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## The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages

### Cover Page Footnote

Weiss Family Distinguished Faculty Scholar and Professor of Law, Penn State Dickinson School of Law (presently); Professor of Law and Justice Frederick Lacey Scholar, Rutgers School of Law-Newark (beginning in the fall of 2008). I presented an earlier draft of this essay at the Forty Years of Loving Symposium held at the Fordham University School of Law in November 2007. I also presented a version of the essay at the City University of New York School of Law, at the Rutgers School of Law-Newark, and at the annual meeting of the Association of American Law Schools held in New York City in January 2008. I would like to thank attendees at all of these events for their thoughtful questions and helpful suggestions. I would also like to thank Victor Romero for his insightful comments on an earlier draft and Cynthia Helzner (Penn State Dickinson School of Law, class of 2009) for her assistance with the research for this essay.

# THE BLURRING OF THE LINES: CHILDREN AND BANS ON INTERRACIAL UNIONS AND SAME-SEX MARRIAGES

Carlos A. Ball\*

## INTRODUCTION

When Richard Loving and Mildred Jeter drove from their hometown of Central Point, Virginia, to Washington, D.C., on June 2, 1958, in order to get married, Mildred was several months pregnant.<sup>1</sup> Later that year—a few weeks before the couple pled guilty to having violated Virginia’s antimiscegenation law—Mildred gave birth to a baby girl.<sup>2</sup> Richard and Mildred had two more children, a son born in 1959 and a second daughter born a year after that.<sup>3</sup>

The legal commentary on *Loving v. Virginia* usually does not discuss the fact that the couple had children.<sup>4</sup> In some ways, this is not surprising given that their status as parents was not directly relevant to either their violation of the Virginia statute, or to their subsequent constitutional challenge to that law. Concerns about the creation of interracial children, however, were one of the primary reasons why antimiscegenation laws were first enacted in colonial America and why they were later adopted and retained by many states. It is not possible, in other words, to understand fully the historical roots and purposes of antimiscegenation laws without an assessment of the role that concerns related to interracial children played in their enactment and enforcement.

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1. Phyl Newbeck, *Virginia Hasn’t Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving* 10–11 (2004).

2. *Id.* at 15.

3. *Id.*

4. *Loving v. Virginia*, 388 U.S. 1 (1967).

The offspring of interracial unions were threatening to whites primarily because they blurred the lines between what many of them understood to be a naturally superior white race and a naturally inferior black race. As long as there was a clear distinction between the two racial categories—in other words, as long as the two categories could be thought to be mutually exclusive—then the hierarchical racial regimes represented first by slavery, and later by legal segregation, could be more effectively defended.<sup>5</sup>

The existence of interracial children destabilized and threatened the understanding of racial groups as essentialized categories that existed prior to, and independent of, human norms and understandings. To put it differently, interracial children showed that racial categories, seemingly distinct and immutable, were instead highly malleable. Therefore, from a white supremacy perspective, it was important to try to deter the creation of interracial children as much as possible, and the ban on interracial marriage was a crucial means to attaining that goal.

Although it is possible to disagree on how much progress we have made as a society in de-essentializing race, it is (or it should be) clear that an essentialized and static understanding of race is both descriptively and normatively inconsistent with the multicultural American society in which we live. In fact, it would seem that we have made more progress in de-essentializing race than we have in de-essentializing sex/gender.<sup>6</sup> One of

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5. See *infra* Part I.

6. The term “sex” is usually understood to capture what can be thought of as the natural (or biological) differences between men and women, while “gender” is usually taken to refer to those cultural norms and expectations that accompany (and constitute) a male or female identity. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 Cal. L. Rev. 1, 21 (1995) (“[S]ex denotes bio-physical aspects of personhood associated with ‘man’ and ‘woman’ while gender denotes the social constructions understood as ‘male’ and ‘female’ or ‘masculine’ and ‘feminine.’”). I agree, however, with those commentators who argue that the disaggregation of “sex” from “gender” often helps to shield sex-based distinctions from critique and analysis. As Professor Katherine Franke eloquently writes,

In many cases, biology operates as the excuse or cover for social practices that hierarchize individual members of the social category “man” over individual members of the social category “woman.” In the end, biology or anatomy serve as metaphors for a kind of inferiority that characterizes society’s view of women.

Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. Pa. L. Rev. 1, 3 (1995); see also David B. Cruz, *Disestablishing Sex and Gender*, 90 Cal. L. Rev. 997, 1008 (2002) (“Too often . . . the history of sex/gender classification in the United States has been marked by the displacement of human responsibility for normative judgments to ‘facts’ of Nature.”).

My discussion in this essay of questions related to sex and gender revolve around the intersection of marriage and parenting. In my estimation, it is unhelpful in this context to disaggregate “sex” from “gender” because the distinct cultural expectations of mothers and fathers (i.e., issues of “gender”) are inextricably linked to what are largely taken to be natural or intrinsic differences (i.e., issues of “sex”) between men and women. In fact, I have elsewhere explained how opponents of parenting by lesbians and gay men often conflate supposedly sex-specific and natural parenting attributes of men and women with externally imposed social norms and expectations that assign distinct roles and responsibilities to male and female parents. See Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity*

the best examples of this difference in progress is that while we no longer, as a legal matter, think of the intersection of race and marriage in essentialized ways, legal arguments against same-sex marriage are still very much grounded in an essentialized (and binary) understanding of sex/gender.<sup>7</sup>

The conservative critique of same-sex marriage is premised on the idea that men and women are different in essential and complementary ways and that these differences justify the denial of marriage to same-sex couples.<sup>8</sup> One of the most important of these differences relate to the raising of children. The reasoning—which is found in the arguments of conservative commentators,<sup>9</sup> in the briefs of states defending same-sex marriage bans,<sup>10</sup> and in some of the judicial opinions upholding those bans<sup>11</sup>—is that there is something unique to women as mothers and something (separately) unique to men as fathers that makes different-sex couples able to parent in certain valuable ways that same-sex couples cannot.

These arguments continue to resonate legally and politically because our laws and culture continue to think about sex/gender in essentialized and binary ways. In fact, one of the reasons why same-sex marriage is so threatening to so many is that the raising of children by same-sex couples blurs the boundaries of seemingly preexisting and static sex/gender categories in the same way that the progeny of interracial unions blur seemingly preexisting and static racial categories.

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*and the Implications of Difference*, 31 Cap. U. L. Rev. 691, 708–20 (2003); see also *infra* note 100 (explaining how the frequent and simultaneous deployment of procreation-based arguments and dual-gender parenting-based arguments against same-sex marriage conflates the concepts of “sex” and “gender”). It is for this reason that in this essay I use the term “sex/gender” rather than (1) use “sex” and “gender” interchangeably, or (2) use both words separately to capture potentially different meanings.

7. The way in which society treats and regulates transgendered and intersexed individuals also contributes to the reification of sex/gender labels as essentialized, natural, and predetermined categories. In fact, Marie-Amélie George has analogized between the ways in which mulattoes in the American antebellum South challenged an essentialized and binary understanding of race and the ways in which intersexed individuals in contemporary America challenge an essentialized and binary understanding of sex/gender. See Marie-Amélie George, *The Modern Mulatto: A Comparative Analysis of the Social and Legal Positions of Mulattoes in the Antebellum South and the Intersex in Contemporary America*, 15 Colum. J. Gender & L. 665, 679 (2006) (“Similar to mulattoes, the intersex are not accepted as a third or variant category, but rather are altered so as to fit within preconceived notions of what sex is and should be.”). George suggests that

[o]ne of the reasons why race [today] may be accepted as constructed, while sex continues to be seen as fixed, is that racial fluidity is more visible. Variations in skin color and tone are readily perceptible, while ambiguities in genitalia are easily hidden. This helps explain why sexual binaries have not been questioned until recently, while racial categories have been suspect for decades.

*Id.* at 666 n.3.

8. See *infra* notes 99–113 and accompanying text.

9. See *infra* note 86 and accompanying text.

10. See *infra* notes 99–101 and accompanying text.

11. See *infra* notes 99, 106 and accompanying text.

In Part I of this essay, I trace the historical roots of antimiscegenation laws with a particular focus on children. In doing so, I focus primarily on pre-revolutionary Virginia because that colony had the earliest and most comprehensive regulation of interracial intimacy and of the children that resulted from it. As I explain, the actual prohibition against interracial marriage in colonial Virginia was only one part of a complex and interlocking set of regulations that sought to cope with the growing number of individuals who did not naturally fit the category of either white or black.

In Part II, I draw a connection between the old arguments against interracial unions and contemporary arguments against same-sex marriages, again with a particular focus on children. My contention is that both antimiscegenation statutes and bans against same-sex marriage have been used to construct and reify essentialized and dualistic understandings of race and sex/gender.<sup>12</sup>

Finally, in Part III, I critique the holding of many courts that *Loving v. Virginia* does not apply to the question of whether bans on same-sex marriage constitute impermissible forms of sex/gender discrimination. In particular, I question these courts' conclusion that the old antimiscegenation statutes that applied equally to whites and blacks are distinguishable from the contemporary same-sex marriage bans that apply equally to men and women because, while the former laws were grounded in racial prejudice, the latter are not based on sex/gender prejudice. In doing so, I critique the contention, frequently advanced by states, that the bans against same-sex marriage are constitutional because they help provide children with optimal home environments.

## I. ANTIMISCEGENATION LAWS AND CHILDREN

It is interesting to note that the colony of Virginia, in the seventeenth century, thought it necessary to address the legal status of interracial children three decades before it sought to condemn interracial marriage.<sup>13</sup> In Virginia, prior to the 1660s, there was no explicit regulation of interracial intimacy.<sup>14</sup> Fornication was a crime, but before the 1660s, black-white fornication was treated in the same way as was white-white fornication.<sup>15</sup>

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12. Andrew Koppelman has noted the psychological and sociological similarities between racism and the antimiscegenation taboo, on the one hand, and sexism and the homosexuality taboo, on the other. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 220–73 (1994). Although Koppelman's analysis is extensive and sophisticated, he does not, as I do in this essay, explore the ways in which the purported links between marital bans (both interracial and same-sex) and children have been used to reify essentialized and dualistic understandings of race and sex/gender.

13. See Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law—An American History* 15 (2002).

14. There is evidence of public condemnation of those who engaged in fornication prior to 1662 in Virginia. It is unclear, however, whether racial factors added to the intensity of that condemnation. See A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Geo. L.J. 1967, 1989 (1989) (noting that “[i]n Virginia before the 1660s . . . [t]here were several instances of

Interracial intimacy as such became problematic when it led to the birth of a growing number of interracial children. It was important, in a society where slavery was increasingly becoming entrenched, to determine the status of those children. In 1662, therefore, the Virginia Assembly enacted a law that made the status of interracial children dependent on the status of their mothers.<sup>16</sup> If the mother was a slave, then her children would also be slaves, regardless of the race of the father. If the mother was a free woman—whether white, of mixed race, or black—then her children would be free as well.

The Virginia statute was a departure from English law, which made the status of children dependent on the status of their fathers.<sup>17</sup> Although precise numbers are difficult to establish, it is likely that a majority of interracial children born in seventeenth-century Virginia were conceived by white fathers and black mothers, with most of the latter being slaves.<sup>18</sup> If the colony had followed the English rule, interracial children conceived by white fathers would have been deemed to be free even if their mothers had been slaves. This was problematic for white Virginians, both because it would have significantly increased the number of free blacks (who might forge alliances with slaves)<sup>19</sup> and because it would deny an additional

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public condemnation of couples who engaged in interracial sex, but the importance of the race factor was unclear”).

15. *Id.* at 1990–92 (providing several examples of the equal treatment).

16. Negro Womens Children to Serve According to the Condition of the Mother [hereinafter Negro Womens Children], in 2 *The Statutes at Large; Being a Collection of All the Laws of Virginia* 170 (William Waller Hening ed., 1823) [hereinafter *Laws of Virginia*]. “Whereas some doubts have arisen whether children got by any Englishman [i.e., white man] upon a negro woman should be slave or free, Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shalbe held bond or free only according to the condition of the mother . . .” *Id.* (emphasis omitted). Higginbotham and Kopytoff note that “[t]he law of the inheritance of slave status was a response to the question of how to classify the children of white men and slave women.” Higginbotham & Kopytoff, *supra* note 14, at 2006.

17. Higginbotham & Kopytoff, *supra* note 14, at 1971 n.20.

18. Joel Williamson, *New People: Miscegenation and Mulattoes in the United States* 8 (1980) (noting that children of slave mothers constituted “a large proportion (perhaps more than half) of the mulattoes in Virginia”). Williamson suggests that, unlike in later centuries, the majority of interracial children born in Virginia in the seventeenth century were conceived as a result of sexual contact between white male servants (both voluntary and involuntary) and black female slaves, as opposed to as a result of sexual relationships between white men and their slaves. *Id.* at 7; see also Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* 44–45 (1998) (“Bastardy lists suggest that the largest source of mixed-race children in the seventeenth-century Chesapeake was not the imposition of white planter men on black slave women but the relations of black slaves and white servants.”). But see Charles Frank Robinson II, *Dangerous Liaisons: Sex and Love in the Segregated South* 3 (2003) (noting that, in seventeenth-century Virginia, “most interracial sexual relations involved intercourse between white masters and slave women”).

19. See Higginbotham & Kopytoff, *supra* note 14, at 1996 (noting the concern of white Virginians with “the dangers in the possible alliances of free negroes and mulattoes with slaves”).

supply of labor to the owners of the black mothers.<sup>20</sup> In contrast, a rule that assigned to interracial children the status of their mothers aided in the entrenchment and expansion of slavery.<sup>21</sup>

The first step that the Virginia Assembly took in 1662 with respect to miscegenation, then, was to link the free or slave status of interracial children to that of their mothers. The second step it took—through the very same statute—was to address, for the first time, the issue of interracial sex by doubling the punishment for interracial fornication.<sup>22</sup> The fact that the new interracial fornication provision was part of the statute that assigned to interracial children the status of their mothers, strongly suggests that the legislators saw the problem as being not “simply the act of interracial sex itself, but [also] its likely result: mulatto children.”<sup>23</sup>

Although many interracial children born in seventeenth-century Virginia were conceived by white men and black women, not all of them were. Some resulted from sexual contact between white women and black men.

20. See *id.* at 1994 n.127 (“The early uncertainty over the status of blacks was being resolved in ways that kept increasing numbers of them in lifetime servitude and sealed the same fate for most of their children.”).

21. See *id.* at 2006 (noting that the 1662 statute “provided slaveowners with easy and cheap ways to increase the number of slaves they held”). In addition, as a result of the enactment of the 1662 statute, “[w]hite men could now be certain that their sexual behavior across the color line would not threaten the institution of slavery.” Robinson, *supra* note 18, at 3.

22. The statute stated “that if any christian [i.e., white person] shall committ ffornication with a negro man or woman, hee or shee soe offending shall pay double the ffines imposed by the former act.” Negro Womens Children, *supra* note 16, at 170. The fine called for by “the former act” was five hundred pounds of tobacco. Higginbotham & Kopytoff, *supra* note 14, at 1993.

Notice that the statute punished the white party but not the black one. For the next two hundred years, Virginia law sought to punish only the white person for engaging in sexual intimacy with a black person. It was not until 1878 that Virginia punished both the white and the black parties for violating its antimiscegenation law. See Wallenstein, *supra* note 13, at 100. To a certain extent, it makes sense that the law did not punish slaves for engaging in intimate relationships with whites. As Higginbotham and Kopytoff note,

[i]t might have been seen as bad policy or unreasonable to punish a slave for acquiescing to the demands of his or her master, even to demands for illicit behavior. In addition, many of the usual punishments were meaningless when imposed on slaves or would result in punishing their masters. Years could not be added to life-long servitude; slaves could not be fined if they owned no property; and imprisonment would have deprived their masters of their work.

Higginbotham & Kopytoff, *supra* note 14, at 2000 (footnote omitted).

It is less clear why the law would not have sought to punish free blacks and mulattoes for engaging in sexual relationships with whites. Higginbotham and Kopytoff suggest that

[p]erhaps whites were so secure in their position of power and superiority that they assumed such relations would not occur unless initiated by whites. After the early years of the colony, as the lines of the racial caste system hardened, the freedom of choice of blacks was ignored in this as in so many other areas of life.

*Id.* at 2001.

23. Higginbotham & Kopytoff, *supra* note 14, at 1994; see also Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-revolutionary and Antebellum South*, 82 N.C. L. Rev. 535, 559 (2004) (“If interracial intimacy was troubling to many because of its sheer physical aspects, . . . it also was troubling because of the inevitable product.”).



This second category of interracial children presented its own set of challenges to colonial leaders for two reasons. First, these children, as the offspring of white women, were not categorized as slaves regardless of how dark the color of their skin might be.<sup>24</sup> These children, therefore, eroded the seemingly natural link between blackness and slavery.<sup>25</sup> Second, while white Virginians were largely indifferent to the issue of black women having interracial children (as long as the children of slaves were also deemed to be slaves, as called for by the 1662 law),<sup>26</sup> they were deeply troubled by the notion of white women having interracial children. It was white women (and not white men) who were charged with the responsibility of keeping the white race "pure."<sup>27</sup> White women were understood, in effect, to be the guarantors of racial purity, and, as such, had to be punished when they transgressed by engaging in sexual relationships that crossed racial lines.<sup>28</sup>

For three decades after the enactment of the 1662 statute, the only legal disincentive for white women to engage in sexual relationships with black men was the existence of the fornication statute that doubled the punishment for interracial sex. By definition, however, the crime of fornication did not apply if the individuals in question were married to each other. And, indeed, there are reported cases of white women marrying black men in seventeenth-century Virginia.<sup>29</sup>

As a result, by the end of the century, the Virginia Assembly concluded that there was a need for additional regulation that would strongly discourage interracial unions and the children that might result from them. In 1691, therefore, the assembly enacted its first interracial marriage law, a descendant of which was struck down by the U.S. Supreme Court almost

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24. See *supra* note 16 and accompanying text.

25. As Martha Hodes notes,

When white women had children with black men, two important social categories were eroded: racial categories were eroded because the children would be of mixed European and African ancestry, and categories of slavery and freedom were eroded because free people of African ancestry endangered the equation of blackness and slavery.

Martha Hodes, *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* 4 (1997).

26. See Higginbotham & Kopytoff, *supra* note 14, at 1997 ("Black women who produced mulatto children were not seen as making the same direct assault on white racial purity; they were unable to produce white children and thus did not affect the white race. There was no comparable concern over their 'lightening' of the Negro race.").

27. See *id.* at 2007 ("Once Virginians had made the decision to classify mulattoes with blacks, the mulatto child of a white mother was an assault on racial purity.").

28. See Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* 221 (2003) ("White women were anointed as the primary gatekeepers of white racial purity, and as such, they became the members of the white community who could, with self-evident justice, be most severely penalized for racial transgressions.").

29. See Robinson, *supra* note 18, at 8 ("On Virginia's eastern shore between 1664 and 1677, five of the ten households headed by free black men seem to have also had white women present as wives.").

three hundred years later in *Loving v. Virginia*.<sup>30</sup> The new law was particularly critical of interracial marriages between white women and nonwhite men. In expressing its disapproval of that category of relationships, the legislature noted that the statutory proscription was required to “prevent . . . that *abominable mixture and spurious issue* which hereafter may increase in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English, or other white women, as by their unlawfull accompanying with one another.”<sup>31</sup> The language of the statute shows that what motivated the legislators to condemn interracial marriages was an objection to the offspring (i.e., the “abominable mixture and spurious issue”) that resulted from the unions of white women and nonwhite men.

Although “it was the prospect of white women mating with nonwhite men that called forth the strong language” contained in the text of the law,<sup>32</sup> the statute called for the lifetime banishment from the colony of any white person who married a nonwhite individual, regardless of whether the former was a man or a woman.<sup>33</sup> Despite the fact that the statute, in theory,

30. 388 U.S. 1 (1967). The antimiscegenation provision was part of a broader statute—called “An Act for Suppressing Outlying Slaves”—that sought to deter alliances between free and enslaved blacks. Another provision of the statute, for example, imposed on owners who wanted to free their slaves the obligation of paying for the costs of transporting them beyond the boundaries of the colony. See Higginbotham & Kopytoff, *supra* note 14, at 1996. As Higginbotham and Kopytoff note, however, “[W]hite Virginians seemed not to realize . . . that they had greatly increased the danger of alliance by classifying most mixed race individuals with blacks rather than with whites in terms of their legal rights.” *Id.* at 1996–97.

31. An Act for Suppressing Outlying Slaves, in 3 Laws of Virginia, *supra* note 16, at 86, 86–87 (emphasis added). In 1705, the legislature amended the statute in order to permit the marriage between a white person and a Native American. See *id.* at 453. In the eighteenth and early nineteenth centuries, some legislators proposed bills—most of which were not enacted—to try to encourage marriages between whites and Native Americans. “The motivation behind these bills was probably a desire to mitigate the danger of Indian attacks on the frontier.” Higginbotham & Kopytoff, *supra* note 14, at 1996 n.133 (citation omitted).

32. Higginbotham & Kopytoff, *supra* note 14, at 1995. In 1705, the Virginia Assembly changed the punishment for entering into an interracial marriage from lifetime banishment to six months in prison for the white party. Wallenstein, *supra* note 13, at 18. It has been suggested that this new penalty was a “more effective deterrent to racial intermarriage among ordinary people,” and one that did not, after the period of incarceration was completed, deprive the colony of laborers. Edmund S. Morgan, *American Slavery American Freedom: The Ordeal of Colonial Virginia* 335 (1975).

The 1705 statute also

protect[ed] the economic investment of slave owners and denied the human rights of the slave. If a master killed his slave during correction, it would not be a felony; any Negro, mulatto, or Indian who struck a white person would get 30 lashes. Slaves could not travel, own cattle, or bear arms. In order to make an example of them, runaways could be dismembered.

Karen Woods Weierman, “*For the Better Government of Servants and Slaves*”: *The Law of Slavery and Miscegenation*, 24 Legal Stud. F. 133, 137 (2000). The 1705 amendment, then, like its 1691 counterpart, see *supra* note 31, was part of a broader statute that sought to entrench and protect the institution of slavery.

33. 3 Laws of Virginia, *supra* note 16, at 87. “Be it enacted . . . that . . . whatsoever English or other white man or woman being free shall intermarry with a negro, mulatto, or

applied to all whites, it was women, as a practical matter, who were likely to be prosecuted for violating antimiscegenation laws.<sup>34</sup> Furthermore, also as a practical matter, the lifetime banishment of the mother meant the lifetime (or at least the long) banishment of interracial children born to her. While the interracial children of slave mothers were dealt with by enslaving them, the interracial children of (married) white mothers were dealt with by banishing them from the colony.<sup>35</sup>

There were reasons other than a specific concern about white women having interracial children that led legislators to condemn strongly their interracial relationships. One of those had to do with the unique revulsion felt by many white Virginians at the very idea of sexual intimacy between white women and black men, a revulsion that was not present when white men were known to have had sexual relationships with black women. Sexual relationships between white women and black men reinforced two related stereotypes, that of the latter as “savagely sexual”<sup>36</sup> creatures and that of the former as sexually vulnerable beings who needed the protection afforded by white men.<sup>37</sup> Some commentators have also argued that the restrictions on white female sexuality were motivated by the perceived need to keep the relatively small number of white women sexually available to the much larger number of white men who lived in the colony at the time.<sup>38</sup>

It does appear, however, that the concern about white women giving birth to interracial children was the primary motivation behind Virginia’s first interracial marriage law. As Judge A. Leon Higginbotham, Jr., and Barbara K. Kopytoff note, “The legislators seemed to feel a particular distaste that white women, who could be producing white children, were producing mulattoes [instead].”<sup>39</sup>

That the existence of interracial children born to white mothers was the primary concern behind the 1691 antimiscegenation law is supported not only by the statutory language already noted,<sup>40</sup> but also by two other provisions of the same statute that dealt with interracial children born from

Indian man or woman bond or free shall within three months after such marriage be banished and removed from this dominion forever . . .” *Id.* (emphasis omitted).

34. See Kathleen M. Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* 199 (1996) (“Very few white men were prosecuted for interracial sexual misconduct [between 1680 and 1710], and none was punished.”).

35. As Wallenstein notes, “If the bride in the interracial couple was white, then she would vanish from Virginia, and her mixed-race child would be born and raised outside Virginia.” Wallenstein, *supra* note 13, at 16.

36. Robinson, *supra* note 18, at 2 (internal quotation marks omitted).

37. See Koppelman, *supra* note 12, at 225 (“The [antimiscegenation] taboo connoted a narrative in which black men represented a dangerous, predatory, uncontrollable sexuality, and white women represented a fragile, asexual purity, the protection of which was the special duty of white men.”); see also Robinson, *supra* note 18, at 6 (“[Male colonists] felt it necessary to control women sexually, for by doing so, they believed that they curtailed the likelihood of rampant societal sexual deviance.”).

38. Morgan, *supra* note 32, at 336; Robinson, *supra* note 18, at 6.

39. Higginbotham & Kopytoff, *supra* note 14, at 1997.

40. See *supra* note 31 and accompanying text.

*nonmarital* relationships. The first provision required white women who had a so-called “bastard child” to pay church wardens fifteen pounds within one month of the baby’s birth.<sup>41</sup> If the mother did not have the money, then the law authorized church wardens to auction off her services for five years.<sup>42</sup> And, as if this was not enough of a disincentive for white women to have interracial children, a second provision authorized church wardens to take the children away from their mothers and auction them off as servants until they attained the age of thirty.<sup>43</sup>

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41. 3 Laws of Virginia, *supra* note 16, at 87. The law did not punish black women who bore mulatto children, suggesting once again that white Virginians were not particularly troubled by the idea of sexual intimacy between white men and black women. White women who had illegitimate children as a result of having sexual contact with white men were also subject to criminal penalties, but they were considerably less harsh than those that applied when the fornication led to the birth of an interracial child. For example,

a law enacted in 1696 provided that if an indentured servant woman had a bastard (presumably not a mulatto), she had to give only one extra year of service to her master, in addition to a fine for fornication, which was “five hundred pounds of tobacco and casque” or 25 lashes.

Higginbotham & Kopytoff, *supra* note 14, at 1996 n.138 (citing An Act for Punishment of Fornication and Seaverall Other Sins and Offences, in 3 Laws of Virginia, *supra* note 16, at 137, 139–40). Higginbotham and Kopytoff add that “[i]f a free white woman bore a white bastard, there was no punishment beyond that for fornication until 1769, when she had to pay 20 schillings.” *Id.* (quoting An Act for the Relief of Parishes from Such Charges as May Arise from Bastard Children Born Within the Same, in 8 Laws of Virginia, *supra* note 16, at 376).

42. Wallenstein, *supra* note 13, at 16 (“[If the mother] was an indentured servant, the law did not mean to punish her owner by denying him her labor (and thus his property). If she was a servant and thus not the owner of her labor at the time of the offense, her sale for five years would take place after she had completed her current indenture.”).

43. *Id.* at 16–17. In 1705, the assembly added a year to the period of servitude for the interracial children of white mothers born out of wedlock. *Id.* at 18. In 1723, the legislature sought to regulate the status of the children of the interracial daughters of white mothers. These grandchildren of the original violator of the law also had to serve an indenture period of thirty or thirty-one years (depending on how many years were served by their mothers). *Id.* “In effect, a third category had been established with reference to the 1662 law, and just as slave women bore slave children, and free women bore free children, these mixed-race long-term servants bore mixed-race long-term servants.” *Id.*

Virginia was by no means alone in enacting these types of laws. In 1664, Maryland became the first colony to adopt a law condemning interracial marriage, although that provision only applied to unions between white women and black men. See Weierman, *supra* note 32, at 141. The statute expressed the legislature’s disapproval of “freeborne Englishwomen [who were] forgettful of their free Condition and to the disgrace of our Nation doe intermarry with Negro slaves.” Peter W. Bardaglio, “Shameful Matches”: The Regulation of Interracial Sex and Marriage in the South Before 1900, in *Sex, Love, Race: Crossing Boundaries in North American History* 112, 114 (Martha Hodes ed., 1999). The law decreed that a white woman who married a slave had to become a servant of her husband’s owner (for as long as the husband was alive) and that her children “shall be slaves as their fathers were.” Weierman, *supra* note 32, at 141. In 1692, the Maryland legislature also prohibited marriages between white men and black women, *id.* at 142, and required that white women who had illegitimate interracial children be indentured as servants for seven years, Bardaglio, *supra*, at 114. As for the interracial children of white women, Maryland law called for their indenture until the age of thirty-one. Weierman, *supra* note 32, at 142.

It was not just southern colonies that enacted laws regulating interracial sexuality and the children resulting therefrom. Under a Pennsylvania law dating to the 1720s, for example, a free black man who married a white woman could be sentenced to serve as a slave for the

It is worth emphasizing that the legislative scheme created by the Virginia Assembly related to interracial children born out of wedlock targeted only white women (and their children).<sup>44</sup> The statute did not impose criminal penalties on white men who had children with black women. The law also did not directly penalize the nonwhite fathers of interracial children,

though it surely broke up any family there might have been. The father was important to the law because, regardless of whether he was free or slave, he was nonwhite and had fathered a child by a white woman. But the penalties were imposed on the woman and the child.<sup>45</sup>

It is also important to keep in mind how the actual prohibition against interracial marriage in colonial Virginia was only one component of a complex and interlocking set of regulations that sought to cope with the growing number of individuals who did not easily fit the category of either white or black. Indeed, there came a point in the late seventeenth century when colonial leaders felt it necessary to use a rather comprehensive statutory regime to try to bring order to the racial confusion created by the existence of interracial children. As Higginbotham and Kopytoff note, these children were perceived to be “anomalies. They simply did not fit into the whites’ vision of the natural order of things: a great chain of Being comprised of fixed links, not of infinite gradations. Things which do not fit into the perceived natural order are seen as unnatural and often as dangerous and ‘abominable.’”<sup>46</sup>

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rest of his life. Wallenstein, *supra* note 13, at 40. And, as in Virginia and Maryland, children of unmarried interracial couples could be sold as servants for the first three decades of their lives. *Id.*

Although Pennsylvania repealed its antimiscegenation law shortly before Independence, Massachusetts reenacted the colonial version of its antimiscegenation law after it became a state. *Id.* at 41. The original antimiscegenation law enacted by colonial Massachusetts in 1705 echoed the language used by the Virginia statute of 1691, *see supra* note 31 and accompanying text, calling for the prevention of “a Spurious and Mixt Issue,” Wallenstein, *supra* note 13, at 42. For its part, North Carolina’s antimiscegenation law of 1741 quoted verbatim from the Virginia law of 1691, condemning interracial marriages because they led to an “abominable Mixture and spurious issue.” *Id.*

44. Kathleen Brown has documented the increase in prosecutions for interracial bastardy after the enactment of the 1691 statute. In a study of court records from three Virginia counties, Brown found that such prosecutions went from less than ten percent of the cases in the 1680s, to seventeen percent in the 1690s, to nearly thirty percent by the 1700s. Brown, *supra* note 34, at 198–99.

45. Wallenstein, *supra* note 13, at 17. The Virginia antimiscegenation statute remained largely unchanged during the eighteenth century and the first half of the nineteenth century. In 1849, however, the Virginia legislature for the first time declared that all interracial marriages were void ab initio. (*See Higginbotham & Kopytoff, supra* note 14, at 199 n.135 (citing Va. Code ch. 109, § 1 (1849)). Prior to 1849, while the white spouse in an interracial marriage was subject to incarceration and a fine, the marriage itself was not invalid. The fact that the marriage remained valid was important not only for the couple, but also for the children, who were spared the additional social and legal disabilities associated with illegitimacy. Beginning in 1849, however, all of the children of interracial couples in Virginia were deemed illegitimate as a matter of law.

46. Higginbotham & Kopytoff, *supra* note 14, at 2005 (footnote omitted).

Interracial children challenged the idea of racial categories as God-given, natural, static, and unchanging. The law was used as a way to try to bring back into clear focus the lines between the races—lines that were becoming increasingly blurred due to the growing number of individuals who were neither entirely white nor entirely black.

Keeping these lines of demarcation clear was important not only for ideological reasons, that is, for reasons that went to the notion that white people were naturally superior to blacks, but also for practical ones. The institution of slavery depended on a clear differentiation between the two racial groups.<sup>47</sup> The existence of a category of individuals that fell somewhere in the middle undermined the (perverse) logic of a slavery regime that linked skin color with the status of being either a free person or a slave.

In the seventeenth century, it was relatively easy to divide non-Native Americans into three racial categories, namely, whites, blacks, and mulattoes. Matters quickly became more complicated, however. As the decades (and eventually the centuries) progressed, the antimiscegenation regime in Virginia and in other southern states came under considerable pressure from the simple and inalterable fact that each successive generation of racial intermixing led to ever-increasing degrees of racial gradations and permutations.<sup>48</sup> The real world, in other words, was showing racial groups to be part of a continuum rather than constituting distinct and separate categories.<sup>49</sup> The law was used to try to police the boundaries between racial groups, but there was only so much that the law could do.

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47. See *id.* (“[T]he idea of a racially based system of slavery depended on a clear separation of the races.”); Winthrop D. Jordan, *White over Black: American Attitudes Toward the Negro, 1550–1812*, at 178 (1968) (“For the separation of slaves from free men depended on a clear demarcation of the races, and the presence of mulattoes blurred this essential distinction.”).

48. For example, the number of so-called mulattoes in the United States the year that the Civil War began was “more than a half million people—or twelve percent of the people of color . . . . Fifteen percent of the people of color in Virginia were listed [in the 1860 census] as mulattoes, and the number rose as high as twenty percent in Missouri and Kentucky.” Gillmer, *supra* note 23, at 558–59 (footnotes omitted).

49. In 1806, the Virginia Supreme Court held that the burden of proof in slave freedom suits would be allocated according to racial appearance. *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134, 140 (1806). If the plaintiffs appeared to be white or Native American, they were presumed to be free. On the other hand, if they appeared to be black, they were presumed to be slaves. *Id.* This was not an easy rule to apply, however, leading one of the judges on the court to complain that “[w]hen . . . these races become intermingled, it is difficult, if not impossible, to say from inspection only, which race predominates in the offspring.” *Id.* at 141 (Roane, J., concurring); see also Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 *Yale L.J.* 109, 111–12 (1998) (“Despite the efforts of legislatures to reduce racial identities to a binary system, and of judges to insist that determining race was a matter of common sense, Southern communities harbored disagreement, suspicion, and conflict . . . over who was black and who was white . . .”).

Starting in 1785, Virginia law presumed that someone who had less than one-fourth African ancestry was “white.”<sup>50</sup> By the early twentieth century, however, that definition had become insufficiently restrictive from a white supremacy perspective because it was perceived to permit too much racial intermixing. In 1910, therefore, the legislature changed the definition of a white person to someone who had less than one-sixteenth African ancestry.<sup>51</sup>

Virginia’s quest for racial purity . . . [led it] to make the definition of a white person more exclusive, a change that would make it much more difficult for a person of both African and European ancestry to qualify for marriage to someone who satisfied the more rigid requirement as a white person.<sup>52</sup>

After only a few years, Virginia legislators came to see even this new, more restrictive definition of who qualified to be deemed legally white as being too broad. As a result, in 1924 they enacted a statute—appropriately but perversely named the “Act to Preserve Racial Integrity”—requiring that in order for individuals to qualify for Caucasian status, they could not have *any* traceable nonwhite ancestry.<sup>53</sup> This meant that a person with a trace of nonwhite ancestry was now legally prohibited from marrying any of the shrinking percentage of individuals who could still be deemed white as a matter of law.<sup>54</sup>

The moral untenability of the antimiscegenation regime was, of course, obvious from its inception. The practical untenability of that regime was also obvious by the time the Virginia legislature adopted the so-called “one-drop” rule in 1924. The adoption of that rule was nothing less than a

50. Wallenstein, *supra* note 13, at 19. The legal definition of a white person was an implied one. The 1785 law explicitly defined a “mulatto” as someone who had at least one-fourth African ancestry. Higginbotham & Kopytoff, *supra* note 14, at 1978. By implication, therefore, anyone with less than one-fourth of such ancestry was considered legally white. An earlier statute, enacted in 1705, defined a “mulatto” as someone who was of mixed-race and had at least one-eighth African ancestry. Wallenstein, *supra* note 13, at 17. Virginia was one of two colonies (the other was North Carolina) that sought to assign racial identity through a statute. Higginbotham & Kopytoff, *supra* note 14, at 1976 & n.42.

51. Wallenstein, *supra* note 13, at 137. As with the 1785 law, the 1910 statute provided a legal definition of a white person by implication, that is, through a codification of who qualified as a “mulatto.”

52. *Id.*

53. *Id.* at 139.

54. The 1924 statute constituted the first time that the Virginia legislature explicitly defined who qualified to be white as a matter of law. Higginbotham & Kopytoff, *supra* note 14, at 1980 n.61. The law exempted from the “one-drop” rule those who had one-sixteenth or less of Native American ancestry. This exception, known as the “Pocahontas exception,” was an effort to accommodate those “white Virginians [who] had long admitted, even celebrated, their descent from the seventeenth-century union between Pocahontas and John Rolfe.” Wallenstein, *supra* note 13, at 139 (internal quotation marks omitted). For a discussion of the Pocahontas exception and, more generally, of the regulation (and sometimes promotion) of intimate relationships between whites and Native Americans, see generally Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 Mich. J. Race & L. 351 (2007).

desperate attempt by legislators to protect the ideal of a "pure" white race.<sup>55</sup> However, this was a hopeless endeavor because, ironically, the more the legislature restricted who qualified as "white," the greater racial intermixing it allowed. For example, while someone who was three-quarters white would not have been allowed to marry a black person at the beginning of the twentieth century, that person would have been permitted to do so after 1924 because he or she (despite being three-quarters white) was now considered to be a nonwhite individual.

Virginia was not alone in statutorily changing racial definitions in order to try to cope with the growing racial intermixing that was taking place from one generation to the next. Several other southern states did the same.<sup>56</sup> "Every time a state moved the boundary that separated one racial identity from another, it demonstrated how flexible the legal definition was, and how arbitrary was the entire enterprise of legislating identity."<sup>57</sup>

Despite the moral and practical untenability of antimiscegenation laws, they remained in place in sixteen states (all of them in the South) by the time the Supreme Court decided *Loving v. Virginia*.<sup>58</sup> In many ways, the argument used in support of antimiscegenation laws in the second half of the twentieth century was essentially the same that had been used all along, namely, that racial groups were God-given and natural categories, which needed to be protected against the perceived threat represented by racial intermixing.<sup>59</sup>

55. Randall Kennedy explains the motivation behind the adoption of the "one-drop" rule as follows:

The one-drop rule at once precluded the formal recognition of intermediate racial castes, assuaged anxieties about the perceived loss of racial purity, facilitated racial-group solidarities, and stigmatized any form of white-black amalgamation. It also vividly reflected and animated Negrophobia by suggesting, essentially, that no matter how white a person might appear, even the tiniest dab of Negro ancestry was sufficiently contaminating to make him a "nigger."

Kennedy, *supra* note 28, at 223.

56. In 1927, the Georgia legislature amended the definition of "persons of color" for purposes of its antimiscegenation law. The previous statutory provision had defined such persons as those who were at least one-eighth black. The new law defined such persons as "having any ascertainable trace of nonwhite ancestry." Wallenstein, *supra* note 13, at 137 (internal quotation marks omitted). In order to qualify as "Caucasian," individuals needed to have "no ascertainable trace of Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins." *Id.* (internal quotation marks omitted).

For its part, Alabama in 1907 changed the definition of a "mulatto" from someone who had at least one-eighth African ancestry—a definition that had been on the books for half a century—to someone who had at least one thirty-second of such ancestry. *Id.* at 141. Twenty years later, Alabama changed the law again to define a "negro" as a person who "descended on the part of the father or mother from negro ancestors, without reference to or limit of time or number of generations removed." *Id.* (internal quotation marks omitted).

57. *Id.* at 140.

58. 388 U.S. 1, 6 n.5 (1967) (listing the states). More than half the states still had antimiscegenation laws in the mid-1950s. *Naim v. Naim*, 87 S.E.2d 749, 753 (Va. 1955).

59. The trial judge in *Loving* upheld the constitutionality of the antimiscegenation statute by noting,

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement



The Supreme Court had the opportunity to hear an appeal challenging Virginia's antimiscegenation statute a year after it decided *Brown v. Board of Education*,<sup>60</sup> but the Court refused to hear the case on procedural grounds.<sup>61</sup> The Court could no longer avoid the issue, however, after the Lovings lost their constitutional challenge in the state courts a decade later. Part of the Justices' much-delayed fatal blow to antimiscegenation laws was undoubtedly normative in nature: by the late 1960s, this remaining vestige of white supremacy could no longer be made consistent with our constitutional values.<sup>62</sup> But I suspect that the opinion can also be explained by the fact that the Court was responding to the reality of interracial relationships and to the fact that the concept of racial purity was not only frightening as a normative matter, but was also inconsistent with the real world as a descriptive one.<sup>63</sup>

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there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

*Loving v. Virginia*, 388 U.S. 1, 3 (1967) (internal quotation marks omitted). Almost a century earlier, another Virginia judge defended the antimiscegenation law in strikingly similar terms:

The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.

*Kinney v. Virginia*, 71 Va. (30 Gratt.) 858, 869 (1878); see also *State v. Gibson*, 36 Ind. 389, 405 (1871) (“The natural separation of the races is . . . an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature.”).

60. 347 U.S. 483 (1954).

61. The constitutionality of Virginia's antimiscegenation law came before the Court in 1955. The Virginia Supreme Court had rejected a constitutional challenge to that law in a case involving an interracial couple from Virginia who had traveled to North Carolina to get married and then returned. *Naim*, 87 S.E.2d at 750. In a highly unusual move, the U.S. Supreme Court, after hearing oral arguments, ruled that the record in the case was inadequate because it was unclear whether the couple were Virginia domiciliaries. *Naim v. Naim*, 350 U.S. 891, 891 (1955). The Court vacated the Virginia Supreme Court's decision, sending the case back to that court and ordering it to remand the case to the trial court. *Id.* The Virginia Supreme Court refused to do so, ruling that it could not, under Virginia procedural rules, send the case back to the trial court. See *Naim v. Naim*, 90 S.E.2d 849, 850 (Va. 1956). The litigation came to an end when the U.S. Supreme Court denied a motion to recall the remand. See *Naim v. Naim*, 350 U.S. 985, 985 (1956). It seems clear that the Court, dealing with the southern states' political backlash and resistance to *Brown*, was in no mood to tackle an issue (interracial relationships) that was even more controversial than that of the racial integration of schools. See Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 Harv. L. Rev. 817, 846 (1987) (noting that, after the strong resistance to *Brown* in southern states, “the last thing in the world the Justices wanted to deal with at that time was the question of interracial marriage”).

62. This seemed particularly clear after the Court struck down as unconstitutional a Florida statute that prohibited interracial cohabitation. See *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

63. After *Loving*, it took the Court another seventeen years to make it clear that not only are race-based marital restrictions unconstitutional, but also that, upon the dissolution of a marriage, it is unconstitutional for courts to award custody on the basis of race. See *Palmore*

## II. SAME-SEX MARRIAGE BANS AND CHILDREN

While colonial assemblies, beginning in the seventeenth century, enacted laws that condemned interracial unions, there were no similar legislatively expressed concerns about same-sex relationships as such. Although sodomy was proscribed under colonial law, it was a proscription that applied primarily to men regardless of the sex/gender of their sexual partners.<sup>64</sup> Sodomy laws in the seventeenth century reflected society's general disapproval of nonreproductive and nonmarital sex; they did not represent a targeted condemnation of those who had sex with individuals of their own sex/gender.<sup>65</sup> Indeed, it was not until the second half of the nineteenth century, more than three hundred years after colonial assemblies

v. Sidoti, 466 U.S. 429, 434 (1984). The trial judge in *Palmore* relied on the social stigma that accompanied the mother's relationship with a black man to justify taking custody away from her. *Id.* at 431. The Supreme Court rejected that reasoning, noting famously that although "[t]he Constitution cannot control . . . prejudices[,] . . . neither can it tolerate them. Private biases may be outside of the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 433.

Interestingly, some courts have denied gay and lesbian parents custody on the ground that third parties are likely to stigmatize the children because of the parents' sexual orientation. For example, the North Dakota Supreme Court in *Jacobson v. Jacobson* held that in light of society's disapproval of homosexuality, it was not in the best interests of the children to be placed with their lesbian mother. 314 N.W.2d 78 (N.D. 1981), *overruled by Damron v. Damron*, 670 N.W.2d 871, 875-76 (N.D. 2003). As the court put it,

[W]e cannot lightly dismiss the fact that living in the same house with their mother and her lover may well cause the children to "suffer from the slings and arrows of a disapproving society" to a much greater extent than would an arrangement wherein the children were placed in the custody of their father with visitation rights in the mother.

*Id.* at 81. Other courts, however, have relied on *Palmore* to reject the proposition that the stigma that society attaches to homosexuality is a valid ground for denying lesbians and gay men custody of their children. *See, e.g.,* *Jacoby v. Jacoby*, 763 So. 2d 410, 413 (Fla. Dist. Ct. App. 2000) ("[E]ven if the [lower] court's comments about the community's beliefs and possible reactions [to homosexuality] were correct and supported by the evidence in this record, the law cannot give effect to private biases." (citing *Palmore*, 466 U.S. at 433)); *Inscoc v. Inscoc*, 700 N.E.2d 70, 82 (Ohio Ct. App. 1997) (holding that "[w]hen determining an allocation of parental rights and responsibilities, a trial court must disregard adverse impact on the child that flow from society's disapproval of a parent's sexual orientation." (citing *Palmore*, 466 U.S. at 429)).

64. Brief for Professors of History George Chauncey et al. as Amici Curiae Supporting Petitioners at 7, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152350 [hereinafter Brief for Professors of History] ("[W]ith one brief exception [sodomy laws in colonial America] applied exclusively to acts performed by men, whether with women, girls, men, boys, or animals, and not to acts committed by two women. Only the New Haven colony penalized 'women lying with women,' and this for only ten years.").

65. *Id.* at \*2 ("[In colonial America] [s]odomy was not the equivalent of homosexual conduct. It was understood as a particular, discrete, act, not as an indication of a person's sexuality or sexual orientation." (internal quotation marks omitted)); *see also* John D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. Rev. L. & Soc. Change 915, 917 (1986) ("[In colonial America] [s]odomy was not an offense unto itself, a category that demarcated one type of individual from another. Instead, it represented a capacity for sin inherent in everyone.").

first criminalized sodomy, that the category of “the homosexual,” as a distinct and separate identity, first emerged.<sup>66</sup>

This identity, which was primarily constituted through scientific and medical discourses,<sup>67</sup> led many to view same-sex sexual intimacy in ways that were similar to how they understood interracial intimacy. Both forms of intimacy came to be viewed as abominations, that is, as deeply troubling departures from the ways in which both God and nature expected human beings to use their sexual capabilities. Indeed, it is fair to say that by the early twentieth century, many Americans were as concerned by same-sex intimacy as they were by interracial intimacy.<sup>68</sup>

The law, however, did not trouble itself with same-sex relationships in the same way that it did with interracial ones. It was difficult for interracial couples to hide their relationships, especially when children were born from those unions. In fact, state officials often used the existence of interracial children as evidence of a sexual relationship between the adults.<sup>69</sup> It was much easier to hide ongoing same-sex relationships—often under the veneer of platonic friendships—than interracial ones.<sup>70</sup> To put it simply, two same-sex partners could walk down the street together without attracting much attention as long as they did not express physical affection for each other. In contrast, the mere fact that a black man and a white woman, for example, had the temerity to walk down the street together raised the likelihood of violence and harassment.<sup>71</sup> Interracial relationships, although highly stigmatized, were more visible (and recognizable), and therefore more vulnerable to explicit social opprobrium and regulation than were same-sex relationships.

For most of the twentieth century, then, committed same-sex relationships largely flew under the legal radar. For most of that century, the medical and psychiatric professions deemed homosexuality to be an illness, subject to (often harsh and inhumane) treatment.<sup>72</sup> Law

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66. Brief for Professors of History, *supra* note 64, at \*10 (“Only in the late nineteenth century did the idea of the homosexual as a distinct category of person emerge . . .”).

67. The classic account of this process is Michel Foucault, 1 *The History of Sexuality: An Introduction* (Robert Hurley trans., Vintage Books 1990) (1978).

68. See William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 39 (1999) (noting that “many Americans in the period between the World Wars . . . [were] nervous about the alarming number of Americans acknowledging their attraction to people of the same sex and forming visible subcultures in cities all across the country” (footnote omitted)).

69. See Robinson, *supra* note 18, at 105–07 (discussing several cases in which the government sought to link an interracial couple to interracial children as a way of proving violations of antimiscegenation law).

70. See Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* 11–36 (1991) (describing female romantic friendships in early twentieth-century America).

71. See Koppelman, *supra* note 12, at 224 (“[T]he barest hint . . . of a black man’s desire for a white woman often sufficed to bring out the lynch mob.”).

72. See Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 129 (1976) (“Lesbians and Gay men have long been subjected to a varied, often

enforcement agencies used so-called vice squads to intimidate and harass gay people who congregated in public.<sup>73</sup> Postal officials tried to prevent the distribution of gay-related materials through the mail.<sup>74</sup> Government employees, in both civilian and military jobs, were subject to dismissal at the mere hint that they might be homosexual.<sup>75</sup> These and other discriminatory policies undoubtedly affected the willingness and ability of lesbians and gay men to enter and remain in ongoing same-sex relationships, but the impact of the policies on those relationships was indirect. There were, in other words, no regulations akin to antimiscegenation laws, that is, regulations enacted with the explicit intent of condemning same-sex relationships.

Indeed, it is clear that when American states first enacted marriage eligibility statutes in the early nineteenth century, there was no intent to exclude or condemn same-sex relationships.<sup>76</sup> Although those statutes (usually implicitly) required prospective spouses to be of different sexes/genders, there was no real concept of a homosexual identity or recognition of the existence of ongoing intimate same-sex relationships. As a result, it cannot be said that the early marriage statutes were aimed at condemning or discouraging same-sex relationships in the same way that antimiscegenation laws, by definition, targeted interracial relationships.<sup>77</sup>

The condemnation of same-sex *sex*, however, was a different matter altogether. Sodomy statutes, beginning in the late nineteenth century and continuing through the early twentieth century, were expanded to cover not just anal sex (which had always been prohibited), but also oral sex.<sup>78</sup> In

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horrifying list of ‘cures’ at the hands of psychiatric-psychological professionals, treatments usually aimed at asexualization or heterosexual reorientation.”).

73. Eskridge, *supra* note 68, at 64 (describing police tactics after World War II aimed at investigating and arresting gay people).

74. *See id.* at 77 (describing efforts by postmasters to prevent the distribution of gay materials).

75. *See id.* at 67–74 (describing efforts to purge the military and the civil service, at both federal and state levels, of gay employees).

76. Nancy Cott has written that pre-Civil War efforts by state legislators to codify marriage rules were limited to only “a few, known boundaries—solemnization took a certain form; marriages could not be bigamous or incestuous or terminated at will; adultery and fornication were crimes.” Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 28 (2000).

77. This has all changed, of course, in the last few years with the enactment of dozens of so-called Defense of Marriage Acts, laws that have no purpose other than to deny legal recognition to same-sex relationships. *See* Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and its Aftermath*, 14 *Wm. & Mary Bill Rts. J.* 1493, 1524 (2006) (noting the passage of Defense of Marriage Acts by many state legislatures).

78. *See* Eskridge, *supra* note 68, at 25 (“By 1921 all of the states containing big cities, except Texas, had updated their criminal laws to make consensual oral sex a felony.”). The first state to amend its sodomy law to include oral sex was Pennsylvania, which did so in 1879:

[T]he terms sodomy and buggery . . . shall be taken to cover and include the act or acts where any person shall willfully and wickedly have carnal knowledge, in a manner against nature, of any other person, of penetrating the mouth of such person; and any person who shall wickedly suffer or permit any other person to

addition, as the twentieth century progressed, the crime of sodomy became increasingly linked with homosexuality, in part because the majority of individuals charged under the statutes were charged for engaging in same-sex sexual conduct.<sup>79</sup> It was not until the 1970s, however, that some states began to amend their sodomy laws in order to decriminalize different-sex sodomy while explicitly proscribing, for the first time, same-sex sodomy.<sup>80</sup>

The first time that the legal system was confronted directly with the existence of same-sex relationships (as opposed to same-sex sex) was in the 1970s when gay plaintiffs brought a handful of cases challenging the constitutionality of denying same-sex couples the opportunity to marry.<sup>81</sup> These early cases, which took place in the years following the Stonewall riots—the historical moment that is generally considered to mark the birth of the modern gay rights movement—showed an increasing willingness on the part of gay individuals to assert legal claims challenging discrimination based on sexual orientation.

Not surprisingly, the early challenges to the bans against same-sex marriage went nowhere. The primary rationale relied on by courts in rejecting the claims was that the plaintiffs were seeking a remedy that was both legally and definitionally impossible to provide. As the courts saw it, the very definition of marriage required that the two prospective spouses be of different sexes/genders.<sup>82</sup> Whatever it was that the plaintiffs were

wickedly and indecently penetrate, in a manner against nature, his or her mouth by carnal intercourse.

*Id.* (citing Act of June 11, 1879 Pa. Laws 156, § 1).

79. *See id.* at 66 (estimating that between forty and eighty-five percent of the arrests for sodomy in five large American cities between 1946 and 1965 “were for consensual same-sex adult intimacy” (footnote omitted)).

80. The eight states that amended their sodomy laws to make them applicable only to same-sex sexual conduct—a process known as the “specification” of sodomy regulations—were Montana and Texas (1973); Kentucky (1974); Arkansas, Missouri and Nevada (1977); Kansas (1983); and Tennessee (1989). William B. Rubenstein, Carlos A. Ball & Jane S. Schacter, *Cases and Materials on Sexual Orientation and the Law* 147 (3d ed. 2008). Professor Nan Hunter has noted,

The specification trend coincided with the emergence of the contemporary versions of both the lesbian and gay rights movement and a renewed movement for religious fundamentalism in American politics . . . . For states revising their criminal codes, the specification of homosexual acts as a crime marked both the greater visibility of homosexuality in a positive sense and the tremendous social anxiety which that visibility generated.

Nan D. Hunter, *Life After Hardwick*, 27 *Harv. C.R.-C.L. L. Rev.* 531, 539–40 (1992).

81. *See generally* *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of federal question*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

82. *See Jones*, 501 S.W.2d at 589 (“It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the [county clerk] to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.”); *Singer*, 522 P.2d at 1192 (concluding that plaintiffs are not being denied entry into marriage because of their sex, but instead they “are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex”).

seeking through their lawsuits, it could not be “marriage” as that term was defined legally and culturally.<sup>83</sup>

Although the reasoning of these early same-sex marriage opinions was tautological—not going much beyond the proposition that same-sex couples were not constitutionally entitled to marry because they were not eligible to marry—the cases clearly reflected a long-standing conception of marriage which required that the spouses be of different sexes/genders. From this perspective, the waiver of the sex/gender restriction necessarily entails the fundamental alteration of the institution of marriage itself.

In the 1990s, when gay litigants once again began challenging the constitutionality of bans against same-sex marriages, new natural law theorists attempted to develop a nontautological explanation of why the institution of marriage should be limited to different-sex couples. That explanation was grounded in the notion that there are natural differences between men and women that are complementary and that make their unions more valuable than those of same-sex couples.<sup>84</sup> One of the most important of those differences relates to sexual and reproductive capabilities that, when joined, lead to the formation of a new life.<sup>85</sup>

Although new natural law theorists gave moral weight to the capability of different-sex couples to have children, they did not address the connection between dual-gender parenting and the well-being of children. Other conservative commentators, however, have argued that such parenting is essential in providing children with an optimal home environment. As one author has put it, being raised by different-sex couples is important “because there are gender-linked differences in child-rearing skills; men and women contribute different (gender-connected) strengths and attributes to their children’s development.”<sup>86</sup>

83. See *Jones*, 501 S.W.2d at 590 (“In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.”).

84. Patrick Lee and Robert George explain the argument as follows:

In reproductive activity the bodily parts of the male and the bodily parts of the female participate in a single action, coitus, which is oriented to reproduction (though not every act of coitus is reproductive), so that the subject of the action is the male and the female as a unit. Coitus is a unitary action in which the male and the female become literally one organism. In marital intercourse, this bodily unity is an aspect—indeed, the biological matrix—of the couple’s comprehensive marital communion.

Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 Am. J. Juris. 135, 144 (1997) (footnotes omitted).

85. See *id.* at 150 (“The lack of complementarity in homosexual couples is a condition which renders it impossible for them to perform the kind of act which makes them organically one.”); see also John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 Notre Dame L. Rev. 1049, 1066 (1994) (arguing that lesbians and gay men cannot, through sexual intimacy, become “a biological (and therefore personal) unit”).

86. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833, 857–58 (“[F]ather love and mother love are different kinds of love.”); see also Lynne Marie Kohm, *The Homosexual “Union”: Should Gay and Lesbian Partnerships Be Granted the Same Status as Marriage?*, 22 J. Contemp. L. 51, 61 (1996) (“States have an enormous interest in supporting and protecting the validity of marriage . . . [to] ensur[e] that

It is the assertion of this claimed link between marriage and optimal parenting that distinguishes the way in which states defended the constitutionality of bans against same-sex marriage in the first generation of cases (those brought in the early 1970s) from the way they did so in the second generation of such cases (which began in the early 1990s). It was difficult enough, in the early 1970s, for some to conceive of same-sex couples as being eligible to marry,<sup>87</sup> much less to think of them as familial units that were either capable of or interested in raising children. Beginning in the early 1980s, however, a growing number of lesbians and gay men (in particular the former) started raising children, many of them doing so as couples.<sup>88</sup>

The crucial shift to a child-based legal defense of the same-sex marriage bans came after the Supreme Court of Hawaii held in 1993 that the state's prohibition against same-sex marriages constituted a sex classification that required the government to establish the existence of a compelling interest.<sup>89</sup> After the court remanded the case for trial, the state chose to make the promotion of the well-being of children the centerpiece of its defense of marriage as an exclusively heterosexual institution.

During his opening statement at the bench trial, the state's lawyer told the court "that the optimal development of children is most likely to occur if . . . children are raised by their mother and father."<sup>90</sup> In contrast to what the state believed to be this well-established principle, the plaintiffs were proposing the "new and novel [theory] . . . that children do not need a mother and a father to raise them, that any two people can do it."<sup>91</sup> The state rejected this notion because "[c]hildren raised by their mother and father have [a] unique gender-related learning experience."<sup>92</sup> The state's lawyer assured the court that the evidence would show that paternal and maternal "nurturing style[s]" had distinct effects on children.<sup>93</sup>

After a nine-day trial, however, the government failed to persuade the court that dual-gender parenting was an essential component of good parenting.<sup>94</sup> It did not help the state's case that its leading expert witness—who testified, as expected, that children benefit from having a mother and

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children are socialized and supported by responsible, committed adults. . . . Statistics continue to show that the most stable family for children to grow up in is that consisting of a father and a mother." (footnote omitted).

87. See *supra* notes 82–83 and accompanying text.

88. See George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* 105–11 (2004) (describing the "lesbian baby boom" that began in the early 1980s).

89. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993).

90. Transcript of Trial at 5, *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. Sept. 10, 1996) (No. 91-1394-05).

91. *Id.* at 8.

92. *Id.*

93. *Id.* at 8–9.

94. The court concluded that the "[d]efendant has failed to establish a causal link between allowing same-sex marriage and adverse effects upon the optimal development of children." *Baehr*, 1996 WL 694235, at \*18.

father—stated that lesbians and gay men, as individuals and as couples, “have the potential to, and often do, raise children that are happy, healthy and well-adjusted.”<sup>95</sup> He added that “[s]ame-sex couples have the same capability as different-sex couples to manifest the qualities conducive to good parenting.”<sup>96</sup>

Although the state failed to meet its legal burden in court, Hawaii voters eventually resolved the controversy by approving an amendment to the state constitution that authorized the legislature to make clear—as it eventually did—that marriage must be between a man and a woman.<sup>97</sup> The issue of dual-gender parenting, however, has remained an important component of constitutional arguments raised by states in defense of their same-sex marriage bans since then, with several courts upholding the bans based on their conclusion that it is rational for the legislature to believe that children are better off when raised by a female parent and a male parent.<sup>98</sup>

The child-based argument made by the states (and largely accepted by the courts) relies on the notion that, for children, being raised by a man and a woman is optimal while being raised by two individuals of the same sex/gender is suboptimal.<sup>99</sup> This argument is grounded in a highly essentialized understanding of what it means not just to be a man or a woman, but more importantly, what it means to be a male parent and a female parent.

The foundational assumption of the argument is that there are essential differences between men and women *when they act as parents*. As the government argued in its brief defending the constitutionality of the ban against same-sex marriage before the Washington Supreme Court, “The complementary and unique characteristics and qualities men and women bring together in marriage are not replicated in any other relationship . . .

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95. *Id.* at \*4–5 (summarizing the testimony of Dr. Kyle Pruett).

96. *Id.* It is more than a little ironic that the state relied on broad generalizations regarding the differing abilities of male and female parents, as well as the differing effects of those capacities on children, in a case in which the Hawaii supreme court concluded that the ban against same-sex marriage constituted a suspect sex-based classification. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). I return to the question of the constitutional vulnerability of the dual-parenting justification as a basis for continuing to ban same-sex marriages in *infra* notes 134–47 and accompanying text.

97. Rubenstein et al., *supra* note 80, at 612.

98. *See infra* notes 99, 106 and accompanying texts.

99. In the state of Washington’s same-sex marriage litigation, for example, the government argued “that rearing children in a home headed by their opposite-sex parents is a legitimate state interest furthered by limiting marriage to opposite-sex couples because children tend to thrive in families consisting of a father, mother, and their biological children.” *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006). The Washington Supreme Court accepted this argument, noting that “the legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a ‘traditional’ nuclear family where children tend to thrive.” *Id.*; *see also id.* at 990 (“The legislature was entitled to believe that limiting marriage to opposite-sex couples furthers the State’s legitimate interests in procreation and the well-being of children.”). The New York Court of Appeals has reached a similar conclusion. *See infra* note 106 and accompanying text.



Society derives much benefit from the relationship defined as marriage. These benefits stem from the unique dynamics of a male-female relationship.”<sup>100</sup> The necessary implication of this argument is that men parent in ways that are fundamentally different from the way that women parent, and that, therefore, two men who parent together, for example, no matter how well intentioned or how much they love their children, are unable to provide the “extra value” afforded to children by female parents (and vice versa).<sup>101</sup>

The crucial point, then, is this: the argument against same-sex marriage based on the unique value of dual-gender parenting and the argument against interracial marriages deployed by supporters of antimiscegenation statutes explored in Part I both rely on the idea of natural, essential, predetermined differences between two categories of individuals to justify limitations on who has access to the institution of marriage. The dual-gender parenting argument deployed against the recognition of same-sex

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100. Brief of Appellant King County at 37, *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (No. 75934-1) (omission in original) (quoting testimony provided to the state legislature by Jeff Kemp of the Washington Family Council). This argument is closely linked to the notion that male-female relationships are unique because of their procreative capabilities. As the government argued in the Washington same-sex marriage case, “Most opposite-sex couples have the ability to create, without the involvement of a third party, a child who is biologically related to both of them. No other relationship has this potential. The unique and profound biological relationship between mothers and fathers and their children provides a rational basis to treat relationships that can create children differently than other relationships.” Reply Brief of Appellant King County at 17, *Andersen*, 138 P.3d 963 (No. 75934-1).

The fact that the procreation argument against recognizing same-sex relationships is usually deployed alongside the dual-gender parenting argument is an example of the conflation between “sex” and “gender” that frequently accompanies discussions of same-sex marriage and parenting. For a further discussion of this conflation, see *supra* note 6. The procreative argument, which is based on what one court characterized as “a function of biology” that results from the “innate, complementary, procreative roles [of men and women],” *Hernandez v. Robles*, 805 N.Y.S.2d 354, 360 (App. Div. 2005), *aff’d*, 855 N.E.2d 1 (N.Y. 2006), would seem to go to issues of “sex,” that is, to the seemingly natural differences between men and women. That argument, however, is almost always followed by the seemingly gender-based notion that mothers and fathers care for children in fundamentally different ways. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003) (noting that the government’s “first stated rationale, equating marriage with unassisted heterosexual procreation, shades imperceptibly into its second: that confining marriage to opposite-sex couples ensures that children are raised in the ‘optimal’ setting”).

101. The state of Vermont argued in its brief to the state supreme court defending its ban against same-sex marriage that only children raised by different-sex couples can “see and experience the innate and unique abilities and characteristics that each sex possesses and contributes to their combined endeavor.” Ball, *supra* note 6, at 711 (quoting State of Vermont’s Brief at 54, *Baker v. State*, 744 A.2d 864 (Vt. 1999) (No. 98-032)). The brief added that the state’s interest in limiting marriage to different-sex couples is “grounded upon the rich physical and psychological differences between the sexes that exist to this very day.” State of Vermont’s Brief, *supra*, at 51; see also Brief for the Commonwealth of Massachusetts at 118, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860) (“In limiting marriage to opposite-sex couples, the Legislature could believe that father[s] and mother[s] each have something special to offer their [s]ons or daughter[s], and that children and families develop best when fathers and mothers are partners in parenting.” (alterations in original) (internal quotation marks omitted)).

marriages, in other words, is grounded in the notion that men and women are intrinsically different in the same way that the antimiscegenation argument was grounded in the notion that whites and blacks were intrinsically different.<sup>102</sup> In addition, opponents of same-sex marriage, like the earlier supporters of antimiscegenation laws, defend restrictions on who can marry whom by problematizing the idea of the couples in question having or raising children.

The notion of “racial purity” was, of course, an important objective behind antimiscegenation laws. It seems to me that proponents of bans against same-sex marriage are, in effect, defending a concept of “sex/gender purity.” From this perspective, the differences between men and women when they serve as parents—as the Washington Supreme Court succinctly put it in rejecting the constitutional challenge to that state’s same-sex marriage ban—are “nonfungible.”<sup>103</sup> Under this reasoning, the abilities of parents, and their impact on children, are strongly correlated to their sex/gender. This conclusion, in turn, renders suspect the arguments raised by proponents of the legal recognition of same-sex relationships that the children of same-sex couples are as likely to benefit from the nurture and care provided by their parents as are the children of different-sex couples.<sup>104</sup>

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102. The arguments in favor of antimiscegenation laws and those in favor of bans against same-sex marriage do differ in one respect: while the former call for racial segregation in marriage, the latter call for sex/gender integration in marriage. Antimiscegenation laws, in other words, aim to keep the races separate when it comes to marriage, while the bans against same-sex marriage (ostensibly) seek to maintain and protect those intimate relationships that bring together individuals of different sexes/genders. The important point, however, is that both marital restrictions are grounded in the idea that individuals have certain natural, essential, and predetermined characteristics and attributes that (should) render them ineligible to marry someone of a different race (in the case of antimiscegenation laws) or of the same sex/gender (in the case of same-sex marriage bans).

103. *Andersen*, 138 P.3d at 1005.

104. Supporters of the notion that dual-gender parenting is an essential element of optimal parenting frequently point to studies which show that children who do not have fathers participating in their lives do not do as well as those who do. *See id.* at 1006 (noting that “[s]tudies summarized in the record before one trial court demonstrated that an absent father is associated with quantifiable deficits in children at every stage of the lifecycle, persisting not only in the adulthood of the child, but even into the next generation” (internal quotation marks omitted)). Those studies, however, usually compare households headed by heterosexual single mothers with families headed by different-sex spouses. *See id.* at 1006 n.47 (citing to three studies that compared children raised by single mothers with children raised by married heterosexual parents). The studies do not compare households headed by two different-sex spouses with households headed by two lesbian mothers to determine whether the lack of a male parent in the latter negatively affects children. This point has been acknowledged by the Institute for Marriage and Public Policy, an organization that opposes same-sex marriage. *See* Maggie Gallagher & Joshua K. Baker, Inst. for Marriage and Pub. Policy, *Do Mothers and Fathers Matter? The Social Science Evidence on Marriage and Child Well-Being* 2 (2004), available at <http://www.marriagedebate.com/pdf/Do%20Mothers%20and%20Fathers%20Matter.pdf> (“Most of the research on family structure . . . does not directly compare children in intact married homes with children raised by birth by same-sex couples.”); *see also* *Varnum v. Brien*, No. CV5965, slip op. at 30 (Iowa Dist. Ct. Aug. 30, 2007) (finding that studies which

The notion of “sex/gender purity” in the same-sex marriage debate is reflected in the belief, sometimes expressed by opponents of parenting by lesbians and gay men, that children benefit from having a parental role model of the same sex/gender.<sup>105</sup> This seems to be what the New York Court of Appeals was getting at in its recent decision rejecting the constitutional challenge to the state’s same-sex marriage ban when it concluded that

[t]he Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of *what both a man and a woman are like*.<sup>106</sup>

Although the court did not state specifically that children benefit from having a parent of the same sex, that appears to be the opinion’s implication. It would seem to follow from the court’s reasoning, in other words, that boys in particular benefit from seeing what a “man” is really “like” and that girls in particular benefit from observing what a “woman” is really “like.” The New York court took as a given not only that men and women are different in fundamental ways, but also—by using the singular (i.e., “a man” and “a woman”) in setting up the frame of reference—that there is little differentiation within the two sex/gender categories.

The benefits of having a parent of the same sex was made even more explicit by a judge who dissented from the Massachusetts Supreme Judicial

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conclude that children benefit from being raised by a married mother and father have not compared the well-being of such children with those raised by same-sex couples).

105. See Wardle, *supra* note 86, at 860–61 (“Parents are important as role models for their children of the same gender because [c]hildren learn to be adults by watching adults.” (internal quotation marks omitted)); see also Brief for the Alliance for Marriage as Amici Curiae Supporting Appellants-Intervenors at 16, *Andersen*, 138 P.3d 963 (No. 75934-1) (“[Fathers] provide protection and economic support and male role models. They have a parenting style that is significantly different from that of mothers, and the difference is important in healthy child development.”).

106. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (emphasis added). These types of arguments associated with the quality and distinctiveness of sex/gender-based parenting were once used to justify the so-called “tender years” doctrine, which presumed, in custody cases, that mothers were better able to care for young children than fathers. That doctrine has been repudiated by most jurisdictions. See Alexandra Selfridge, *Equal Protection and Gender Preference in Divorce Contests over Custody*, 16 J. Contemp. Legal Issues 165, 174 (2007) (discussing the law on this point in several jurisdictions). One of the courts that rejected the maternal preference presumption is the Maryland Court of Appeals. See *Elza v. Elza*, 475 A.2d 1180, 1183–84 (Md. 1984). Several years after *Elza*, a trial court granted a mother’s petition requesting that custody of her daughters be taken away from the father and given to her because the younger of the two girls in particular had “a need for a female hand.” *Giffin v. Crane*, 716 A.2d 1029, 1033 (Md. 1998) (emphasis omitted). The Maryland Court of Appeals rejected that view, holding that “[t]he trial court erred [when] it assumed that the [mother] necessarily would be a better custodian solely because she has a female hand, and that a girl child of a certain age has a particular and specific need to be with her same sex parent.” *Id.* at 1040.

Court's decision striking down the state's ban against same-sex marriage.<sup>107</sup> This particular judge was troubled by the fact that lesbian couples might not be able to effectively teach their sons about what it means to be a man sexually:

[The raising of children by a same-sex couple] raises the prospect of children lacking any parent of their own gender. For example, a boy raised by two lesbians as his parents has no male parent. . . . It is . . . rational to posit that the child himself might invoke gender as a justification for the view that neither of his parents "understands" him, or that they "don't know what he is going through," particularly if his disagreement or dissatisfaction involves some issue pertaining to sex.<sup>108</sup>

In other words, mothers, because they are women, are apparently unable to adequately teach their sons about matters related to sexuality and intimacy.<sup>109</sup> This is a highly essentialized and rigid understanding of

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107. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 983 (Mass. 2003) (Cordy, J., dissenting).

108. *Id.* at 1000 n.29 (citation omitted). The same judge determined that it is rational for the legislature to conclude that

a family environment with married opposite-sex parents remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm.

*Id.* at 999–1000 (footnote omitted). The judge added that the fact that Massachusetts law allows same-sex couples to adopt does not undermine the rationality of the same-sex marriage ban because "adoption presupposes that at least one of the child's biological parents is unable or unwilling . . . to participate in raising the child. In that sense, society has 'lost' the optimal setting in which to raise that child—it is simply not available." *Id.* at 1000.

109. The state of Florida, in defending the constitutionality of a law that prohibits lesbians and gay men from adopting, not only argued that dual-gender parenting plays a "vital role . . . in shaping sexual and gender identity," but that it is also crucial "in providing heterosexual role modeling." *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004). This latter argument posits that heterosexual parents are better able to provide their children with the education and guidance needed to date members of the opposite sex. The U.S. Court of Appeals for the Eleventh Circuit found this argument to be rational, concluding that heterosexuals "are better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence" given that the majority of adopted children will eventually manifest a different-sex sexual orientation. *Id.* at 822 (footnote omitted). The court did not explain what might be in the best interests of those children who will eventually manifest a same-sex sexual orientation.

Judge Rosemary Barkett, in a dissent from the denial of en banc review in *Lofton*, ridiculed the panel's reasoning on this point:

There is certainly no evidence that the ability to share one's adolescent dating experiences (or lack thereof) is an important, much less essential, facet of parenting. The difficult transition to adulthood is a common human experience, not an experience unique to human beings of a particular race, gender, or sexual orientation. It is downright silly to argue that parents must have experienced everything that a child will experience in order to guide them.

*Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 377 F.3d 1275, 1299 (11th Cir. 2004) (Barkett, J., dissenting from denial of en banc review).

sex/gender: male parents can do things that female parents cannot and vice versa.

In addition to concerns about the need to have a parental role model of the same sex and about teaching children the facts of life, opponents of same-sex marriage worry that children raised by same-sex couples will be confused in terms of what is expected of them given their sex/gender.<sup>110</sup> Interestingly, there may be some support for this view. There is some suggestion in the empirical literature that the children of gay and lesbian parents tend to have preferences, and to act in ways, that are less consistent with traditional sex/gender expectations than children raised by heterosexual parents.<sup>111</sup> Some studies, for example, suggest that the daughters of lesbian mothers express a greater interest in pursuing occupations (such as law, medicine, and engineering) that have traditionally been dominated by men than do the daughters of heterosexual mothers.<sup>112</sup> Some of the studies also suggest that the level of aggressiveness and the play preferences of the sons of lesbian mothers are less gender typical.<sup>113</sup>

In my estimation, this departure from traditional sex/gender expectations among the children of lesbians and gay men, to the extent it exists, is a positive development because it undermines an understanding of sex/gender that is essentialized and binary in nature. The preliminary empirical findings, in other words, support the position that sex/gender categories are as malleable and contestable as racial ones. From this perspective, the definition of what it means to be a man or a woman (or to act in male or female ways) is a fluid one, constructed through social norms, practices, and expectations.

In contrast, conservative opponents of same-sex marriage tend to view sex/gender categories in the same way that proponents of antimiscegenation statutes viewed racial groups, that is, as natural and static categories that exist largely outside of forces of social construction. For them, there are particular and predetermined ways in which—to paraphrase the New York Court of Appeals—men are like and women are like,<sup>114</sup> and society has a legitimate interest in making sure that every new generation of parents raises children in ways that are consistent with those sex/gender

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110. Lynn Wardle, for example, has argued that “[h]omosexual parenting poses particular risks for the emotional and gender development of children” and that children “have stronger gender identity . . . when they are reared in two-parent, dual-gender families.” Wardle, *supra* note 86, at 863; see also Paul Cameron, *Homosexual Parents: Testing “Common Sense”—A Literature Review Emphasizing the Golombok and Tasker Longitudinal Study of Lesbians’ Children*, 85 *Psychol. Rep.* 282, 293 (1999) (noting that “common sense” tells us that “[c]hildren raised by homosexuals, lacking regular input from and experiences with both a father and a mother, should be more apt to exhibit gender confusion of various sorts” (emphasis omitted)).

111. Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 *Am. Soc. Rev.* 159, 168 (2001).

112. *Id.*

113. *Id.* I explore the conclusions and implications of the Stacey and Biblarz article in Ball, *supra* note 6, at 697–705.

114. See *supra* note 106 and accompanying text.

characteristics and expectations. Parenting by lesbians and gay men—especially when done by couples—is threatening because it blurs the seemingly natural and clear lines of demarcation between sex/gender categories in the same way that interracial couples who are parents blur seemingly natural and clear racial lines.

There is, finally, an additional similarity between the two marriage bans and their relationship to children, namely, their relative *ineffectiveness*. As I noted in Part I, the antimiscegenation regime was eventually undermined, as a practical matter, by the fact that each successive generation of racial intermixing led to ever-increasing degrees of racial gradations and permutations.<sup>115</sup> It may have been possible to prohibit white people from marrying black people, but it was much more difficult to prevent them from having children. The birth of each new interracial child, in turn, only led to even greater racial intermixing when that child eventually had children of his or her own.

Similarly, it is possible to prevent individuals from marrying others of their own sex/gender. It is much more difficult, however, to prevent them from raising children together. Indeed, the state has been considerably more successful in withholding marital status from lesbians and gay men than it has been in withholding parental status from them. That this is the case is hardly surprising. Many of the children raised by lesbians and gay men are biologically related to them, and the state, as a constitutional matter, cannot unduly interfere with those relationships once they exist.<sup>116</sup> In particular, there is little that the state can do to prevent lesbian and gay parents from choosing to have their partners help raise their children. Although the issue of whether those partners will be recognized as legal parents is a complicated one that frequently varies by jurisdiction,<sup>117</sup> the important point is that the same-sex marriage bans have been quite ineffective in preventing same-sex couples from raising children together, and therefore have been quite ineffective in promoting what the states insist is the optimal form of parenting.

And herein lies the ultimate irrationality of the children-based arguments against same-sex marriages. In order to advance the purported interests of *some* children (i.e., those raised by different-sex couples), policy makers—with the constitutional approval of many courts—seem more than happy to deny *other* children (i.e., those raised by same-sex couples) the protections and stability that would be afforded to them through the legal recognition of the relationships between the care-giving adults. It is children—rather than understandings of what “men are like” and “women are like”—who are

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115. See *supra* notes 48–57 and accompanying text.

116. The Supreme Court first discussed the constitutional limitations on the ability of the state to interfere with the parent-child relationship in *Pierce v. Society of Sisters*, 268 U.S. 510, 518–19 (1925), and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The same constitutional protections available to lesbian and gay parents who are biologically related to their children apply, of course, to lesbians and gay men who become legal parents through adoption.

117. See Rubenstein et al., *supra* note 80, at 148–54.

truly nonfungible.<sup>118</sup> While the prohibition against same-sex marriage harms the children of same-sex couples (by denying them the benefits that would accompany the legal recognition of the relationships between the adults),<sup>119</sup> it does nothing for those children who will be raised by different-sex couples *regardless* of whether lesbians and gay men are permitted to marry.<sup>120</sup>

### III. *LOVING*, CHILDREN, AND SEX/GENDER-BASED PREJUDICE

The plaintiffs in same-sex marriage cases have sought to use the holding and reasoning of *Loving v. Virginia* in two ways. First, they have argued that *Loving*, as well as other Supreme Court marriage cases,<sup>121</sup> supports the notion that there is a fundamental right to marry that requires courts to apply heightened scrutiny when assessing the constitutionality of the bans against same-sex marriage.<sup>122</sup> This first argument goes to the question of

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118. See *supra* note 103 and accompanying text (noting that the Washington Supreme Court concluded that men and women are “nonfungible” when they act as parents).

119. As the Massachusetts Supreme Judicial Court has noted, “Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.” *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003).

120. Efforts to connect the well-being of the children of different-sex relationships to the ban on same-sex marriages can border on the absurd. The New York Court of Appeals defended the rationality of the ban by using the following curious reasoning: (1) different-sex relationships that produce children can be “casual or temporary” because of the ease with which those children can be created through heterosexual sex; (2) in contrast, same-sex couples who want to have children have to engage in considerable discussions and planning, and as a result, enjoy relationships that are *more* stable than those of different sex-couples; therefore (3) it is rational for the legislature to limit the stability and permanence provided by marriage to those couples (and their children) who need it most! See *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); see also *Morrison v. Sadler*, 821 N.E.2d 15, 30 (Ind. App. 2005) (noting that “[e]ven accepting that many same-sex couples are successfully raising children in today’s society, these couples are not at ‘risk’ of having random and unexpected children by virtue of their ordinary sexual activities”).

The complete disconnect between permitting same-sex couples to marry and the promotion of responsible childrearing by different-sex couples makes the New York court’s reasoning deeply flawed. For the court’s argument to carry weight, we would have to be persuaded that some different-sex relationships will turn out to be less “casual or temporary” because of the fact that same-sex couples are not allowed to marry. Such a contention makes no sense. Chief Justice Judith S. Kaye in her dissent noted that “no one rationally decides to have children because gays and lesbians are excluded from marriage.” *Hernandez*, 855 N.E.2d at 31 (Kaye, C.J., dissenting). Similarly, no one rationally decides to stay with one’s different-sex partner after having children with that person because lesbians and gay men are excluded from marriage.

121. See *Turner v. Safley*, 482 U.S. 78 (1987) (holding that prisoners enjoy a constitutional right to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that individuals who owe child support cannot be denied the opportunity to marry).

122. See, e.g., *Conaway v. Deane*, 932 A.2d 571, 619 (Md. 2007) (noting that gay litigants, in arguing that individuals have a fundamental right to marry the person of their choice, rely *inter alia* on *Loving*); *Lewis v. Harris*, 908 A.2d 196, 210 (N.J. 2006) (“Plaintiffs . . . rely on [*Loving*] to support their claim that the right to same-sex marriage is fundamental.” (citation omitted)).

whether the prohibition against same-sex marriage violates substantive due process rights. Most courts that have addressed that question have answered it in the negative, concluding that *Loving* and the other Supreme Court marriage cases stand for the proposition that the fundamental right to marry is limited to the traditional definition of the institution of marriage, one that requires spouses to be of different sexes/genders.<sup>123</sup>

For purposes of this essay, I am interested in the second way in which plaintiffs in same-sex marriage cases have sought to use *Loving*, one that addresses issues of equal protection.<sup>124</sup> Since the Hawaii Supreme Court's decision in *Baehr v. Lewin*,<sup>125</sup> most plaintiffs in same-sex marriage cases have argued *inter alia* that the bans against gay marriage are unconstitutional because they discriminate on the basis of sex/gender.<sup>126</sup> The states have responded to this contention by raising an "equal application" defense, namely, that the bans do not constitute impermissible sex/gender discrimination because they treat men and women equally. In other words, men and women are equally prevented from marrying others of the same sex/gender, and therefore, it is argued, the different-sex requirement embodied in the marriage statutes is not intended to benefit one sex/gender category over another.<sup>127</sup>

Plaintiffs have sought to counter the "equal application" defense by reminding courts that the Commonwealth of Virginia also argued in *Loving* that its antiscegenation statute did not violate the Constitution because it imposed an equal burden on whites and blacks—members of both groups were equally prohibited from marrying someone from the other group.<sup>128</sup> Gay plaintiffs have argued that courts today should reject the "equal application" defense raised by the states in the same-sex marriage cases in the same way that the *Loving* Court rejected the notion that the equal application of Virginia's antiscegenation statute immunized it from a challenge under the Equal Protection Clause.<sup>129</sup>

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123. See, e.g., *Conaway*, 932 A.2d at 620; *Lewis*, 908 A.2d at 210; *Hernandez*, 855 N.E.2d at 9–10; *Andersen v. King County*, 138 P.3d 963, 989 (Wash. 2006) (en banc).

124. I have elsewhere addressed the relevance of the Supreme Court's marriage cases to the due process question of whether the fundamental right to marry includes same-sex couples within its ambit. See generally Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 Minn. L. Rev. 1184 (2004).

125. 852 P.2d 44 (Haw. 1993) (holding that the ban against same-sex marriage constitutes a sex-based classification that requires the state to establish a compelling interest).

126. See, e.g., *Conaway*, 932 A.2d at 585; *Hernandez*, 855 N.E.2d at 10; *Andersen*, 138 P.3d at 989. For scholarly elaborations on the argument that sexual orientation discrimination constitutes a form of sex/gender discrimination, see generally Koppelman, *supra* note 12, and Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187.

127. See, e.g., *Conaway*, 932 A.2d at 600–01 (explaining the "equal application" defense); *Andersen*, 138 P.3d at 989 (same).

128. *Loving v. Virginia*, 388 U.S. 1, 8 (1967).

129. See, e.g., *Conaway*, 932 A.2d at 619 (noting that gay litigants "rely principally on *Loving*" to counter the state's "equal application theory"); *Andersen*, 138 P.3d at 989 ("Plaintiffs maintain . . . that *Loving* supports their argument that [the Maryland Defense of



The state supreme courts that have addressed the constitutionality of the same-sex marriage bans have, for the most part, rejected the equal protection analogy drawn by the plaintiffs to *Loving*.<sup>130</sup> These courts have conceded that, after *Loving*, the equal application of a marriage restriction cannot by itself immunize it from a constitutional challenge. They have also noted, however, that the *Loving* Court rejected the “equal application” defense because it concluded that the antimiscegenation law was motivated by invidious racial discrimination and that it was part of a broader effort to establish and maintain a regime of “White Supremacy.”<sup>131</sup> In contrast, these courts have contended that the bans against same-sex marriage are not motivated by sex/gender-based prejudice. As the New York Court of Appeals said,

By limiting marriage to opposite-sex couples, New York is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex. This is not the kind of sham equality that the Supreme Court confronted in *Loving*; the statute there, prohibiting black and white people from marrying each other, was in substance anti-black legislation. Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class.<sup>132</sup>

For its part, the Maryland Court of Appeals, in rejecting the constitutional challenge to that state’s ban on same-sex marriage, concluded that

[b]ecause there is no evidence in the record before us that the Legislature intended . . . to differentiate between men and women as classes on the basis of some misconception regarding gender roles in our society, we conclude that the [state constitution’s Equal Rights Amendment] does not

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Marriage Act] violates the [Maryland Constitution’s Equal Rights Amendment]. Plaintiffs reason that in *Loving* the Court held Virginia’s antimiscegenation statute invalid even though the law treated the races equally.”). The Court in *Loving* reasoned as follows: “[W]e reject the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations.” *Loving*, 388 U.S. at 8.

130. See, e.g., *Conaway*, 932 A.2d at 601–02; *Hernandez*, 855 N.E.2d at 11; *Andersen*, 138 P.3d at 989. But see *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring) (“The equal protection infirmity at work here is strikingly similar to . . . the invidious discrimination perpetrated by Virginia’s antimiscegenation laws unveiled in the decision of *Loving v. Virginia* . . .”); *Baker v. State*, 744 A.2d 864, 906 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (concluding that “the sex-based classification contained in the marriage laws is unrelated to any valid purpose, but rather is a vestige of sex-role stereotyping that applies to both men and women, [and that therefore] the classification is . . . unlawful sex discrimination even if it applies equally to men and women”); *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993) (analogizing to *Loving* in concluding that a same-sex marriage ban constitutes a sex-based classification).

131. See *Loving*, 388 U.S. at 11.

132. *Hernandez*, 855 N.E.2d at 10–11.

mandate that the State recognize same-sex marriage based on the analogy to *Loving*.<sup>133</sup>

Under the reasoning of these courts, then, the equal application of a law that restricts marital rights to all the members of a protected class constitutes a valid defense to an equal protection challenge in the absence of evidence that the restriction was motivated by prejudice.

The courts that have reasoned in this way have been too quick to conclude that there is no prejudice behind sex/gender-based marital restrictions. As the Supreme Court, in addressing the issue of sex/gender discrimination has made clear, prejudice in this area is not limited to the explicit or overt preference of one sex/gender category over another. Instead, sex/gender-based prejudice is often grounded in the acceptance and replication of stereotypes about the purportedly distinct abilities, needs, and interests of men and women.<sup>134</sup>

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133. *Conaway*, 932 A.2d at 602; see also *Goodridge*, 798 N.E.2d at 992 n.13 (Cordy, J., dissenting) (“Unlike Virginia’s antimiscegenation statute, neither the purpose nor the effect of the Massachusetts marriage statute is to advantage or disadvantage one gender over the other. This distinction is critical and was central to the *Loving* decision.”); *Baker*, 744 A.2d at 880 n.13 (rejecting the argument that a same-sex marriage ban constitutes an impermissible sex-based classification given the absence of evidence showing purposeful discrimination).

134. I will concede for purposes of argument that marriage laws impact men and women equally in order to focus on the further conclusion reached by several courts that the sex/gender-based marital restriction is not based on prejudice. As many commentators have noted, however, the history of the institution of marriage is replete with examples of the ways in which it has contributed, in powerful ways, to the subordination of women by men. See Claudia Card, *Against Marriage and Motherhood*, 11 *Hypatia* 1, 4 (1996) (“Marriage and motherhood in the history of modern patriarchies have been mandatory for and oppressive to women . . . .”); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 *Am. Univ. J. Gender Soc. Pol’y & L.* 167, 170 (2000) (noting how for second-wave feminists “[m]arriage was the principal institution that maintained . . . patriarchy”); see also Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 *Stan. L. & Pol’y Rev.* 97, 107 (2005) (“[A]ny temptation to assert that same-sex marriage bans do not discriminate because they apply equally to men and women alike must give way in view of males’ traditional position of superiority in law, society, and family life.” (footnote omitted)); Justin Reinheimer, Note, *Same-Sex Marriage Through the Equal Protection Clause: A Gender-Conscious Analysis*, 21 *Berkeley J. Gender L. & Just.* 213, 231 (2006) (“Women of all sexualities, as a group, are disproportionately impacted by marriage given the institution’s role in maintaining and enforcing sex inequality . . . .”). One of the most important components of that subordination results from the indisputable proposition that the norm of dual-gender parenting, defended by states in the same-sex marriage litigation, has traditionally expected much more child care of mothers than it has of fathers. This *unequal* application of the norm of dual-gender parenting, in turn, has significantly restricted the social, political, and economic opportunities of women.

Although I am persuaded by the critique of the traditional understanding of marriage as one that subordinates women to the interests of men, I wonder whether a majority of judges, in the foreseeable future, are likely to agree. My sense is that judges may be more open to the idea that the marital sex/gender restriction is ultimately grounded in stereotypes about the abilities and traits of *both men and women* than to the notion that the institution of marriage, as traditionally understood, is an intrinsically patriarchal one. The subordination argument and the stereotyping argument, of course, are not mutually exclusive. In fact, the institution of marriage has historically served to subordinate women precisely because of stereotypical

The Supreme Court in *Price Waterhouse v. Hopkins*, for example, concluded that defendants engage in impermissible discrimination under Title VII when they make employment-related decisions that are grounded in sex/gender-based stereotypical understandings of the way in which individuals should act.<sup>135</sup> As the Court stated,

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.<sup>136</sup>

The Court has been similarly suspicious of sex/gender stereotypes when interpreting the Equal Protection Clause. In *United States v. Virginia*, for example, the state argued that women students were incapable of benefiting from the application by the Virginia Military Institute (VMI) of what it called its “adversative method” of instruction.<sup>137</sup> That method was characterized by “[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.”<sup>138</sup> The state justified the categorical exclusion of women from VMI by arguing that there are important “psychological and sociological differences” between men and women that made the application of the adversative method to women less beneficial and effective.<sup>139</sup> The Court rejected the state’s position, noting that “[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females.”<sup>140</sup> The Court added that the government, in meeting its high burden in defending policy-based sex/gender distinctions, cannot “rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>141</sup>

It should be added that the Court has not exempted from constitutional scrutiny sex/gender-based considerations related to what the state believes is the optimal allocation of responsibilities within family units. In *Orr v. Orr*, for example, the Court was confronted with a law that imposed

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understandings of the needs, interests, and capabilities of women/wives. Given the facial neutrality of sex/gender marital restrictions, however, it may be easier to persuade judges of the constitutional infirmity of those restrictions by exposing how arguments in support of same-sex marriage bans rely on stereotypes relating to both men and women rather than through a patriarchy-based critique that ultimately requires judges to conclude that the institution of marriage, as currently defined, promotes the subordination of women.

135. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989).

136. *Id.* at 251 (internal quotation marks omitted); see also *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 730 (2003) (“Reliance on [gender] stereotypes cannot justify the States’ gender discrimination in [the area of employment].”).

137. *United States v. Virginia*, 518 U.S. 515, 540 (1996).

138. *Id.* at 522 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1421 (1991)).

139. *Id.* at 549.

140. *Id.* at 541 (internal quotation marks omitted).

141. *Id.* at 533.

alimony obligations after divorce only on men.<sup>142</sup> In striking down the statute, the Court made clear that the Constitution does not countenance “the State’s preference for an allocation of family responsibilities under which the wife plays a dependent role, [while] seeking . . . the reinforcement of that model among the State’s citizens.”<sup>143</sup> Indeed, as Professor Andrew Koppelman has noted, “Since it began subjecting sex-based classifications to heightened scrutiny, the Court has *never* upheld a sex-based classification resting on *normative* stereotypes about the proper role of the sexes.”<sup>144</sup>

To return to the issue at hand, then, the states’ child-based arguments justifying the continued prohibition against the recognition of same-sex marriages are constitutionally impermissible because they are grounded, as explained in Part II, on the notion that parents have distinct talents and capacities based on their sex/gender, and in doing so, they perpetuate sex/gender stereotypes. In fact, the contention that women are better able to provide children with certain benefits and that men are better able to provide *distinct* benefits is precisely the type of impermissible reliance on

142. *Orr v. Orr*, 40 U.S. 268 (1979).

143. *Id.* at 279. In *Weinberger v. Wiesenfeld*, the Supreme Court assessed the constitutionality of a Social Security Act provision that granted smaller survivors’ benefits to widowers and their children than to widows and their children. 420 U.S. 636 (1975). In striking down the law, the Court noted that, although “the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support[,] . . . such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families’ support.” *Id.* at 645 (footnote omitted); *see also* *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975) (“No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”).

Furthermore, the Court, in holding that Congress appropriately abrogated the states’ sovereign immunity when it enacted the Family and Medical Leave Act, recognized the dialectical relationship between gender stereotypes in the family sphere and gender stereotypes in the employment sphere:

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees.

*Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

144. Koppelman, *supra* note 12, at 218 (emphasis added). Susan Frelich Appleton has noted the extent to which “[s]tate and federal legislatures, as well as state courts, have followed the Justices’ lead [in rejecting the promotion by the state of gender stereotypes by] developing gender-neutral rules about child custody, post-dissolution support, premarital contract enforcement, and age requirements for marriage—to name some representative illustrations.” Appleton, *supra* note 134, at 113–14 (footnotes omitted). In fact, Appleton adds that “the requirement of one man and one woman for a valid marriage” is the last important sex/gender criterion that remains standing in family law, “even though the spouses’ legal roles and responsibilities have become essentially interchangeable.” *Id.* at 119.

traditional sex/gender stereotypes that the Supreme Court, in other contexts, has rejected.<sup>145</sup>

The courts that have refused to apply the equal protection component of *Loving* in the same-sex marriage context have distinguished between the hierarchical racial regime represented by antimiscegenation laws and the seemingly sex/gender-neutral regime represented by the bans against same-sex marriage. These courts have failed to understand, however, that the *equal application of a governmental policy that is grounded on sex/gender stereotypes is as constitutionally impermissible as the unequal application of such a policy.*

An example might help to explain this point. It would seem clear that the government, consistent with the Equal Protection Clause, could not implement a policy that denied all promotions to its female employees who, in the government's estimation, are too masculine. It would also seem clear that the government could not implement a separate policy that denied all promotions to its male employees whom it regards as being too feminine. But what if the government were to institute a single policy that denied employees all promotions on the ground that they fail to abide by what the government believes is appropriate sex/gender-based behavior? It is possible to articulate this policy in a facially neutral way by, for example, announcing that promotions will not be given to any employees who act in ways that are inconsistent with their sex/gender. The government, in turn, could try to argue that its unified policy is constitutional because it treats men and women in the same way. Courts, however, would likely and properly reject that contention because the government would be denying opportunities to individuals based on sex/gender stereotypes, that is, on the notion that there are proper ways for men to conduct themselves and that there are *distinct* ways in which women should conduct themselves.<sup>146</sup>

The same reasoning should be applied when assessing the legitimacy of the effort by states to justify the exclusion of same-sex couples from the institution of marriage on the ground that a parent from each sex/gender category is required in order for children to receive optimal parental care.

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145. For further discussion, see Ball, *supra* note 6, at 725–48.

146. Justice Antonin Scalia, in dissenting from a ruling in which the Court held that it is unconstitutional for the government to exercise peremptory challenges on the basis of a prospective juror's sex, contended that there can be no unconstitutional discrimination as long as both men and women are subject to such challenges. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 159 (1994) (Scalia, J., dissenting) ("Since all groups are subject to the peremptory challenge . . . it is hard to see how any group is denied equal protection."). The majority, however, rejected that argument, noting that

[a]ll persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination. Striking individual jurors on the assumption that they hold particular views simply because of their gender is "practically a brand upon them, affixed by the law, an assertion of their inferiority."

*Id.* at 141–42 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (footnote omitted)).

Although this justification can be packaged in a seemingly sex/gender-neutral way (i.e., as a single policy that impacts men and women in the same manner), it is nonetheless constitutionally unacceptable because it is grounded in stereotypical understandings of how sex/gender determines (and constrains) the ability of parents to nurture and care for their children.<sup>147</sup>

It is true, as an empirical matter, that married mothers generally spend more time performing child care (and doing domestic work) than do their husbands.<sup>148</sup> The social science literature also suggests that married fathers spend more time playing with their children, while mothers spend more time meeting the practical needs of their children.<sup>149</sup> The *normative* notion, however, that optimal child care depends on something unique about mothers *as women* conflates social expectations and roles imposed on parents according to their sex/gender with seemingly natural and intrinsic characteristics that distinguish women from men (and vice versa).<sup>150</sup>

The Supreme Court has made it clear that, “[w]hen state actors . . . [rely] on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women.”<sup>151</sup> Courts in same-sex marriage cases need to be more skeptical than they have been so far in assessing the validity of the contention that optimal parenting depends on considerations

147. Professor Stephen Clark has noted that the equal application defense raised by the states in same-sex marriage cases has a “superficial appeal” because, at a broad level of generality, the marriage bans seem to represent a single policy that treats men and women equally. Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 Rutgers L.J. 107, 143 (2002). The defense, however, constitutes nothing more than a “semantic shell game,” *id.* at 144, meant to hide the fact that the bans are “designed to simultaneously enforce both a male gender role and a female gender role, [thus] amount[ing] to a regime of dual discrimination injuring both sexes,” *id.* at 140.

148. “Although fathers’ engagement with children has increased in recent decades, mothers continue to do about two thirds of all child care.” Daniel N. Hawkins et al., *Parent-Adolescent Involvement: The Relative Influence of Parent Gender and Residence*, 68 J. Marriage & Fam. 125, 125 (2006) (citation omitted).

149. Leslie D. Hall et al., *Gender and Family Work in One-Parent Households*, 57 J. Marriage & Fam. 685, 686 (1995).

150. It is interesting to note that the reports on the differences in parenting roles between men and women have for the most part studied intact families in which there is a mother and father present in the home. A recent study that compared *single* fathers with *single* mothers, however, found that they did not differ in either the time spent with their children or in the kinds of activities that they engage in with their children. *Id.* at 690 & tbl.4. This suggests that the differences reported in the literature on both of these criteria are not explained by natural differences between men or women, but are instead explained by the different expectations (both social and internal) that attach to being a male parent and a female parent in married, different-sex households. As the authors of the study note,

Being the caretaker of family members is seen by women, and more broadly by society, as something women are rather than as something they do. Conversely, caretaking is something that fathers . . . do rather than something that they are. The meaning of the activity differs by virtue of the gender of the actor. Consequently, the family labor of women and men both shapes and is shaped by social constructions of gender.

*Id.* at 691.

151. *J.E.B.*, 511 U.S. at 140.

of sex/gender. It is not permissible, under Supreme Court precedents, to rely, as the New York Court of Appeals did, on “[i]ntuition and experience” in assessing the constitutional validity of that argument.<sup>152</sup>

Indeed, although one would not know it by reading recent judicial opinions upholding the constitutionality of bans against same-sex marriage, many social scientists question the connection between optimal parenting and sex/gender. As stated in the introduction to the most recent edition of one of the leading texts on the role that fathers play in the well-being of children,

[F]athers and mothers seem to influence their children in similar rather than dissimilar ways. Contrary to the expectations of many developmental psychologists, the differences between mothers and fathers appear to be much less important than the similarities. . . . [T]he mechanisms and means by which fathers influence their children also appear very similar to those that mediate maternal influences on children. Stated differently, students of socialization have consistently found that parental warmth, nurturance, and closeness are associated with positive child outcomes regardless of whether the parent involved is a mother or a father. The important dimensions of parental influence are those that have to do with parental characteristics rather than gender-related characteristics.<sup>153</sup>

Furthermore, despite the rejection by most courts of the applicability of *Loving* to the issue of same-sex marriage, that case would seem to be highly relevant to an equality-based constitutional challenge to same-sex marriage bans given that the optimal parenting justification for those bans is grounded, as I explored in Part II, in the idea of natural, essential, and predetermined differences between men and women that is similar to the notion of natural, essential, and predetermined differences between whites

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152. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006). Given that the dual-gender parenting argument, at its core, is based on the notion that men and women have different abilities as parents that correlate directly to their sex/gender, the burden should be on the government to present evidence that the absence of a male parent in a household headed by a lesbian couple and the lack of a female parent in a household headed by a gay male couple negatively affects children. Relying on studies that compare households headed by single heterosexual mothers to those headed by different-sex spouses, *see supra* note 104, should not be enough in cases in which the government chooses to defend a law on the constitutionally suspect ground that men and women have “different talents, capacities, or preferences,” *United States v. Virginia*, 518 U.S. 515, 533 (1996).

153. Michael E. Lamb & Catherine S. Tamis-Lemonda, *The Role of the Father: An Introduction*, in *The Role of the Father in Child Development* 1, 10 (Michael E. Lamb ed., 4th ed. 2004). Even Dr. Kyle Pruett, who was the leading witness for Hawaii during the trial that assessed the constitutionality of that state’s ban on same-sex marriage, *see supra* notes 95–96 and accompanying text, and whose work is frequently cited by those who view dual-gender parenting as essential to the well-being of children, *see, e.g.*, Wardle, *supra* note 86, at 857 n.120, 858 nn.125 & 130, 860 n.151, 861 n.158, has more recently written that “I . . . now realize that most of the enduring parental skills are probably, in the end, not dependent on gender,” *see* Kyle D. Pruett, *Fatherhood: Why Father Care Is as Essential as Mother Care for Your Child* 18 (2000).

and blacks that served as the normative foundation for the antimiscegenation regime.<sup>154</sup>

The Supreme Court in *Loving* was willing to look behind the appearance of equal treatment reflected on the face of Virginia's antimiscegenation statute to assess the constitutionality of that law. Most courts that have addressed the constitutionality of the bans against same-sex marriage, however, have refused, in any meaningful way, to look behind the facade of equal treatment contained in sex/gender-based marital restrictions. If the courts were to do so, they would find, as I have sought to explain in this essay, that both the interracial and the same-sex marriage bans, as reflected in their respective relationships to children, have been grounded in the idea that racial categories (in the context of antimiscegenation laws) and sex/gender categories (in the context of bans against same-sex marriage) are natural categories that exist independently of human norms and practices. The marriage bans have been used as an important means to enforce boundaries between the categories in question that seem natural (and, to some, God-given), but which are actually the result of forces of social construction.

The use of marital restrictions to police race-based boundaries is now largely discredited. The time has come for the use of marital restrictions to police sex/gender-based boundaries to be deemed similarly suspect.

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154. See *supra* notes 99–114 and accompanying text.