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# The New Illegitimacy: Winning Backward in the Protection of the Children of Lesbian Couples

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# THE NEW “ILLEGITIMACY”: WINNING BACKWARD IN THE PROTECTION OF THE CHILDREN OF LESBIAN COUPLES

NANCY D. POLIKOFF\*

Introduction .....	721
I. <i>Debra H. v. Janice R.</i> —The New York Court of Appeals Rebuffs a Full-On Attack on <i>Alison D. v. Virginia M.</i> .....	723
A. The Debra H. Court misstated Vermont Parentage Law by Misreading <i>Miller-Jenkins v. Miller-Jenkins</i> .....	726
B. The Bright Line of Marriage/Civil Union is the Easy, But Wrong, Approach .....	728
II. The Mistake of Seeking a Win for Married Lesbians Only .....	734
A. Iowa .....	734
B. Maryland .....	737
Conclusion.....	738

## INTRODUCTION

“New York Court Expands Rights of Nonbirth Parents in Same-Sex Relationships.”<sup>1</sup> So read the May 2010 New York Times headline reporting the outcome of *Debra H. v. Janice R.*,<sup>2</sup> a case brought by a

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1. See Jeremy W. Peters, *N.Y. Court Expands Rights of Nonbirth Parents in Same-Sex Relationships*, N.Y. TIMES, May 5, 2010, at A26 (summarizing the holding of *Debra H. v. Janice R.*).

2. See generally *Debra H. v. Janice R. (Debra H. IV)*, 930 N.E.2d 184 (N.Y. 2010), *reh’g denied*, 933 N.E.2d 210 (N.Y. 2010), *cert. denied*, 131 S. Ct. 908 (2011) (holding that Debra H. could maintain custody and visitation rights based on comity

nonbiological mother seeking joint custody of the child she had raised with her former partner. A reader would be forgiven for assuming that the court ruling marked a victory for same-sex couples and the children they raise.

It did not; although, Debra H. did prevail. Looked at solely from her viewpoint, the case was a win. But I consider it an example of *winning backward*. Winning backward is a victory whose legal basis sets back a goal greater than the immediate outcome. It is distinguishable from incremental gain, which may not accomplish all that proponents hope for, but can be considered a step, even if small, toward the greater goal. An incremental gain does not foreclose, push farther away, or make less likely achievement of that greater goal; winning backward does.<sup>3</sup>

This Article examines protection of the status of *some* LGBT parents, specifically lesbians who are married to, or in an equivalent formal status with, a woman who bears a child. I argue that obtaining parental rights based upon the legal relationship between the two mothers, without simultaneously creating parentage for a partner who is not married to a birth mother, is an example of winning backward. It revives the discredited distinction between “legitimate” and “illegitimate” children, this time in the context of same-sex couples. Without a shift in current movement priorities, it is not likely to be an incremental gain – a first step towards recognizing parentage on more appropriate bases. Rather, parentage recognition derived from marriage will reduce the urgency of advocating protecting parent-child relationships on more suitable grounds. Thus is born the phenomenon I call “the new ‘illegitimacy.’”

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given to her status under Vermont law as the civil union partner of the biological mother).

3. I was inspired to articulate this concept of winning backward by the phrase *losing forward*, coined by gay rights lawyer Evan Wolfson shortly before the 2004 elections. See Evan Wolfson, *Marriage Equality and Some Lessons for the Scary Work of Winning*, FREEDOM TO MARRY, [http://archivefreedomtomarry.org/evan\\_wolfson/speeches/scary\\_work\\_of\\_winning.php](http://archivefreedomtomarry.org/evan_wolfson/speeches/scary_work_of_winning.php) (last visited June 28, 2011). Voters were about to approve bans on same-sex marriage in all eleven states where they appeared on the ballot. Gay rights supporters were discouraged and angry about the money and effort devoted to these certain defeats.

Wolfson defined losing forward as fighting the ballot initiatives using a strategy that would ultimately hasten marriage for same-sex couples. That strategy, he argued, was telling compelling stories about the lives of real gay couples; other approaches, such as reliance on generic pleas for fairness and messages that changing the state’s constitution was unnecessary because the law already prohibited same-sex marriage, were a mistake. They would not attract allies or move what he called the reachable middle third of the country toward support for marriage equality. *Id.* (“When, in the name of ‘practicality’ or advice from pollsters or political operatives, we fail to put forward compelling stories and explain the realities of what marriage equality does and does not mean, it costs us the one chance we have to do the heavy-lifting that moves people. *We wind up not just not winning, but not even losing forward.*”).

Just as the way a campaign or case is lost can produce forward motion, the way a campaign or case is won can turn a social justice endeavor around and point it backward.

The first part of this Article describes *Debra H. v. Janice R.* I show that Debra’s lawyers at Lambda Legal, the nation’s largest LGBT legal rights organization, argued for her parental rights based upon the couple’s intent to bear and raise the child together and Debra’s behavior as her son’s mother with Janice’s consent.<sup>4</sup> Nonetheless, the New York Court of Appeals ruled in her favor based solely on her status as Janice’s Vermont civil union partner, a result that required it to misread Vermont law. Debra’s victory, coupled with the advent of marriage equality in New York, may make it harder to achieve legislative reform protecting parent-child relationships for all children of same-sex couples in New York.

In the second part of this Article, I examine two other Lambda Legal efforts. In Iowa, Lambda represents married lesbian couples seeking a court order requiring the state to place the names of both spouses on the birth certificate of a child born to either spouse. In Maryland, Lambda achieved this exact result through administrative advocacy. I argue that these efforts are misguided because, even when successful, they make the parental status of a nonbiological mother dependent entirely upon her marriage to the biological mother.

In both states, there were options to urge parentage reform unconnected to the marital status of the couple. Advocacy that, instead, slices through a community of lesbian mothers and their children and makes some of those children “legitimate,” while leaving others unprotected, reflects a misplaced priority that will only magnify with time. Parentage tied to marriage will need to be defended when challenged in a state that does not recognize same-sex marriage. That defense, like all marriage-related advocacy, will become a priority, leaving yet fewer resources and less political will to demand protection for family relationships formed without marriage. In conclusion, I argue that such an undesirable result can be avoided only by adhering to a principle that has guided family law for the last 40 years—that children should not suffer because their parents do not marry.

#### I. *DEBRA H. V. JANICE R.*—THE NEW YORK COURT OF APPEALS REBUFFS A FULL-ON ATTACK ON *ALISON D. V. VIRGINIA M.*

*Debra H.* was the case that advocates hoped would overturn *Alison D. v. Virginia M.*, a shameful decision from almost twenty years earlier, in which a nonbiological mother was denied standing to petition for custody of or visitation with the child she had raised with her lesbian partner.<sup>5</sup> The

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4. *Debra H. IV*, 930 N.E.2d at 184; see *infra* Parts I & II.

5. See *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991).

relevant statute gave standing to “parents” without defining that term,<sup>6</sup> and the court refused to include a person in Alison’s position within the definition.

In the intervening two decades, with glaring exceptions, most appellate courts had created a mechanism for ensuring that a child would not lose a parent when the couple’s relationship ended.<sup>7</sup> Perhaps the most dramatic turnaround came in California. In the *Alison D.* era, a California appeals court had also denied parental status to a nonbiological mother.<sup>8</sup> In 2005, the California Supreme Court rejected that reasoning in a case that would unquestionably have made Debra a parent had the family lived in that state.<sup>9</sup>

Debra’s complaint alleged numerous facts about the couple’s joint planning for, and joint parenting of, their son. The trial court ruled that if she could prove those facts, Janice should be equitably estopped from blocking her petition for joint custody.<sup>10</sup> The judge ordered visitation three days a week—the schedule the couple followed when they first split up.<sup>11</sup> Janice appealed and the Appellate Division issued a stay, then reversed, citing *Alison D.*<sup>12</sup> Debra and the attorney for the child asked for review in the Court of Appeals and for reinstatement of *pendente lite* visitation. The Court reinstated visitation one day a week and agreed to hear the case.<sup>13</sup>

Among the facts asserted by Debra was that she and Janice had gone to Vermont and entered a civil union one month before their son’s birth. This played a small role in the arguments made on her behalf. In the sixty-six-page argument section of her Court of Appeals brief, Debra devoted only five and a half pages to the claim that New York should recognize her parentage based on the couple’s Vermont civil union.<sup>14</sup> Seven friend of the

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6. N.Y. DOM. REL. LAW § 70 (McKinney 2011).

7. See NAT’L CTR. FOR LESBIAN RTS., *Legal Recognition of LGBT Families* (2011), [http://www.nclrights.org/site/DocServer/Legal\\_Recognition\\_of\\_LGBT\\_Families.pdf](http://www.nclrights.org/site/DocServer/Legal_Recognition_of_LGBT_Families.pdf) (identifying numerous states in section IV).

8. See *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Ct. App. 1991) (holding that a lesbian partner who was not the natural or adoptive parent could not fall under the purview of the Uniform Parentage Act, and therefore could not receive custody rights over the objection of the mother).

9. See *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (holding that a non-biological lesbian mother could be a presumed parent under the Uniform Parentage Act).

10. *Debra H. v. Janice R. (Debra H. I)*, No. 106569/08, 2008 WL 7675822 (N.Y. Sup. Ct. Oct. 2, 2008), *rev’d by* 877 N.Y.S.2d 259 (App. Div. 2009).

11. See *id.* (providing that the stipulation regarding visits from July 2008 should remain in place unless it is determined to be outside the child’s best interests).

12. *Debra H. v. Janice R. (Debra H. II)*, 877 N.Y.S.2d 259 (App. Div. 2009).

13. See *Debra H. v. Janice R. (Debra H. III)*, 914 N.E.2d 1006 (N.Y. 2009) (order granting stay and reinstatement of visitation); *id.* at 1011 (order granting leave to appeal).

14. Brief for Petitioner-Appellant at 74-80, *Debra H. v. Janice R.*, 930 N.E.2d 184

court briefs were filed in support of Debra. The briefs represented bar associations,<sup>15</sup> children's groups,<sup>16</sup> civil liberties organizations,<sup>17</sup> mental health workers,<sup>18</sup> family law academics from every New York law school,<sup>19</sup> and well over a dozen gay rights groups.<sup>20</sup> All *amici* emphatically argued that the law should recognize Debra's relationship with her son either by distinguishing or overruling *Alison D.*<sup>21</sup> None asked the court to rule in Debra's favor based on her civil union status.<sup>22</sup> The only brief to even mention the significance of the civil union was that filed by the gay rights groups, and it devoted less than a page to the subject; did not even give it a subheading; and noted it only as a subset of its argument that the law that makes a consenting husband the parent of the child born to his wife using donor insemination should apply equally to unmarried couples.<sup>23</sup>

The ruling that prompted the headline with which I began this article found Debra a parent of her son because he was born while she and Janice were in a Vermont civil union. The court reaffirmed *Alison D.* in its entirety.<sup>24</sup> It reasoned that the functional tests urged by Debra and her *amici* would produce an intolerable level of uncertainty about a child's parentage.<sup>25</sup> Recognizing parentage derived from the couple's civil union,

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(N.Y. 2010) (No. 106569/08).

15. Brief for N.Y.C. Bar Ass'n, Women's Bar Ass'n of the State of N.Y., N.Y. et al. as Amici Curiae Supporting Petitioner-Appellant, *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010) (No. 106569/08) [hereinafter Bar Ass'n Brief].

16. Brief for Citizens' Comm. for Children, Lawyers for Children, & Children's Law as Amici Curiae Supporting Petitioner-Appellant, *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010) (No. 106569/08) [hereinafter Brief for Children's Group].

17. Brief for N.Y. Civil Liberties Union et al. as Amici Curiae Supporting Petitioner-Appellant, *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010) (No. 106569/08) [hereinafter Brief for Civil Liberties Organizations].

18. Brief for Nat'l Assoc. of Soc. Workers et al. as Amici Curiae Supporting Petitioner-Appellant, *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010) (No. 106569/08) [hereinafter Mental Health Workers Brief].

19. Brief for Family Law Academics as Amici Curiae Supporting Petitioner-Appellant, *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010) (No. 106569/08) [hereinafter Family Law Academics Brief].

20. Brief for Nat'l Ctr. for Lesbian Rights et al. as Amici Curiae Supporting Petitioner-Appellant, *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010) (No. 106569/08) [hereinafter Gay Rights Groups Brief].

21. See, e.g., Bar Ass'n Brief, *supra* note 15 (supporting Debra H's relationship with her son and urging the court to overrule *Alison D.*); Brief for Children's Group, *supra* note 16 (same); Brief for Civil Liberties Organizations, *supra* note 17 (same); Mental Health Workers Brief, *supra* note 18 (same); Family Law Academics Brief, *supra* note 19 (same); Gay Rights Groups Brief, *supra* note 20 (same).

22. See, e.g., Mental Health Workers Brief, *supra* note 18 (failing to ask the court to rule in Debra's favor).

23. Gay Rights Groups Brief, *supra* note 20, at 35.

24. *Debra H. IV*, 930 N.E.2d 184, 206 (N.Y. 2010), *reh'g denied*, 933 N.E.2d 210 (N.Y. 2010), *cert. denied*, 131 S. Ct. 908 (2011).

25. *Id.* at 194. For a thorough critique of this argument, see Carlos Ball, *Rendering*

the court claimed, was a clear and certain test.<sup>26</sup> The court examined Vermont law, declared that Vermont would consider Debra a parent as a result of the civil union, and applied the doctrine of comity to recognize her parental status in New York.<sup>27</sup> Now that same-sex couples can marry in New York, the distinction articulated in *Debra H.* will solidify into a distinction between those who marry and those who do not.<sup>28</sup>

But the *Debra H.* court got Vermont law wrong. A child born to a couple in a civil union in Vermont is not automatically and predictably the child of both women. Below, I describe Vermont law and demonstrate the New York court's misreading of that law. Then, I explain that misreading by considering the overwhelming emphasis on achieving formal recognition for same-sex couples, through marriage or, as a second-best result, through civil unions or comprehensive domestic partnership.

*A. The Debra H. Court misstated Vermont Parentage Law by Misreading Miller-Jenkins v. Miller-Jenkins*

*Miller-Jenkins v. Miller-Jenkins*<sup>29</sup> is the only Vermont case in which a nonbiological mother separated from a biological mother has argued that she is a legal parent, and the court's reasoning in *Debra H.* relied upon it. Lisa Miller-Jenkins gave birth to Isabella Miller-Jenkins while she was in a civil union with Janet Miller-Jenkins. After the couple split up, Lisa argued that Janet was not Isabella's parent because they lacked a biological connection.

The Vermont court rejected this argument. If Lisa was correct that biology determined parentage, the court reasoned, then no child born of donor insemination would have a second parent unless the second parent adopted the child.<sup>30</sup> This would even apply to the children of married heterosexual couples, because Vermont has no statute declaring that a consenting husband is the father of a child born to his wife using donor insemination. The court wished for legislative guidance, but in its absence the court found itself bound to protect the best interests of children.<sup>31</sup> The

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*Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623 (2012).

26. See *Debra H. IV*, 930 N.E.2d at 194.

27. See generally *id.*

28. The court might continue to recognize parentage based on civil union or comprehensive domestic partnership when the couple moved to New York from a state that provided only a formal status other than marriage and the couple entered that status while living in that state.

29. *Miller-Jenkins v. Miller-Jenkins (Miller-Jenkins I)*, 912 A.2d 951 (Vt. 2006).

30. See *id.* at 967.

31. See *id.* at 970 (acknowledging that there is no legislative intent, and therefore the court must look to other sources of authority for interpretation).

court cited its 1993 ruling authorizing second parent adoption as an example of stepping in to protect children born of assisted reproduction in the absence of legislative direction.<sup>32</sup>

The court noted that, "The parentage act does not include a definition of 'parent.' . . . We have held that the term 'parent' is specific to the context of the family involved."<sup>33</sup> The court then listed the "many factors" supporting its determination that Janet was Isabella's parent.<sup>34</sup> The civil union was the first and most important of these factors.<sup>35</sup> But there were others. These included the expectation and intent of both women that Janet would be a parent; Janet's participation in the decision that Lisa would bear a child and her active participation in prenatal care and the child's birth; the fact that both women treated Janet as a parent while they lived together and that Lisa identified Janet as a parent when she filed to dissolve the civil union; and that no one else claimed to be a parent so a decision against Janet would leave Isabella with only one parent.<sup>36</sup>

Under these circumstances, the court ruled, a husband would be the father of a child born to his wife, and Janet was the parent of the child born to her civil union partner.<sup>37</sup> The court cited numerous donor insemination cases from other states, including one that found parentage in an unmarried woman's male partner.<sup>38</sup> After noting that those rulings relied on varying legal theories, the Vermont court stated that, "we adopt the result in this case as a matter of policy and to implement the intent of the parties."<sup>39</sup> Although the civil union was "extremely persuasive evidence" of Janet's parentage, the court stated that "because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child's parent, we need not address which factors may be dispositive on the issue in a closer case."<sup>40</sup>

In holding Debra to be the parent of her son, the New York Court of Appeals said simply this: "In *Miller-Jenkins*, the Vermont Supreme Court relied upon [the civil union statute] to hold that a child born by artificial

32. *Id.* at 967 (citing *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993)).

33. *See id.* at 969.

34. *See id.* at 970.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 970 (citing *Brown v. Brown*, 125 S.W.3d 840 (Ark. Ct. App. 2003); *People v. Sorensen*, 437 P.2d 495 (Cal. 1968); *In re Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998); *Levin v. Levin*, 645 N.E.2d 601 (Ind. 1994); *R.S. v. R.S.*, 670 P.2d 923 (Kan. Ct. App. 1983); *State ex rel. H. v. P.*, 457 N.Y.S.2d 488 (App. Div. 1982); *Brooks v. Fair*, 532 N.E.2d 208 (Ohio Ct. App. 1988); *In re Baby Doe*, 353 S.E.2d 877 (S.C. 1987)).

39. *Miller-Jenkins I*, 912 A.2d at 971.

40. *Id.*



insemination to one partner of a civil union should be deemed the other partner's child under Vermont law . . . ."<sup>41</sup>

But *Miller-Jenkins* did no such thing. It looked at Lisa and Janet's civil union but also looked at other *factors* to reach its conclusion. Debra might not have been found a parent in Vermont because Janice strenuously disputed numerous facts claimed by Debra, including whether Debra participated in Janice's decision to have a child and in selecting the semen donor.<sup>42</sup> A Vermont court would have ruled on these factual disputes before resolving whether Debra was a parent. *This is precisely the inquiry the New York Court of Appeals claimed it was avoiding by affirming* Alison D.

The New York court's reliance on *Miller-Jenkins* is especially striking given that neither the Vermont nor the New York statute defined the term "parent," yet *Miller-Jenkins* found that it is the responsibility of the court to protect children when there is insufficient legislative direction, while *Debra H.* eschewed that role.

*B. The Bright Line of Marriage/Civil Union is the Easy, But Wrong, Approach*

When Isabella was born, civil union was the only formal status available to same-sex couples. Now, marriage is possible in seven jurisdictions—including, most recently, in New York<sup>43</sup>—and an equivalent formal status in nine more.<sup>44</sup> The *Debra H.* court wanted an on-off switch and the civil union made that possible.

The existence of marriage—or an equivalent formal status—makes it easier to implement bright line rules about legal consequences. This ease means that judges and legislators, satisfied that marriage is a good enough dividing line, will be less likely to engage in the messier business of achieving justice. Because marriage is the most visible item on the gay

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41. *Debra H. IV*, 930 N.E.2d 184, 195 (N.Y. 2010), *reh'g denied*, 933 N.E.2d 210 (N.Y. 2010), *cert. denied*, 131 S. Ct. 908 (2011).

42. *Debra H. I*, No. 106569/08, 2008 WL 7675822 (N.Y. Sup. Ct. Oct. 2, 2008), *rev'd by* 877 N.Y.S.2d 259 (App. Div. 2009).

43. Jurisdictions that allow same-sex marriage include Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, District of Columbia, and New York. See *Relationship Recognition for Same-Sex Couples in the U.S.*, NAT'L GAY & LESBIAN TASK FORCE (June 28, 2011), [http://www.thetaskforce.org/downloads/reports/issue\\_maps/rel\\_recog\\_6\\_28\\_11\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_6_28_11_color.pdf) (depicting the different types of relationships various states legally recognize).

44. Jurisdictions with an equivalent formal status: New Jersey, Illinois, Delaware, Hawaii, California, Oregon, Washington, Rhode Island, and Nevada. *Id.* While Washington has passed a law legalizing same-sex marriage, it will not go into effect until later this year, and opponents are likely to repeal it through referendum. See *Washington: Gay Marriage Legalized*, N.Y. TIMES, Feb 13, 2012, <http://www.nytimes.com/2012/02/14/us/washington-gay-marriage-legalized.html>.

rights agenda, with civil union or comprehensive domestic partnership understood as another way—even if a lesser one—of validating same-sex couples, judges and legislators can actually feel *good* about a bright-line rule that favors those who opt in to marriage or its legal equivalent. They do not need to think about developing a better rule.

For most of history, marriage was an on-off switch determining a man’s parentage. A man was a parent of a child born to his wife and not a parent of a child born to any other woman.<sup>45</sup> This is no longer the case. Not only can a man genetically connected to a child be found a parent in the absence of marriage, even if he is married to a different woman<sup>46</sup> or the woman is married to a different man,<sup>47</sup> but under varying legal standards, a man who is not the genetic father of a child can be a legal parent because he held the child out as his own,<sup>48</sup> signed an acknowledgment of parentage,<sup>49</sup> commissioned a child born to a surrogate,<sup>50</sup> said he would adopt a child,<sup>51</sup> or consented to a woman’s insemination with the intent to parent the

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45. See generally HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* (1971).

46. See, e.g., *Abbe v. Bochart*, No. C.A.19637, 2000 WL 327233, at \*1 (Ohio. Ct. App. Mar. 29, 2000) (affirming an order for a father married to another woman to pay child support and awarding visitation).

47. See UNIF. PARENTAGE ACT § 607 (amended 2002), 9B U.L.A. 50 (Supp. 2011) (establishing that a man may bring a proceeding within two years after the birth of a child to establish parentage of a child born to a woman who is married to another man); see also CAL. FAM. CODE § 7541(b) (West 2010) (designating that a motion for blood tests to establish paternity must be brought within two years from a child’s date of birth).

48. See, e.g., *In re Nicholas H.*, 46 P.3d 932, 937 (Cal. 2002) (showing that receiving a child into one’s home and holding the child out as one’s own supports the court’s conclusion that a man may be a presumed father of the child even if he admits he is not the biological father of the child); see also UNIF. PARENTAGE ACT § 204(a) (amended 2002), 9B U.L.A. 22-23 (Supp. 2011) (“A man is presumed to be the father of a child if: . . . for the first two years of the child’s life, he resided in the same household with the child and openly held out the child as his own.”).

49. E.g., *Sinicropi v. Mazurek*, 760 N.W.2d 520, 525 (Mich. Ct. App. 2008) (explaining that the court cannot enter an order of filiation under the state Paternity Act if an acknowledgement of parentage has already been executed and has not been revoked); *In re J.B.*, 953 A.2d 1186, 1189 (N.H. 2008) (noting that under state law, an affidavit of paternity establishes paternity, and a challenge to the paternity after 60 days of filing the affidavit must be brought before a court).

50. E.g., *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (applying the rule that a husband is the “lawful father of a child unrelated to him when his wife gives birth after artificial insemination” because of his consent to artificial insemination, and holding that a husband is a lawful father after a surrogate gives birth to a biologically unrelated child on his behalf because he and his wife “initiated and consented to” the procedure).

51. E.g., *Geramifar v. Geramifar*, 688 A.2d 475, 478-79 (Md. Ct. Spec. App. 1997) (holding that even though the husband and wife never finalized the adoption of a child, they obtained guardianship in Iran, and because the husband entered into a contract to adopt the child, he has an obligation to support the child unless the duty is terminated by an order of the court).

resulting child.<sup>52</sup>

Any rule that gives a child two legal parents if the couple is married—or in a civil union or domestic partnership—and one legal parent if the couple is not is a move backward more than forty years. In 1968, the Supreme Court began striking down laws as unconstitutional that disadvantaged both children whose parents were not married and parents who had children outside marriage.<sup>53</sup> A rule that introduces the discredited division between marital and non-marital children into the families created by same-sex couples is a step backward. That it comes in the context of a win for a civilly-unioned mother is no consolation. That is what makes it an example of winning backward.

We cannot know for sure how the case would have been decided had Debra and Janice not been in a civil union. Two of the unanimous seven who ruled for Debra wrote concurrences based on grounds other than the civil union.<sup>54</sup> In the absence of the civil union, the other five would have been forced to confront the tragedy of depriving a child of a parent and would have had only one way out: distinguishing or overruling *Alison D.* I do not know if two of those five justices would have so voted, but their dramatic misreading of *Miller-Jenkins* gives me reason to believe that they wanted to find two parents for this child.

One might argue that it cannot be considered winning backward unless a court ruling makes it worse than it was before the “win.” Since Debra could not have won under the *Alison D.* framework, the case may not seem like a backward step. But just as the idea of *losing forward* acknowledges the current loss but looks ahead to better days that will be produced by the way the fight was fought,<sup>55</sup> *winning backward* acknowledges the current win but looks ahead to dire consequences that will be difficult to dislodge.

At worst, Debra would have lost. That loss might have been the impetus to push through legislative change. In a companion case handed down the

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52. *E.g.*, *In re Parentage of M.J.*, 787 N.E.2d 144, 152 (Ill. 2003) (holding that a man who orally consented to and encouraged a woman to become pregnant through artificial insemination is legally obligated to support the child, just as an unmarried man who biologically causes conception is legally obligated to support a child).

53. *See, e.g.*, *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding that “illegitimate child” is an invidious classification, and it is unconstitutional to deny a non-marital child the opportunity to recover damages for the loss of his mother); *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968) (holding that state law that denies a mother the ability to recover for the wrongful death of her non-marital child on the basis of the child being “illegitimate” violates the Equal Protection Clause).

54. *See Debra H. IV*, 930 N.E.2d 184, 202 (N.Y. 2010) (Ciparick, J., concurring) (arguing that a functional test will more often result in an outcome that serves the best interests of the child), *reh'g denied*, 933 N.E.2d 210 (N.Y. 2010), *cert. denied*, 131 S. Ct. 908 (2011); *Debra H. IV*, 930 N.E.2d at 205 (Smith, J., concurring) (arguing for the application of the common law presumption of parentage for same-sex couples living together).

55. *See supra* note 3.

same day, the New York Court of Appeals ruled that a non-biological mother could be ordered to pay child support to a former partner for a child they planned and raised together.<sup>56</sup> The sharp contrast between assigning financial responsibility on the one hand, yet denying the right to a relationship on the other, would have made a powerful case for a broken statutory scheme.<sup>57</sup>

The numerous *amici* in this case could have made an influential lobbying force if they turned their attention to the legislature as the only avenue available to avoid another twenty years of disastrous outcomes for children. The *amici* staked out substantive positions, and none asked the court to rule for Debra as a result of the civil union.<sup>58</sup> Yet it is much harder to make a case for legislative change after an outcome heralded as an expansion of the rights of same-sex parents.

Lambda Legal did encourage statutory reform after *Debra H.* A bill introduced in the New York State Assembly would have amended the statutory definition of parent.<sup>59</sup> That definition would include a gender-neutral, marital-status-neutral "person" who consents to a woman's insemination with the intent to parent.<sup>60</sup> In an apparent effort to implement intent- and function-based parentage while being mindful of the *Debra H.*

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56. *H.M. v. E.T.*, 930 N.E.2d 206, 209 (N.Y. 2010).

57. Had Debra wished to avoid her responsibilities towards the child, Janice could have succeeded in getting an order requiring her to pay child support. Because the two cases were decided on completely different legal theories, a mother ordered to pay child support under *H.M.*, might still be ineligible to claim visitation or custody.

58. See Brief for Children's Group, *supra* note 16, at 5-6 (stressing that the court should determine whether a *de facto* parental relationship existed and whether it is the child's best interest to preserve the relationship); Family Law Academics Brief, *supra* note 19, at 1 (suggesting the family law approach to custody and visitation rights rejects the rule of *Alison D.*); Mental Health Workers Brief, *supra* note 18, at 6 (asserting that social science studies of children's best interests show that New York courts should allow gay and lesbian parents to petition for visitation and custody on the basis of the bonds being critical to children's development and well-being); Gay Rights Groups Brief, *supra* note 20, at 3 (maintaining that the court should recognize *de facto* parental relationships and hold that "the presumption of parentage applies equally to all intended parents who plan to conceive a child together using anonymous donor sperm"); Bar Ass'n Brief, *supra* note 15, at 1 (arguing that the court should reconsider and overturn *Alison D.*); Brief for Civil Liberties Organizations, *supra* note 17, at 2 (suggesting that the court has moved away from precluding *de facto* claims of parentage with regard to visitation or custody, and the application of *Alison D.* is "outmoded").

59. See A.B. 700, 234th Gen. Assemb., Reg. Sess. (N.Y. 2011) (amending the definition of parent to create parentage, *inter alia*, for a gender-neutral, marital-status neutral "person" who consents to a woman's insemination with the intent to parent).

60. This part of the bill appears to be modeled on the District of Columbia's parentage statute enacted in 2009. See Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 247-50 (2009) (discussing the District of Columbia's legislation that establishes parentage of both mothers when they have a child through assisted reproduction using donor insemination).

court's concern about bright lines, the bill also would have defined a parent as a person who could prove by clear and convincing evidence that the parent consented to the formation of a parent-child relationship in some written form such as a birth certificate, written agreement, birth announcement, document from a religious ceremony, or school or medical record.<sup>61</sup> That person also would have to both live with the child for long enough time to establish a bonded, dependent, parent-child relationship and perform parental functions to a significant decree.<sup>62</sup>

The parentage reform effort in New York was entirely eclipsed by advocacy for access to marriage for same-sex couples. Furthermore, the advent of marriage equality in New York may stall any interest in reforming parentage legislation. At the time of *Debra H.* there was no formal status available to same-sex couples in New York. The opinion was greeted with some incredulity because it made parentage dependent upon a legal status that couples would have to leave to the state to accomplish.<sup>63</sup> This is no longer necessary.

New York is not the only place where this new form of "illegitimacy" exists. Two cases in Massachusetts, the first state to allow same-sex couples to marry, demonstrate disturbing acceptance of distinguishing "legitimate" from "illegitimate" children of same-sex couples. Consistent with the Uniform Parentage Act as originally written in 1973, under Massachusetts law, a husband who consents to his wife's insemination is the father of the resulting child.<sup>64</sup> In *T.F. v. B.L.*, a woman, B.L., consented to her partner's insemination but left the relationship before the child was born and refused to support the child.<sup>65</sup> At the time, Massachusetts did not

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61. A.B. 700.

62. As a point of comparison, California defines a parent to include a birth mother's partner when that person (male or female) receives the child into her home and holds the child out as her own. *See* *Elisa B. v. Superior Court*, 117 P.3d 660, 667 (Cal. 2005). There is no minimum period of time that the child and that parent must live together. *See* *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 3d 26, 36-37 (Ct. App. 2009). In Delaware, on the other hand, a legal parent includes a "de facto" parent, but that status requires that the person "has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature." DEL. CODE ANN. tit 13, § 8-201(c) (2009).

63. In articulating why her client's victory in *Debra H.* was insufficient, Lambda Legal attorney Susan Sommer said, "Children whose parents conceive them using an anonymous donor but haven't traveled out of state to enter into a civil union or marriage should be protected as well." *New York High Court Rules in Lambda Legal Case: Vermont Civil Union Establishes Parental Rights of Non-Biological Mother*, LAMBDA LEGAL (May 4, 2010), [http://www.lambdalegal.org/news/pr/ny\\_20100504\\_ny-high-court-rules-in-lambda-legal-case.html](http://www.lambdalegal.org/news/pr/ny_20100504_ny-high-court-rules-in-lambda-legal-case.html).

64. MASS. GEN. LAWS ch. 46, § 4B (2009); *accord* N.Y. DOM. REL. LAW § 73(1) (McKinney 2011) (designating that a child born by artificial insemination shall be considered the "birth child" of the husband and wife who consent in writing to the wife's insemination).

65. *See* *T.F. v. B.L.*, 813 N.E.2d 1244, 1247-48 (Mass. 2004).

allow same-sex couples to marry, but by the time this case reached the Supreme Judicial Court it did allow such marriages. Had the couple been married, B.L. would have been the child's parent; the court stated this explicitly.<sup>66</sup> In the absence of marriage, the court found neither statutory nor common-law authority for determining that B.L. had responsibility for supporting the child.<sup>67</sup>

In *A.H. v. M.P.*, the couple used in vitro fertilization, which resulted in M.P.'s pregnancy. Both women signed the consent forms at the fertility clinic; A.H.'s surname became the child's middle name; and the child called M.P., "Mommy," and A.H., "Mama."<sup>68</sup> The couple's relationship ended when the child was almost two years old, and M.P. refused A.H. access to the child.<sup>69</sup> A.H. instituted a court proceeding asking for joint custody and for an order requiring her to pay child support.<sup>70</sup> The Massachusetts Supreme Judicial Court rejected every theory she advanced as a basis for maintaining her relationship with the child.<sup>71</sup> Had the couple been married, the decades-old statute on donor insemination of married couples would have secured A.H.'s parentage.<sup>72</sup>

Both New York and Massachusetts allow a same-sex partner to adopt a child through second-parent adoption.<sup>73</sup> There are numerous reasons why couples do not go this route. It is time consuming and expensive, it requires a lawyer, it subjects the family to court scrutiny, and it cannot start until after the child's birth, leaving the relationship unrecognized for months or longer until a final adoption decree is signed. Couples may be unfamiliar with such procedures, may lack resources to

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66. *Id.* at 1249-50; see *Della Corte v. Ramirez*, No. 11-P-451, 2012 WL 285026 (Mass. App. Ct. Feb. 2, 2012). Courts have repeatedly held that a husband who consents to his wife's insemination is the parent of the resulting child even if the couple splits up before the child is born. See, e.g., *Laura W.W. v. Peter W.W.*, 856 N.Y.S.2d 248, 263-64 (App. Div. 2008) (affirming the lower court's conclusion that the husband is the legal father because he consented to his wife's decision to conceive the child through artificial insemination).

67. See *T.F.*, 813 N.E.2d at 1253 (holding that because B.L. is not a parent of the child under any statutory provision and is "legally a stranger to the child," B.L. has no duty to support the child).

68. See *A.H. v. M.P.*, 857 N.E.2d 1061, 1065 (Mass. 2006).

69. See *id.* at 1067-69.

70. See *id.* at 1068.

71. See *id.* at 1074-75.

72. See *id.* at 1074 (explaining that where a person is not a child's biological or adoptive parent, a private agreement is not sufficient to create parental rights).

73. See, e.g., *Adoption of Tammy*, 619 N.E.2d 315, 318-19 (Mass. 1993) (concluding that the statute does not preclude joint adoption of a child by unmarried same-sex partners, and noting that the joint adoption would serve the purpose of the statute since it would be in the best interest of the child); *In re Jacob*, 660 N.E.2d 397, 401 (N.Y. 1995) (holding that allowing unmarried second parents to adopt is consistent with the language of the statute and the statute's purpose, which is to encourage the adoption of children).

pursue them, and may not understand the ramifications of not completing them.

Courts in some states that permit second-parent adoption also established theories that protect the parent-child relationship in the absence of an adoption.<sup>74</sup> This must be done because, as I have said elsewhere, a mother should not have to adopt her own child.<sup>75</sup> States that allow a lesbian couple to marry or enter into a civil union or comprehensive domestic partnership must similarly make a parental status available on a basis other than the formalization of the couple's relationship.

## II. THE MISTAKE OF SEEKING A WIN FOR MARRIED LESBIANS ONLY

Lambda Legal did not urge a win for Debra H. based on the civil union. The New York court handed down a winning backward result, but it did so without encouragement from gay rights groups. This stands in contrast to two other Lambda efforts, in Iowa and in Maryland. In both those states there was a problem with recognition of a parental relationship between a child and her nonbiological mother. In both, there was an option to prioritize actions that would protect those relationships regardless of the legal relationship between the two mothers. Furthermore, in both, Lambda chose a path that at best would protect the parent-child relationship only if the mothers were married.

### A. Iowa

Lambda was successful counsel in *Varnum v. Brien*, the case that brought same-sex marriage to Iowa.<sup>76</sup> The Iowa Attorney General has refused to authorize the addition of a female spouse's name as a parent on the birth certificate of a child born to a married lesbian.<sup>77</sup> Lambda is back

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74. See, e.g., *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 3d 26, 47 (Ct. App. 2009) (noting that a parentage presumption would further "public policy favoring a child having two parents . . . as a source of both emotional and financial support"), cert. denied, 130 S. Ct. 1522 (2010); *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (holding that because V.C. is the "psychological parent," she should not be precluded from visitation with the children since continued visitation is in the children's best interests); *Shineovich v. Shineovich*, 214 P.3d 29, 40 (Or. Ct. App. 2009) (extending the statute that establishes parentage for a consenting husband whose wife bears a child through artificial insemination to the consenting same-sex partner of a woman who bears a child through artificial insemination); *In re Parentage of L.B.*, 122 P.3d 161, 172-73 (Wash. 2005) (creating *de facto* parentage).

75. Polikoff, *supra* note 60, at 205-06 (asserting that while second-parent adoption has been a useful legal tool for gay and lesbian families, it is a problematic solution because a nonbiological lesbian mother is forced to adopt her own child to secure the family's legal protection).

76. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) (holding that the Iowa marriage statute violates equal protection of the law under Iowa's constitution by depriving gay and lesbian people admission into civil marriage).

77. See, e.g., Linda Waddington, *Same-Sex Couple Sues State for Right to Appear*

in court challenging the attorney general's opinion of what the law requires.<sup>78</sup>

This is a mistake for a simple reason. If successful, these efforts will benefit only the children of couples who marry. It is one thing to be saddled with a distinction between children born in or out of formalized relationships, as the *Debra H.* court has done. It is quite another to expend efforts to achieve such a distinction.

Iowa has no statute on children born of assisted conception. It does not have a parentage statute creating a presumption of parentage based on holding a child out as one's own, as some states do. It has not recognized "de facto" parents. At the time the Iowa Attorney General staked out his position, there were law reform avenues that could have solidified the relationships of many more same-sex couples raising children without dividing the children of Iowa's lesbian couples into those who are "legitimate" and those who are "illegitimate."<sup>79</sup>

An Iowa trial judge has ruled in Lambda's favor, but only when conception occurs through unknown donor insemination.<sup>80</sup> If Lambda successfully defends that ruling on appeal, so that a child's birth certificate must list two women if those women are married and use an anonymous donor to conceive, it will have accomplished little, even for those children. Although it is evidence, a birth certificate is not a definitive determination of parentage. Furthermore, parentage achieved solely because a couple is married is vulnerable in the majority of states that ban recognition of same-sex marriages. Even if Lambda is successful in its Iowa action, a biological mother who moves out of state with the child will be able to claim in most states that the non-biological mother's parentage should not be recognized because it derives solely from a marriage that is not recognized.

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*on Daughter's Birth Certificate*, IOWA INDEP., May 30, 2010, <http://iowaindependent.com/33946/same-sex-couple-sues-state-for-right-to-appear-on-daughters-birth-certificate>.

78. See generally *Gartner v. Newton*, LAMBDA LEGAL (May 7, 2010), <http://www.lambdalegal.org/in-court/cases/gartner-v-newton> (summarizing Lambda Legal's policy argument in *Gartner v. Newton*).

79. In November 2010, Republicans gained control of the Iowa House of Representatives and the state elected a Republican governor. See *Iowa Election Results 2010: Leonard Boswell Defeats Brad Zaun in Close Race*, WASH. POST, Nov. 2, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/02/AR2010110207857.html>. By focusing in early 2010 on a court-based solution for married lesbian couples only, Lambda lost the opportunity to seek legislation on parentage of children conceived through assisted reproduction when the governor was a Democrat and both houses of the legislature were controlled by Democrats.

80. See *Gartner v. Iowa Dep't of Pub. Health*, No. CE 67807, slip op. at 11 (Iowa Dist. Ct. Jan. 4, 2012) (finding that the Department could not possibly identify the biological father when the sperm was donated anonymously, thereby negating the Department's argument that, in order to prevent future confusion, the same-sex spouse must formally adopt the child to appear on the child's birth certificate).



This was the argument made by Lisa Miller in the long-running Miller-Jenkins custody dispute.<sup>81</sup> After Virginia enacted its Marriage Affirmation Act,<sup>82</sup> Lisa, who was living with Isabella in Virginia, argued that because Janet's parental status derived from the civil union, and Virginia did not recognize that civil union, then Virginia should find that Lisa was Isabella's only parent.<sup>83</sup> Lisa was unsuccessful because Vermont was the first state to rule on the child's custody and Virginia was required to give full faith and credit to Vermont's orders.<sup>84</sup> Had Lisa filed initially in Virginia, the argument that Janet should be considered Isabella's mother because she and Lisa were in a civil union might well have produced a different result. For this reason, lawyers around the country, from the first marriages recognized in Massachusetts, have warned couples not to rely on their marriages alone to create parental rights.<sup>85</sup>

Given the need to protect all the children of same-sex couples in Iowa, it

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81. The case has been litigated multiple times in the appellate courts of Vermont and Virginia. *Miller-Jenkins I*, 912 A.2d 951 (Vt. 2006), *cert denied*, 550 U.S. 918 (2007); *Miller-Jenkins v. Miller-Jenkins (Miller-Jenkins II)*, No. 2007-271, 2008 WL 2811218 at \*1 (Vt. Mar. 18, 2008) (affirming family court's order on appeal after remand), *cert denied*, 129 S. Ct. 306 (2008); *Miller-Jenkins v. Miller-Jenkins*, 12 A.3d 768 (Vt. 2010); *Miller-Jenkins v. Miller-Jenkins (Miller-Jenkins III)*, 637 S.E.2d 330, 337 (Va. Ct. App. 2006) (vacating earlier order, and holding that the Virginia trial court did not have jurisdiction over the case due to the Parental Kidnapping Prevention Act); *Miller-Jenkins v. Miller-Jenkins*, No. 0688-06-4, 2007 WL 1119817, at \*1 (Va. Ct. App. Apr. 17, 2007) (vacating trial court's order refusing to allow Janet Miller-Jenkins to register the Vermont order in Virginia), *aff'd*, *Miller-Jenkins v. Miller-Jenkins (Miller-Jenkins IV)*, 661 S.E.2d 822 (Va. 2008), *cert denied*, 555 U.S. 1069 (2008); *Miller v. Jenkins*, 678 S.E.2d 268 (Va. Ct. App. 2009); *Miller v. Jenkins*, No. 0705-09-4, 2010 WL 605737 (Va. Ct. App. Feb. 23, 2010).

82. The language of Virginia's law is very broad. It reads: "A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable." VA. CODE ANN. § 20-45.3 (West 2009).

83. See *Miller-Jenkins III*, 637 S.E.2d at 337.

84. See *Miller-Jenkins IV*, 661 S.E.2d at 827.

85. See GAY & LESBIAN ADVOCATES & DEFENDERS (GLAD), HOW TO GET MARRIED IN MASSACHUSETTS 25 (2011), available at <http://www.glad.org/uploads/docs/publications/how-to-get-married-ma.pdf>. The publication states:

In Massachusetts, a child born into a marriage is presumed to be the child of both parties, and both parents' names are listed on the birth certificate. Nonetheless, this is just a presumption and does not have the same effect as a court judgment. It is subject to being challenged and overturned.

In addition, the marriage could encounter a lack of respect in some states, so relying on the fact of the marriage alone to protect your children is not the best approach. Therefore, GLAD strongly recommends that you consult a lawyer and continue the practice of securing a second-parent adoption in order to obtain a decree of legal parenthood that should be recognized broadly outside of Massachusetts, independent of the marriage.

is appropriate to question an effort that, even if successful, will produce so little of real value. It is, in my opinion, a mistaken emphasis on marriage that propelled the current Iowa litigation. When it comes to birth certificates, the Iowa attorney general is giving married lesbian couples something different from what married different-sex couples receive. When the lens through which all efforts are evaluated and judged is marriage equality, then choosing that battle makes sense. For what it actually accomplishes for parents and children in Iowa, it makes much less sense. There is always a cost to a marriage equality lens, as it leaves many relationships inappropriately unprotected.<sup>86</sup> But when that lens produces a divide between “legitimate” and “illegitimate” children, it should be resisted.

### B. Maryland

Lambda has also viewed parentage through a marriage equality lens in Maryland. Maryland’s Attorney General, Douglas Gansler, issued an opinion in February 2010 that same-sex marriages from elsewhere could be recognized in Maryland.<sup>87</sup> In February 2011, Lambda claimed success when the state agreed to place the name of two mothers on a child’s birth certificate if the mothers were married.<sup>88</sup>

The press release announcing this success did not assert that this made the two women legal parents, because it could not; a birth certificate is evidence of parentage but not proof of parentage. Lambda subsequently stated this explicitly and urged that married same-sex couples pursue second-parent adoptions.<sup>89</sup> But second-parent adoptions are also available to parents who do not marry, and any campaign encouraging second-parent adoption should be targeted at all same-sex couples. What Maryland desperately needed was legislation to protect all children of same-sex couples when there has not been a second-parent adoption.

86. See generally NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 7 (2008) (asserting that the marriage-equality movement supports gay civil rights, but it does not focus on family-based needs).

87. Whether Out-of-State Same-Sex Marriage That is Valid in State of Celebration May Be Recognized in Md., 95 Op. Md. Att’y Gen. 3, 3-4 (Feb. 23, 2010), available at <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>. Maryland does not allow same-sex couples to marry. A constitutional challenge to its prohibition failed. See *Conaway v. Deane*, 932 A.2d 571, 634 (Md. 2007) (holding that the Maryland law is not unconstitutional under rational basis review).

88. *Maryland Will Issue Birth Certificates Naming Two Married Moms as Parents: Lambda Legal Applauds New Protection for Children*, LAMBDA LEGAL (Feb. 11, 2011), [http://www.lambdalegal.org/news/pr/md\\_20110211\\_birth-certificates.html](http://www.lambdalegal.org/news/pr/md_20110211_birth-certificates.html).

89. See LAMBDA LEGAL, *BIRTH CERTIFICATES AND SECOND-PARENT ADOPTIONS FOR MARRIED SAME-SEX COUPLES IN MARYLAND* (2011), available at [http://data.lambdalegal.org/publications/downloads/fs\\_birth-certificates-second-parent-adoptions-maryland.pdf](http://data.lambdalegal.org/publications/downloads/fs_birth-certificates-second-parent-adoptions-maryland.pdf) (stressing that a court-ordered adoption decree is the best means of ensuring both parents’ legal rights as a child’s parents are respected).

In 2008, the Maryland Court of Appeals ruled in *Janice M. v. Margaret K.* that the state does not recognize de facto parents, thereby overruling lower appellate court rulings that for many years had guaranteed that a child would not lose either parent if his or her parents split up.<sup>90</sup> In response, in 2010, the legislature was poised to enact a law that would have negated *Janice M.* and created de facto parentage by statute.<sup>91</sup> The Attorney General then issued his opinion recognizing same-sex marriages from elsewhere.<sup>92</sup> Anti-gay legislators threatened to amend the de facto parentage legislation to add language denying recognition to out-of-state same-sex marriages, and one of the measure's chief sponsors, State Senator Jamin Raskin, halted the parentage bill to prevent that.<sup>93</sup>

In 2011, Senator Raskin did not reintroduce a de facto parent bill, because the state's gay rights lobbying organization, Equality Maryland, wanted all the legislative focus on obtaining marriage equality. Lambda Legal also participated in Maryland marriage equality efforts. Those efforts failed but are being renewed in 2012. Meanwhile, there is no progress at all for de facto parents who do not marry.

#### CONCLUSION

The national gay rights legal organizations have consistently urged recognition of the parent-child relationships formed in gay and lesbian families, without regard to which parent has a genetic connection to the child. Boston-based Gay and Lesbian Advocates and Defenders (GLAD), for example, filed an *amicus* brief in support of the non-biological mother in *A.H. v. M.P.*<sup>94</sup> Although GLAD is largely responsible for the advent of civil unions and marriage equality in New England,<sup>95</sup> its lawyers do not

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90. 948 A.2d 73, 87 (Md. 2008) (holding that Maryland does not recognize *de facto* parent status because it would be contrary to Maryland jurisprudence requiring a showing of unfitness of the biological parent or the existence of exceptional circumstances in custody and visitation disputes).

91. See S.B. 600, 427th Gen. Assemb., Reg. Sess. (Md. 2010).

92. Op. Md. Att'y Gen., *supra* note 87, at 54 (maintaining that the Maryland Court of Appeals is likely to find that marriages of same-sex couples that are valid under a different jurisdiction may be recognized under state law).

93. Conversation with Sen. Jamin Raskin, Professor of Law, Director of Law & Government Program, American University Washington College of Law, in Washington, D.C. (Mar. 19, 2010).

94. See, e.g., GAY & LESBIAN ADVOCATES & DEFENDERS (GLAD), WINTER BRIEFS 6 (2007), available at [http://www.glad.org/uploads/docs/newsletters/Briefs2007\\_Winter.pdf](http://www.glad.org/uploads/docs/newsletters/Briefs2007_Winter.pdf). (defending the parental rights of non-biological parents).

95. See *Baker v. State*, 744 A.2d 864, 866-67 (Vt. 1999) (holding that Vermont may not exclude same-sex couples from the benefits and protections the state provides to different-sex married couples); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 424 (Conn. 2008) (holding that extending civil unions but not marriage to same-sex couples violates the state's guarantee of equal protection); *Goodridge v. Dep't of Pub.*

believe that a child's relationship with a parent should be severed, or a child denied financial support, simply because her parents did not marry each other. Lambda Legal's representation of Debra H. was consistent with its work on behalf of nonbiological parents across the country.<sup>96</sup>

Yet the high visibility of marriage equality efforts has melded the relationship between parentage and marriage in a manner that confuses policymakers, advocates, and couples planning children. A recent newspaper article about a lesbian wedding described one such couple in Washington, DC.<sup>97</sup> After one of the women became pregnant through donor insemination, the couple decided to marry based in part on the legal consequences, described in the article as including "the right to have [the nonbiological mother] listed as a parent on the baby's birth certificate."<sup>98</sup> District of Columbia law authorizes the placement of the second mother's name on the birth certificate of a child conceived through donor insemination regardless of whether the couple is married; the couple can sign a Consent to Parent form available through the DC Office of Vital Records.<sup>99</sup> When I contacted the journalist who wrote the article to correct the mistaken impression, she responded that she suspected the couple themselves did not realize they had an option other than marriage to achieve this result.<sup>100</sup>

Every time a gay rights organization links parentage to marriage, as Lambda has done in Maryland and Iowa, it furthers such mistaken

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Health, 798 N.E.2d 941, 957 (Mass. 2003) (holding, for the first time in a state's highest court, that exclusion of same-sex couples from marriage violates the state's constitution).

96. Lambda Legal represents Janet Miller-Jenkins in the Virginia litigation concerning her parental status. The group has also represented non-biological parents in other states. See *Egan v. Fridlund-Horne*, LAMBDA LEGAL (Apr. 29, 2009), <http://www.lambdalegal.org/in-court/cases/egan-v-fridlund-horne.html> (Arizona); *In re S.J.L.*, LAMBDA LEGAL (Oct. 4, 2010), <http://www.lambdalegal.org/in-court/cases/in-re-sjl-and-jkl.html> (Ohio); *In re L.K.M.*, LAMBDA LEGAL (Feb. 2, 2011), <http://www.lambdalegal.org/in-court/cases/in-the-matter-of-lkm.html> (Ohio); *Jones v. Boring*, LAMBDA LEGAL (Feb. 23, 2004), <http://www.lambdalegal.org/in-court/cases/jones-v-boring.html> (Pennsylvania); *T.B. v. L.R.M.*, LAMBDA LEGAL (Oct. 3, 1996), <http://www.lambdalegal.org/in-court/cases/tb-v-lrm.html> (Pennsylvania); *N.B. v. A.K.*, LAMBDA LEGAL (May 4, 2011), <http://www.lambdalegal.org/in-court/cases/nb-v-ak.html> (Alabama).

97. Ellen McCarthy & Erin Williams, *We Just Match Each Other at This Emotional Level*, WASH. POST, July 8, 2011, [http://www.washingtonpost.com/lifestyle/weddings/we-just-match-each-other-at-this-emotional-level/2011/07/01/gIQAmnfK4H\\_story.html](http://www.washingtonpost.com/lifestyle/weddings/we-just-match-each-other-at-this-emotional-level/2011/07/01/gIQAmnfK4H_story.html) (discussing the recent marriage between Sarah Schooler and Mary Busker).

98. *Id.*

99. When an unmarried heterosexual woman wants to list a father on her child's birth certificate the couple also must sign a form—a Voluntary Acknowledgement of Paternity, commonly referred to as a VAP—provided by the Office of Vital Records.

100. E-mail from Ellen McCarthy, Writer, WASH. POST, to author (July 13, 2011) (on file with author).

impressions. The prominent argument that same-sex couples must be permitted to marry to further the best interests of their children also intensifies the impression that parentage within marriage provides benefits that cannot be obtained in any other way.

Furthermore, every success limited to married couples will compound the distinction between those children whose parents marry and those who do not. This is because if parentage based on marriage is achieved in Iowa or Maryland, for example, then Lambda and the other gay rights legal groups will vigorously defend that parentage when it is (inevitably) challenged in another state or at the federal level.

National gay rights legal groups have limited resources and must prioritize their work, including their administrative advocacy, technical assistance, and public education efforts. Cases or campaigns that will result in parentage recognition only for married couples are a mistake because they prioritize marriage equality goals at the expense of the children of unmarried same-sex couples. The child of two heterosexuals who are not married has two parents. The child of two lesbians deserves the same.