
ESSAY

CONCORD WITH WHICH OTHER FAMILIES?: MARRIAGE EQUALITY, FAMILY DEMOGRAPHICS, AND RACE

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Lesbian and gay parents figured prominently in two decades of litigation concerning marriage equality, and *Obergefell v. Hodges*¹ was no exception. Although only 16-18% of same-sex couples are raising children,² about 69% of the plaintiff couples in the combined cases that made up *Obergefell* were parents.³ This disproportionate number was the culmination of an extraordinary transformation. For most of the past twenty years, opponents

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¹ 135 S. Ct. 2584 (2015).

² GARY J. GATES, WILLIAMS INST., LGB FAMILIES AND RELATIONSHIPS: ANALYSES OF THE 2013 NATIONAL HEALTH INTERVIEW SURVEY 5 fig.4 (2014) [hereinafter GATES, LGB FAMILIES] (listing 18% of married same-sex couples and 19% of unmarried same-sex couples as raising children); JONATHAN VESPA, JAMIE M. LEWIS & ROSE M. KREIDER, U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012, at 24 tbl.9 (2013) [hereinafter CENSUS REPORT 2012] (noting that overall 16.4% of same-sex couples are raising children, comprising 10.5% of male same-sex couples and 21.6% of female same-sex couples).

³ The Supreme Court's *Obergefell* decision combined six district court decisions from Kentucky, Ohio, Michigan, and Tennessee. Of the sixteen plaintiff couples involved in those cases, eleven couples, or about 69%, were parents. See *Love v. Beshear*, 989 F. Supp. 2d 536, 540 (W.D. Ky. 2014) (neither of the two plaintiff couples were parents); *Henry v. Himes*, 14 F. Supp. 3d 1036, 1041-42 (S.D. Ohio 2014) (four plaintiff couples were parents); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 759-60 (E.D. Mich. 2014) (one of one plaintiff couples were parents); *Tanco v. Haslam*, 7 F. Supp. 3d 759, 764-65 (M.D. Tenn. 2014) (two out of three plaintiff couples were parents); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 546 (W.D. Ky. 2014) (two out of four plaintiff couples were parents); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 975-76 (S.D. Ohio 2013) (one out of two plaintiff couples, both of which involved one deceased partner, were parents); Chris Kenning, *Kentucky's Plaintiffs Savor High-Court Win*, USA TODAY (June 26, 2015), <http://www.usatoday.com/story/news/nation/2015/06/26/kentucky-same-sex-marriage-plaintiffs/29355397/> [<https://perma.cc/7H8H-GQ36>] (noting that a third couple involved in *Bourke v. Beshear* were parents).

brandished the wellbeing of children as a weapon against marriage equality. But in recent years, and especially after the Supreme Court's ruling in *United States v. Windsor*,⁴ marriage equality advocates claimed the offensive, using the wellbeing of children as an argument against same-sex marriage bans. This essay explores that transformation and its underacknowledged racial dimension.

Support for a wide diversity of family forms and relationships was a tenet of the LGBT rights movement for four decades. During this same period, conservatives began blaming the decline of lifelong heterosexual marriage for a vast array of social problems. They explicitly targeted women raising children outside of marriage, a group that is disproportionately populated by women of color, for the greatest disapproval.⁵ They posited marriage, rather than a shift in public priorities, as the solution to poverty, violence, homelessness, illiteracy, crime, and other problems.⁶

Initially, opposition to same-sex marriage was part of the conservative canon. But over time, some conservatives revised their position to encompass support for same-sex marriage precisely because it was *marriage*.⁷ To capture or solidify this support, LGBT advocates often either adopted or acquiesced in positions preferring childrearing by married parents—as long as same-sex couples could marry.⁸

4 133 S. Ct. 2675 (2013).

5 See, e.g., Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14 (arguing that “illegitimacy is the most important social problem of our time—more important than crime, drugs, poverty, illiteracy, welfare or homelessness because it drives everything else” and that the solution is “to end all economic support for single mothers”); Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC, Apr. 1993 (“Most social scientists now agree that single motherhood is an important and growing cause of poverty, and that children suffer as a result.”).

6 Murray, *supra* note 5.

7 The paradigmatic about-face came from David Blankenhorn, who wrote a book opposing same-sex marriage in 2007 and testified in favor of California's ban on same-sex marriage in 2010 but then publicly switched his position. David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (Jun. 22, 2012), <http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html> [https://perma.cc/7YAR-54QV]. See generally Theodore B. Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK (Jan. 8, 2010), <http://www.newsweek.com/conservative-case-gay-marriage-70923>.

8 For example, the ACLU filed a lawsuit challenging North Carolina's second-parent adoption ban, which prevented same-sex couples from adopting, and later amended the complaint to challenge North Carolina's same-sex marriage ban. *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695 (M.D. N.C. 2014). After same-sex couples gained the right to marry in North Carolina, the ACLU dismissed the adoption claims, even though this left the ban on unmarried couple adoption in place. *Motion to Dismiss the Complaint, Fisher-Borne*, 14 F. Supp. 3d 695 (M.D. N.C. 2014) (No. 1:12CV589). In addition, advocates in Mississippi have filed a suit challenging the ban on same-sex adoption, but only on behalf of married same-sex couples. *Complaint for Declaratory and Injunctive Relief at 1-2, Campaign for S. Equal. v. Dep't of Human Servs.*, No. 3:15cv578DPJ-FKB (S.D. Miss. Aug. 12 2015), 2015 WL 4757429.

Attributing greater social welfare to married families is the corollary to blaming unmarried women of color and their male partners for social ills. Any such stance is bound to alienate same-sex couples of color, who raise children in much greater proportion than their same-sex White counterparts, endure significantly greater economic disadvantages, and overwhelmingly live in the same neighborhoods as stigmatized unmarried parents of color. The wellbeing of those children is indelibly bound up with issues of racial and economic justice, which marriage equality cannot bring.

I. THE EVOLUTION OF MARRIAGE EQUALITY ARGUMENTS AND THE WELLBEING OF CHILDREN

Opponents of gay fathers and lesbian mothers used to argue that gay men and lesbians made undesirable parents.⁹ They therefore defended bans on same-sex marriage as a means of discouraging gay and lesbian childrearing. This argument proved increasingly ineffective in litigation, as lesbian and gay childrearing garnered unconditional support from mainstream mental health and child welfare organizations.¹⁰

Opponents of same-sex marriage consequently switched emphasis. They argued that the purpose of marriage was to create a structure for raising the unplanned children who follow naturally from heterosexual sex.¹¹ They later refined this “accidental procreation” argument by asserting that same-sex marriage sent a message disconnecting marriage from procreation, and would therefore result in fewer heterosexual marriages and even more nonmarital births.¹² Opponents essentially shifted from disparaging gay and lesbian parents to disparaging unmarried parents.

⁹ See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 852-67, 893-97 (1997) (describing the potential harms to children from “homosexual parenting” and advocating a “rebuttable presumption that ongoing homosexual relations by an adult seeking or exercising parental rights is not in the best interest of a child”).

¹⁰ See LESLIE COOPER & PAUL CATES, AM. CIVIL LIBERTIES UNION, *TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* 15-24 (2d ed. 2006), https://www.aclu.org/files/images/asset_upload_file480_27496.pdf [<https://perma.cc/K5F4-QYS7>] (reprinting statements opposing restrictions on gay and lesbian parenting from the Child Welfare League of America, American Academy of Pediatrics, American Medical Association, American Psychiatric Association, American Psychological Association, American Academy of Child and Adolescent Psychiatry, North American Council on Adoptable Children, and American Academy of Family Physicians); Brief of the American Psychological Association et al. as Amici Curiae on the Merits in Support of Affirmance at 18-20, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 871958, at *18-20 (“[T]he vast majority of scientific studies that have directly compared gay and lesbian parents with heterosexual parents has consistently shown that the former are as fit and capable parents as the latter and that their children are as psychologically healthy and well adjusted.”).

¹¹ See Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 89 (2011) (citing cases in which this argument was advanced).

¹² *Id.* at 92.

Gay rights advocates, beginning in the 1970s, argued that heterosexual parents were not better than gay parents and that there was nothing intrinsically superior about marriage as a family form in which to raise children. In 2014, world renowned child development expert Dr. Michael Lamb offered a summary of the research supporting both points:

Numerous studies of youths raised by same-sex parents conducted over the past 30 years . . . conclude that children and adolescents raised by same-sex parents are as successful psychologically, emotionally, and socially as children and adolescents raised by different-sex parents, including biological parents.

It is beyond scientific dispute that the factors that account for the adjustment of children and adolescents are the quality of the youths' relationships with their parents, the quality of the relationship between the parents or significant adults in the youths' lives, and the availability of economic and social resources. These factors affect adjustment in both traditional and nontraditional families . . .¹³

Support for a wide diversity of family forms and relationships was a tenet of the LGBT rights movement. This included advocacy for adoption by unmarried same-sex (and different-sex) couples; for access to assisted reproductive technology regardless of marital status or sexual orientation; and for the retention of child custody by divorced parents—gay and straight—living with new, nonmarital partners.¹⁴

As same-sex marriage opponents increasingly emphasized the importance of marriage to children, gay rights advocates adjusted their position. They began arguing that children of same-sex couples were harmed because their parents could not marry.¹⁵ Sometimes they listed the injury to children in

¹³ Expert Report of Michael E. Lamb at 5, *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014) (No. 13-1861), 2014 WL 3708452.

¹⁴ For example, when second-parent adoption first reached New York's highest court, Lambda Legal represented both a same-sex and a different-sex unmarried couple. *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995). When the Uniform Parentage Act was rewritten in 2002, the National Center for Lesbian Rights (NCLR) was a strong advocate for defining parentage to include a consenting, unmarried, male partner of a woman bearing a child by donor insemination. *See* John J. Sampson, *Preface to the Amendments to the Uniform Parentage Act (2002)*, 37 FAM. L.Q. 1, 3 (2003). Both Lambda Legal and NCLR have assisted heterosexual, unmarried, male functional parents seeking to maintain their relationships with the legal child of their female partners. *See, e.g., In re Scarlett Z.-D.*, 28 N.E.3d 776, 781-82 (Ill. 2015) (noting Lambda Legal's involvement on behalf of such a parent); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. (forthcoming) (manuscript at 25) (on file with the University of Pennsylvania Law Review) (describing assistance provided by NCLR to a nonbiological father who raised a child from birth with his unmarried female partner).

¹⁵ *Cf.* Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 587-88 (2005) (describing some of the legal consequences of parentage as distinct from marriage and criticizing same-sex marriage advocacy failing to recognize this distinction).

terms of legal consequences, such as economic support and the right to make decisions.¹⁶ But those consequences flow from a legally recognized parent-child relationship for which marriage is neither necessary nor, in many instances, sufficient.¹⁷ Economic consequences also vary by individual family circumstance.¹⁸

What marriage equality advocates could claim was that all the children of same-sex couples suffered harm because they were required, against the wishes of their parents, to live in unmarried family units. For example, when Mary Bonauto criticized the marriage prohibition because it “means that you are increasing the number of children who are raised outside of marriage,”¹⁹ she implicitly agreed that marriage is the preferred family form for raising children and sought support from those who share that view.

II. THE PARADOX

Asserting that the children of gay and lesbian parents were “all right,” while simultaneously arguing that they were harmed by bans on same-sex marriage, contained an inherent contradiction. Chief Justice John Roberts pointed out this paradox in an exchange with Solicitor General Donald Verrilli during the oral argument in *Hollingsworth v. Perry*²⁰ in March 2013:

CHIEF JUSTICE ROBERTS: . . . We see the argument made that there is no problem with extending marriage to same-sex couples because children raised by same-sex couples are doing just fine and there is no evidence that they are being harmed. And the other argument is Proposition 8 [the California initiative limiting marriage to a man and a woman] harms children by not allowing same-sex couples to marriage. Which is it?

GENERAL VERRILLI: . . . I think what Proposition 8 does is deny the long-term stabilizing effect that marriage brings

CHIEF JUSTICE ROBERTS: But you also tell me there has been no harm shown to children of same-sex couples.

¹⁶ *Id.* at 589.

¹⁷ *Id.*; see also *In re Q.M. v. B.C.*, 995 N.Y.S.2d 470 (N.Y. Fam. Ct. 2014) (allowing the biological father of a child born to a woman who was married to another woman to rebut the marital presumption).

¹⁸ See KYLE POMERLEAU, TAX FOUNDATION, UNDERSTANDING THE MARRIAGE PENALTY AND MARRIAGE BONUS 2 (2015), http://taxfoundation.org/sites/taxfoundation.org/files/docs/TaxFoundation_FF464_o.pdf [<https://perma.cc/RGT6-95NL>] (calculating that the largest tax benefit for marriage applies to couples with one high-earner and a much lower earning partner, such as would occur with a stay-at-home spouse).

¹⁹ Nina Totenberg, *Legal Battle over Gay Marriage Hits the Supreme Court Tuesday*, NPR (Apr. 27, 2015), <http://www.npr.org/blogs/itsallpolitics/2015/04/27/402456198/legal-battle-over-gay-marriage-hits-the-supreme-court-tuesday> [<https://perma.cc/L8M7-NB74>].

²⁰ 133 S. Ct. 2652 (2013).

GENERAL VERRILLI: . . . There are 37,000 children in same-sex families in California now. Their parents cannot marry and that has effects on them in the here and now When they go to school, . . . they don't have parents like everybody else's parents. That's a real effect, a real cost in the here and now.²¹

This answer ducked the Chief Justice's point. If the research on the wellbeing of children is correct then either the alleged stabilizing effect of marriage does not exist, or it exists but its absence does not harm the development or adjustment of children with gay and lesbian parents.

Marriage cannot give children "parents like everybody else's parents" if "everybody else's parents" are heterosexual. Verrilli's answer actually makes sense only if "everybody else" has married parents and if the children of same-sex couples are like the children of married heterosexuals in every way except for the inability to marry.²² As this essay demonstrates, neither of these premises is accurate, and the inaccuracy has dramatic racial and economic implications.

III. THE SUPREME COURT SPEAKS

In the majority opinion of *United States v. Windsor*, Justice Anthony Kennedy wrote that the section of the Defense of Marriage Act denying federal recognition of same-sex marriages made it "difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."²³ "Concord with other families"—all other families—sounds like a desirable condition for building schools and neighborhoods where people feel that they share a common interest in the wellbeing of their community.

This was not Justice Kennedy's point. Rather, like Verrilli, Justice Kennedy conjured a community of married parents raising children; the ones with whom children of same-sex couples were impermissibly denied the ability to feel "concord." Justice Kennedy also said denial of marriage recognition "humiliates tens of thousands of children now being raised by same-sex couples."²⁴ After *Windsor*, lower federal court judges used this

21 Transcript of Oral Argument at 61-62, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (Mar. 26, 2013) (No. 12-144).

22 Fifteen years ago, sociologists Judith Stacey and Timothy Biblarz criticized reliance on the argument that there are "no notable differences" between children with gay and lesbian parents and those raised by heterosexuals. Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 160 (2001). They rejected equating differences with deficits and urged gay rights advocates to do the same. *Id.* at 178-79.

23 133 S. Ct. 2675, 2694 (2013).

24 *Id.* at 2694.

powerful language to strike down state same-sex marriage bans, often further elaborating upon the stigmatizing effect of having unmarried parents.²⁵

Indeed, Justice Kennedy's words in *Windsor* became the dominant statement, for advocates and judges alike, about the relationship between banning same-sex marriage and the wellbeing of children. Unsurprisingly, the briefs in the cases that made up *Obergefell* consistently argued that "marriage brings 'social legitimization' and stability to families;"²⁶ that there is harm to children from their parents' inability to provide the "stable family structure" of marriage;²⁷ and that marriage is necessary to spare children "the stigma of being in a family without the social recognition that exists through marriage."²⁸

In *Obergefell*, Justice Kennedy doubled down on his reasoning from *Windsor*. Speaking this time in an affirmative register, he said that marriage is what "allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'"²⁹

IV. CONCORD WITH WHICH OTHER FAMILIES?

If marriage is what will allow children of same-sex couples to feel concord with other families in their community and in their daily lives, then those other families must consist of married parents. With that rhetorical construct, Justice Kennedy erased a large swathe of American families, indeed entire communities.

Forty-six percent of American children live with their married heterosexual parents in a first marriage.³⁰ Another 9% live with their married

²⁵ See, e.g., *Bostic v. Schaefer*, 760 F.3d 352, 383 (4th Cir. 2014) (quoting Justice Kennedy's "concord" language in affirming an injunction of Virginia's ban on same-sex marriage); *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 919 (S.D. Miss. 2014) (quoting Justice Kennedy's "humiliates" language in overturning the Mississippi same-sex marriage ban); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 980 (S.D. Ohio 2013) (quoting Justice Kennedy's "concord" language in overturning the Ohio same-sex marriage ban).

²⁶ Brief for Petitioners at 37, *Deboer v. Snyder*, 135 S. Ct. 2584 (2015) (No. 14-571), 2015 WL 860740.

²⁷ Brief of Amicus Curiae Garden State Equality in Support of Petitioners at 29, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1022691 (internal quotation marks and citation omitted).

²⁸ Brief of Bay Area Lawyers for Individual Freedom, et al. as Amici Curiae Supporting Petitioners at 15, *Obergefell*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 981541 (citation omitted).

²⁹ *Obergefell*, 135 S. Ct. at 2600 (quoting *Windsor*, 133 S. Ct. at 2964-95). Justice Kennedy continued that, "Without the recognition, stability, and predictability marriage offers, [the] children suffer the stigma of knowing their families are somehow lesser The marriage laws at issue here thus harm and humiliate the children of same-sex couples." *Id.* at 2600-01.

³⁰ Gretchen Livingston, *Fewer than Half of U.S. Kids Today Live in a 'Traditional' Family*, PEW RES. CTR. (Dec. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/> [<https://perma.cc/RMC4-C3W6>].

heterosexual parents but one or both of the parents have been married before.³¹ Forty-five percent of all children do not live with their married parents: 34% live with a parent who is single or cohabiting with an unmarried partner; 6% live with a parent and a stepparent; 5% live with someone other than a parent, such as a grandparent.³² Married parent families are heavily concentrated among those who are highly educated and economically secure.³³ The majority of African American children, 55%, live with a single parent, as do 31% of Hispanic children, compared with about 21% of White children and 13% of Asian American children.³⁴

If Kennedy believed that same-sex couples with children—after marriage equality—would blend unambiguously into a world of married-parent families, he also misperceived the demographics of same-sex couple parents. The choice of plaintiffs in the cases making up *Obergefell* could have contributed to such misunderstanding. The parents before Justice Kennedy were an unrepresentative group.³⁵ On dimensions of race, gender, and how children come to be raised by a same-sex couple, all of which act in synergy with one another, they painted a misleading picture of lesbian and gay couples and their children in America.

Most same-sex couples with children are raising children born to one partner while in an earlier different-sex marriage or relationship,³⁶ but only one of the eleven parent-plaintiff couples fit this profile.³⁷ On the other hand, only 22% of same-sex couples with children have an adopted child,³⁸ yet 2.5

31 *Id.* (calculating that 15% of children live with two parents in a remarriage, and 6% of children live with a stepparent, leaving 9% of children living with parents who had been previously married).

32 *Id.*

33 JUNE CARBONE AND NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 16-17 (2014).

34 CENSUS REPORT 2012, *supra* note 2, at 27 fig.8.

35 See Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136 fig.1 (2015), <http://www.yalelawjournal.org/forum/perfect-plaintiffs> [<https://perma.cc/P9VC-TPNY>] (demonstrating that the *Obergefell* plaintiffs, when compared to the LGBT population as a whole, were disproportionately White, male, economically advantaged, and raising children).

36 See Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, NAT'L COUNCIL FAM. REL., FAM. FOCUS, Winter 2011, at F2, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf> [<https://perma.cc/4TX9-RTZK>] [hereinafter Gates, *Family Formation*] (“Several data sources offer evidence that a common path to parenthood for LGB men and women is a relationship with a different-sex partner when they are young.”).

37 For a list of the eleven parent-plaintiff couples, see *supra* note 3 and accompanying text. Tammy Boyd and Kim Franklin, two of the plaintiffs from *Bourke v. Beshear*, were also parents. Kenning, *supra* note 3.

38 GARY J. GATES, WILLIAMS INST., DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY 8 fig.6 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf> [<https://perma.cc/M3ZE-CHP5>] [hereinafter GATES, 2013 ACS]. Only

times that percentage of the parent-plaintiffs, 55%, were raising adopted children.³⁹ Four of the female plaintiff couples used donor insemination to conceive.⁴⁰

The parent-plaintiffs were also disproportionately male. Of the eleven couples with children, six (55%) were female and five (45%) were male.⁴¹ Yet of all same-sex couples raising children, female couples (77%) outnumber males (23%) more than three to one.⁴²

The parent-plaintiffs were not representative of the racial demographics of same-sex couples raising children. Five of the 22 individuals in the 11

22% of all same-sex couples with children, and 28% of married same-sex couples with children, have an adopted or foster child. *Id.*

³⁹ The *Obergefell* case in the Supreme Court reviewed six different district court opinions. *See supra* note 3. Of the eleven plaintiff couples raising children, six had adopted children. *See* Henry v. Himes, 14 F. Supp. 3d 1036, 1042 (S.D. Ohio 2014) (noting that the Vitale/Talmas family had adopted children); DeBoer v. Snyder, 973 F. Supp. 2d 757, 759-60 (E.D. Mich. 2014) (noting that DeBoer and Rowse had adopted children); Tanco v. Haslam, 7 F. Supp. 3d 759, 765 (M.D. Tenn. 2014) (noting that the Espejo/Mansell family had adopted children they were fostering); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 975-76 (S.D. Ohio 2013) (noting that the Michener/Ives family had adopted children); Michael S. Rosenwald, *The Other Cases in the Landmark Supreme Court Hearing on Gay Marriage*, WASH. POST (Apr. 6, 2015), <https://www.washingtonpost.com/news/local/wp/2015/04/06/the-other-cases-in-the-landmark-supreme-court-hearing-on-gay-marriage/> [<https://perma.cc/Rf36-AH3Z>] (noting that the Bourke/DeLeon family from *Bourke v. Beshear* had adopted children); Nina Totenberg, *Meet the 'Accidental Activists' of the Supreme Court's Same-Sex-Marriage Case*, NPR (Apr. 20, 2015), <http://www.npr.org/2015/04/20/401007033/meet-the-accidental-activists-of-the-supreme-courts-same-sex-marriage-case> [<https://perma.cc/FM4F-T4FH>] (noting that the Campion/Johnson family from *Bourke v. Beshear* had adopted children).

⁴⁰ *See* Henry, 14 F. Supp. 3d at 1041-42 (noting that the Henry/Rogers, Yorksmith, and Noe/McCracken families had children through artificial insemination with anonymous sperm donors); Tanco, 7 F. Supp. 3d at 764 (noting that the Tanco/Jesty family had conceived through artificial insemination). Although a significant proportion of lesbian couples choosing insemination use a known donor, none of the four inseminating couples in the litigation did so. *See* ABBIE E. GOLDBERG, *LESBIAN AND GAY PARENTS AND THEIR CHILDREN: RESEARCH ON THE FAMILY LIFE CYCLE* 60 (2010) (describing one study in which 45% of lesbian inseminating couples chose a known donor and another in which 31% did so). In addition, none conceived children by one member of the couple having sexual intercourse with a man, although this is a documented pathway to parentage for lesbian couples. *See* S.M. v. E.C., Fo65817, 2014 WL 2921905, at *1 (Cal. Ct. App. 2014) (resolving a parental status dispute involving a married lesbian couple, of which the biological mother had inseminated with known donor semen while at the same time having sexual intercourse with the donor).

⁴¹ *See* Henry v. Himes, 14 F. Supp. 3d 1036, 1041-42 (S.D. Ohio 2014) (three female and one male couple with children); DeBoer v. Snyder, 973 F. Supp. 2d 757, 759-60 (E.D. Mich. 2014) (one female couple with children); Tanco v. Haslam, 7 F. Supp. 3d 759, 764-65 (M.D. Tenn. 2014) (one female and one male couple with children); Bourke v. Beshear, 996 F. Supp. 2d 542, 546 (W.D. Ky. 2014) (one female and two male couples with children); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 975-76 (S.D. Ohio 2013) (one male couple with children).

⁴² GATES, 2013 ACS, *supra* note 38, at 6. The figure for married same-sex couples is 2.4 to 1, as 71% of married same-sex couples with children are female. *Id.*

parent-plaintiff couples (23%), were people of color,⁴³ yet 34% of individuals in same-sex couples raising children are people of color.⁴⁴ Among same-sex couples, the African American childrearing rate is 2.5 times that of Whites (41% vs. 16%).⁴⁵ In fact, African American same-sex couples are disproportionately raising children when compared with both White same-sex couples and African American different-sex couples.⁴⁶

Children living with same-sex couples are much more likely to be poor (23% for male same-sex couples, and 19% for female same-sex couples) than their counterparts living with married different-sex couples (12%).⁴⁷ Race plays a substantial role in identifying those children. Twelve percent of the children of White same-sex couples, both male and female, are poor.⁴⁸ For African American children, the statistics are dire; data from numerous sources between 2006 and 2012 reveal a poverty rate of 52% for those raised by male same-sex couples and 38% for those raised by female same-sex couples.⁴⁹

Furthermore, African American parents in same-sex couples do not live in enclaves of gay-friendly communities with statistically higher numbers of

43 See discussion of *Obergefell* Plaintiffs, *supra* note 3. They included one African American couple and three biracial couples, two White and Latina/o and one White and Filipino. Ashleigh Atwell, *Ohio Couple Changes the Face of Marriage Equality Fight*, ELIXHER (Oct. 13, 2014), <http://elixher.com/ohio-couple-changes-the-face-of-marriage-equality-fight/> [https://perma.cc/2PL5-Y5Q6]; Stacey Barchenger, *Gay Marriage Plaintiffs: 'Emilia Will Always Have 2 Moms'*, USA TODAY (Apr. 26, 2015), <http://www.usatoday.com/story/news/nation/2015/04/26/gay-marriage-plaintiffs/26413305/> [https://perma.cc/4K6Q-8V2L]; Alexandra Bolles, *Greg Bourke & Michael De Leon on Advocacy and Raising Teens in a Multi-Racial Family for #LGBTQfamilies Day*, GLAAD (June 2, 2014), <http://www.glaad.org/blog/greg-bourke-michael-de-leon-advocacy-and-raising-teens-multi-racial-family-lgbtqfamilies-day> [https://perma.cc/864H-D63J]; Mark Sherman et al., *Same Sex Marriage Plaintiffs' Stories of Love, Life*, DETROIT NEWS (Apr. 23, 2015), <http://www.detroitnews.com/story/news/politics/2015/04/22/same-sex-marriage-plaintiffs-stories-love-life/26222099> [https://perma.cc/E9RJ-K6AG].

44 GATES, 2013 ACS, *supra* note 38, at 7 tbl.3.

45 ANGELIKI KASTANIS & BIANCA D.M. WILSON, WILLIAMS INST., RACE/ETHNICITY, GENDER AND SOCIOECONOMIC WELLBEING OF INDIVIDUALS IN SAME-SEX COUPLES 2 (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census-Compare-Feb-2014.pdf> [https://perma.cc/B7TY-VZGU]. The figure for Latinos/as is 1.9 times that of Whites, as 30% of Latino same-sex couples are raising children. *Id.*

46 Among different-sex couples, African Americans are only 1.3 times more likely than Whites to be raising children. Gates, *Family Formation*, *supra* note 36, at F3. African Americans comprise 12% of individuals in same-sex couples raising children, a figure that greatly exceeds the 8% of individuals in different-sex couples raising children who are African American. GATES, 2013 ACS, *supra* note 38, at 7 tbl.3.

47 M.V. LEE BADGETT ET AL., WILLIAMS INST., NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY 8 tbl.2 (2013) [hereinafter POVERTY REPORT 2013], <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf> [https://perma.cc/EZ28-DKUR]. However, the poverty rate for children living with unmarried different-sex couples is significantly higher, at 30%. *Id.*

48 See *id.* at 16 tbl.10.

49 *Id.*

lesbian and gay individuals and couples. They live in parts of the country, and the urban neighborhoods, where there are higher proportions of African Americans.⁵⁰ The children they are raising are primarily the biological children of one or the other member of the couple.⁵¹

These characteristics interrelate in significant ways. White same-sex couples (18%) are almost twice as likely as couples with at least one person of color (9.6%) to have an adopted child.⁵² Same-sex couples with adopted children have nearly 200% the median household income of those with biological or stepchildren (\$157,000 vs. \$82,000).⁵³ Individuals in those couples are twice as likely as those raising biological or stepchildren (62% to 31%) to have college degrees or higher.⁵⁴ According to 2013 Census data, the median household income of married, male, same-sex couples with adopted children dwarfs that of all other same-sex couple households.⁵⁵

In a 2012 article, Williams Institute demographer Gary Gates summed up the research by describing “two paths to parenting.”⁵⁶ One path is for disproportionately White same-sex couples raising adopted children in high income households in gay supportive regions of the country; a second path is for disproportionately racial minority same-sex couples raising biological children in low income households in regions of the country more hostile to LGBT families.⁵⁷

50 ANGELIKI KASTANIS & GARY J. GATES, WILLIAMS INST., LGBT AFRICAN-AMERICANS AND AFRICAN-AMERICAN SAME-SEX COUPLES 3 (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census-AFAMER-Oct-2013.pdf> [<https://perma.cc/5DNF-9PWU>].

51 See Mignon R. Moore, *Color Us Invisible: In the Shadows of Communities Black and Gay, Black Lesbians Forge Lives, Loves, and Family*, HUFFINGTON POST: GAY VOICES (Nov. 4, 2011), http://www.huffingtonpost.com/mignon-r-moore/black-lesbians_b_1075251.html [<https://perma.cc/2MHA-CXFJ>] (describing sociologist Mignon Moore’s three-year study of more than 100 black lesbians that identified that the most frequent path to motherhood among them was through a heterosexual relationship prior to coming out).

52 Gates, *Family Formation*, *supra* note 36, at F3.

53 Gary J. Gates, *For Same-Sex Parents, a Tale of Two Paths to Parenting*, HUFFINGTON POST (Feb. 16, 2012), http://www.huffingtonpost.com/gary-j-gates/for-samesex-couples-a-tal_b_1277784.html [<https://perma.cc/7SVV-UJV5>] [hereinafter Gates, *Two Paths*]. This contrasts with the disparity among different-sex couples raising adopted children, which is relatively small. *Id.*

54 Presentation of Gary J. Gates, Williams Inst., Same Sex Couples: A Tale of (at Least) Two Paths to Parenting 9 (2013) (on file with the University of Pennsylvania Law Review). Again, this dichotomy does not appear in different-sex couples. *Id.*

55 See Presentation of Gary J. Gates, Williams Inst., Future Research Directions: Marriage and Families 5 (2015) (on file with the University of Pennsylvania Law Review) (showing that such couples have a median household income of nearly \$275,000, while the next highest category is below \$175,000).

56 See Gates, *Two Paths*, *supra* note 53.

57 *Id.*

V. WHY IT MATTERS

There is a longstanding critique of the LGBT rights movement for insufficient attention to issues of racial and economic justice.⁵⁸ A 2013 report on poverty among lesbians, gay men, and bisexuals documented increased risk of economic hardship and greater use of public assistance programs among LGB individuals and same-sex couples, but also identified subcommunities—such as those who are young, of color, parents, and living in rural and non-coastal regions of the country—who are at even greater risk of poverty.⁵⁹ The authors demonstrated “the need for anti-poverty organizations and LGBT organizations to include considerations of poor LGBT people in their work.”⁶⁰

No group of people can have their needs considered if they remain unseen. So it is with the disproportionate number of economically disadvantaged same-sex couples of color raising children previously born to one or both of them in racial minority communities where nonmarital childrearing is the norm. Marriage will not produce “concord” between those families and others in their community because the other families in their community are not married.

The higher incidence of nonmarital childrearing by African American and Latina women is not just a statistical fact. Those who resist fundamental, structural changes necessary to produce a more just society instead place individual blame on unmarried mothers, especially women of color, and their male partners. Identifying failure to marry before childbearing as the root cause of social and economic problems deflects attention from racism, education deficits, overcriminalization, income inequality, and other injustices, such as lack of well-paying jobs, child care, paid family leave, and affordable housing.

Law professor Melissa Murray identified the “racial undertones” of marriage equality advocacy in the name of ending the “illegitimacy” of the children of same-sex couples.⁶¹ The paradigmatic, and stigmatized, single mother is young, poor, African American, and receiving public assistance. The public face of LGBT rights is affluent, White, and often male. Marriage equality advocacy on behalf of the children of White, economically

58 See, e.g., Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”?: Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358, 1361 (2000) (criticizing the “white-normative” construction of LGBT identity and advocating a multidimensional analysis as a more effective approach to securing gay and lesbian equality); Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1039 (2014) (criticizing leaders of the mainstream gay-rights movement who assert that racial justice issues are not gay issues).

59 POVERTY REPORT 2013, *supra* note 47, at 25.

60 *Id.* at 24.

61 Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POLY & L. 387, 425 (2012).

comfortable, same-sex couples creates a distance between marriage-seeking gay and lesbian parents and those *others*, who are permitted to marry but choose a different family form. But living among those others are a disproportionate number of poor, same-sex couples of color raising children. When their neighbors and relatives are the targets of hostility directed at unmarried parents, they are unlikely to see the fight to raise children within marriage, especially in the name of decreasing the number of children raised outside of marriage, as responsive to their needs.

The erasure from marriage equality advocacy of this disproportionate group of same-sex couples raising children has contributed to another dimension of racial polarization, epitomized by Judge Posner's majority opinion in *Baskin v. Bogan*:

Formally these cases are about discrimination against the small homosexual minority But at a deeper level, . . . they are about the welfare of American children. The argument that the states press hardest . . . is that the only reason government encourages marriage is to induce heterosexuals to marry so that there will be fewer "accidental births," which when they occur outside of marriage often lead to abandonment of the child to the mother (unaided by the father) or to foster care. Overlooked by this argument is that many of those abandoned children are adopted by homosexual couples, and those children would be better off both emotionally and economically if their adoptive parents were married.⁶²

The opinion makes numerous further references to "unwanted" children in foster care and posits married same-sex couples as a solution that will result in fewer children both in foster care and raised by single mothers.⁶³

Posner is silent about race, but the data is unambiguous. African American children appear disproportionately in foster care; they comprise 14% of children as a whole but 31% of the foster care population.⁶⁴ As law professor Dorothy Roberts demonstrated in her groundbreaking book *Shattered Bonds*, racism pervades the child welfare system.⁶⁵ By describing the children as "abandoned" and "unwanted," Posner ignores that racism and the other impediments to maintaining family relationships.

⁶² 766 F.3d 648, 654 (7th Cir. 2014).

⁶³ *Id.* at 662, 672.

⁶⁴ U.S. DEPT OF HEALTH & HUMAN SERVS., ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE 3 (2011), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [<https://perma.cc/7CK2-5ASQ>]. See generally U.S. DEPT OF HEALTH & HUMAN SERVS., THE AFCARS REPORT (2011) (presenting preliminary data from the Adoption and Foster Care Analysis and Reporting System for fiscal year 2010).

⁶⁵ See generally DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

Posner notes that same-sex couples are more likely than different-sex couples to have both foster children and adopted children.⁶⁶ But this hardly constitutes proof that encouraging such fostering and adoption (let alone encouraging it by allowing same-sex couples to marry) is the solution that Posner posits. Nationally, there are some 400,000 children in foster care, about 100,000 of whom are available for adoption.⁶⁷ The vast majority of same-sex couples are not raising children, and the number of those that are is too small to make a substantial dent in that population.⁶⁸

Posner's construct instead plays a more symbolic and ideological role. It markedly differentiates between marriage-seeking, largely White, economically advantaged, same-sex couples and marriage-rejecting, largely Black, economically struggling mothers who in his eyes do not want their children and lack sufficient personal responsibility to care for them. Gay rights advocates should have rejected this reason to support marriage equality. It not only signals complicity in the severely broken child welfare system, it overlooks the disproportionate number of same-sex couples in those communities who are likely the victims of that same broken system.

It is possible to support adoption of individual children currently in foster care who will never be returned to their parents while simultaneously acknowledging the importance of rectifying the wrongs that result in the removal of a disproportionately large number of children of color from their families. No marriage equality advocate did this. In fact, advocates approvingly cite reasoning similar to Posner's in current litigation seeking to end impediments to adoption by same-sex married couples.⁶⁹

The image of "concord" between children of same-sex couples and children of married heterosexual couples is an image largely devoid of the children of poor, African American, same-sex couples. Black lives matter. *These* Black lives matter. Let's advocate and act accordingly.

⁶⁶ *Baskin*, 766 F.3d at 663.

⁶⁷ U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 1 (2014), <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport21.pdf> [<https://perma.cc/2Y3B-CY24>].

⁶⁸ See GARY J. GATES, WILLIAMS INST., LGBT PARENTING IN THE UNITED STATES 1, 3 fig.4 (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf> [<https://perma.cc/BC8W-HBTT>] (noting that same-sex couples are raising 3400 foster children and 22,000 adopted children, compared with 148,000 biological or step children and 48,500 children who are grandchildren or siblings or related or unrelated to the adults).

⁶⁹ See, e.g., Complaint for Declaratory and Injunctive Relief, *supra* note 8, at 31 (citing with approval the trial court's finding in Campaign for Southern Equality v. Bryant, 64 F. Supp. 3d 906, 943-44, that "Like many states, Mississippi suffers when heterosexual parents have unprotected sex, bear children and cannot take care of them. A number of those children end up in the foster care system, the juvenile justice system, and the children's mental health system. These children need homes and caretakers that love them. Same-sex couples can help").

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