2005

For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark

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Acknowledgements

Professor Polikoff would like to thank Lauren Izzo, University of Arizona James E. Rogers College of Law Class of 2005, for her research assistance during Professor Polikoff's year as a visitor on their faculty, and Lauren Taylor, for her friendship, encouragement, and editing.

FOR THE SAKE OF ALL CHILDREN: OPPONENTS AND SUPPORTERS OF SAME-SEX MARRIAGE BOTH MISS THE MARK

*Nancy D. Polikoff**

Both opponents and proponents of same-sex marriage champion the well-being of children. Opponents claim that children do best when raised by their married, biological parents and argue that the state must encourage only this childrearing unit. Supporters of gay and lesbian equality have disputed this point of view for decades, advocating a focus on quality of parenting rather than family structure. Today's same-sex marriage advocates, however, assert a version of their opponents' stance. Both in and out of courtrooms, they piggyback on the polarizing and politically charged assertion that children do best when their parents are married to persuade the public and the courts that lesbian and gay couples be allowed to marry. In this essay, I fault both sides of this public debate.

The first part of this essay details the "child welfare" arguments of opponents and the rationales of judges who approve same-sex marriage bans. I also briefly review what is wrong with their arguments. Next, I show that advocates of same-sex marriage advance some of the same rationales, which I also critique. Finally, I urge supporters to base their right-to-marry arguments on equality and, when considering the interests of children, to advocate for the social and legal supports necessary for optimal child outcomes in all families.

I. Opponents of Same-Sex Marriage Claim to Speak for the Interests of Children

A. Arguments for Banning Same-Sex Marriage

Litigation challenging same-sex marriage bans has forced states to give reasons in support of the status quo. The rhetoric of Republican political campaigns and evangelical churches can rely

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on hate, fear, hell, fire, and brimstone.[1] The rhetoric of the state in courts, however, must be based on reason. Even under the rational basis standard of equal protection review, the state must give a reason for preventing lesbian and gay couples from marrying.

The dominant reason proffered in court cases over the past decade is as follows: The state can reserve marriage to heterosexual couples in order to reinforce the link between marriage and procreation because children do best when raised by a married couple who are their biological parents.[2] This justification first surfaced in Hawaii in 1996, after the state supreme court in *Baehr v. Lewin*[3] remanded the issue of the constitutionality of banning same-sex

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[1] *See, for example*, http://www.godhatesfags.com/fags/fag.html, the website of Reverend Fred Phelps, who states that homosexuals "fuel God's wrath, they burn in lust, and they will burn in hell."

[2] Courts and commentators have noted the illogic of this argument. *E.g.* Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 963 (Mass. 2003) ("The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the 'optimal' child rearing unit."); Judith Stacey, *Legal Recognition of Same-Sex Couples: The Impact on Children and Families*, 23 QUINNIPIAC L. REV. 529, 533 (2004) (noting the "non sequitur logical flaw involved in presuming that excluding same-sex couples from marrying will increase the number or the percentage of children who will be parented by both a male and female parent . . . ."). One premise of this argument, that children do best when raised by their married biological parents, factors prominently into arguments against not only same-sex marriage but also no-fault divorce. For articulation of these arguments and rebuttal to them, see KAREN STRUENING, NEW FAMILY VALUES: LIBERTY, EQUALITY, DIVERSITY 65-96 (2002); Stacey, *supra*, at 530 ("[C]laims that research establishes the superiority of the married heterosexual-couple family and that children need a mother and a father conflate and confuse research findings on four distinct variables—the sexual orientation, gender, number, and marital status of parents . . . . [O]pponents of same-sex marriage . . . and even some advocates, draw selectively, indiscriminately, and inappropriately from research findings about all four variables to address questions the studies were not designed to, and are not able, to illuminate.").

An exclusive focus on family structure avoids examination of other factors that influence child outcomes. Critiquing a policy focus on marriage, law professor Martha Fineman writes, "[t]he real danger of the civil societarian's narrow focus on family form is that it will deflect attention away from the more serious problems that the current political and economic contexts present for the family." MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 93 (2004). After citing increased income disparity, stagnating lower- and middle- income wages, and a child poverty rate higher than that in sixteen other industrialized countries, Fineman notes that "[t]he United States is the only Western industrialized nation that does not have some form of universal cash benefit for families raising children." *Id.* at 91. "The problem with society," she concludes, "is *not* that marriage is in trouble. The real crisis is that we expect marriage to be able to compensate for the inequality created by and within our other institutions." *Id.* at 94.

[3] 852 P.2d 44 (Haw. 1993).

marriage to the trial court for a factual determination of the state's interest in the ban and the relationship of the ban to achieving that interest.[4] The state of Hawaii argued that it had:

> a compelling interest to promote the optimal development of children . . . . It is the State of Hawaii's position that, all things being equal, it is best for a child that it be raised in a single home by its parents, or at least by a married male and female . . . .[5]

After a trial centered entirely on this asserted interest, the court ruled that even the state's expert witnesses had failed to demonstrate that lesbians and gay men were inferior parents or that the state could achieve its legitimate interest in the well-being of children and families by banning same-sex marriage.[6]

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[4] Because the court held that the ban constituted discrimination based on sex, a suspect classification under the Hawaii constitution, *Baehr* required that the state show that the ban was necessary to achieve a compelling state interest. *Id.* at 68.

[5] Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996).

[6] Specifically, the court made the following findings of fact:

> 121. A father and a mother can, and do, provide his or her child with unique paternal and maternal contributions which are important, though not essential, to the development of a happy, healthy and well-adjusted child.
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> 122. Further, an intact family environment consisting of a child and his or her mother and father presents a less burdened environment for the development of a happy, healthy and well-adjusted child. There certainly is a benefit to children which comes from being raised by their mother and father in an intact and relatively stress free home.
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> 123. However, there is diversity in the structure and configuration of families. In Hawaii, and elsewhere, children are being raised by their natural parents, single parents, step-parents, grandparents, adopted parents, hanai parents, foster parents, gay and lesbian parents, and same-sex couples.
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> 124. There are also families in Hawaii, and elsewhere, which do not have children as family members.
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> 125. The evidence presented by Plaintiffs and Defendant establishes that the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child. More specifically, it is the quality of parenting or the "sensitive care-giving" described by David Brodzinsky, which is the most significant factor that affects the development of a child.
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> 126. The sexual orientation of parents is not in and of itself an indicator of parental fitness.
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> 127. The sexual orientation of parents does not automatically disqualify them from being good, fit, loving or successful parents.
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> 128. The sexual orientation of parents is not in and of itself an indicator of the overall adjustment and development of children.
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> 129. Gay and lesbian parents and same-sex couples have the potential to raise children that are happy, healthy and well-adjusted.
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> 130. Gay and lesbian parents and same-sex couples are allowed to adopt children, provide foster care and to raise and care for children.

Later, in *Baker v. State*,[7] Vermont unsuccessfully justified its same-sex marriage ban by focusing on the link between marriage and procreation. The state argued that it had a strong interest in "promoting a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support," and that "the Legislature could reasonably believe that sanctioning same-sex unions 'would diminish society's perception of the link between procreation and child rearing . . . [and] advance the notion that fathers or mothers . . . are mere surplusage to the functions of procreation and child rearing.'"[8] The state also argued that because same-sex couples cannot procreate on their own, same-sex marriage "could be seen by the Legislature to separate further the connection between procreation and parental responsibilities for raising children," and that the legislature was consequently justified "in using the marriage statutes to send a public message that procreation and child rearing are intertwined."[9]

Although this argument was also unsuccessful in *Goodridge v. Department of Public Health*,[10] the case that legalized same-sex marriage in Massachusetts, the dissent accepted this rationale for limiting marriage to opposite-sex couples. As long as marriage is open only to heterosexual couples who theoretically can procreate, the dissent said, "society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor."[11] If marriage is opened to same-sex

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131. Gay and lesbian parents and same-sex couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children.

132. Gay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples.

133. While children of gay and lesbian parents and same-sex couples may experience symptoms of stress and other issues related to their non-traditional family structure, the available scientific data, studies and clinical experience presented at trial suggests that children of gay and lesbian parents and same-sex couples tend to adjust and do develop in a normal fashion.

134. Significantly, Defendant has failed to establish a causal link between allowing same-sex marriage and adverse effects upon the optimal development of children.

Id. at *17-18.

7 744 A.2d 864 (Vt. 1999).

8 *Id.* at 881.

9 *Id.*

10 798 N.E.2d 941 (Mass. 2003).

11 *Id.* at 1002 (Cordy, J., dissenting).

couples who cannot procreate:

> it could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation: just as the potential of procreation would not be necessary for a marriage to be valid, marriage would not be necessary for optimal procreation and child rearing to occur.[12]

Courts that have upheld bans on same-sex marriage have all accepted this argument. The Arizona appeals court in *Standhardt v. Superior Court* found the state's interest in encouraging procreation and childrearing within marriage legitimate.[13] The state argued that it had an interest in "encouraging procreation and childrearing within the stable environment traditionally associated with marriage," and that "by legally sanctioning a heterosexual relationship through marriage, thereby imposing both obligations and benefits on the couple and inserting the State in the relationship, the State communicates to parents and prospective parents that their long-term, committed relationships are uniquely important as a public concern."[14] Noting that its interest in committed sexual relationships is limited to those capable of producing children, the state asserted that restricting marriage to opposite-sex couples is reasonable.[15] Observing that "[i]ndisputably, the only sexual relationship capable of producing children is one between a man and a woman," the court held that "[t]he State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children."[16] In addition, because same-sex couples cannot procreate without assistance, the court determined that "the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships."[17]

More recently, a federal court in Florida upheld the constitutionality of the Defense of Marriage Act[18] by recognizing the two

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12 *Id.*
13 77 P.3d 451, 463-64 (Ariz. Ct. App. 2003).
14 *Id.* at 461.
15 *Id.*
16 *Id.* at 462-63.
17 *Id.* at 463.
18 1 U.S.C. § 7; 28 U.S.C. § 1738C [hereinafter DOMA].

rationales the state had advanced. DOMA "fosters the development of relationships that are optimal for procreation" and "encourage[s] the creation of stable relationships that facilitate the rearing of children by both of their biological parents."[19] The court accepted the 11th Circuit's holding in *Lofton v. Secretary of Department of Children and Family Services*[20] that "encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest."[21]

Advocates of same-sex marriage bans also articulate a corollary principle to the one calling for reinforcement of the link between marriage and procreation; they argue that only a couple of different genders—one man and one woman—can create an optimal childrearing environment. They thus describe and prescribe a profoundly gendered world, one in which women and men are so innately different and this difference is not only relevant to, but critical for, the optimal rearing of children. For example, in *Baker v. State*, Vermont argued that it had an interest in "promoting child rearing in a setting that provides both male and female role models,"[22] "uniting men and women to celebrate the 'complementarity' . . . of the sexes and providing male and female role models for children,"[23] and that:

(1) marriage unites the rich physical and psychological differ-

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19 Wilson v. Ake, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005). In a challenge to New York's same-sex marriage ban, the court similarly ruled that "preserving the institution of marriage for opposite sex couples serves the valid public purpose of preserving the historic institution of marriage as a union of man and woman, which, in turn, uniquely fosters procreation," noting that marriage is a fundamental right "founded on the distinction of sex and the potential for procreation." Shields v. Madigan, 783 N.Y.S.2d 270, 276 (Sup. Ct. 2004). *But see* Hernandez v. Robles, 794 N.Y.S.2d 579, 598 (Sup. Ct. 2005) ("It is . . . indisputable that [New York law] does not bar women who are past child-bearing age to marry, and that the long-term union of a man and a woman is no longer the only familial context for raising children. . . . While eloquently praising the indisputably central role that marriage plays in human life, neither defendant, nor amici indicate how that role would be diminished by allowing same-sex couples to marry, nor how the marriages of opposite-sex couples will be adversely affected by allowing same-sex couples to marry."). *See also* Lewis v. Harris, 875 A.2d 259, 276 (N.J. Super. Ct. 2005) (Parrillo, J., concurring) ("[T]he very existence of marriage does 'privilege procreative heterosexual intercourse.' . . . When plaintiffs, in defense of genderless marriage, argue that the State imposes no obligation on married couples to procreate, they sorely miss the point. Marriage's vital purpose is not to mandate procreation but to control or ameliorate its consequences - the so-called 'private welfare' purpose. To maintain otherwise is to ignore procreation's centrality to marriage.").

20 377 F.3d 1275 (11th Cir. 2004).

21 *Wilson*, 354 F. Supp. 2d at 1309.

22 Baker v. State, 744 A.2d 864, 884 (Vt. 1999).

23 *Id.* at 909 (Johnson, J., concurring in part and dissenting in part).

> ences between the sexes; (2) sex differences strengthen and stabilize a marriage; (3) each sex contributes differently to a family unit and to society; and (4) uniting the different male and female qualities and contributions in the same institution instructs the young of the value of such a union.[24]

Similarly, the state in *Goodridge* argued that the marriage statutes intended for children to be reared in a single family unit "with specialized roles for wives and husbands."[25] The dissent in that case concluded that because same-sex couples "cannot provide children with a parental authority figure of each gender" they cannot be as optimal a childrearing unit as "the biologically based marriage norm."[26]

Legal scholarship opposing same-sex marriage also argues the necessity of traditionally gendered families. Notre Dame law professor Gerard Bradley contends that the "necessary sexual complementarity of marriage . . . results in a unique combination of male and female psyches, temperaments, and culturally shaped roles for the husband/father, wife/mother, daughter/sister, son/brother."[27] He notes that gender differentiation "is endemic to our experience of life as embodied males or females,"[28] and asserts that being a wife and mother "is a natural moral reality upon which culture—and law—rightly supervene, and in so doing structure, specify, reinforce, protect."[29] Similarly, Brigham Young University law professor Lynn Wardle maintains that:

> The union of two persons of different genders creates something of unique potential strengths and inimitable potential value to society. It is the *integration* of the universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity that constitutes the core and essence of marriage.[30]

Outside of the law, the "fatherhood movement" identifies "fatherlessness" as the root of all social problems.[31] Two early

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[24] *Id.*

[25] Brief of Plaintiffs-Appellants at 43, Goodridge, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860) *at* http://www.glad.org/marriage/Appellants_Brief.pdf.

[26] Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 1000 (Mass. 2003) (Cordy, J., dissenting).

[27] Gerard V. Bradley, *Law and the Culture of Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 189, 197 (2004).

[28] *Id.*

[29] *Id.* at 197-98.

[30] Lynn D. Wardle, *Is Marriage Obsolete?*, 10 MICH. J. GENDER & L. 189, 219 (2003).

[31] *See* DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCI-

books, *Fatherless America*[32] and *Life Without Father,*[33] assert among the many innate differences between men and women that men are inherently sexually promiscuous and that they must be pressured into investing in their children.[34] The cultural norm that encourages men to make such investments is making them the traditional head of their family, the breadwinner who, at most, assists his wife in child care and household labor, the areas of family life that are distinctly her domain.

Maggie Gallagher, a spokesperson for the conservative "marriage movement" and an emphatic opponent of same-sex marriage, also relies on inherent differences between men and women to assert that "reliable fathers are cultural creations, products of specific ideals, norms, rituals, mating and parenting practices."[35] Because, according to Gallagher, good fathers (unlike mothers) are "made, not born," law must recognize only those unions consisting of a mother and a father.[36] By this bizarre reasoning, allowing same-sex couples to marry will make heterosexual fathers disappear from the lives of their children.

B. Responses to These Arguments

The argument linking marriage, procreation, and optimal childrearing contains three premises. The first is that children do best when raised by their married biological parents. The second is that the state can and should do something to increase the number of children raised in this optimal family form. The third is that restricting marriage to those who can procreate without assisted conception will accomplish this goal. Even if the first premise were true[37] and the second, therefore, plausible as public policy, the

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ETY (1996); DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995).

32 BLANKENHORN, *supra* note 31.

33 POPENOE, *supra* note 31.

34 Focus on the Family's Position Statement on Same-Sex 'Marriage' and Civil Unions asserts that "marriage is . . . the way societies socialize men and protect women from predatory males." Glenn T. Stanton, *Focus on the Family's Position Statement on Same-Sex "Marriage" and Civil Unions*, *at* http://www.family.org/cforum/fosi/marriage/ssuap/a0029773.cfm (Jan. 16, 2004).

35 Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L REV. 773, 779 (2002).

36 *Id.* at 780.

37 It is not. As far back as 1997, a distinguished group of social scientists with expertise on the well-being of children, none of whom were associated with political advocacy on behalf of gay and lesbian parents, wrote the following in an amicus brief filed in the Hawaii same-sex marriage litigation, *Baehr v. Miike*:

> [A]mici advise this Court that the social science research does not—and

third does not follow. The state does not limit marriage to those who can procreate; few who oppose same-sex marriage would oppose marriage for the elderly or assisted conception for infertile couples.[38] The dissent in *Goodridge* characterizes Massachusetts law as limiting marriage to those who "theoretically" can procreate,[39] but a woman with no ovaries or uterus, a man who does not produce sperm, or anyone with a physical infirmity preventing sexual intercourse cannot procreate, theoretically or otherwise.[40] Thus, the restriction of marriage to a man and a woman is actually linked more to gender than to procreative potential.

Responding to the argument that children need a parent of each gender, sociologist Judith Stacey notes that "[a]lthough there is widespread popular belief that children develop best when raised by a male and a female parent, this empirical claim lacks social scientific support."[41] She continues:

> Suprisingly, very little research addresses the question of the impact on children of gender differences in parenting. Instead this discourse consists primarily of overly generalized stereotypes about gender differences (such as that fathers rough-

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> cannot—support the State's assertion at trial that the presence of two biological or opposite-sex parents comprises an "optimal" child rearing environment. There is broad consensus among social scientists that child outcomes are affected by a large number of factors other than the number and types of parents present in a child's household. These factors include, inter alia, the overall quality of parenting as reflected in parental love, warmth, involvement and consistency; pre- and post-natal care; adequate nutrition and health care; whether the child was planned or wanted; the mother's age at conception; parental socioeconomic resources; quality of neighborhood and schools; influences of peers and siblings; and the child's own abilities, temperament, attitudes and psychological resources. Moreover, research reflects wide variation in child outcomes even for siblings residing in the same family. As no one study can adequately control for all factors relevant to child outcomes, and because child outcomes vary so greatly, the State's assertion at trial that the presence or absence of the single variable of residing with two biological or opposite-sex parents provides a so-called "optimal" environment for children is simply not scientifically valid.

Brief of Amici Curiae, Andrew E. Cherlin, Ph.D., Frank F. Furstenberg, Jr., Ph.D., Sara S. McLanahan, Ph.D., Gary D. Sandefur, Ph.D. and Lawrence L. Wu, Ph.D, Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (No. 91-1394-05), *at* http://www.qrd.org/qrd/usa/legal/hawaii/baehr/1997/brief.doctors.of.sociology-06.02.97.

38 Baker v. State, 744 A.2d 864, 881-83 (Vt. 1999); Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 961-62 (Mass. 2003).

39 *Goodridge*, 798 N.E.2d at 1002 (Cordy, J., dissenting).

40 Further, the Supreme Court has held that prisoners retain the fundamental right to marry under the Due Process Clause even though they cannot consummate their marriage, let alone procreate. Turner v. Safley, 482 U.S. 78, 96 (1987).

41 Stacey, *supra* note 2 at 533.

> house, foster independence, impose discipline, while mothers are more protective, nurturing, empathic, and permissive) accompanied with unsupported assertions that children *need* one parent of each category . . . . [T]here is *no* empirical support in the social science research literature for the claim that there is an optimal gender mix of parents or that children with two female or two male parents suffer any developmental disadvantages compared with two different-gender parents. Research conducted over the last fifty years has firmly established that it is the quality of parenting and of the parent-child relationship, rather than the gender of parents, that predicts healthy children's adjustment.[42]

Dr. Michael Lamb, senior research psychologist at the National Institute of Child Health and Human Development, has done extensive research on the role of fathers in child development. He testified recently in litigation challenging Arkansas's ban on foster parenting by lesbians and gay men.[43] According to the court's opinion, he testified that "both men and women have the capacity to be good parents and . . . there is nothing about gender, per se, that affects one's ability to be a good parent."[44] The trial judge referred to Lamb as "the most outstanding" of the expert witnesses in the case, saying he provided data to the court "without any hint of animus or bias, for or against any of the parties."[45] Sara McLanahan, Andrew Cherlin, and other respected researchers on child well-being often cited by same-sex marriage opponents told the Hawaii court through an *amicus* brief that "the State's assertion . . . that the presence or absence of the single variable of residing with two biological or opposite-sex parents provides a so-called 'optimal' environment for children is simply not scientifically valid."[46]

Gay male couples raising children destroy the argument that only heterosexual marriage facilitates male participation in the lives of their children. The refusal of the "fatherhood" and "marriage" movements to embrace this conclusion demonstrates the deeper meaning of their insistence that each sex possesses "innate and unique abilities and characteristics."[47] Professor Carlos Ball

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42 *Id.*

43 Howard v. Child Welfare Agency Review Bd., CV 1999-9981, 2004 WL 3154530 at *5-6 (Ark. Cir. Ct., Dec. 29, 2004).

44 *Id.* at *5.

45 *Id.* at *8.

46 Brief of Amici Curiae, *supra* note 37.

47 Amicus Curiae Brief at 18, *Baker*, 744 A.2d 864 (Vt. 1999) (No. 98-32), *at* http://www.nclrights.org/publications/pubs/nclrbrief_baker-vermont.pdf. In *Baker*, Vermont filed a Motion to Dismiss for Failure to State a Claim arguing, among other

writes:

> [G]iven that there are countless parents of one sex that display and effectuate the parenting skills and attributes that are supposed to be distinctive of the other would suggest that those skills and attributes have more to do with socially constructed (and often stereotypical) understandings of what it means to be a female parent and a male parent than with inherent biological and psychological differences between men and women.[48]

Writing about the research suggesting that children raised by lesbian mothers show less gender role conformity, Ball notes that opponents of same-sex marriage fear precisely that gay and lesbian parents "will interfere with the transmission of what [they] take to be appropriate gender roles."[49] Their opposition, therefore, is not about the well-being of children but rather about the perpetration of patriarchy.[50] Their concern then is not only, perhaps not primarily, about same-sex couples and the children they raise. Rather they resist the possibilities that same-sex couples raising children create for heterosexual couples and their much greater number of children—a world without rigid gender roles, perhaps someday without gender at all. As Professor Nan Hunter put it almost fifteen years ago, same-sex marriage has the potential to "dismantle the legal structure of gender in every marriage."[51]

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things, that the state could properly promote child rearing "in a setting with both male and female role models," because "each gender contributes differently to the family unit and to society [and] children see and experience the innate and unique abilities and characteristics that each sex possesses . . . ." State of Vermont's Motion to Dismiss, *Baker*, 744 A.2d 864 (Vt. 1999) (No.S1009-97Cnc), *at* http://www.fitzhugh.com/samesex.html.

48 Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 711 (2003).

49 *Id.* at 716.

50 *Id.* at 717-18.

51 Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 19 (1991). I once criticized Professor Hunter's article, arguing that because advocates of same-sex marriage did not base their demands on an end to gender hierarchy, it was unlikely to accomplish that goal. *See* Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993). Both of our articles were written before the issues of same-sex marriage and parenting by same-sex couples became linked in both popular and legal discourse. I remain as committed as ever to family law reforms that recognize myriad family forms and dethrone marriage from its privileged place in the law. *See* Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201 (2003); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step In The Right Direction*, 2004 U. CHI. LEGAL F. 353 (2004). Nonetheless, as I see supporters of same-sex marriage bans build their arguments around the imperative of distinctly gendered parenting, I have come to agree with Professor Hunter that recognition of the families formed by lesbians or gay men and their children has more transformative potential than I had once believed.

II. Supporters of Same-Sex Marriage also Claim to Speak for the Interests of Children

The principal arguments for ending the ban on same-sex marriage are grounded in the theories of liberty and equality. Advocates have masterfully presented these arguments, building on established constitutional principles.[52] When it comes to children, however, supporters of same-sex marriage produce a variation of opponents' rhetoric. While advocates reject the contention that children do best when raised by a married couple *of opposite genders*, they embrace the argument that children do best when raised by a

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[52] For example, the Brief of Plaintiffs-Appellants in *Goodridge* argues as follows:

> III. THE RIGHT TO MARRY IS PROTECTED UNDER THE MASSACHUSETTS CONSTITUTION
>
> A. *Introduction: Protection of Individual Liberty And Equality is Enshrined in the Constitution.*
>
> The Declaration of Rights forcefully articulates the foundational principles of liberty and equality. Article I of the Declaration of Rights provides:
>
> > All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their Lives and Liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under law shall not be denied or abridged because of sex, race, color, creed or national origin.
>
> Mass. Const., Decl. of Rights, art. I (as amended by art. CVI). In addition to article I, article X guarantees that, "Each individual of the society has a right to be protected by it in the enjoyment of his life, *liberty* and property, according to standing laws. . . ." Mass. Const., Pt. 1, art. X (emphasis added). Taken together, articles I and X embody a guarantee that the government will not interfere with, and indeed will protect, individual liberty, at least as to those "natural, essential and unalienable rights," embodying spheres of individual choice and behavior over which the majority may not exercise control.

Brief of Plaintiffs-Appellants, *supra* note 25, at 18-19 (internal citations omitted). In *Baker*, Appellants included the following in their argument for equality:

> Gay and lesbian individuals enrich every aspect of society to the same extent as their heterosexual counterparts. In particular, like others in our society, gay men and lesbian women, including the Appellants in this case, form committed, long-term, and often lifetime relationships. Many lesbian and gay couples raise children together, and gay and lesbian families are woven into the rich fabric of our communities. Any law which purports to distinguish gay and lesbian families from other families on the basis of generalizations about the ability of gay and lesbian persons to form, nurture, and maintain cohesive families that serve the same functions in our society as other families is as flawed as those laws excluding women from valuable educational opportunities on the basis of women's claimed inferiority, and should be subjected to heightened scrutiny.

Appellants' Brief, *Baker*, 744 A.2d 864 (Vt. 1999) (No. 98-32), *available at* http://www.vtfreetomarry.org/Archived/co_lawsuit_appealbriefs.html.

married couple. This dimension of the argument for same-sex marriage crystallized in Massachusetts after the *Goodridge* decision. The state legislature sought to avoid implementing marriage for lesbian and gay couples by offering a civil union status like that in Vermont. Such a status confers on couples all of the benefits and obligations conferred on married couples under state law.[53]

The controversy over whether civil unions would satisfy the mandate of *Goodridge* returned to the Massachusetts Supreme Judicial Court.[54] In its brief opposing such an interpretation of *Goodridge*, Gay and Lesbian Advocates and Defenders (GLAD), counsel to the plaintiffs, argued, among other things, that:

> If S.2175 [the bill creating civil union status in lieu of extending marriage to same-sex couples] were to become the law of the Commonwealth, none of the *Goodridge* plaintiffs' children would enjoy the social recognition and security which comes from having married parents. As this Court has already noted, the social status of marriage is a direct benefit to children whose parents are married. Annie Goodridge, along with Paige Chalmers, Kate Wade-Brodoff and Avery and Quinn Nortonsmith would all still have to answer "No" when asked if their parents are married. As the Court pointedly noted in *Goodridge*, this dividing line between children has consequences for them in the realm of family stability and economic security.[55]

From this perspective, marriage is good for children—better than having unmarried parents—and therefore children of lesbian and gay parents will be better off if their parents can marry.

Such advocacy is troubling at several levels. It fails to separate advantages children of married couples enjoy because the *law* gives them these advantages. By focusing on marriage itself, rather than the legal regime that privileges marriage, supporters of same-sex marriage make it appear that marriage is the solution. An equally effective solution, and one that would benefit a larger number of children of both heterosexual and gay or lesbian parents, would be eliminating the benefits that now go only to children whose parents are married to each other. Such advocacy also sounds disturb-

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[53] Because the federal DOMA precludes recognition of same-sex marriages under any federal law, the legal consequences of same-sex unions and marriages are identical, at least in the United States (although it is possible that some governmental or private entities might differentiate between the two).

[54] *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

[55] Brief of Interested Party/Amicus Curiae Gay & Lesbian Advocates & Defenders at 23, *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (No. 09163), *available at* http://glad.org/marriage/Advisory_Opinion_Brief_GLAD.pdf (citation omitted).

ingly close to support for the ideological position favoring marriage above all other family forms. This represents at best backpedaling from, and at worst abandonment of, a vision of family pluralism that once imbued advocacy for gay and lesbian families. Moreover, it fails to recognize that many, if not most, of the children of same-sex marriages will one day be the children of same-sex divorces. A platform designed to benefit children with lesbian and gay parents must address the needs of such children as well.

A. Arguing that the Law Gives Children with Married Parents Advantages

For most of history, children whose parents were not married to each other suffered severe legal and social disabilities.[56] For the past three decades, law reform has sought to reverse this reality.[57] A combination of constitutional adjudication and statutory reform has to a large extent leveled the legal playing field between children born in and those born out of wedlock. The key to this equality is a determination of legal parentage for both of a child's parents. Children with gay and lesbian parents need such parentage determinations to reap the benefits of this legal revolution; they have become available in many states through adoption decrees,[58] orders of parentage,[59] and, to a lesser extent, through the use of equitable doctrine conferring some, if not all, of the indicia of parenthood.[60]

At first glance it may appear that marriage would simplify this process by presuming that a child born to either person after a

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56 *See generally* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971). *See also* Weber v. Aetna Cas. & Sur. Co., 406 US 164, 175 (1972) ("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage.").

57 Several Supreme Court cases, beginning with *Levy v. Louisiana*, 391 U.S. 68 (1968) and *Glona v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968), established constitutional equality principles for children born out-of-wedlock. As a statutory matter, the 1973 Uniform Parentage Act (1973), sought to achieve "substantive legal equality of children regardless of the marital status of their parents." UNIF. PARENTAGE ACT (amended 2002), 9B U.L.A. 379 (2001).

58 *See, e.g.*, *In re* M.M.D., 662 A.2d 837 (D.C. 1995); *In re* Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); *In re* Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993); CONN. GEN. STAT. ANN. §45a-724(3) (West 2004).

59 *See* Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Lesbian Coparents*, 50 BUFF. L. REV. 341 (2002).

60 These doctrines appear primarily in cases facilitating custody and visitation for a legally unrecognized parent after a lesbian couple ends their relationship, *see, e.g.*, V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000), or in cases requiring a legally unrecognized parent to pay child support, *see, e.g.*, L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. 2002).

marriage is the child of both spouses. Yet for the moment neither the federal government nor the states are expected to recognize parenthood conferred solely through a same-sex marriage, which means that even legal spouses may need adoption or parentage decrees to solidify their legal status.[61] Additionally, the rule that a married mother's spouse is her child's other parent, even for heterosexual spouses, is only a presumption.[62] The question of who can challenge the presumption and the circumstances under which it will be rebutted will remain open to contention even when same-sex marriage is more widely recognized. Thus, advocates for lesbian and gay families cannot let up on the development of doctrines conferring parenthood on both members of a gay or lesbian couple irrespective of the couple's relationship to each other.

Even when a child has two legally recognized parents, children with *married* parents do gain benefits from the privileged legal status of marriage. For example, consider Social Security survivors' benefits. When a parent dies, the surviving child receives benefits,[63] but the child's other caretaker receives benefits only if that caretaker was married to the deceased parent.[64] The disadvantage this creates for nonmarital children is not a reason gay and lesbian couples should be permitted to marry; it is a reason to change the law so that the child's other caretaker, regardless of marital status, can receive a benefit designed to assist that person in preserving the economic well-being of the child.

Similarly, when two parents separate, the noncustodial parent must pay child support to the custodial parent, regardless of marital status.[65] Only a married couple, however, must allocate their assets under the equitable principles that divorce triggers.[66] Thus,

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61 The website of GLAD (Gay and Lesbian Advocates and Defenders), the organization responsible for attaining same-sex marriage in Massachusetts, advises that marriage will not provide the same protections provided by joint adoption, because "[a]doptions are legal judgments entitled to respect in other states and by the federal government." Marriage-Tips & Traps, *at* http://glad.org/marriage/tips+traps.html#Parenting_In_General.

62 *Id.*

63 42 U.S.C. § 402(d) (2004).

64 *Id.* § 402(g).

65 "[I]t is now generally accepted that children of informal and formal relationships must be treated equally with respect to the amount and duration of child support." PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §3.01 Cmt. b (American Law Inst.) [hereinafter ALI Principles].

66 The ALI Principles dramatically alter this approach by applying to separating domestic partners the same equitable principles applicable to divorcing couples. *Id.* at ch. 6. In the absence of such principles, almost all states apply only contract principles to separating, unmarried couples, both opposite-sex and same-sex. *Id.*

a custodial parent and her child could be forced to leave their home or could be without sufficient resources to obtain equally suitable housing if the custodial parent has no claim to the noncustodial parent's economic resources. This problem applies equally to same-sex and unmarried opposite-sex partners. Although same-sex marriage would remedy this situation for gay and lesbian couples who marry, it would leave vulnerable custodial parents and their children whenever a non-marital relationship dissolves.[67]

The preferable solution for all children is eliminating the need for a couple to marry in order to be required to equitably allocate their resources. When one partner has foregone individual financial gain to care for a child and otherwise benefit a partnership, that partner should be entitled to receive an allocation of property and some financial support when the relationship dissolves. This is the proposal of the American Law Institute in its *Principles of the Law of Family Dissolution*, which applies identical rules to divorcing couples and to dissolving domestic partners, a category that includes two people who raise a child together for a specified period of time.[68]

Since the 1970s, many legal reforms have been based upon the belief that a child should not suffer because his or her parents do not marry each other. Centuries of law stigmatizing and disfavoring such children have been replaced with rules equalizing the legal rights and status of out-of-wedlock children. Advocates for children of gay and lesbian couples should stand for expansion of such reforms wherever necessary, including the areas of Social Security benefits and equitable dissolution rules. Like children of

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67 "[F]ull attention to the legal needs of same-sex couples requires legal regulation of informal, or unregistered, relationships, as well as formal, or registered, relationships." Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1617 (2004). Blumberg summarizes that her article:

> concentrates on the potential of American family law to encompass informal as well as formal conjugal families, whether headed by same-sex or opposite-sex couples. The Article explores various strategies for moving the law toward inclusion. Those strategies are organized around three themes: functionality, equivalence, and the correspondence of rights and obligations. Those themes challenge the procedural and contractual formality of American family law, which is expressed in the view that marriage requires conformity with legally prescribed procedures and that nonmarital cohabitation creates inter se legal obligations only to the extent that the parties affirmatively agree to assume them.

Id.

68 ALI Principles, *supra* note 65, ch. 6. For greater discussion of this chapter, *see* Polikoff, *Making Marriage Matter Less*, *supra* note 51. R

heterosexual parents, children of gay and lesbian couples should not need their parents' marriage to access those rights.

Some who advocate same-sex marriage conflate the legal consequences of marriage and parenthood. Consider, for example, the Human Rights Campaign Foundation's report, "The Cost of Marriage Inequality to Children and Their Same-Sex Parents," which details the financial disadvantages to gay and lesbian couples raising children of the requirements for Social Security survivors' benefits, the lack of access to health insurance and Family and Medical Leave, and some federal income tax rules.[69] Although the report does note the availability of second-parent adoption in some parts of the country, it does not clearly delineate which of the evils it names are cured by a determination of legal parentage and which require marriage of the partners to remedy those disadvantages.[70] The report reaches the conclusion that:

> the lack of universal access to equal marriage for same-sex couples in the United States . . . means that . . . children . . . are deprived of the expansive range of protections available to their classmates, neighbors and other children being raised by heterosexual parents. . . . Until all states grant equal marriage to same-sex couples, the children in these families will continue to be deprived of the security of being recognized as a "legal" family.[71]

However, these conclusions are misleading. For those advantages linked to parenthood, marriage is not now necessary for the children of either same-sex or opposite-sex couples. For those requiring marriage of a child's parents, all children with unmarried parents suffer. All of the costs to children of what Human Rights Campaign (HRC) calls "marriage inequality" would be eliminated by building on the changes started in the 1970's to eliminate the disadvantages children born out-of-wedlock experience. Such ad-

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[69] Lisa Bennett & Gary J. Gates, *The Cost of Marriage Inequality to Children and Their Same-Sex Parents*, http://www.hrc.org/Content/ContentGroups/Publications1/kids_doc_final.pdf (Apr. 13, 2004).

[70] For example, one section of the report, entitled, "Protections Available to Same-Sex Couples with Children," states that only one state permits same-sex marriage, that such marriages are not recognized for purposes of federal laws, and that most children being raised by same-sex parents live in states that do not uniformly permit second-parent adoption. *Id.* at 7. The next paragraph says: "As a result, these children cannot rely on: both their parents to be permitted to authorize medical treatment in an emergency; support from both parents in the event of their separation; or Social Security survivor benefits in the event of the death of the parent who was unable to establish a legal relationship with the child." *Id.* Yet each of these three stated problems is cured by establishment of legal parentage through adoption or parentage decrees. None requires marriage, for opposite-sex or same-sex couples.

[71] *Id.* at 13.

vances would benefit more children. HRC and other gay and lesbian advocacy organizations take the wrong approach when they focus on marriage as the solution.

B. Arguing that Children Benefit in Other Ways When Their Parents are Married

Proponents of same-sex marriage also argue that gay and lesbian couples should be able to marry, beyond the legal and financial reasons, for the sake of their children. This position sounds dangerously close to acceptance of the ideological stance favoring marriage above all other family forms.[72] While advocates for lesbian and gay parents once saw themselves as part of a larger movement to promote respect, nondiscrimination, and recognition of diverse family forms, some now appear to embrace a privileged position for marriage. They thus abandon a longstanding commitment to defining and evaluating families based on function rather than form, distancing themselves from single-parent and divorced families, extended families, and other stigmatized childrearing units.[73] If Annie, Paige, Kate, Avery, and Quinn have to answer "no" when asked if their parents are married, they are in no different position from that of millions of other children. The goal of lesbian and gay activists used to be—and should be—eliminating both tangible disadvantages and intangible social scorn from such an answer.[74]

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[72] One document, an amicus curiae brief filed in the New Jersey marriage case, crosses the line. Brief of Nat'l. Assoc. of Soc. Workers and Nat'l. Assoc. of Soc. Workers New Jersey Chapter as *Amici Curiae* in Support of Plaintiffs-Appellants at 7, Lewis v. Harris, 875 A.2d 259 (N.J. Super. Ct. 2005) (No. A-2244-03T5). It uncritically adopts the exact rhetoric used in "marriage promotion" campaigns that divert critically needed public funds to programs that encourage marriage, financially reward those who marry, or penalize those who do not. "Marriage between a child's parents uniformly is good for children," it states. "It advances child welfare to permit—and indeed to promote—marriage where there are children." *Id.* at 11. This same point of view is expressed by Jonathan Rauch who asks, "How could any pro-family conservative claim that [children of same-sex couples] are better off with unmarried parents?" Jonathan Rauch, *Power of Two,* N.Y. TIMES, Mar. 7, 2004, §6, at 13.

[73] Perhaps most extreme among same-sex marriage advocates, Jonathan Rauch argues that "expecting marriage for all Americans . . . would protect the institution of marriage from the proliferation of alternatives (civil unions, domestic-partner benefits, and socially approved cohabitation) . . . ." Rauch, *supra* note 72 at 13.

[74] *See* Lisa Duggan, *Holy Matrimony! As Politicians Square Off On Gay Marriage, Progressives Must Enter The Debate*, THE NATION, Mar. 15, 2004, at 14 ("In a bid for equality, some gay groups are producing rhetoric that insults and marginalizes unmarried people, while promoting marriage in much the same terms as the welfare reformers use to stigmatize single-parent households, divorce and 'out-of-wedlock' births. If pursued in this way, the drive for gay-marriage equality can undermine

An *amicus curiae* brief filed by the American Psychological Association and New Jersey Psychological Association in the case challenging New Jersey's ban on same-sex marriage[75] exemplifies the problem. The brief contains the following argument:

> [M]arriage can be expected to benefit the children of gay and lesbian couples by reducing the stigma currently associated with those children's status. Such stigma can derive from various sources. When same-sex partners cannot marry, their biological children are born "out-of-wedlock," conferring a status that historically has been stigmatized as "illegitimacy" and "bastardy." Although the social stigma attached to illegitimacy has declined in many parts of society, being born to unmarried parents is still widely considered undesirable. As a result, children of parents who are not married may be stigmatized by others, such as peers or school staff members. This stigma of illegitimacy will not be visited upon the children of same-sex couples when those couples can legally marry.[76]

Attorney Evan Wolfson, a leading advocate for same-sex marriage, put it this way: "[A]ll children deserve to know that their family is worthy of respect in the eyes of the law. . . . [T]hat respect come[s] with the freedom to marry."[77] I argue that respect comes from equally valuing all family forms. Wolfson himself expressed this point of view in a draft position paper entitled "Family Bill of Rights," which he authored in 1989 and which I discuss at the end of this essay.

C. *Supporters Ignore the Needs of the Children of* Divorced *and* Single *Lesbian and Gay Parents*

Privileging marriage in tangible ways, and accepting as natural and inevitable arguments for its intangible superiority, dooms children of lesbian and gay parents to share permanent second-class status with children of unmarried heterosexual parents. This includes single lesbians and gay men who bear or adopt children and raise those children alone or in a non-marital family. It also includes those who marry and subsequently divorce.

In fact, advocates who use arguments about the well-being of

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rather than support the broader movement for social justice and democratic diversity.").

75 Lewis v. Harris, 875 A.2d 259 (N.J. Super. Ct. 2005).

76 Brief of American Psychological Association and New Jersey Psychological Association as Amici Curiae in Support of Plaintiffs-Appellants at 51-52, *Lewis*, 875 A.2d 259 (N.J. Super. Ct. 2005) (No. A-2244-03T5), http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/320.pdf.

77 EVAN WOLFSON, WHY MARRIAGE MATTERS 96-97 (2004).

children to support same-sex marriage ignore the fact that gay marriages are no less likely than straight marriages to end in divorce. Children of once-married parents then will find themselves faced with the economic hardship of no longer living in a family unit entitled by law to "special rights." For example, according to Evan Wolfson, once same-sex couples can marry, "children will come to . . . see happy gay people getting married. They'll see married gay people forming families. They'll see classmates whose parents are now legally married and better able to care for them."[78] Wolfson neglects to mention that they will also see unhappy gay marriages, gay couples divorcing, and parents *less* able to care for their children because single-parent families and families created by two unmarried people who join together to raise a child are disadvantaged under the law.

Professor William Eskridge, author of numerous articles and books advocating same-sex marriage, also elides the likelihood of high numbers of children with divorced same-sex parents. First, he refers to researcher Lawrence Kurdek's speculation that same-sex couples separate at a rate higher than married couples because they lack the legal and social support marriage brings.[79] He writes that "[i]t is reasonable to believe that legal recognition of same-sex marriages, especially if accompanied by gradual social acceptance, would enhance the durability of lesbian and gay relationships."[80] Then, crediting research on the value to children of having married parents, he asserts that:

> [S]tate denigration of lesbian and gay relationships often harms children. Thousands of children are being raised in lesbian and gay households today. Studies have suggested . . . that lesbian parents are doing a very good job raising these children. Assume it is true, as traditionalists do, that children benefit from having two parents rather than just one. Assume, further, that state denigration of lesbian and gay partnerships undermines their longevity. In that event, the state is contributing to the break-up of some lesbian and gay families rearing children— to the detriment of the children. To put the matter more positively, by denying gay men and lesbians the right to marry, the state is foregoing an opportunity to reinforce the stability of the two-parent household for the children of those relationships.[81]

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78 *Id.* at 101.

79 William N. Eskridge, Jr., *The Relational Case for Same-Sex Marriage*, *in* MARY LYNDON SHANLEY, JUST MARRIAGE, 58, 60 (2004).

80 *Id.* at 61.

81 *Id.*

Assuming same-sex marriages last as long as heterosexual marriages, an enormous number of same-sex relationships will still end in divorce. Children of same-sex divorces will then need a legal and social climate that values all family structures in order to thrive. Advocates for children should pursue legal reform toward that end.

III. A Better Route to Justice and Equality

As long as marriage exists as a legal institution, lesbian and gay couples must have access to it. The inability to marry is a badge of inferiority and validates discrimination against and disapproval of lesbians and gay men, as well as bisexual and transgendered individuals. Opponents of same-sex marriage might champion the well-being of children, but what they really want, at best, is to stigmatize any relationship that points by example away from a "traditional," rigidly gendered family structure. If children's well-being were their priority, they would focus on those forces that most harm children, beginning with the structural economic inequality that dooms so many American children to poverty regardless of the marital status of their parents.[82] Some of the country's most distinguished social scientists argued as follows in an *amici curiae* brief before the Hawaii Supreme Court:

> Amici's research has led to a number of policy recommendations, implemented on both state and federal levels, designed to further this interest directly. These policies include access to quality health care and universal health insurance, supplementation and stabilization of parental income, and provision of day care for working parents. Such policies provide examples of direct means by which any state, including Hawaii, could promote optimal child outcomes in all families without abridging the constitutional rights of same-sex couples or maintaining sex discrimination in marriage.[83]

Supporters of same-sex marriage should base their arguments on the equal worth and value of gay and lesbian people and gay and lesbian intimate relationships. When supporters instead rely on arguments about the well-being of children raised by gay and lesbian couples, they pander to a conservative vision that disapproves of all non-marital families and to what remains of a legal system that enshrines such disapproval.

Even same-sex marriage advocates who do not align them-

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82 *See* Fineman, *supra* note 2.

83 Brief of Amici Curiae, *supra* note 37, at 7.

selves with the interests of today's heterosexual divorced and never-married parents and their nonmarital families must recognize that gay men and lesbians will continue to comprise a large segment of tomorrow's divorced and never-married parents well after same-sex marriage is legalized. Supporters of same-sex marriage should not accept laws and policies that would disadvantage those children, and they certainly should not rely on the injustice of such laws to bolster their insistence today that lesbians and gay men be allowed to marry.

In 1989, when same-sex marriage was not on the agenda of any of the national legal or political organizations working for gay and lesbian rights, Evan Wolfson, then a staff attorney at Lambda Legal Defense and Education Fund (now Lambda Legal), drafted a blueprint for a just policy encompassing the needs of all families, entitled Family Bill of Rights. Now as founder and executive director of Freedom to Marry, Wolfson devotes his efforts entirely toward achieving same-sex marriage rights. To the extent that the well-being of children forms a basis for his arguments, and those of other advocates of same-sex marriage, I offer the possibility that the Family Bill of Rights, written more than fifteen years ago, is more likely to improve the lives of all children, regardless of the sexual orientation or marital status of their parents.

The Preamble to the Family Bill of Rights sets out the document's defining values of respecting diversity and pluralism in family composition and according equal recognition to all functionally equivalent family forms. It reads as follows:

> PREAMBLE
>
> WHEREAS, Americans value not only their freedom, rights, and identities as individuals, but also the relationships they inherit and form as members of families; and
>
> WHEREAS, the diversity of the cultures within American society and the choices individuals make result in many kinds of living arrangements sharing the values properly associated with family; and
>
> WHEREAS, these defining family values include mutual emotional and financial commitment and interdependence, lives shared together in relationships of dedication, caring, and self-sacrifice; and
>
> WHEREAS, the reality of American life today is that families are formed in many ways, through blood, marriage, and adoption, as well as by choice, commitment, and association, and that, therefore, family can be best be [sic] defined not by reliance on fictitious legal distinctions, but rather with respect to

> such attributes as the level of emotional and financial commitment, the manner in which the family members have conducted their everyday lives and held themselves out to society and friends, the reliance placed upon one another for daily family services, the longevity of the family relationship, and any other pattern of conduct, agreement, or action which evidences their intention of creating long-term, emotionally committed relationships; and
>
> WHEREAS, the American tradition of respect for individual freedom in shaping one's own destiny and making important personal choices free of government intrusion, and of encouraging diversity and pluralism warrants that all family relationships that, in the totality of circumstances, possess such attributes be accorded equal respect, recognition, and rights; and
>
> WHEREAS, government actions should encourage, not undermine all families possessing such attributes,
>
> NOW, THEREFORE, we representatives of all of America's diverse families, united in commitment and concern for our family members, our communities, our nation, and each other, do urge the adoption of this FAMILY BILL OF RIGHTS, to protect our equal needs and entitlements in the following areas . . . .[84]

The Family Bill of Rights then asserts that same-sex couples must be allowed to marry, but that unmarried and married couples should be treated alike and no recognition should turn on the presence or absence of a marital unit.[85] Thus, all families should be entitled to equal treatment in allocation of government and employee benefits, ability to raise children, and access to protections afforded in criminal and civil law.[86] The underlying values and the

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[84] The Family Bill of Rights (on file with the New York City Law Review).

[85] *Id.*

> I. RECOGNITION
>
> All families have a right to secure formal recognition of their relationships. Where benefits are conditioned upon such recognition, it should not depend on marital relation, genetic history, or other arbitrary distinctions, but rather should reflect the defining family values set forth in the preamble.
>
> *Bill of Particulars*
>
> ¶ The institution of marriage should be open to samesex couples
>
> ¶ Whether or not they then elect to marry, lesbians and gay men in samesex couples should be accorded the same recognition and rights as partners in formally married couples.
>
> ¶ Family relationships and recognition should not turn on the presence or absence of a marital unit.

[86] *Id.*

> II. GOVERNMENT BENEFITS AND PRIVILEGES

All families have a right to equal treatment under the laws in the allocation of benefits, privileges, and presumptions by local, state, and federal government.

Bill of Particulars

¶ Taxation should not reward or penalize any particular family living arrangement, nor should there be special benefits extended solely to formally married couples. In particular, tax codes should be amended to eliminate any restrictions on employers' ability to provide benefits without marital relation or other arbitrary cut-off. [i.e. § 89]

¶ If benefits are to be extended to individuals on the basis of their relation to another family member, i.e., to dependents or committed partners, all similarly situated family members should be treated the same.

¶ Equality should be extended to the benefits and privileges offered under Social Security, veterans' benefits programs (educational and medical), ERISA, and so on.

. . . .

VI. EMPLOYMENT

All families have a right to equal treatment in an employer's provision of benefits and other compensation.

Bill of Particulars

¶ Ideally, each citizen would have his or her own health insurance and other vital protections through universal systems, rather than leaving such necessities up to the vagaries of employers, employment, or family relation and dependency. Also ideally, individual workers would not be asked to accept disparate pay and to shoulder the burden of providing such coverage to the families or dependents of fellow employers.

¶ Until this ideal is achieved, employee-benefit plans should allocate benefits fairly, making provision for all similarly situated family members of employees without regard to formal marital relationship or other arbitrary distinction.

¶ Workers' compensation programs should treat similarly situated family members the same, defining recipients and dependents without regard to formal marital relationship or other arbitrary distinction.

VII. CHILDREN

All families have a right to equal respect for their desire to have, raise, and care for children. There should be no invidious discrimination with respect to children, but rather the best interests of children should be recognized without regard to prejudice, stereotype, or mandated conformity. . . .

VIII. LEGAL SYSTEM

All families have a right to equal access to, and equal treatment by, the civil and criminal legal systems.

Bill of Particulars

¶ The protections of the criminal justice system should be extended on a full and equal basis to members of families affected by crimes. In particular, similarly situated family members should be treated equally by crime victims compensation programs, should be equally eligible for protection under statutory schemes regarding domestic violence, and should be accorded testimonial and other

specific proposals in this draft are a perfect foundation for lesbian and gay families and our children.

Advocates in the United States should also look north to Canada. There, marital status is rarely the dividing line between those who receive legal and economic entitlements and those who do not.[87] Heterosexual and gay and lesbian couples alike can *choose* to marry without the coercive incentives of a system of laws and policies that privileges marital over non-marital relationships. The Supreme Court of Canada held long ago that it offends the dignity of those who choose not to marry to treat their functionally equivalent relationships differently from those of married couples.[88] In Canada, as in Western Europe, the state provides a minimum threshold of benefits to all children, regardless of the marital status of their parents.[89]

> evidentiary privileges commensurate with the attributes of the relationship.
>
> ¶ Marital relation or other arbitrary distinction should not be required when a family member seeks to compose a living will, health care proxy or medical directive, or durable power of attorney.
>
> ¶ Protections and claims under tort law, such as recovery for wrongful death or loss of consortium, should not rest on marital relation or other arbitrary distinction.

87 *See generally* Nicholas Bala, *Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships*, 29 QUEEN'S L.J. 41 (2003).

88 In *Miron v. Trudel*, [1995] 2 S.C.R. 418, 497-99 (Can.), the Court overturned the exclusion of an unmarried partner from the definition of spouse in an automobile insurance policy. It wrote:

> [D]iscrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. . . . [D]iscrimination on the ground of marital status may be seen as akin to discrimination on the ground of religion, to the extent that it finds its roots and expression in moral disapproval of all sexual unions except those sanctioned by the church and state.

Id. The Court extended this principle to unmarried same-sex partners in *M. v. H.*, [1999] 2 S.C.R. 3 (Can.), which found unconstitutional an Ontario statute extending spousal support benefits to unmarried heterosexual partners but not to same-sex partners.

89 Writing about the United States, Canada, Austria, Denmark, Finland, France, Federal Republic of Germany, Italy, Netherlands, Norway, Sweden, and United Kingdom, Sheila Kamerman concludes that:

> All these countries except the United States provide child benefits (child or family allowances)—universal cash benefits that are based on the presence and number of children in a family and are provided regardless of the family's income. Eight of the 12 nations have established special benefits for children in divorced families, whereby the child is

Sociologist Judith Stacey notes her "ironic ambivalence" in assisting advocates for same-sex marriage.[90] She writes:

> Allowing same-sex couples to join the conjugal congregation is likely to intensify social discrimination against everyone else who, whether by choice or fate, were to remain outside its privileged grounds. . . . This is not an outcome I consider desirable or democratic. To love or live without marrying should not be a social scandal . . . but discriminating against those who do so should be. . . . [U]nless legal recognition of same-sex marriage is accompanied with social recognition and material support for the broad array of contemporary family forms which children and adults of all genders and sexual orientations now inhabit, their gain might prove to be a loss for vast numbers of other children and families.[91]

Ruthann Robson, whom we honor in this symposium issue, warns repeatedly against "fetishiz[ing] equality" over "fundamental and structural change."[92] Her stance, which she names "anti-assimilationist," cautions against the coercion inherent in providing rewards for those who assimilate. An anti-assimilationist perspective, she writes, "would not privilege those members of the community who can, or do, assimilate or find fault with those who do not . . . ."[93] Same-sex marriage may provide gay and lesbian couples and their children with the benefits of assimilation now provided only to married heterosexual couples and their children. That may be a victory for gay and lesbian equality, but it will be a long way from the fundamental and structural change necessary to ensure the well-being of all children.

> guaranteed a minimum amount of financial support. . . . All these countries except the United States provide either national health insurance or a national health service, thereby assuring all children (and their parents) access to health care. Except for the Anglo-American nations, most of these countries provide universal, free or low-cost preschool to all or almost all children beginning at age 2 or 3 . . . . Thus, except in the United States, an important social infrastructure is in place for single as well as married couples and their children.

Sheila B. Kamerman, *Gender Roles and Family Structure Changes in the Advanced West: Implications for Social Policy, in* POVERTY, INEQUALITY, AND THE FUTURE OF SOCIAL POLICY 243 (Katherine McFate et al. eds., 1995). *See generally* Sara McLanahan & Irwin Garfinkel, *Single-Mother Families and Social Policy: Lessons for the United States from Canada, France, and Sweden in* POVERTY, INEQUALITY, AND THE FUTURE OF SOCIAL POLICY 367-83 (Katherine McFate et al. eds., 1995).

90 Stacey, *supra* note 2 at 540.

91 *Id.* at 539-40.

92 Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 733 (2002).

93 *Id.*