
- ¹¹¹ *Id.* at 1018 (emphasis in original).
- ¹¹² *Id.* (emphasis in original).
- ¹¹³ *Id.*
- ¹¹⁴ *Id.*
- ¹¹⁵ 908 A.2d 196, 211, 220 (2006).
- ¹¹⁶ *Id.* at 212 & n.13.
- ¹¹⁷ *Id.* at 204 n.6, 217.
- ¹¹⁸ *Id.* at 230 (Poritz, C.J. concurring and dissenting).
- ¹¹⁹ See *id.* at 218.
- ¹²⁰ *Id.* at 216-17.
- ¹²¹ 908 A.2d 196, 211, 218 (2006); see also *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) (noting that it is irrational to punish illegitimate children for the actions of their parents).